

INVISIBLE PRECEDENTS: ON THE MANY LIVES OF LEGAL STORIES THROUGH LAW AND POPULAR CULTURE

Jonathan Yovel*

It is a maxim among these lawyers, that whatever hath been done before, may legally be done again; and therefore they take special care to record all the decisions formerly made.

Jonathan Swift, *Gulliver's Travels*¹

"Have you read it anywhere before?"—"No, of course not."—"Really, nowhere? Then, Monsieur," he says sadly, "it is because it is not true. If it were true, someone would already have thought it."

Jean-Paul Sartre, *Nausea*²

PREFACE

This study looks into textualization in legal and extra-legal occurrences: how some texts (here, a legal "opinion") allow for reiteration of language and a plurality of text-artifacts that follow from it, and how subsequent acts of recasting these texts in social settings—namely, later legal cases—manipulate, communicate, and import distinctly contextual elements into the newly created text-event. Typically, those elements support, justify, and rationalize (in two competing senses, discussed below) placing a legal decision within an established history of textuality, a doctrinal canon, or a moral approach.

The study begins by examining the hold that a notorious 1824 English murder case had—or did not have—on the legal, literary, and folk

* Faculty of Law, University of Haifa, Israel; Visiting Assistant Professor, Brooklyn Law School. This Article was written while visiting at the Max Planck Institute for Comparative Public and International Law, Heidelberg, for which I am grateful to the Institute and its directors. I thank Elizabeth Mertz and Kristina Beckmann for comments on an earlier draft, as well as Ledra Horowitz for assistance in preparation of the manuscript.

¹ JONATHAN SWIFT, *GULLIVER'S TRAVELS* 259 (Signet Classic 1960) (1726).

² JEAN-PAUL SARTRE, *LA NAUSEE* 158 (1938).

imaginings of its time. As it stood, *R. v. Thurtell*³ failed to impress the former and was recorded in a law report. Yet, it made a great impression on the latter, as illustrated by the amazingly rich array of narrative forms that aimed to capture aspects of it—a splendid polyphonic tapestry of moral poems, broadside ballads, stage plays, novella-like renditions, essays, journalistic studies, memoirs, anecdotes, vignettes, and even household artifacts sold as mementos.⁴ The second part of the study presents six twentieth century cases, three American and three British, that track down and employ—through quotation, citation, and other forms of importation and reference—not merely *Thurtell*'s doctrines, but its exact rhetoric. Yet, canonically speaking, that case did not exist in any legal canon and its legal textuality was itself a phantom. None of the courts hereby discussed considered this fact insurmountable, and, in their "drive for reference," they devised several ways around the problem of textuality.

In looking at multiple facets of textuality that evolved around *Thurtell*, the study examines the *performance* of reference to precedents in cultural, inter-discursive terms rather than merely legal-doctrinal ones (I shall say close to nothing on the doctrine of precedent).⁵ It focuses on questions of legal textuality, reiteration, and recontextualization. What does judicial reference, by way of importation and incorporation of the language of prior cases, *do*? Why is contextual reference so prevalent in judicial opinions? How can an examination of rhetoric—of the *language* of reference rather than the propositions pronounced by it, the performance and manipulation of reference rather than the doctrine expressed through it—promote an understanding of how courts and other social agents conceptualize law?

³ See *TRIAL OF THURTELL & HUNT* (E.R. Watson ed. 1920).

⁴ These denotations do not entail a strict generic (nor formal) classification. For instance, the traditional form of broadside ballad at different times accommodated the moral or confessional poem, as illustrated by *A Warning from the Tomb, or J. Thurtell's Caution to the Youth of Great Britain*, which begins with the following verse:

Give ear, young men, whose heedless course/Fast to destruction run,/And learn by this, my humble
verse,/The snares of guilt to shun/. . . I might have been a prosperous man,/Had I been well
inclin'd/But Pleasure did my soul trepan,/And did my senses blind.

Id. at 209-10.

⁵ For classic works on precedent in common law traditions, see EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949); JOHN SALMOND, *SALMOND ON JURISPRUDENCE* (P.J. Fitzgerald ed., 12th ed. 1966). An excellent analysis of the logical (but not the rhetorical or ideological) structure of manipulating precedent is Joseph Raz, *Law and Value in Adjudication*, in *THE AUTHORITY OF LAW* 180-209 (1979).

The conclusion abstracts from the prior discussion and looks into legal textualization from the perspective of a performative interpretation of a "drive for reference."⁶

It begins with a murder.

LEGAL, LITERARY, AND POPULAR IMAGINATIONS:
THE TRANSFORMATIONS OF *R. v. THURTELL*

A. *On How Contemporaneous Legal Imagination Was Not Impressed with
R. v. Thurtell*

On December 4, 1823, a man was charged with murder before the Justice Park at the Hertford Assizes. His name was John Thurtell, a gambler charged with the murder of a fellow gambler, one William Weare. The trial did not seem to involve any special legal problems. Although the defendant denied the charge to the end, the evidence was substantial (though circumstantial), and

⁶ This point requires some forehand elucidation, as talk about "drive for reference" in performative terms may seem unusual to some—namely, to theorists who read the "drive for reference" as a kind of discursive neurosis, as the main metaphor through which language is conceptualized solely as a representational framework, its true performativity obscured or altogether ignored by semantico-referential forms that are subsequently "put to use." The standard "drive for reference" critique is that while speakers are quick to think of language as a system of signification that stands in some correspondence relation to the world, they are by and large oblivious to language's metalinguistic performance that shapes the ways in which we talk about the world. The prevailing language ideology is to regard language as transparently fitting the divisions and structures of the extra-linguistic world. The relative nontransparency of the ways in which language forms discourse rather than serves it in some neutral way veils language's ideological aspects. See Elizabeth Mertz & Jonathan Yovel, *Metalinguistic Awareness*, in *HANDBOOK OF PRAGMATICS* (Verschueren, et al. eds., forthcoming 2002). The "drive" identified here follows Strawson's insight that reference itself is a performative device, as systematized on a metapragmatic level by Silverstein. See Michael Silverstein, *Language Structure and Linguistic Ideology*, in *THE ELEMENTS: A PARASESSION ON LINGUISTIC UNITS AND LEVELS* 193 (Paul R. Clyne et al. eds., 1979); Michael Silverstein, *Metapragmatic Structure and Metapragmatic Function*, in *REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS* 33 (John Lucy ed., 1993); Peter F. Strawson, *On Referring*, 5 *MIND* 320 (1950); see also Alan Rumsey, *Wording, Meaning and Linguistic Ideology*, 92 *AMERICAN ANTHROPOLOGIST* 346 (1990). In an illuminating anthropological study, Rosaldo argues that the "drive for reference" (as well as speech act theory in general) is, as a matter of language ideology, more specifically language-dependent and culture-dependent than standard accounts assume, at least in the matter of the primacy of reference and representation over performative functions. See Michelle Z. Rosaldo, *The Things We Do with Words: Ilongot Speech Acts and Speech Act Theory in Philosophy*, 11 *LANGUAGE IN SOC'Y* 203 (1982). Elsewhere, I argue that the "things" law purports to apply to cannot be dealt with independently from the ways in which they are treated and talked about, which undermines any "aboutness" relation between law and that to which law applies; see Jonathan Yovel, *What is Contract Law "About"? Speech Act Theory and a Critique of "Skeletal Promises,"* 94 *NW. U. L. REV.* 937 (2000).

Thurtell was condemned to execution. As a work entitled *The Hertfordshire Tragedy* relates,

On Friday, January nine,
Thurtell was convey'd
Unto the fatal drop, and there
His forfeit life he paid.⁷

Another contemporaneous work reports how, in front of the Hertford Goal, "Upon the gallows tree he hung\Suspended by the neck."⁸

Although expansively covered in daily newspapers and other mass media—as documented below—none of the period's law reports bothered either to report or record *R. v. Thurtell*. The case is not found in the *Law Journal Report* (covering cases from 1822 to 1949), or in any of the less reputable "nominate reports" such as *Barnardiston's Cases*, or in any of the reports that were subsequently reprinted in the *English Reports* (covering cases prior to 1866), *Revised Reports* (1785-1866), or even the formidable *All England Law Reports Reprint* (1558-1935).⁹ It must be kept in mind that trials were documented not by judges or agencies sanctioned by the judiciary or the bar, but by professional recorders in the employ of commercial publishing houses.¹⁰ Trial judges, if they wrote opinions, kept them to themselves or passed them on to reporters as they saw fit.

A special class of less established editions were the so-called "nominate reports." Frequently the work of a single reporter, their accuracy held to varying levels of esteem. Of *Barnardiston's Cases*, collected, edited, and published by a retired serjeant-at-law (a senior barrister) of that name, Wallace uncharitably writes:

[he] was a careless dog, and his Reports . . . but litle esteemed.¹¹

⁷ *The Hertfordshire Tragedy; or, The Fatal Effects of Gambling* (London, Catnach, 1824) ("The Hertfordshire Tragedy"), reprinted in TRIAL OF THURTELL & HUNT, *supra* note 3, at 211-16. See also ARTHUR GRIFFITHS, 2 CHRONICLES OF NEWGATE 327-29 (1884) ("GRIFFITHS"); HAYDN'S DICTIONARY OF DATES AND UNIVERSAL INFORMATION (20th ed., London, Ward, Lock, Bowden & Co, 1892) ("HAYDN'S DICTIONARY").

⁸ TRIAL OF THURTELL & HUNT, *supra* note 3, at 217.

