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Any Given Tuesday: Performance of Law During Small Claims Court

Michael E. Muhme

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Any Given Tuesday: Performance of Law
during Small Claims Court

by

Michael E. Muhme

A Thesis
Submitted to the
Faculty of the Graduate College
in partial fulfillment of the
requirements for the
Degree of Master of Arts
School of Communication

Western Michigan University
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2005

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Michael E. Muhme

Any Given Tuesday: Performance of Law during Small Claims Court

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Western Michigan University, 2005

Building on Hasian's examination of Jurisprudence as performance and Nolan's research of performance in drug courts, this study looks at Small Claims Court as cultural performance through the examination of face-to-face interactions in the courtroom. They are evaluated through the metaphoric lens of Turner's social drama as well as integrating the legal metaphors of law as grid, energy, and perspective. This study found that the court uses scripts to limit issues and that claimants are rewarded more for following the rules of the court rather than resolving the conflict. Additionally, Small Claims Court exacerbates conflict between low-income tenants and the landlords who rent to them by tacitly sponsoring predatory practices of the landlord. This support tends to disenfranchise poor tenants, especially African Americans. Mediation is suggested as an alternative to court.

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Chapter One: Introduction

A Story

It was a Tuesday morning in a Small Claims Court in the Midwest. I had been working as a mediator in the court for years and had witnessed many incidents similar to one I am about to describe. The plaintiff represented a local school. The school had already won the case in a previous court proceeding and was attempting to collect payment for late book fees. The defendant was "F.T.A." which is court shorthand for "failure to appear." The judge asked the plaintiff if she "would like a B.A.?" A B.A. is a body attachment. Small Claims Court is a civil court and not a criminal court, so body attachments are used to bring people to court who are not showing up by their own accord. This means the police would arrest the defendant, hold him or her in custody, and produce him or her before the court. Defendants can get out of custody by paying a bond set by the judge. The body attachment is designed to insure that plaintiffs either get paid through the bond posted or are able to question the defendant who might be trying to avoid the court about payment arrangements. The body attachment includes a bond which is usually the dollar amount owed or \$1000, whichever is the least. The amount owed in this case was under \$200.

A few cases earlier, a collection agent who represented a local car company asked the judge for a body attachment to repay a debt in the amount of \$150. This means a mother on her way to work or to pick up her kids or to shop for groceries would be pulled over by the police and summarily arrested, taken down to the county jail, processed, and have to post bond for a debt of \$150. The

plaintiff who represented the school also could have asked for a B.A. and be well within her rights. In this case, however, the plaintiff who represented the school responded hesitantly, "I'd like to give them another chance."

I discussed these two particular moments with the Judge after court. I commented on how some people want the court to get their money but then become hesitant about using the apparatuses of the court to prosecute their case. The Judge replied that the public school has to consider if it wants to have the parent of one of its students arrested for \$200 in book fees. His point is well taken. The student will still attend that school and the parents will be involved with other parents of students at that school. Next year, there will be more book fees. Schools have the image of being a caring environment; to jail a parent over \$200 in book fees might damage that image. Therefore, the plaintiff who represented the school must consider how she constructs her identity and the identity of the school toward the parent because that identity has an attentive audience in both the courtroom and the public.

Performance and Social Dramas

The claimant's difficulty in using the apparatus of the court system to prosecute her own case indicates both the court's and the claimant's relationship to the larger culture. The court room is not a culture-free or moral-free environment where a legal decision offers claimants an objective truth or standard of goodness; rather the courtroom is a forum for an aesthetic interaction where meaning is negotiated (Hasian, 2000). The outcome derived by the claimants has less to do with the court imposing an external meaning on the

conflict than the meaning negotiated between all the actors in the courtroom. In the previous example, one claimant took the B.A. and perhaps felt she acted appropriately by society's standards while the other claimant refused the B.A. and perhaps felt the same way.

Courtrooms, then, are places of performance where significance is achieved not by the application of law, but rather by the enactment of law (Butler, 1995). The courtroom is a stage, similar to a theater in which people enact their roles and assume identities in front of an audience in order to achieve individual goals. Actors negotiate meaning in a contest of characters (Goffman, 1967). Law as performance opens the disturbing possibility that law is applied to humans with no more ethical consideration or rationale than an actor utilizes on stage or an artist considers when applying paint (Schlag, 2002). Though viewing law as performance may appear to diminish ethics and reason, it offers the opportunity for law to be contextualized in such a way that researchers can examine its effect and application to human relations, especially with regard to gender, race, and class (Minow & Spelman, 1990). These human relationships become especially salient in Small Claims Court where lawyers, who have a special relationship to law, generally are absent.