⁹ For a general description of the publications listed herein, see MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 516-38 (1989).

¹⁰ See W.F.S. DANIEL, THE HISTORY AND ORIGIN OF THE LAW REPORTS (1884).

¹¹ JOHN WILLIAM WALLACE, THE REPORTERS, ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS 423 (Boston, Soule and Bugbee, 4th ed. 1882).

...

Lord Mansfield absolutely forbade [them] to be cited: 'for it would only be misleading students to put them upon reading it.' He said it was marvelous, however, to those who knew the serjeant and his manner of taking notes, that he should so often stumble upon what was right.¹²

These legal apocrypha, however, contain, at times, fascinating materials that the more established ones ignored, several of which are cited and quoted in this Article. One that turned out to be helpful is a volume packed with *Thurtell*-related miscellany, including what purports to be verbatim renditions of the trial arguments, speeches, and examinations.¹³ Compiled by George Henry Jones, a contemporary magistrate's clerk at the Hertford Assizes, it eventually got cited, as if ironically to fill some discursive vacuum, as *Jones' Report*.¹⁴ The only way Justice Park's speeches to the jury in *R. v. Thurtell*, or his interim decisions concerning severance of proceedings, could become available to later generations was through apocrypha. Like so many other cases, *R. v. Thurtell* did not make it to the legal canon. Nevertheless, its language and its shadows persevered and passed on through the grapevine of imagination as a sort of institutional rumor that emerged to defy the narrow modern categorization of standard legal forms.

B. On How *R. v. Thurtell* Captured Folk and Literary Imaginations

During the winter of 1823-24, the story of Weare's murder by Thurtell broke all criminal story records for having a hold on the English public's imagination. "No murder," wrote Arthur Griffiths, Warden of Newgate Prison, "has created greater sensation and horror throughout England."¹⁵ The *Thurtell* case, according to British historian G.M. Trevelyan, was the event that stirred the most popular interest between the adultery trial of Queen Caroline and the

¹² *Id.* at 423-24. On this specific series Lord Lyndrust remarked: "I recollect in my younger days, it was said of Barnardiston, that he was accustomed to slumber over his note-book, and the wags in the rear took the opportunity of scribbling nonsense in it." *Id.*

¹³ GEORGE HENRY JONES, ACCOUNT OF THE MURDER OF THE LATE MR. WILLIAM WEARE (1824). Note how quickly the publication followed Thurtell's trial and hanging.

¹⁴ *Id.* Or even by the common abbreviation "rep." See, e.g., 14 DIGEST § 2679. This volume should not be confused with any of a series of more-or-less genuine "Jones' Reports," all of which share that appellation, but none of which appeared at or around the time of *R. v. Thurtell* (the first appeared in the seventeenth century and the last from 1834 to 1838). See WALLACE, *supra* note 11, at 255, 343. There was even a New York *Jones' Report* that published eight volumes between 1853 and 1862. *Id.* at 584.

¹⁵ GRIFFITHS, *supra* note 7, at 327-28.

Reform Bill of 1832.¹⁶ It commanded a huge popular, at times vulgar, thirst for sensation as much as the fascination of such authors as Thomas Carlyle and Walter Scott, and later, Robert Louis Stevenson. For its savagery of deed and hold on public imagination, renditions of later murders made this one a standard reference point. In discussing another infamous case, a contemporary anonymous author noted that "[N]o event, of a domestic occurrence, since the murder of Mr. Weare by John Thurtell, has monopolized more of the public interest and sympathy throughout all parts of the country"¹⁷ The details were highly dramatic: having been invited by fellow gambler John Thurtell down to a cottage occupied by a common friend (Probert) for a day of sport and shooting, Weare set out of London with Thurtell in Thurtell's coach, or "gig."¹⁸ Night was falling. From this point on, J.B. Atlay writes in his lovely dramatized gem *Famous Trials*:

Driving at a rapid pace, and turning off the main road at Radlet, the gates of Gill's Hill cottage [T]he time has come. Diverting his companion's attention for a moment, Thurtell fired a pistol point blank in his face, but the cheek-bone [sic] stopped the bullet, and the wretched man sprang from the gig and rushed down the lane shrieking for mercy. Thurtell, who was possessed of great physical strength, darted after him, overtook him, and, forcing him down, cut his throat in two places, and, in a paroxysm of fury, beat in his skull with the pistol barrel until life was extinct. . . .¹⁹

This was written in 1899. Contemporaneous renditions, such as the following Ballad, composed by Mr. William "Flare Up" Webb, acrobat, linkboy, and afterwards transported convict, were liable to combine colorfulness, cockney wit, and a unique choice of detail:

¹⁶ GEORGE M. TREVELYAN, *BRITISH HISTORY IN THE NINETEENTH CENTURY 170-71* (1922). For this and other references, I am indebted to Albert Borowitz. See ALBERT BOROWITZ, *THE THURTELL-HUNT MURDER CASE: DARK MIRROR TO REGENCY ENGLAND* (1987).

¹⁷ *THE TRIAL OF WILLIAM CORDER FOR THE MURDER OF MARIA MARTEN*, Part I (London, Knight & Lacey, 1828), available at <http://gaslight.mtroyal.ab.ca/knitlace.htm>.

¹⁸ J.B. ATLAY, *FAMOUS TRIALS* 14-15 (1899). See *infra* note 45 for further discussion of the "gig."

¹⁹ ATLAY, *supra* note 18, at 15.

They asked him down from London town
 A-shooting for to go,
 But little did the gem'man think
 As they would shoot him too.

....

His throat they cut from ear to ear,
 His brains they punched in;
 His name was Mr. William Weare
 What lived in Lyon's Inn.²⁰

Richer in emotional poetics and gory figuratives but somewhat poorer on the wit, *The Hertfordshire Tragedy* was published early in 1824 by the industrious penny-publisher James Catnach:

The helpless man sprung from the gig,
 And strove the road to gain,
 But Thurtell pounced on him, and dash'd
 His pistol through his brains.
 Then pulling out his murderous knife,
 As over him he stood,
 He cut his throat, and, tiger-like,
 Did drink his reeking blood.²¹

The Hertfordshire Tragedy was a huge commercial success, printed complete with "Ten woodcuts, including two portraits;"²² 250,000 copies were sold by Catnach's paperboys, yelling "horrid murder of Mr. William Weare!,"²³

²⁰ TRIAL OF THURTELL & HUNT, *supra* note 3, at 216. This ballad appears in numerous sources, some of which have "wor" instead of "what" in the last line of this stanza. See also BOROWITZ, *supra* note 16, at 200; ATLAY, *supra* note 18 at 12; MICHAEL HARDWICK, THE VERDICT OF THE COURT 65 (1960); GUY B. H. LOGAN, VERDICT AND SENTENCE 111 (1935); RAYMOND POSTGATE, MURDER, PIRACY, TREASON: A SELECTION OF NOTABLE ENGLISH TRIALS 171 (1925).

²¹ See HARDWICK, *supra* note 20, at 68-69. Other versions vary slightly. For example, one version reads, "pounce'd" instead of "pounced." TRIAL OF THURTELL & HUNT, *supra* note 3, at 213.

²² TRIAL OF THURTELL & HUNT, *supra* note 3, at 211.

²³ CHARLES HENDLEY, THE HISTORY OF THE CATNACH PRESS 69-71 (1886). The authors of these street ballads remain mostly unknown. Penny-publishers such as Catnach or Pitts would either write or commission, for as little as two to three shillings a piece, works on passing events from freelance street poets, and sell them for as little as a penny a sheet. See THE CAMBRIDGE HISTORY OF ENGLISH AND AMERICAN LITERATURE 18 (1907-1921) ("CAMBRIDGE HISTORY"). Catnach's most famous series was a twopenny broadside, *Life in London; or, the Spree of Tom and Jerry; Attempted in Cuts and Verse*, with twelve woodcuts. See *id.* However, his greatest success came from popular renditions of crime stories. According to *Cambridge*

competing for the public favor with their colleagues of *The Observer* and with Thomas Kelley's oeuvre, *Fatal Effects*.²¹

Not all broadside ballads were as colorful, and some—whether for want of poetic brilliance or some sense of restraint—were quite understated, almost laconic. The following is an anonymous creation:

They knocked him down
With a pocket pistol
His throat they badly cut,
Then into a ditch
In a sack well stich [sic]
This wounded man they put.²⁵

Moral poems, in the vein of the day, were composed and penny-editions of popular renditions of the murder enriched many a quick publisher. Artists drove down from London to the country to draw the macabre scenery of Gill's Hill Lane—where the murder took place—and sent their creations back, among multitudes of curious spectators, willing to pay a shilling each for a day's pleasure.²⁶ Hastily written, produced, and staged, were two stage plays, one of them even as the trial was in process. The New Surrey Theatre staged *The Gamblers* while the case was *sub judice*.²⁷ Then, by order of the King's

History, Catnach "gave, from day to day, a vivid and various picture of the life of his times; and in his broadsheets and flysheets may be found the mind of the labouring and the criminal classes of his period." *Id.* at 18-19. *The Hertfordshire Tragedy*, reporting the Thurtell affair, was probably Catnach's largest success until the depiction of the 1828 murder of Maria Marten and the confession of her murderer, which surpassed *The Hertfordshire Tragedy* with an estimated circulation of over one million copies sold. *See id.* at 18; *see supra* note 17.

²⁴ THOMAS KELLEY, *THE FATAL EFFECTS OF GAMBLING: EXEMPLIFIED IN THE MURDER OF WM. WEARE, AND THE TRIAL AND FATE OF JOHN THURTELL, THE MURDERER, AND HIS ACCOMPLICES* (1824). The subtitle continues thus: "With biographical sketches of the parties concerned, and a comment on the extraordinary circumstances developed in the narrative, in which gambling is proved to be the source of forgery, robbery, murder, and general demoralization. To which is added, the *Gambler's Scourge*, a complete expose of The Whole System of Gambling in the Metropolis; with Memoirs and Anecdotes of Notorious Blacklegs." Borowitz, ever dependable, cites this work as dating from 1824; the volume I managed to obtain is dated 1828 and is hence probably a later printing—though this is nowhere indicated—in deluxe format (512 pages), which perhaps comes to show such lingering public interest with the *Thurtell* case that economically justified the later printing.

²⁵ On file with author.

²⁶ *See, e.g.,* Edward Herbert, *A Pen and Ink Sketch of a Late Trial for Murder, in A Letter from Hertford*, LONDON MAGAZINE IX 165-85 (1824).

²⁷ *See* BOROWITZ, *supra* note 16, at 129; HARDWICK, *supra* note 20, at 112. *See also* KELLEY, *supra* note 24, at 67-71.

Bench court, upon a motion by Thurtell's illustrious counsel Joseph Chitty,²⁸ the theatre postponed shows until after the trial, to resume on the very day of Thurtell's execution. Eager Londoners (and no one was as eager to witness an execution as a nineteenth century Londoner) could witness Thurtell's actual execution by morning and make it on time to cheer the actors representing that event by the eve of the same day. *The Gamblers* was followed by a comic operetta titled *Four Inside; or, Off by the Night Coach*.²⁹ The Surrey promised to stage authentic Thurtell memorabilia: the identical gig and horse in which Thurtell drove Weare to his death, the dinner table from Probert's cottage on which the murderer and his accomplices supped once the deed was done, et cetera.³⁰ The Royal Coburg proceeded to open on the same evening with *The Hertfordshire Tragedy; or, The Victims of Gaming*.³¹ Success for the two plays lasted for the following two seasons.³²

Yet, it was not only the murder itself—nor the dreary scenery alone—that stirred the public imagination. The main actor in this drama, John Thurtell, proved to be of a strong and charismatic personality (he never admitted to the crime). The speech he made in his own defense struck a note with Dickens, who remarked that “Thurtell, too, died very game, and made a capital speech when he was tried.”³³ Writing a generation later, Andrew Steinmetz, a barrister and author both repelled and fascinated by the votaries of gambling and their practices, notes:

Thurtell was evidently no common man. His spoken defence, as reported, is one of the fine specimens of impassioned eloquence—perfectly Demosthenic. . . . Nothing can be finer than the turn of the

²⁸ See OBSERVER, Nov. 23, 1823 at 1; see also BOROWITZ, *supra* note 16, at 93, 110.

²⁹ See Kelley, *supra* note 24, at 67-71.

³⁰ See TIMES, Jan. 12, 1824, at 2; BOROWITZ, *supra* note 16, at 129-30, 198.

³¹ See BOROWITZ, *supra* note 16, at 198.

³² If Thurtell were compared to the 1995-1996 and 1997 trials of Orenthal J. Simpson in California, public fascination with these proves to have produced, in terms of literary creativity, a pale shadow to its Regency forebearers. One is struck by the variance of narrative forms that the 1820s popular legal culture indulged in, compared merely to the daily television spectacles and learned and semi-learned and not-learned-at-all commentaries that accompanied the unfolding of the Simpson murder trial. At the time, the O.J. Simpson criminal trial was almost universally dubbed “the trial of the century” by various American media (see, e.g., FELICIA OKEKE-IBEZIM, O.J. SIMPSON: THE TRIAL OF THE CENTURY (1997); FRANK SCHMALLEGER, TRIAL OF THE CENTURY: PEOPLE OF THE STATE OF CALIFORNIA VS. ORENTHAL JAMES SIMPSON (1996); see also J. NEIL SCHULMAN, THE FRAME OF THE CENTURY? (1999)). This brings to mind a passage from Doctorow's *Ragtime*, referring to the turn-of-the-century murder of Sanford White: “. . . [t]he newspapers called the shooting the Crime of the Century, [but] Goldman knew it was only 1906 and there were ninety-four years to go.” E.L. DOCTOROW, *RAGTIME* 4-5 (1975).

³³ CHARLES DICKENS, MISCELLANEOUS PAPERS, ch. 4 (1912).

following sentence:—"I have been represented by the Press—[which carries its benefits or curses on rapid wings] from one extremity of the kingdom to the other—as a man more depraved, more gratuitously and habitually profligate and cruel, than has ever appeared in modern times. . . . I have gambled; I have been a gambler. . . . If I have erred in these things, half of the nobility of the land have been my examples; some of the most enlightened statesmen of the country have been my companions."³⁴

A typical British fascination with Thurtell was that he was "of goodly parentage."³⁵ *The Hertfordshire Tragedy* in fact begins with the family background:

In Norwich town there dwelt a man
Of fair and honest fame
A just and upright man is he
And Thurtell is his name.³⁶

Likewise, *The Life, Trials, and Execution of John Thurtell* reads: "John Thurtell is my lawful name/On it I've brought disgrace/Of goodly parentage I came," et cetera.³⁷ The contrived "confessional" was an established genre. In those days of public executions, semiformal papers including "last words" of condemned persons were put out by the Ordinary of Newgate prison; however, when these proved too dull for the public taste, the publishing industry busied itself with the "safe and brisk market for 'Last Sorrowful Lamentations,'"

³⁴ ANDREW STEINMETZ, *THE GAMING TABLE, ITS VOTARIES AND VICTIMS, IN ALL TIMES AND COUNTRIES, ESPECIALLY IN ENGLAND AND IN FRANCE* vol. II, 124 (London, Tinsley Bros. 1870). There seems enough in these last pronouncements to form the basis for at least one half-decent conspiracy theory. *Id.* The author himself seems as colorful as his chosen topic. He is self-described as "Andrew Steinmetz, Esq., of the Middle Temple, Barrister-at-Law; First-Class Extra Certificate School of Musketry, Hlythe; Late officer-instructor of musketry, The Queens [sic] Own Light Infantry Militia." His other titles include *A Smoker's Guide, Philosopher and Friend* (1877); *The Romance of Dueling in All Times and Countries* (1868); and *History of the Jesuits* (1848). One hopes that Steinmetz's hand at musketry was lighter than in rhyming; the emphatic motto he penned for *The Gaming Table* runs:

The sharp, the blackleg, and the knowing one,
Livery or lace, the self-same circle, run;
The same the passion, end and means the same—
Dick and his Lordship differ but in name.

Id. at i.

³⁵ See TRIAL OF THURTELL & HUNT, *supra* note 3, at 209.

³⁶ *Id.* at 211.

³⁷ *Id.* at 209.

where successful broadsheets such as Pitts' or Catnach's would hold any or all of portraits, confessions, and woeful ballads, all on one sheet.³⁸

While certainly dominating the scene, Thurtell enjoyed something of a supporting cast both at the time of the deed and at the trial. Joseph Hunt was his accessory in hiding the body, and was tried with him; Probert, another accessory and Tenant of Gill's Hill Cottage, turned Crown witness—he hung the following year for horse stealing.³⁹ Thurtell and his associates' actions pursuant to the murder were as widely reported and commented upon as the crime itself. Atlay reports that, having temporarily disposed of Weare's corpse,

[t]he trio entered the house [Probert's cottage at Gill's Hill—J. Y.], Hunt was introduced to Mrs. Probert, directions were given to cook some pork chops for supper, and then Thurtell took the two men to the field, where they rifled the body, and left it lying enveloped in the sack. After supper a jovial evening was spent, Hunt sang several songs over the grog, and Thurtell gallantly presented Mrs. Probert with the gold chain he had taken from the body.⁴⁰

The Hertfordshire Tragedy did not fail to emphasize the particulars:

Although his hands were warm with blood,
He down to supper sat,
And passed the time in merry mood,
With drink and songs and chat.⁴¹

The singing bit commanded attention. Although Thurtell did not quite make it into the *Book of Remarkable Criminals* by the "remarkable" H.B. Irving (a Victorian barrister, author, and afterwards actor, son of celebrated thespian Sir Henry Irving),⁴² in discussing post-homicide cold-blooded tranquility, Irving remarks, "Such callousness is almost unsurpassed in the annals of criminal insensibility. Nero fiddling over burning Rome, Thurtell

³⁸ See CAMBRIDGE HISTORY, *supra* note 23, at 16-19.

³⁹ See HAYDN'S DICTIONARY, *supra* note 7, at 353.

⁴⁰ ATLAY, *supra* note 18, at 15-16. See also TRIAL OF THURTELL & HUNT, *supra* note 3, at 213. Hunt was a professional singer who was remunerated for his performance on that night. See ATLAY, *supra* note 18, at 11; TRIAL OF THURTELL & HUNT, *supra* note 3, at 213.

⁴¹ *The Hertfordshire Tragedy*, reprinted in TRIAL OF THURTELL & HUNT, *supra* note 3, at 213.