These human relationships and character contests that occur during legal performances are a form of social drama. A social drama, according to anthropologist Turner (1987), is an isolatable sequence of social interactions which are conflictive or combative in nature. Social dramas start to manifest with a "breach of a norm, the infraction of a rule or morality, law, custom, or etiquette

in some public arena” (Turner, 1982, p. 70). Though many of the breaches litigated in the court could be considered private (i.e., rental agreements or loans), the choice by the claimants to take their private conflict to a public venue qualifies it as a social drama.

Critics typically analyze a social drama through the application of the following structure: breach, crisis, redress, and either reintegration or recognition of irreparable damage (Turner, 1982, p. 70-71). The courtroom is the arena of the redress stage. The breach and crisis stages of the social drama occur off the stage that is the court room. They are, in essence, the back story that is heard during the performance before the judge. The reintegration or recognition of irreparable damage then happens after the court is finished and the claimants are left to decide how to handle the decision handed down by the Judge. Therefore, a court hears the history of the social drama during the proceedings; it performs the redress stage before an audience of people who are also there for their own respective social dramas.

This thesis uses the metaphor of social drama as a framework to examine performance in Small Claims Court. Just as the plaintiff who represented the school in the story mentioned earlier had to consider how she constructed her own identity and the identity of the school before a public audience, so must every claimant who chooses the courtroom as a vehicle for redress. The primary method of argument in Small Claims Court is story telling (Hollihan, Rily, & Freadhoff, 1986). This method of argumentation relies on the judge to hear the stories, decide the facts, and apply the appropriate law. In essence, the judge is

expected to place law as if it were a grid over the facts of the case and then render a decision based on the result (Schlag, 2002). However, story telling in a public arena is clearly a performance. Therefore, it can be judged by aesthetic criteria. In order to examine this performance, this thesis will use critical performance ethnography as a methodology. Critical performance privileges the dynamic qualities of face-to-face interaction with the recognition that discourse is not exclusively verbal (Conquergood, 1991). Rituals, dramas, and, in the case of this thesis, courtrooms are “orchestrations of media, not expressions in a single media” (Turner, 1986, p. 23). They are not the rigid systems of behavior often associated with the term “ritual;” rather they are complex interactions between the agents and the senses (Turner, 1982). Therefore, as the literature review in the next chapter will show, performance study draws on diverse fields of study to examine how individuals utilize these media.

Conclusion and Organization

In order to examine performance in Small Claims Court, this thesis will be comprised of five chapters including this introduction. Chapter Two will first review the relevant literature starting with a discussion of the definition of performance. Then, it will present some of the foundational theorists who have contributed to the field of performance study; that being, Kenneth Burke (1954, 1966, 1969a, 1969b, 1972), Erving Goffman (1959, 1967), J.L. Austin (1975), and culminating with the work of Victor Turner (1957, 1980, 1982, 1986) and his concept of social dramas. The review of the foundations of performance study then will be followed by a discussion of law and how it can be viewed from a

performance paradigm. Finally, Chapter Two will close with the research question this thesis investigates; namely, the enactment of Small Claims Court and how it reflects the culture in which the court is embedded. As to the remainder of this thesis, Chapter Three will discuss the methodology used to examine the research question and includes a discussion about performance ethnography. The fourth chapter will report the findings of my examination and the analysis of those findings. This thesis will conclude with Chapter Five, which discusses the implications and interpretations of viewing law as performance.

Chapter Two: Review of the Literature

Introduction: Another Story

Alcohol is perhaps the most conflict-laden and politically complex consumable good in the United States. It was outlawed and then later made legal again in two constitutional amendments, has organizations such as MADD (Mother's Against Drunk Driving) dedicated to preventing its abuse, and numerous laws limit its sale and use. Alcohol also is a party staple, and youth often test the waters of adulthood by drinking illegally. Into this cultural contest, a young woman with a fake ID strolled into a bar in San Francisco as reported on National Public Radio's *All Things Considered* (Norris, 2004). The young woman was served; twice. A bartender was fooled by the fake ID and, as luck would have it, the establishment was raided by police that night and fined for serving underage drinkers. In retaliation, the owner of the bar then sued the young woman in Small Claims Court for the cost of the \$3,000 fine levied against it by the State of California and won. Now, other establishments are considering suing young adults who use fake ID's to fool them into serving alcohol (Norris, 2004).

This lawsuit is much more than a dispute between a business and customer over \$3,000. It includes aspects of cultural power, rebellion against power, shifting responsibility for illegal actions, and changing concepts of the role of business and customers (see Scheible, 1992, for a performance examination of fake IDs). Though this case made national headlines, everyday decisions are adjudicated in Small Claims Court that have cultural meaning and ramifications.