⁴² See H.B. IRVING, A BOOK OF REMARKABLE CRIMINALS (Hyperion Press 1975) (1918).

fresh from the murder of Weare, inviting Hunt, the singer and his accomplice, to 'tip them a stave' after supper⁴³

Nor did the proceedings of the trial lack in amusement, supplied generously by Joseph Hunt's testimony in court.⁴⁴ Hunt was questioned about the above-mentioned supper indulged in immediately after the murder took place: "Was the supper postponed?"—"No, it was pork."⁴⁵ The matter of the gig aroused much comment. "I knew he was a gentleman"—one witness allegedly said of Weare—"because he kept a gig."⁴⁶ Atlay dryly comments that "All the reputable personages in the story appear to have spent their time in driving about in gigs."⁴⁷ The eminent essayist Thomas Carlyle was delighted with this new definition of respectability.⁴⁸ Both humored and contemptuous, he built upon the professed obsession of the media, as well as some of the witnesses in the trial, with the numerous gigs involved in the case (we count the one gig Weare kept, and the one in which Thurtell drove him to his death—later to be exhibited on the stage of the New Surrey Theatre—and the one in which Probert and Hunt followed).⁴⁹ Carlyle delighted in the sarcastic coining of such catchwords as "gigman," "gigmatic" and "gigmanica" as emblems of all that is ridiculous about bourgeois values and the working class' strive for "respectability,"⁵⁰ or, in George Borrow's terms, "gentility" ("who," remarks Borrow, "can be a gentleman who keeps no gig?"⁵¹) Carlyle's delight is reflected in some of Palmer's letters, referring to "'respectable[s]' who 'keep gigs.'"⁵² Palmer noted an occasion in which he encountered a "very select

⁴³ *Id.* at 298. In his testimony, Probert told how "after that [the murder and the following dinner—] . . . Hunt sang two or three songs . . . 'He's a very fine voice,' has Hunt." HARDWICK, *supra* note 20, at 81.

⁴⁴ An account of the trial of Thurtell and Hunt was given in *THE NEWS*, No. 960, Jan. 11, 1824. See also POSTGATE, *supra* note 20. According to *Verdict*, Probert said the same: to the prosecutor's outraged exclamation, "You had supper!" he responded "Yes, pork chops." HARDWICK, *supra* note 20, at 81.

⁴⁵ POSTGATE, *supra* note 20, at 171.

⁴⁶ *Id.* Atlay dryly comments that he was unable to verify this quotation. ATLAY, *supra* note 18, at 13 n.1. Watson contemptuously notes the "free libations to Bacchus (even the witnesses being mostly intoxicated)." TRIAL OF THURTELL & HUNT, *supra* note 3, at 50.

⁴⁷ ATLAY, *supra* note 18, at 13 n.1.

⁴⁸ See Thomas Carlyle, *Jean Paul Richter Again*, FOREIGN REV. (1830), reprinted in CRITICAL AND MISCELLANEOUS ESSAYS 196, 208 (1872). (Of Richter, Carlyle wrote that his merits made his voice sound, though he "was not a nobleman, nor a gentlemen, nor gigman; but simply a man.") *Id.* See also BOROWITZ, *supra* note 16, at 274-75.

⁴⁹ BOROWITZ, *supra* note 16, at 129.

⁵⁰ Carlyle, *supra* note 48, at 208.

⁵¹ See George Borrow, *The Romany Rye*, in THE WORKS OF GEORGE BORROW 227, 229 (Clement Shorter ed., 1923); see also BOROWITZ, *supra* note 16, at 275.

⁵² Letter from Samuel Palmer to Anne Gilchrist (Nov. 1863), in 2 THE LETTERS OF SAMUEL PALMER 681 (Raymond Lister ed., 1974).

company: carriage and poodle people; more respectable than Thurtell who only 'kept a gig,' in which he took Mr. Weare into Hertfordshire to be murdered."⁵³ Yet, in *The French Revolution*, Carlyle is prophetic: "Respectability, with all her collected Gigs inflamed for funeral pyre, wailing, leaves the earth . . . it is the end of the domination of *Imposture* (which is Darkness and opaque Fire-damp); and the burning up, with un-quenchable fire, of all the Gigs that are in the Earth."⁵⁴

In the nineteenth century, the genre of literary treatments of famous crimes and trials—almost invariably murders—were as popular in England as courtroom and detective fiction is today (the main difference being the relative richness of genres in Regency, Victorian, and Edwardian England: poems, ballads, plays, morals-plays, farces, and every conceivable variation thereof).⁵⁵ Especially striking is the genre of quasi-legal popular writing that has since all but disappeared—a province where retired barristers such as J.B. Atlay were particularly active—and the decline of which corresponds with the rise of organized court reporting, and perhaps more with the emergence of the fictional detective story genre, not least with Edgar Allen Poe and Arthur Conan Doyle.⁵⁶ The London and Edinburgh publishing house of William Hodge & Company enjoyed great success with its illustrated series of *Notable Trials*, in which some thirty different volumes were published, each dedicated to one case.⁵⁷ These volumes are no mean feat: the *Trial of Thurtell & Hunt* holds over 200 pages, complete with illustrations of the major characters, plans of the cottage at Gill's Hill and the surrounding area, and appendices of verbatim renditions of parts of the proceedings, including documentation of the evidence, speeches, and the statements given at the coroner's inquest.⁵⁸ The attention and emphasis on details is truly astounding. Nor are anthropomoralistic comments spared: Thurtell's accomplices "possessed the lineaments

⁵³ Letter from Samuel Palmer to Thomas Howard Wright (Mar. 17, 1870), *supra* note 52, in 2 *THE LETTERS OF SAMUEL PALMER* 681, 809 (Raymond Lister ed., 1974).

⁵⁴ THOMAS CARLYLE, *THE FRENCH REVOLUTION* III 318-19 (Standard Classics (n.d.)).

⁵⁵ See discussion *supra* Part B.

⁵⁶ Emphasis on detail underlies many of these works, some of which appeared as late as the first half of the twentieth century. See POSTGATE, *supra* note 20, at 41; see also GEORGE A. BIRMINGHAM, *MURDER MOST FOUL! A GALLERY OF FAMOUS CRIMINALS* 519-559 (1929), (beginning with family background accounts of Thurtell and accessory Hunt, and subsequently focusing on Thurtell's character).

⁵⁷ For a description list and bibliographical information for this series, see *TRIAL OF THURTELL & HUNT*, *supra* note 3, at i-ii.

⁵⁸ See *TRIAL OF THURTELL & HUNT*, *supra* note 3.

of human beings, and there all resemblance between them and human nature ceases.⁵⁹

Atlay's *Famous Trials* is a small masterpiece in the genre of popularizing trials and crime stories while keeping to a documentary form.⁶⁰ It is, at once, a detailed rendition and a thrilling narrative drawn by a master storyteller. Unlike the cumbersome detailed documentation of *Notable Trials*, Atlay tells a rapid and rhythmic story; his main concern is to keep his audience alert, excited, at times breathless, even as he informs it. That the author sees his project as artistic, as much as documentary, is obvious. The reader who is blissfully unfamiliar with the story is in for a ride: the author leads her by the hand into the depths of the morbid Surrey countryside, the subculture of the London gambling dens, and the inner workings of the characters. She is introduced to the background: the characters in their natural surroundings of decadent London gambling houses and wild prize-fighting arenas, the society of people who might have been ruined by gambling, yet to whom the possibility of work never occurs.⁶¹ The narrative begins with the description of a party of Hertfordshire passers-by hearing a horrible shriek (and failing to inquire as to its cause and origin), and of workmen finding horrible evidence on the following day: a knife and a pistol smeared with human blood and brains.⁶² It seems a terrible crime took place; but who was killed? By whom? And why? An inquest begins.⁶³ A naked corpse is found in a nearby pond.⁶⁴ Not for one minute is the reader more informed than the investigating officials were at any point. Yet the work is saturated with subtext typical of that period's fascination with decadent romanticism. For Atlay, the key to understanding the horror of the story is the morose cottage at Gill's Hill and its sinister Hertfordshire surroundings. The lane leading to the house, on which the murder occurred, is a "narrow and dismal ravine where the hedges almost meet overhead, and which winds along for nearly three-quarters of a mile until it passes the gates of a lonely habitation called Gill's Hill Cottage."⁶⁵ As mentioned above, hoards of spectators came down from London to examine the spot during the trial. *The Hertfordshire Tragedy* has this to say of the site:

⁵⁹ *Id.* at 49. By contrast, Watson feels compassion for Hunt, whom he hints at as being a dimwit and easily manipulable by the charismatic Thurtell. See ATLAY, *supra* note 18, at 15.

⁶⁰ See ATLAY, *supra* note 18.

⁶¹ *Id.* at 1-2.

⁶² *Id.* at 2-3.

⁶³ *Id.* at 11.

⁶⁴ *Id.* at 10-11.

⁶⁵ *Id.* at 2.

- * - A man named Probert had a cot
 In Hertfordshire hard by,
 Most Dark and gloomy was the spot,
 And few e'er passed by.⁶⁶

Gill's Hill Lane is described there as "that dark and dismal place."⁶⁷ However, the cottage's dark prime did not last. Sir Walter Scott, who visited the spot a few years later, writes in his diary of the

labyrinth of intricate lanes, which seemed made on purpose to afford strangers the full benefit of a dark night and a drunk driver, in order to visit Gill's Hill, famous for the murder of Mr. Weare. . . . The principle part of the house is destroyed, and only the kitchen remains standing. The garden has been dismantled, though a few laurels and flowering shrubs, run wild, continue to mark the spot. The fatal pond is now only a green swamp, but so near the house, that one cannot conceive how it was ever chosen as a place of temporary concealment for the murdered body. The dirt of the present habitation equals its desolation . . . [t]he landlord had dismantled the place because no respectable person would live there.⁶⁸

Thus, the corrupt house, as much an accomplice in the deed as any, was smitten.