This chapter is an examination of the relevant literature necessary to conduct a performance study of Small Claims Court. It is separated into two sections: *performance* followed by *law as performance*. The first section, performance, is divided further into a brief discussion of the definition of performance and then an examination of the major theorists who have contributed to the field of performance study. Due to the multidisciplinary nature of performance study (Striff, 2003), the review then draws on four distinct yet related fields of inquiry: rhetoric, sociology, linguistics, and anthropology. Following the discussion of performance, this chapter then narrows its focus to the performance of law. First, there will be a brief discussion of law as studied within communication pedagogy. Then, the discussion will detail four aesthetic lenses through which law is viewed by legal scholars. Finally, this chapter concludes with a unifying research question.

Performance

Definition of Performance

“Performance” is defined as a specific set of repeatable actions, such as musical notes or parts of a play, which occurs on an occasion within a time frame and in a specific place (Sayre, 1995). This definition is composed of three parts: performance as repeatable actions, a specific time frame, and a sense of place.

Performances are a set of repeatable actions and, in everyday use, are thought of as artistic or entertainment events (Sayre, 1995) These actions often take the form of a work of art, such as a play, which consists of scripts, sets, music, lighting, and staging. The work of art being performed is limited by an

original work or ideal performance that overarches and encompasses the specific performances of the work (Sayre, 1995). This original work is considered to both transcend the different performances and also manage to contain their variety (Sayre, 1995). For example, there is the stand-alone text for the Shakespeare play *The Taming of the Shrew*, yet there have been many distinct performances of that play. Nonetheless, all performances still are beholden to the original script. Audiences judge the specific performance based upon their conceptions of the original work and the audience expects the specific performance to contain some variations on the original work either due to mistake or intention (Sayre, 1995). A performance, then, includes both an overarching concept or master script that is being repeated by the performance and variations that performers add to their interpretation of the performance.

Social performances are viewed as overarching and encompassing works of art as well. Much of what people perceive as everyday living are structured and repeated behaviors (Carlson, 1996). The way an individual wears his or her clothes or serves a meal are viewed as performance events (Striff, 2003). In the example of clothes, there is a general encompassing concept or social norm of how a businessman should dress in a suit and tie, for instance. There also is variance in the suit and tie construct which usually is the design on the tie or the cut of the suit. People judge the suit and tie performance based both on its adherence to the original construct of socially acceptable suit and tie and based on the variance of the tie. Thus, people say “nice tie!”

In another context that represents both artistic and social norm performance, Liepe-Levinson (2003) examined striptease events and noticed that they “reproduce many stereotypical aspects of our culture’s sex roles” (p. 42). The culture’s sex roles then become an overarching script to which the stripper must adhere. It is not surprising then that Liepe-Levinson (2003) found that female strippers displayed vulnerability and accessibility while male strippers displayed physical strength and social authority, since these are the social roles generally ascribed to the different sexes. The overarching social roles are then re-interpreted in the context of the striptease. The striptease event has its own set of repeatable actions such as lap dancing (Liepe-Levinson, 2003). Spectators base their judgments on both the adherence to the set of actions of say, a lap dance, and to the adherence to the social norms. They also may judge the variance in the performance, such as if a stripper allowed the spectator to touch. Therefore, performances, both artistic and everyday, are repeatable events of a set of actions but they also are bounded by a time frame.

In everyday use, performances are thought of as artistic or entertainment events where audiences purchase tickets to watch artists create and/or recreate a work of art such as a text or musical score or dance (Sayre, 1995). Typically, a performance has a very clear beginning and end. The curtain rises and the curtain falls. These moments separate the participants, both actors and the audience, from everyday life and place them in a state of cultural limbo (Turner, 1986). As seen in the striptease example (Liepe-Levinson, 2003), this cultural limbo occurs because the social norms of the culture become salient in the

performance. Sometimes this moment is clearly defined, such as in an artistic performance in a theater where lighting and the curtain can define when performance begins and ends. Other times, the time frame of the performance is more ambiguous. Less formalized performances, such as street parades or carnivals, do not always have a clear beginning and end but at some point the festivities do end and participants reinsert themselves into their defined places in society (Schechner, 2003). Performances, then, are events with repeatable sets of actions within a time frame.

Finally, as some of the previous examples have shown, performances are not limited to the arena of the artist. They can occur in the city streets (Schechner, 2003), bars (Corey, 1996; Scheible, 1992), social rituals such as marriage renewal vows (Baxter & Braithwaite, 2002), self-defense classes (Jackson, 1993), the college classroom (Warren, 2001), a nursing home (Sass, 2000), and courtrooms like congressional hearings (Phelan, 2003) or Supreme Court hearings (Butler, 1995). The location of the performance has an effect on the relationship between actor and audience. When a performance takes place in a theater, the line between performance and non-performance, actor and audience is sharply defined (Striff, 2003). When a performance takes place outside the artistic arena, the lines between actor, director, and audience become blurred. One example of this blurring occurred in the aforementioned Liepe-Levinson's (2003) examination of tipping rituals in strip clubs where interaction between the tipping spectator and the stripping performer is the performance. Spectators become a performer and in fact pay more for their own

stage time where they can be seen by other members of the audience watching the stripper. However, performance is always for an audience, even if that audience is the self, who recognizes and validates the performance (Burke, 1969b; Carlson, 1996).

Individuals can appreciate an act as *performance*, even if they are both a performer and a spectator appreciating the act (Striff, 2003). An example of this is a person who acts in front of a mirror. Without a proscenium that separates actor from audience, the audience is implicated in the performance as much as the performer (Striff, 2003). Referring to the striptease example (Liepe-Levinson, 2003), by being a spectator in the tipping ritual, the tipper associates himself with the implications of the performance and gives it his consent. The spectators of a street parade give the performance greater credence by their attendance to it (Schechner, 2003). If there is no one to watch the parade, the parade would not happen. The spectator, then, gives the performance credibility by watching and is, therefore, implicated in the performance because without the audience's passive participation the performance would not continue or exist. Hence, a performance is an event of a repeatable set of actions within a time frame in a specific location which has implications for the audience.

Performance study, then, is the examination of performance or how people represent themselves and repeat those representations (Striff, 2003). It is both a method of inquiry and a method of reporting (Turner & Turner, 1986). Performance study is an interdisciplinary field which draws from many points of views and academic fields (Striff, 2003). Though the field of performance study is

a relatively new one, the groundwork and foundations for it was laid decades earlier through the work of several distinct but related theorists.

Foundational Theorists

Many scholars have contributed to the field of performance study. Though it is difficult to reduce the field of contributors down to a select few, some recent authors have made the case for a select group to be viewed as foundational. Striff (2003) in the introduction to *Performance studies: Readers in cultural criticism* names Erving Goffman, Victor Turner, and J.L. Austin as three theorists who have significantly influenced the field of performance study. Pacanowsky & O'Donnell-Trujillo (1983), in their ground breaking article "Organizational communication as cultural performance" also give prominence to Goffman and Turner as foundational theorists and mention Kenneth Burke as being in their company. Burke and his theory of Dramatism is mentioned by Carlson (1996) though Carlson names numerous contributors to the field and does not give Burke any special prominence. However, in my own examination of the literature, I found the work of Kenneth Burke cited with some frequency. Therefore, I have chosen these four theorists; Kenneth Burke, Erving Goffman, J.L. Austin, and Victor Turner, to briefly discuss as individuals who have established the foundation for the field of performance study.

Kenneth Burke

Kenneth Burke, a rhetorician, is an important figure in the development of performance study. Burke (1954; 1966; 1969a; 1969b; 1972) developed the theory of Dramatism which employs Aristotelian drama terms as a system for

understanding human motivation and influence. These dramatic terms are arranged in a figure called the dramatic pentad. The pentad is made up of five items: act, agent, agency, scene, and purpose (Burke, 1969a). These five terms of the pentad are defined by five questions. These questions are similar to the questions asked by a reporter. The first question is in reference to the *act* and asks: what took place or what was done? The *agent* is who did the act and the *agency* is how it was done? The fourth question asks: where it happened which is the *scene* where the drama takes place. Finally, the *purpose* is sought by asking: why did it happen? The components of the pentad are examined for their interaction with each other. Human motivation is a product of the tensions between the dramatic terms (Burke, 1969a).

These tensions between dramatic terms are called ratios. Burke later stated that this ratio made him think that “the idea of an act implied the idea of an agent; the idea of an agent acting implied the idea of a scene in which the act takes place” (Burke, 1972, p. 22). The relationship then takes on a form. For example: a parent (agent) talking about his or her child (act) with the teacher (co-agent) would imply the most likely place (scene) would be a classroom or school office. All together, the ratios create a form of expectations. Since there are 5 terms, there are ten interrelated ratios: scene/act, scene/agent, scene/agency, scene/purpose, act/purpose, act/agent, act/agency, agent/purpose, agent/agency, and agent/purpose (Foss, Foss, & Trapp, 1991).

Burke developed this pentad to study motives (Burke, 1969a). Most Burkean scholarship lies in the realm of rhetoric, largely due to this focus on

motives (Carlson, 1996). For example, Foss, Foss, and Trapp (1991) describe the rhetoric of the Equal Rights Amendment debate and show that the proponents of the amendment focused primarily on *scene*: a discriminating and excluding setting for women who are motivated by justice; while the opponents focused more on the *agent*: housewives and mothers who are motivated by being true to self (see also Foss, 1990).