Through the century, reference to Weare's murder by Thurtell became *monnaie courante*, if not altogether a household reference. Thus, while protesting a rival commentator's interpretation of Bacon's politics, another distinguished essayist, Thomas Babington Macaulay, acidly remarks:

There is a possibility that Thurtell may have killed Weare only in order to give the youth of England an impressive warning against gaming and bad company. There is a possibility that Fauntleroy may have forged powers of attorney, only in order that his fate might turn the attention of the public to the defects of the penal law. These things, we say, are possible. But they are so extravagantly improbable that a man who should act on such suppositions would be fit only for Saint Luke's.⁶⁹

⁶⁶ TRIAL OF THURTELL & HUNT, *supra* note 3, at 212.

⁶⁷ *Id.*

⁶⁸ THE JOURNAL OF SIR WALTER SCOTT 148 (David Douglas ed., Harper & Brothers, 1890); *see also* ATILAY, *supra* note 18, at 18.

⁶⁹ Thomas Babington Macaulay, *Francis Bacon*, EDINBURGH REVIEW (July 1837).

The *Thurtell* case produced more than merely textual artifacts, as household items were embellished with the likeness of the affair's protagonists. A pinkish, glazed quart tankard made by the North Shields pottery, a contemporary manufacturer quite tuned in to events featured the three accomplices in bold profile over the script (in rather poor penmanship),

Wm. Probert John Thurtell Josh Hunt

The persons charged with the murder of Mr. Weare

Ian Sharp, a specialist in Sunderland Lustre ware from Tynemouth Village in Northumberland, reports at least three other *Thurtell*-related prints on pottery from this firm.⁷⁰ One print is of Weare's body removed from the pond where it was disposed of, one of Probert's cottage, and one of Thurtell himself.

The story kept its notoriety for horror throughout the century. Thurtell's own grave provided the tiny community of Elstree (or Idlestree), in whose churchyard he was buried, with a special attraction for those Englishmen who seek out such indulgences. It was quite the small collection of horror victims, Weare's neighbor within the church being a certain Mrs. Martha Rey, shot by a lovesick reverend in 1779.⁷¹ Even by the turn of the century, Robert Louis Stevenson's *Markheim* recalls a fair where he observed "dismally designed, garishly coloured . . . Weare in the death-grip of Thurtell; and a score besides of famous crimes."⁷² The case and its protagonist have been categorized, serialized, canonized.

Thurtell's cranium, by the way, is exhibited to this very day in what Borowitz labeled "the murderer's equivalent of Poets' Corner"—the museum of the Royal College of Surgeons in Lincoln's Inn Fields, in the company of the remains of villains of commensurate notoriety.⁷³

⁷⁰ I thank Mr. Sharp for sharing this knowledge (report on file with author). An image of the tankard is accessible online at <http://sharpantiques.demon.co.uk>. Mr. Sharp adds that "North Shields is about one mile from Tynemouth, miles from where the murder took place . . . the case was obviously very well known . . . but saying that, many of the northeast potters relied on the east coast trade to sell goods." *Id.*

⁷¹ *The Royal National and Commercial Directory and Topography of the Counties of Essex, Herts, and Middlesex*, published in 1839, informatively notes that "in the churchyard [of Elstree] is buried Mr. Weare, who was murdered by John Thurtell at Gill's-hill cottage, parish of Aldenham." Elstree lays about eleven miles northwest of London and, in 1839, its population was given as 341.

⁷² Robert Louis Stevenson, *Markheim*, in *THE MERRY MEN AND OTHER TALES AND FABLES* 128 (1887).

⁷³ See Richard Whittington-Egan, *Eugene Aram: The Scholar Murderer of Knaresborough*, 139 *NEW L. J.* 1434 (1989).

While *R. v. Thurtell* lost the battle over contemporaneous legal imagination, it definitely won over the popular and literary ones. Yet, even common law imagination has a limited regulating force: legal doctrines, not stories, are supposed to filter through the mechanism of precedent. When law students are offered to bask in the textual canon of their legal systems, they are advised to neglect the "facts" and "discover" the "rule;" distinguish the generality of the normatively-binding ratio decidendi from the descriptive transience of res judicata. Literary and popular imaginations, however, work differently, and narratives are exactly what appeal to them. They refuse to make categorical, a priori distinctions between the so-called universal and the transient.

The next Part examines interactions between the legal and literary imaginations as viewed through the reemergence of *R. v. Thurtell* in twentieth century legal contexts, on both sides of the Atlantic. The focus is on how the performative drive for reference submits the legal to the narrative by rhetorically mobilizing the latter to serve the functions of the former, all the while reinventing *Thurtell's* textuality in the process.

C. Thurtell's Case: Performative Reference and the Crossing of Canonical Boundaries

Although *R. v. Thurtell* posed no special problems of legal doctrine, it did involve a few matters of procedure and evidence that in retrospect proved to catch the attention of later tribunals. The main procedural matter was a motion, partially granted by the court, for postponement (or "continuance") of proceedings, on the basis of prejudice related to the strong public reactions to the murder.⁷⁴ Nothing about this trial escaped the press, and a special, eight-page issue of *Trial* was hastily printed on "very cheap paper," titled:

Murder of Mr. Weare!!!

Postponement of the Trial of Thurtell, Hunt and Probert. First edition.⁷⁵

⁷⁴ See JONES, *supra* note 13, at 95-145. Thurtell's counsel claimed prejudice: that the jury would be affected by the public opinion which was much stirred against the accused, on account of the stage plays and numerous prejudiced publications, including those of depositions taken from prosecution witnesses. The court (Justice Park), somewhat vexed, granted a month's postponement (the original motion was for a stay until the next assizes term).

⁷⁵ W. Chubb, *Murder of Mr. Weare!!! Postponement of the Trial of Thurtell, Hunt and Probert*, available at <http://people.netcom.co.uk/mcrafer/hart/catalogue43.htm>.

The second point relates to the proper reliance upon circumstantial evidence: it so happened that the evidence in the trial, as strong as it was, was wholly circumstantial—Thurtell never admitted to the murder, and there were no eye witnesses.⁷⁶

The third matter was a legal point of the defendant's right, in criminal proceedings, to disclosure of particulars of the indictment and evidence that the prosecution holds, a right later granted in England by the Indictable Offences Act, 1848 and the Indictments Act, 1915, but nonexistent at the time of *R. v. Thurtell*;⁷⁷ indeed, in that case, some depositions taken from prosecution witnesses were published in the media prior to the trial, upon which Justice Park commented gravely as a hindrance of justice, a "high crime and misdemeanor."⁷⁸

In the following Part, six British and American twentieth century cases that in some way relied on *R. v. Thurtell* (the "nonexistent case," as it were) are briefly presented. As *R. v. Thurtell* was not recorded in any formal medium—the concept of a formal medium, in the early 1900s, was somewhat anachronistic to begin with—the courts had, in their search for textuality, to refer to the sources discussed above (or later transformations of them): folk, literary, and journalistic. It is instructive to see how the different courts dealt with this problem. The British courts' legal culture allowed for an approach that was different, and in particular more relaxed and open to a relative variety of sources, than its American counterpart. The American courts were uneasy in citing out-and-out extra-legal sources, and some mediating devices were developed to obscure that necessity. It is also instructive to detect the mechanisms that allowed for *Thurtell's* perseverance, albeit its initial failure to impress the compilers of the legal canon, its failure of discursive textuality. By this I mean that specifically *discursive* (in this case, legal) textuality failed to deal with the case, but that general culture—feasting in the various textual modes investigated further on in this study—did not. The legal discourse then borrowed from general culture to compensate for its own failure.

⁷⁶ "But Thurtell he denied the crime/And stoutly did maintain/I that neither judge nor jury could/Convict him of the same." *The Hertfordshire Tragedy*, *supra* note 7, at 214; see also ATLAY, *supra* note 18, at 8; HARDWICK, *supra* note 20, at 127.

⁷⁷ In the dramatic American case of *Brady v. Maryland*, 373 U.S. 83 (1963), where a convicted murderer's appeal was granted on the basis of an admittance of a co-defendant withheld during the trial by the prosecution, the defendant's discovery rights were acknowledged on due process grounds. *Brady* was further developed in *United States v. Agurs*, 427 U.S. 97 (1976) (establishing prosecutors' duty to inform the defense of some classes of evidentiary material (as opposed to the defense's right to discovery upon demand)).

⁷⁸ TRIAL OF THURTELL & HUNT, *supra* note 3, at 191-94.

The main thematic axis hereby used is the examination of the different courts' drive for reference. We deal here in matters of legitimization and of rationalization in two senses that are almost inverse to each other. One is the courts' drive to rationalize decisions through precedent and contextualization (e.g., demonstrating that a doctrine is rooted in a common-law tradition or an established line of argument). In this sense, "rationalization" is used as a somewhat pejorative term: as an excuse for the lack of argumentation, as obscuring, by recourse to authority, a problematic phase of an issue. (In the terms coined by the pioneering philosopher of language J.L. Austin, this concerns illocutionary performance achieved through a perlocutionary effect: a rhetorical scheme by which it is sufficient to convince interlocutors that an authentic performance has been performed—e.g., argumentation—to excuse lack of actual performance).⁷⁹ Of course, contextualization in common law is a mode of legitimization (that, in essence, is *stare decisis*), yet the language of the courts hereby examined makes it clear that they do not actually see performative reference as a sufficient condition of legitimacy (Sartre's autodidact, in the quotation that opens this paper, makes a case for it being a necessary one, though). The courts therefore act from within an internal scheme of *rationalization*, which essentially is an exercise in hermeneutics: it understands rationalization in terms of making sense of practice—the Weberian-Habermasian sense, rather than the Freudian.⁸⁰

⁷⁹ J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962). For further discussion, see Jonathan Yovel, *What Do We Do When We Say? An Essay about Language Paradigms in Philosophy, Law, and Theology*, 5 MOUNTBATTEN L.J. 5 (2002).