Though some examination of motive is included in performance studies, Dramatism's value to performance theorists resides in its focus on human action within a "staged" context (Carlson, 1996). Burke (1954) referred to this as the distinction between action and motion. This distinction is based on Burke's (1972) assumption that humans are both symbol using animals (i.e., language and structures of meaning) and at the same time inventors of the symbols they use. Action is purpose-driven and occurs in the invented symbolic world while motion occurs in the literal non-symbolic world. The difference, though perhaps overly-simplistic, could be described like such: when playing billiards, the striking of the cue ball with the *intent* of pocketing the 2 ball is an action full of purpose and meaning but the movement of the 4 ball that gets accidentally bumped along the way is merely motion. Action occurs, then, in a symbolically constructed world such as education, money, morality, or politics and individuals are motivated to achieve within these symbolic structures goals that are created by those structures (Burke, 1954). By way of example, money is a structure used to facilitate the exchange of goods and services but the structure itself becomes a goal so that people often desire to have money. The structure becomes a goal.

People desire the money not the goods and services. The desire for money, then, is entirely symbolic. These actions are staged or performed in that they are for an audience which includes the self (Burke, 1969b). Due to the symbolic nature of the goal, it is only when the act is performed for an audience that it has meaning. Thus, money loses its meaning where there is no audience, such as on a deserted island.

Schechner's *The street is the stage* (2003) displays how Burke's terms are used, though perhaps not always consciously, and how this action motivation is displayed in performance. In describing street carnivals, Schechner states "*acting out forbidden themes is risky so people don masks and costumes . . . Sometimes street actions bring about change . . . But mostly such scenes, both celebratory and violent, end with the old order restored*" (p. 111, emphasis added).

Schechner clearly utilizes Burkean terminology. People in street parades and carnivals enact forbidden themes which, drawing on Burke's concept of symbolic action, indicates a symbolic moral structure which they react against.

Performance tends to privilege events and figures that cross or violate a symbolic boundary (Conquergood, 1991). By crossing a boundary, a performer makes salient the symbolic world out of which symbolic motivations are born. Thus, an important feature of performance study is the examination of the symbolic structures represented or brought into question by the performance.

Kenneth Burke is one of the foundational theorists in the field of performance studies. His dramatic pentad, being drawn from theater and used as rhetoric, has become a staple method used to discuss motives from a theatrical

standpoint. For performance theorists, his focus on symbolic action within symbolic structures provides a way to examine motivation and also the communication and effect produced by that communication (Carlson, 1996). Though much of Burke's work centers on the performer, his inclusion of the audience, including self as audience, is equally important in order to investigate motives.

Erving Goffman

Another foundational theorist to the field of performance studies is sociologist Erving Goffman. Goffman, in his seminal book *The presentation of self in everyday life* (1959), developed a metaphor that views an individual's everyday life as that individual performing certain character roles. These roles are similar to the role played by an actor. Just as actors in a play might perform the part of a waiter before an audience, so an actual waiter in a restaurant performs the role of the *waiter* before an audience, which are the customers the waiter serves. Performance refers to an individual's activities before an audience of observers on whom the performer has some influence (Goffman, 1959). This brings to the foreground the actor/audience relationship which has become an essential component of performance studies (Carlson, 1996). Hymes (1975) further elaborates on Goffman's relationship between actor and audience by describing the relationship as a responsibility. The audience holds the actor accountable for fidelity to the role being played. In the waiter example, the actions of the waiter influence his audience, which judges how well the waiter

performs the role of a waiter; this judgment often comes in the form of a monetary tip.

This performance is value-inflected (Carlson, 1996). Goffman (1959) quotes Sartre from his book *Being and nothingness* (1966) where Sartre discusses the same waiter mentioned in the example above as “playing at being a waiter.” This play, according to Sartre, is imposed by the public or audience on the waiter and the limitations the public or audience places on the role are an imprisonment to the self. When individuals commit themselves fully to a role, the individual self exists only in representation which Sartre termed nothingness. This committing fully to a role is important with regard to agency. Burke (1954) made agency or purposeful action a central component of his dramatism. Goffman (1959) views agency on a continuum; at one end an actor is completely cognizant of the distinction between the enacted role and true self while at the other end of the continuum an actor identifies so strongly with the enacted role that the role is considered to be the true self – the company-man, for instance. The latter end of the continuum is more closely related to Sartre’s nothingness: the complete loss of self in the enacted role. Goffman does not give this enactment the negative connotation Sartre implies. He remains neutral on the evaluation of roles. However, performance of roles just as easily could be described as connotatively positive, offering the self both a creative outlet and an opportunity for growth (Carlson, 1996).

Goffman, perhaps, did not give an evaluation of the role of the performer because his emphasis was more on how the audience recognized a performance

and how that performance functioned in society (Carlson, 1996). Often, the performer and audience are interactive in that they are both performers and audience members. Thus, the waiter is a performer for the audience-customer and the customer is a performer for the audience-waiter. Goffman (1967) referred to this as the ritual element of social interaction.

Goffman's work on the ritual element of social interaction has become a staple in the organizational literature including the study of facework (Tracy, 1990) and impression management (Cheney, 1991; Czarniawska-Joerges, 1994). Face deals with the "positive social value a person effectively claims" (Goffman, 1967, p. 5). Individuals feel a certain right to be thought of positively and expect other people to act in accordance with this right. An extreme example of this comes from law. Defamation is based on the preservation of a person's reputation among well-meaning individuals (Davidson, Knowles, & Forsythe, 1998). Defamation law codifies face. People have a right to face or positive social value unless the individual is already known to be of ill-repute (Davidson et al., 1998). In the on-going example of the waiter, the waiter feels he or she has a professional right to be thought of as a good waiter and receive a fair tip while the customer feels he or she has a social right to good service and a smooth dining experience. Both have the public right to be thought of as having positive social values such as being moral, chaste, and disease free.

Though defamation is an extreme attack on face, Goffman (1967) views social interactions as smaller face negotiations. He refers to these as character contests. Each performer creates a play that dictates the roles people must enact

as well as being an audience for the other performers who also attempt to enact their version of the play. Each performer attempts to define the play in his or her own terms. Therefore, a character contest occurs over whose version of the play will continue and whose definitions of performer and audience is accepted (Goffman, 1967). To illustrate this, Goffman (1967) cites a story of a barmaid and a bandit as reported in the *San Francisco Chronicle*, July 14, 1966. As the story goes, the bandit measuring six feet five inches entered the bar and ordered a beer. He then brandished a small pistol demanding the money out of the register. The barmaid placed \$11 on the bar. The bandit, unsatisfied, demanded more. The barmaid reached for the money bag under the till and pulled out a .22 caliber pistol. She then asked the bandit, "Now, what do you want to do?" The bandit left his beer and the money behind.

This extended example shows how a character contest works. The bandit played the role of the bandit and expected the barmaid to play the role of victim. However, the barmaid changed the dynamic of the performance by brandishing her own gun. The bandit had to make the decision to either continue to play the role of the bandit and possibly get in a shoot out with the barmaid, or to give up his role and accept the performance on the barmaid's terms which place him as the victim. Clearly, there is a moral component to this contest. Goffman refers to character contests as a "special kind of moral game" (1967, p. 240). If the bandit had won the contest and taken the money, the barmaid would have felt badly since she been the victim of a robbery and perhaps blamed herself for any number of things she could have done to prevent the crime. In this case, the

barmaid's version of the play won and the bandit was made to feel badly as he left the bar dishonored, perhaps he blamed himself for any number of things he could have done to succeed in the crime.

This win/lose scenario as shown in the example above does not always occur. Goffman (1967) points out that sometimes the negotiation is so flexible that both sides can give the impression that they have won. This often is the case in war where one side claims victory because it stopped the advancing forces at the bridge and the other side can claim victory because it advanced to the bridge. Both sides save face by presenting the outcome as a victory.

Erving Goffman's examination of the relationship between performer and audience is an essential quality of performance (Carlson, 1996). Roles are both created and negotiated by the performer and audience in order to create the drama of everyday life. Often, there are competing dramas that play out and vie for dominance. Goffman's work gives scholars a metaphor to discuss these dramas and understand the process of social interaction.

J.L. Austin

Linguist J. L. Austin (1975) in his book *How to do things with words* put forth the view that communication itself represents acts of doing or performance. Austin's use of the word *with* denotes that words themselves are instruments in getting things done (Butler, 1995). Historically, this represented a shift in linguistic study away from an examination of language structure or the relationship between words and what they represent to the way language is

actually used or performed in interactions (Foss et al., 1991). Austin named this performance of language a “speech act.”

A speech act is a unit of language used to express intention (Austin, 1975). There are two types of speech acts: performative and constative. A constative speech act carries out the assumed function of language where words are used to describe or report facts and these statements are judged based on their veracity. This view of language as constative had been the dominant and acceptable area of linguistic inquiry for centuries (Robinson, 2003). Austin (1975) added performative speech acts. A performative speech act includes intention and is not judged based on veracity but achievement or appropriateness. Austin gives the example of christening a ship or saying “I do” during a marriage ceremony (Austin, 1975, p. 5-6). The phrase “I do” does not merely report a fact but also communicates an action (i.e., the marriage couple is agreeing to, promising to, and approving the vows). The phrase “I do” cannot be evaluated based on veracity in the same way as the phrase “we just got married” is judged. It can only be judged based on achievement (i.e., the marriage couple adheres to the vows, or appropriateness).