⁸⁰ The two senses of "rationalization" must be distinguished here. The first (following Weber and Habermas) is that of "making sense of a practice," providing a theoretical ground against which practice assumes rational basis—not to be confused with the Freudian and Marxian pejorative sense of contriving, manipulating, and obscuring the true nature of a phenomenon. As Habermas notes, it is typical of the social sciences that they deal with pre-interpreted subject matter: that the interpretation of a practice held by its practitioners is part of the practice. See RICHARD J. BERNSTEIN, *THE NEW CONSTELLATION* 45-56 (1992). Thus, while I see my own attempts at "critical rationalization" as following a Weberian-Habermasian project, the practitioners discussed here—mainly judges—are "rationalizing" in both senses: their attempts at Weberian-Habermasian rationalization at times produce problems of legitimization, whose overcoming necessitates Freudian rationalization. Following Bourdieu, rationalization in the Marxian sense is sometimes seen as a *condition* of practice: certain performances must obscure their true function in order to succeed. This is especially true when the question of legitimization emerges as a main challenge with which the practice must deal, such as in adjudication.

D. Three British Cases: Gossip and the Grapevine

The court in *R. v. Churchill and Others*⁸¹ faced a motion (or an "application") by an accused for the particulars concerning an alleged conspiracy (the details here do not matter).⁸² When describing the state of the law and its historical transformations, the court quoted lengthily from Justice Park's speech in *Thurtell* in which he bitterly regretted the defendant's knowledge of such particulars.⁸³ How did Justice Thesiger—the presiding judge in *Churchill*—know of this speech?⁸⁴ Where did he find it verbatim? Moreover, why did he consider it legitimate—or, for that matter, desirable—to refer to a case that, as it were, was absent from the legal textual canon for over 140 years? *Thurtell*, in *absentia*, eluded the formal legal discourse. Therefore, it does not obviously belong in the realm of judicial knowledge, nor was it introduced to the court as a matter of fact or a piece of literature. It seems that although *Thurtell* was absent from the law reports, its shadows—rumors about it—went down through the grapevine of the quasi-formal communicative lines in the legal profession, and Justice Thesiger was versed enough in that culture to offer remarks on who Thurtell's counsel was, as well as other "external" details concerning that case (those that do not even belong to the realm of *res judicata*, let alone any *ratio decidendi*). The best way to describe *Thurtell*'s emergence in *Churchill* is, I think, through a mechanism akin to gossip. This is not a derogatory term; traditions retain gossip on the fringes of canons, especially delectable gossip such as the circumstances provided for by *Thurtell*. Justice Thesiger must have had at his disposal some of those literary, folk, and journalistic materials from which he could draw to fill the hollow in the textual canon. Yet, the primary association that caused *Thurtell* to occur to him must have been less textually-specific. *Thurtell*'s notoriety hovered among other historical instances that were transformed into a sort of common knowledge, shared by certain communities. Once the association occurs, the literary sources are there to furnish the textuality that the legal-formal ones are unable to. It was the literary imagination that subsequently vindicated the initial lack of the professional one.

It is one question as to how *Thurtell* survived and a different question as to how reference to it was justified, or even acknowledged. In *Churchill*, the

⁸¹ [1965] 1 WLR 1174, (CCC 1965) (Eng.), 2 All E.R. 793.

⁸² 2 All E.R. at 793.

⁸³ [1965] 1 WLR at 1178.

⁸⁴ *Id.* Funny enough, "Thesiger" was also the name of the counsel for Joseph Hunt, one of Thurtell's accomplices in *R. v. Thurtell*. See HARDWICK, *supra* note 20, at 75; BOROWITZ, *supra* note 16, at 110.

court cited two sources: *The Times* of Dec. 6, 1923,⁸⁵ and that all-impressive, eclectic collection, *The English and Empire Digest*.⁸⁶ The *Digest* itself contributes a single sentence about *Thurtell*: "Local prejudice at place of trial."⁸⁷ It then cited its own sources: *The Times*, Atlay's *Famous Trials*, and *Jones' Rep.* 1824 (in that order),⁸⁸ as well as a 1847 case for redefinition.⁸⁹ Yet, that is not all, for the canon builds itself cyclically through self-reference. In discussing *Thurtell*, the 1977 reissue of the *Digest* proceeds to cite *R. v. Churchill* as well.⁹⁰ Interestingly enough, the court in *Churchill* was satisfied with a reference to the *Digest* that has nothing whatsoever to say about the issue at hand (*Churchill*'s business being a matter of disclosure, not of prejudice), and although the *Digest* openly relies upon literary and journalistic sources (the *Times*, *Famous Trials*),⁹¹ the court shied from the example and obscured this fact by not noting it.⁹² In 1977, the added reference became circular in the droll way that legal *renvoi* sometimes creates: the *Digest* refers to *Churchill*, which refers to the *Digest*; yet, the *Digest* considers *Thurtell* to deal with prejudice, while *Churchill* relies on it for the matter of disclosure. Content-wise, the *Digest*'s *Thurtell* and *Churchill*'s *Thurtell* are different cases.

The courts acted somewhat differently in the cases of *R. v. Ramasamy*⁹³ and *Lam Chi-Ming v. The Queen*.⁹⁴ In *Ramasamy*, the court sought support for the claim that subsequent evidence is admissible even if resulting from unlawful interrogation (the doctrine being that although a defendant's statement, if extracted unlawfully, is not admissible, any subsequent evidence it led to—in this case, the finding of a gun that was an alleged murder weapon—is admissible).⁹⁵ As *Ramasamy* occurred in imperial Ceylon, the court was intensely inclined to demonstrate that whatever doctrine it applied was well-grounded in common-law traditions.⁹⁶ In *Thurtell*, Justice Park ruled that

⁸⁵ [1965] 1 WLR at 1178.

⁸⁶ *Id.*

⁸⁷ See DIGEST, *supra* note 14.

⁸⁸ *Id.* For full citations of these sources, see TIMES, *supra* note 30; ATLAY, *supra* note 18; JONES, *supra* note 13.

⁸⁹ *Id.* (citing Coldicutt v. Beagin 8 L.T.R.O.S. 319 (1847)).

⁹⁰ See DIGEST, *supra* note 14.

⁹¹ *Id.*

⁹² [1965] 2 All. E.R. at 795; [1965] 1 WLR at 1178.

⁹³ [1965] App. Cas. 1 (P.C. 1964) (appeal taken from Ceylon).

⁹⁴ [1991] 2 App. Cas. 212 (P.C. 1991) (appeal taken from Hong Kong).

⁹⁵ See Ramasamy, [1965] App. Cas. at 15 nn. 3-4.

⁹⁶ In this case, there is a statutory source as well: Legislative Enactments of Ceylon (1938 Rev.), Evidence Ordinance § 27(1). To repeat a methodological point, the construct I offer here is not a motivational

although Hunt's statement as to the location of Weare's body was inadmissible (it was extracted by threat), the actual discovery of the cadaver in the pond at Gill's Hill—resulting from that statement—was admissible.⁹⁷ "It is every day practice," remarked Justice Park, "that if, in the course of such a confession, the party state where stolen goods or a body may be found, and they are found accordingly, this is evidence, because the fact of finding [rather than the confession] proves the truth of the allegation."⁹⁸ In other words, the subsequent evidence matures to a kind of independence, unimpaired by the original unlawfulness. The *Ramasamy* court cited neither the *Digest* nor the *Times*, but rather *Notable British Trials*.⁹⁹

The court in *Lam Chi-Ming* was concerned with a similar issue.¹⁰⁰ The particulars are peculiar enough to merit a short description. The two defendants were sentenced to death for the murder of a man who raped their sister. They used a knife that they subsequently disposed of in the sea. During the police investigation, the defendants confessed to the crime and reconstructed it on video, complete with the toss of the knife into the water from the actual spot; whereupon divers were successful in recovering the original item.¹⁰¹ At the trial, it was established that the confessions were extracted by police brutality and therefore were inadmissible.¹⁰² The question for the court was how to deal with the video tapes and the finding of the knife. The trial judge found this original solution: he ruled that although all that was *said* by the defendants was inadmissible, the visual recordings of the re-enactments were not; and the video tapes were subsequently admitted *without sound*.¹⁰³

The Court of Appeals was not amused. However, it did acknowledge that, in common law, the doctrine of inadmissibility of evidence discovered due to involuntary confessions is not clear.¹⁰⁴ It was never quite clear what interests guided the exclusionary rule: curbing police brutality or wariness of the

explanation but a text-based hermeneutic exercise in rationalization.

⁹⁷ TRIAL OF THURTELL & HUNT, *supra* note 3, at 145.

⁹⁸ *Id.*

⁹⁹ See Ramasamy, [1965] App. Cas. at 15 nn. 3-4. At the risk of pedantry, the precise name of the series is NOTABLE ENGLISH TRIALS (Scottish trials were published under a separate title. See *supra* note 51, at ii). In other contexts such remarks may pass for undue tediousness, but less so when the search for textuality itself is the issue.

¹⁰⁰ [1991] 2 App. Cas. at 212.