Performative speech acts are divided into three categories: locutionary, illocutionary, and perlocutionary (Austin 1975). A locutionary act is meaning in the usual sense in that the words refer to something, such as “He said to me ‘stop.’” Illocutionary acts have an amount of force in an attempt to create an effect, such as “He urged me to stop.” The illocutionary act of “urged me to . . .” has an implied amount of force involved where “said to me . . .” does not.

Perlocutionary acts deal with the effect the speech act is attempting to bring about in the listener, such as “He stopped me, thankfully, saving my life.” There is both the effect of actually stopping the person as opposed to the attempt to stop by forceful language and the effect of gratitude from the person. Because these performative speech acts operate on different levels, it is possible to find all three involved in an utterance to varying degrees (Garoian, 1999). Robinson (2003) gives the example of a teenage daughter expressing a desire to move out to which the father responds “Go right ahead, drive another nail into your mother’s coffin” (p. 145). The locutionary speech act can be seen in “drive another nail . . .” which represents or implies leaving will kill the mother because the mother will miss her daughter. “Go right ahead” is an illocutionary act because he gives the daughter permission to move out. However, it is clear that the illocutionary speech act and the locutionary speech act are at odds with one another which bring about the perlocutionary speech act which causes confusion in the daughter about her decision making.

Performative speech acts also reorient the speaker’s relationship to others or their surroundings (Foster, 2003). The “I do” represents for the married couple a change in their relationship to each other. The speaker actively changes the relationship with the other person. This confers some power or authority to the speaker. Performative speech acts are acts of authority because their action has a binding power (Butler, 2003). In order for the couple to view themselves as married, they and society must confer on the judge or pastor the power to bind them to these oaths through the phrase “I now pronounce you” If a waiter

were to use this same phrase to a couple at a dinner table, no one would view the performance as binding. The waiter does not have the authority to marry people. Though this is still a performance, it is not a performative speech act because of the lack of power and binding. However, the power to bind does not lie in the person but in the repetition of the speech act by the person (Butler, 2003). The binding power comes from the historical and repetitive use of the phrase "I now pronounce you" The judge's or pastor's will or authority does not marry the couple; rather, they are married by the citation or repetition of the ritual by the authority. Just as the waiter lacks the authority to marry, the judge or pastor who does have the authority cannot impose marriage on others. It is only in the confines of the ritual that the judge or pastor can practice the authority.

Because the binding power resides in repetition of the speech act, the enactment of a performative speech act implicates the speaker and the other (i.e., the couple in the example above) in the diverse networks of meanings associated with the speech act (Foster, 2003). A repeated phrase carries in it a history of meaning. Butler (2003) represents this concept in a doctor's performance of the speech act "It's a girl!" at the end of birthing. The proclamation brings into play the gender norms of the culture and invests into the birth the history of the gender norms on both the newborn baby, the parents, and the hospital staff.

Austin's (1975) work is important for establishing that words themselves are actions. The use of speech acts not only perform an action intended by the speaker but may also perform actions that are unintended and have cultural

implications. It brings into performance study the need to examine power through repeated action with respect to binding authority.

Victor Turner

Anthropologist Victor Turner (1957, 1980, 1982, 1986) is considered one of the most influential contributors to the field of performance studies for his development of a convergence between anthropology and theater (Carlson, 1996). Turner (1957) studied the Ndembu tribe in Africa and drew from the tribe's rituals the concept of the social drama. Turner (1986) defines a social drama as being an isolatable sequence of social interactions which are conflictive or combative in nature. These dramas are ritualistic in their structure and occur in groups with a shared history and values (Turner, 1980). A good example of this is in a court of law; it has clear ritual components such as rising for the judge and the formal procedure of adjudication. The court also utilizes a shared history and value system, both as a product of American culture and a product of its own culture of legal precedence.

Turner also developed a method for the analysis of a social drama which views it as composed of four parts: "breach, crisis, redress, and either reintegration or recognition of schism" (1980, p. 149). The social drama first manifests in a *breach* which is a violation of a rule or norm or law in some public arena (Turner, 1982). These breaches are unintentional on the part of the individual, as in the case of a student who unwittingly states a racial slur in class (see Warren, 2001), or intentional with the goal of challenging some authority as occurred during the Boston Tea Party (Turner, 1980). Due to the public nature of

a social drama breach, individuals involved in the conflict take sides and establish positions that coincide with a larger societal context.