¹⁰¹ *Id.* at 216.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id. passim.*

reliability of testimony surrendered under excessive pressure. If the second is exclusive, then subsequent evidence (such as fishing the knife in *Lam Chi-Ming* or the discovery of Weare's body in *Thurtell*) cancel out the presumption of unreliability. This thesis, the court stated, was indeed recognized and applied in the early 1800s, notably in *R. v. Thurtell*.¹⁰⁵ The citation is to *Notable British Trials*. No reference is made to the *Digest*. The court, however, cited *Ramasamy*¹⁰⁶ and quoted from the same section of that opinion that refers to *Thurtell*: once the baptismal reference has been performed, it can be referred to ever again. By citing *Ramasamy*, the court in *Lam Chi-Ming* performed the perfectly ordinary act of reference to a canonical text, and was thus excused from bothering itself with the question of how that court came to introduce *Thurtell*.¹⁰⁷ This approach to precedent, recast in performative terms, in effect recognizes a "baptismal reference" that transforms a "historical" source to the status of a "legal" one, not just for this case but for all subsequent ones as well. It is an act of legitimization of future reference. Courts are normally perceived as creating precedents for future decisions. In turn, they are expected to rely on some proper understanding of precedent in their own decisions. When they transgress, they are at an awkwardness that drives them to mask the baptismal performance of reference as a normal one.

Imperial and colonial courts seem to have been especially inclined to slip in a typically English case—such as *Thurtell*—that expresses the magistrates' cultural proximity to their home peers, as distinct from mere institutional

¹⁰⁵ *Id.* at 217. Indeed, it was not until the 1980s that English courts clearly ruled against the exclusivity of unreliability as grounds for inadmissibility in such cases. In *Wong Kam-Ming v. The Queen*, [1980] App. Cas. 247 (P.C. 1978) (appeal taken from Hong Kong), Lord Hailsham of St. Marylebone (preceded by Lord Diplock) emphatically argued in his dissent:

Any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody . . . should not be subjected to ill treatment or improper pressure . . .

Id. at 261. See also *R. v. Sang*, [1980] App. Cas. 402, 436, 454. Lord Salmond plainly argued that, "A confession by an accused which has been obtained by threats or promises is inadmissible as evidence against him, because to admit it would be unfair." *Id.* at 445. Notwithstanding, Lord Hailsham's view of "civilised societies," it is interesting to realize that in this relatively late development, the English courts followed courts in Queensland, see *R. v. Beere*, [1965] Qd. R. 370, and Scotland, see *Chalmers v. H.M. Advocate*, 1954 J.C. 66. *Sang*, [1980] App. Cas. at 448.

¹⁰⁶ [1965] 2 App. Cas. at 217.

¹⁰⁷ One is reminded of Salmond's distinction between "legal" and "historical" sources (otherwise known as sources "of validity" and "of content"). See SALMOND, *supra* note 5, at 133-35.

affiliation. *Ramasamy* was tried in Ceylon,¹⁰⁸ *Lam Chi-Ming* in Hong Kong.¹⁰⁹ *Rodd v. Mansfield*, an 1830 case heard before the Supreme Court of New South Wales, Australia, made casual reference to "the case of Thurtell, who had been hanged for the murder of Mr. Wear [sic], in Hertfordshire."¹¹⁰ There is, needless to say, no citation.¹¹¹ *Thurtell* is invoked more like an obvious segment of general culture than a legal precedent—more Donne than Denning.¹¹²

British courts' references to *Thurtell* fulfilled different functions. For sure, they helped ascertain certain legal propositions (as in *Lam Chi-Ming*¹¹³). Yet, they also served to present paradigms of legal doctrine that have since been changed (in the fields of procedure and evidence, as in *Churchill*¹¹⁴). In that sense, no strict precedent was extracted from it; *Thurtell* was used as a window, a telescope stretching over a century and a half to the legal culture of its time. It performed as a linking agent, connecting novel statutory law to the traditional common law doctrines (cf. *Ramasamy*¹¹⁵), as well as contrasting those with new doctrines and by this illuminating them (cf. *Churchill*¹¹⁶). We may well wonder why should this case, quite ordinary in doctrinal respects, be chosen to fulfill these functions? Why not settle for less problematic, textually canonical cases that could surely deliver the same point? One answer is that, having been established as paradigmatic of a certain argument, a certain source is transformed into assuming that role for any future performative reference. Once a case becomes exemplary of a claim, it occupies that referential niche. Frequently, what enables it to occupy the niche to begin with is its rhetoric.¹¹⁷

¹⁰⁸ [1965] App. Cas. at 1.

¹⁰⁹ [1991] 2 App. Cas. at 212.

¹¹⁰ *Rodd v. Mansfield*, [1830] NSWCS 65.

¹¹¹ There are two ironies relating to the court's performance: one is the failure to spell correctly Wear's name (the victim being much less interesting than his murderer), the second is that New South Wales was the territory to which Joseph Hunt, Thurtell's chief accomplice, was deported and where he eventually became a constable until his death in 1861. See BOROWITZ, *supra* note 16, at 233.

¹¹² I cannot desist from commenting on the performance of this, my own sentence, that makes the trope "Denning" a part of general, rather than legal, culture in a similar, if not even offhand manner than how the New South Wales Supreme Court treats *Thurtell*; it likewise makes the assumption concerning Donne.

¹¹³ [1991] 2 App. Cas. at 217.

¹¹⁴ [1965] 2 All. E.R. at 795; [1965] 1 W.L.R. at 1178.

¹¹⁵ [1965] App. Cas. at 15.

¹¹⁶ [1965] 2 All. E.R. at 795; [1965] 1 W.L.R. at 1178.

¹¹⁷ For a taste of *Thurtell*'s rhetoric, see *supra* note 123.

E. Three American Courts: Performative Reference as an Agent of Legitimatization, Contextualization, and Rationalization

All the three American cases that were found to cite *Thurtell*—from the Supreme Courts of Colorado¹¹⁸ and Montana¹¹⁹ and the California Court of Appeals¹²⁰—share several common features. They are all appeals of murder cases, in which the appeal is based, inter alia, on the claim of insufficiency of evidence (which is circumstantial in all). In all three cases, the appeal was rejected and judgment of the trial court was affirmed; all discussed the issue of the status of circumstantial evidence and quoted lengthy (and identical) passages¹²¹ from Justice Park's speech in his address to the jury in *Thurtell*.¹²² To understand the allure that this address held for these courts, the passage is quoted here verbatim:

The eye of Omniscience can alone see the truth in all cases: circumstantial evidence is there out of the question: but clothed as we are with the infirmities of human nature, how are we to get at the truth without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances, which sometimes envelop human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice and most skilled in judicial proceedings, is much more satisfactory than the testimony of a single individual who swears he has seen a fact committed.¹²³

The appeal of this paragraph for a modern day court is double-fold. On the one hand, it rationalizes and comforts the general doctrine allowing reliance on circumstantial evidence and, while recognizing its risks, almost trivializes them (in addition, it manifests the common law's traditional mistrust of witnesses).

¹¹⁸ *Corbett v. People*, 387 P.2d 409 (Colo. 1963).

¹¹⁹ *Montana v. Cor*, 396 P.2d 86 (Mont. 1964).

¹²⁰ *People v. Scott*, 1 Cal. Rptr. 600 (1959).

¹²¹ I hesitate to refer to them as "paragraphs," which are structural segments of a text. For, other than by and through the performances of the courts hereby discussed, we do not know when, where, and in what circumstances Justice Park's speeches became texts, when the passage became a paragraph, or when iterability became repeatability.

¹²² See *Corbett*, 387 P.2d at 411; *Cor*, 396 P.2d at 88; *Scott*, 1 Cal. Rptr. at 619.

¹²³ *Corbett*, 387 P.2d at 411. According to Borowitz, the speech included the dictum that wholly discounting circumstantial evidence "would be an end at once to the judicature of man." BOROWITZ, *supra* note 16, at 176.

On the other hand, it lends the judge a feeling of continuing a long and tested tradition of common sense. The long quotation (that appeared in full in all three opinions)¹²⁴ is not, after all, necessary to substantiate any point of legal doctrine in the legal systems of Montana, Colorado, or California. It was no longer the case, as Wheeler, the editor of *Reports of Criminal Law Cases*, wrote in 1851, that "we are almost entirely indebted to English cases and decisions on this branch of the [criminal] law."¹²⁵ It is also noteworthy that in none of the cases (all from the late 1950s and early 1960s) did the courts refer to any contemporary opinion given by a foreign court—whether in another state or abroad. This liberty was allowed only in respect to the 1820s British decision, well remote in history and space. When a distant mirror is invoked, no prestige is surrendered and no competitive position compromised. A performance of this kind puts the court's decision in line with a venerable tradition, invoking "omniscience" and benevolent, yet sober, philosophical and humanistic deliberations. The rhetoric is performative in that it contextualizes the doctrine, lends it a degree of inevitability, and proves it a recognized part of an established culture. The drive for reference manifested here does more than provoke the common law's default reliance on things said and done in the past (rationalized by the doctrine of precedent). The reference constructs the cultural framework in which the specific doctrine is rationalized, not in analytic, abstract terms, but as representative of a culturally rooted conception of human reason and its fallibilities.¹²⁶

Although *Thurtell* was a British case, the American courts failed to cite to any British source. Instead, they cited an American private publication noted above.¹²⁷ Jacob D. Wheeler, compiler and editor of this eventually three-volume series, had an ambitious project in mind: to "collect and publish every criminal trial that has occurred in the United States, making a complete

¹²⁴ See *Corbett*, 387 P.2d at 411; *Cor*, 396 P.2d at 88; *Scott*, 1 Cal. Rptr. at 619.

¹²⁵ 2 REPORTS OF CRIMINAL LAW CASES ix (Jacob D. Wheeler ed., Banks, Gould & Co. 1851) ("Wheeler").

¹²⁶ Another case of a passage delivered through the years is presented by Gilmore: a passage concerning strict contractual liability and excuse introduced by Morton, J. of the Massachusetts Supreme Court in *Adams v. Nichols*, 19 Mass. (1 Pick.) 275, 276 (1837). GRANT GILMORE, *THE DEATH OF A CONTRACT* 45 (1972). According to Gilmore, "[t]his language was copied, almost word for word, from one of the seventeenth century reports of *Paradine v. Jane*—a case which, in all probability, Judge Morton had never read and which he did not cite." *Id.* The passage was actually quoted from (and cited to) a paraphrase on *Paradine* that was taken from a note written by Serjeant Williams, the contemporary editor of the *Saunders* collection, to *Walton v. Waterhouse*, 85 Eng. Rep. 1233 (K.B. 1684). Gilmore suggests that both through the textual transformation (the passage was being quoted verbatim) and the shifting context, the original meaning of *Paradine* was circumvented, perhaps lost. *Id.* at 46.

¹²⁷ See Wheeler, *supra* note 125, at 462.

collection of American State Trials."¹²⁸ Justice Park's "omniscience" speech is quoted there in an editorial footnote to the report of *The People v. Johns*.¹²⁹ Its source is not cited, and could have been any of the many lay renditions of the trial.¹³⁰ The citation to Wheeler is then an indirect citation of these invisible sources, mediated through a publication that, although semiformal at best, is associated and affiliated with legal textualization. None of the American courts chose to cite to the *Digest*, a more formal source presumably available to them that openly relies on Atlay's *Famous Trials* and the *Times*, which are definitely informal sources.¹³¹

The mediating semi-transparent agent (Wheeler in the American case, the *Digest* in the British) probably facilitated the courts' performance in referring to *Thurtell*, as they may have proved more reluctant to do so had they been confined to literary sources directly. The approaches, however, differ, in that this is truer of the American courts—the British ones found it unproblematic to cite directly to *Famous Trials*, *Trial of Thurtell & Hunt*, and the *Times*. Also, the *Digest* is a more transparent mediator than *Wheeler*: while the former cites *Famous Trials* as a source, the latter is comfortably silent in regard to its own. The British courts were rewarded for their relaxed approach to canonical barriers with richer and more informative sources, both as to the facts of the *Thurtell* case and the various judicial utterances that it offered. The latter were worked into various judicial performances, featuring doctrinal argumentation, discursive contextualization of the doctrinal exposition, and ultimately its rationalization in interdiscursive, but also extradiscursive terms. The latter are terms recognized by the legal community, but also by non-practitioners, as "doing law"—namely, appeal and reliance on canonical precedent, to reiterate Swift's dictum at the head of this study. It should be added that the textual history of *Thurtell* is not claimed to be exceptional—on the contrary, the suggestion that it features quite a normal history of reference is what makes it significant.

F. Conclusion: Texts as Reiterability of Language and Importation of Context

This study deals with two constitutive characteristics of texts that figure strongly in the performances of judicial reference: reiterability and

¹²⁸ *Id.* at v.

¹²⁹ See *id.* at II, 451, 462.

¹³⁰ The most likely ones being: JONES, *supra* note 13; VERBATIM REPORT OF THE PROCEEDINGS ON THE TRIAL OF JOHN THURTELL AND JOSEPH HUNT, ETC. (1824); *The News*, No. 960, Jan. 11, 1824.

¹³¹ *DIGEST*, *supra* note 14; *ATLAY*, *supra* note 18; *TIMES*, *supra* note 30.

importation. The first is treated as the ability to approach, manipulate, and read texts (such as legal cases) away from their context of creation, or of a prior reading, and to reapproach them in separate instances as a matter of decontextualization. The second is treated as the discursive and political significance of recontextualization, e.g., the importation of contextual elements into the reading text-event. The first allows for doctrinal reliance on precedent through traditions of interpretation and application. The second allows for placing the first in a political and discursive tradition and is a main element of rationalization and legitimization in legal argumentation.

The argument that underlies the performative analysis of the uses of *R. v. Thurtell* in later legal cases runs as follows: texts isolate a chunk of social action, or of human creativity, within a reiterable medium. The text then has its own existence, away from some, or even much, of the social context in which it was originally produced. However, the qualifier "some" is not inserted here for caution's sake. All the texts dealt with in culture carry with them some contextual coded information. That capacity—to internalize, import, and carry contextual elements—is no less constitutive of texts than reiterability. In law, agents continuously count on both functions to constitute a text's meaning: textual contracts, for instance, exist in perpetual tension of reiterability (sometimes over years and decades) and shifting contextual importation.¹³² In drafting a contract, drafters import as many contextual elements as they think necessary for the contract to fulfill its communicative goals. At times, they envision future disputes over interpretation and strategically plant "interpretative anchors" for future argument and manipulation, including some that the other relevant parties may not suspect at the time of drafting. Typically, future disputes revolve around contextual questions: what does the reiterable word "chicken" mean in different practical contexts?¹³³ Or a "vehicle"?¹³⁴ When a commercial sales contract does not fully indicate freight arrangements or distribution of risk, what contextual norms should then govern those matters?¹³⁵ Even if the contract holds no

¹³² For legal models of such long-term "relational" contracts, see Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); Richard Speidel, *Court-Imposed Price Adjustments in Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981).

¹³³ *Fragilament Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

¹³⁴ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

¹³⁵ See, e.g., United Nations Convention on Contracts for the International Sale of Goods, Annex I, U.N. Doc. A/Conf. 97/18 (1980), art. 8 and elsewhere.

language that is reiterable or referential concerning those matters, it may contain enough contextual importation for suggesting conclusions in such matters. These are transformed through interpretative contexts, like the invisible outlines of a makeshift soccer field where kids' pick-up match is in perpetual progress, in Seamus Heaney's words,

. . . The corners and the squares
Were like longitude and latitude
Under the bumpy ground, to be
Agreed about or disagreed about
When the time came.¹³⁶

These two levels of textualization—reiterability and importation—are what make precedent in its narrative form both possible and effective. In the cases using language from *Thurtell*, the two functions interplay. Doctrine and its supporting persuasive language is reiterated, but the language itself, its clearly archaic magnanimous style and other poetic qualities, imports the institutional context of common-law adjudication, with its considerable weight and uneven history. Judges are offered the opportunity to contextualize their decisions in a long tradition of similar action. The performance of reference in its various modes serves in intricate ways as a device for contextualization of a line of argument, a dilemma, or a moral choice, within an established history of discourse as transformed into a history of textuality. The use of voice in direct speech—quotations, the very language being invoked—is a very different kind of textual act than merely repeating an argument or ascribing it to prior courts. That courts roam far from their own standard canon to import language points to the power of what I propose to term in this work as a “performative drive for reference.”¹³⁷ The drive for reference manifests common law's own ideology, its agents' own understanding of what rationalizes and legitimizes their action (needless to say, this does not mean that these performances are the *only* elements of legitimization or rationalization). The case of *Thurtell*, of course, is a very modest one. However, it is exactly an offbeat, seemingly marginal history of entextualization, removed from the legal canon, that illustrates the power of the drive for reference and the complex matrix of textuality that it produces. In an interesting, perhaps ironic way, *R v. Thurtell* was transformed over time from legal apocrypha to legal canon—just as Thurtell's tale, at first featured in works by little-known or anonymous street-authors and poets,

¹³⁶ SEAMUS HEANEY, *SEEING THINGS* 10 (1991).

¹³⁷ See *supra* note 6.

eventually made it impact and presence in the works of such canonical authors as Dickens, Carlyle, Stevenson, and Scott.¹³⁸

In a brilliantly ironic piece, the linguist and anthropologist Michael Silverstein writes about the "secret lives of texts" and how text-artifacts are cast and recast interdiscursively in respect to other "text-occasions," such as reading, oral narration, and its documentation, et cetera.¹³⁹ In dealing with the "Winter Bathing" narrative that Edward Sapir recorded in 1905 while conversing with both indigenous and relocated natives of the Yakima Reservation, Silverstein shows how Sapir's (as well as his own) dealing with the text recasts or entextualizes it as the immediate context is shed off and the text reemerges from the play between the performers who reconstruct it—Sapir and his informants in 1905 and Silverstein and his readers since 1996. As a text, *R. v. Thurtell* leads a double life: secret yet public, invisible yet triumphantly emerging in unexpected legal-institutional instances. Like Sapir's, the story itself is drawn from a background of myth-telling, and while working through it, I could not avoid the thought that, in a small way, the textualization and narration that evolved by *R. v. Thurtell* made it something of a unicorn: a semi-clandestine text, at times possessing almost mythical qualities.

¹³⁸ *Passim*, above. I use the term "canon" here in as a non-ideological, positive sense as possible, one that describes the role of these bodies of work in culture and in law in the sense of their perception as constructing, isolating, and unifying identity and discourse. Critiquing and deconstructing this perception is a different matter. The *Thurtell* case provides its own twist on the fluidity of canonical boundaries.

¹³⁹ See Michael Silverstein, *The Secret Lives of Texts*, in NATURAL HISTORIES OF DISCOURSE 81 (Michael Silverstein & Gregg Urban eds., 1996).