The *breach* between the sides becomes so wide that a *crisis* develops in which the struggle becomes exposed as both a conflict between the individuals and a conflict between the social groups they represent (Turner, 1980). Rites of passage rituals contain within them a conflict between the forward aggression of youth and the established domineering authority of the elders (Turner, 1980). These rites of passage rituals are designed to bring *redress* to this conflict which is the third stage of a social drama. A *redress* is a mechanism used to limit the spread of the breach (Turner, 1980). As Turner (1986) states, a "crisis is contagious" (p. 34). Individuals not only take sides in a conflict but also induce others to take sides. The *redress* portion of a social drama attempts to limit this growth. Though sometimes this *redress* takes the form of a public ritual performance, such as a rite of passage or court proceeding, it also is as simple as personal advice or informal arbitration from an accepted authority figure (Turner, 1980). The *redress* phase is designed to bring about a resolution which leads to the final phase.

A social drama ends with either *reintegration* or *recognition* of irreparable differences (Turner, 1980). Either the *breach* will be healed or the parties in the conflict must separate. In current events, the issue of abortion displays how social drama plays out in the realm of public debate. Pro-choice and pro-life individuals delineate the conflict as either support for a woman's "right to choose" or the "protection of unborn life." There is no middle ground presented. An

individual who was perhaps uncertain would be aggressively coerced on the one hand to recognize that a woman has the right to make decisions about her health or on the other hand to recognize the human life begins at conception and should be protected. Participants in the conflict want separation, so as to both gain supporters for their cause and to have a clear enemy to oppose. As of yet, there has not been a resolution phase to this social drama.

Social dramas and cultural performances get their significance from their liminality (Turner, 1986). Liminality refers to the separation of the performers from everyday life for the purpose of performance reflexivity or, in other words, an opportunity for people to think about and consider certain aspects of their culture (Turner, 1986). Though liminality separates the performance, Turner views these performances as "in between" points, which have the function of transitioning people from one state to another (Turner, 1982). Thus, in rite of passage rituals, participants transition from one state, that being youth, to another, adulthood. During these performances, people reflect on the meaning of their life and that reflection leads them to a new place. In Baxter's and Braithwaite's (2002) examination of marriage renewal rituals, couples expressed a desire to display both the individual aspects of their relationship and to be a role model for other marriages. Couples reflect on their marital lives and examine their success while they transition to the status of marital role model by the performance of marriage vow renewal. The liminality resides both in the cultural separation that allows them to reflect on the meaning of marriage and in the reification of the cultural values of marriage. Liminality tends to focus on the collective values and history

of a culture and, even when the ritual brings into question those values or history, end up promoting the culture (Turner, 1982).

Turner is another foundational theorist in the discipline of performance study. His social drama is partitioned into of four parts: breach, crisis, redress, and either reintegration or recognition of schism. It is a means to examine the ritualistic elements of society due to the liminality or reflexivity of the ritual.

Turner's work supplies a good framework for the examination of performance.

Conclusion of Performance

Performance is defined as a specific set of repeatable actions which occurs on an occasion within a time frame and in a specific place (Sayre, 1995).

These performances are of both an artistic and social nature and are judged by an audience. Performance study is the examination of performance or how people represent themselves and repeat those representations (Striff, 2003).

Four theorists who established the foundation for performance study are Kenneth Burke, Erving Goffman, J.L. Austin, and Victor Turner. It is to the performance of law that this thesis will now turn.

Law as Performance

Courtrooms are places of performance. Significance is achieved not by the application of law, but rather by the enactment of law (Butler, 1995). Within communication research, there have been few studies that examine law as something other than rhetoric as represented by such work as Lewis' (1994) look at the romantic idealism or heroism of law in the flag burning debate and, more recently, Aune's (1999) description of romance and tragedy in the rhetoric of the

establishment clause. Perhaps the most thorough piece of research that examines law as performance is Nolan's (2001) examination of drug courts as theater. His research examined not only performance in the drug courts but also the backstage performances that went into the creation and management of them. Eventually, Nolan moved from observation to participation in assisting the creation of other drug courts in the U.S. Hasian (2000) first applied performance to jurisprudence within the communication discipline but applied performance to a past historical event, namely, John Brown's trial at Harper's Ferry. He argues that examining the speech delivered by John Brown during his trial from a traditional legal and rhetorical lens would yield it a complete failure as it lacked cohesiveness or logic or even a pleasing style, was not exactly truthful, nor did it succeed in saving him from execution. However, when viewed as a performance, the speech was immensely successful as the audience both in the court and in the larger culture were led to rethink current views of slavery.

This thesis will apply jurisprudence as performance to an actual performed event. Though the performances in Small Claims Court may lack the historical significance of the John Brown trial, they still have cultural significance for the everyday lives of the individuals who utilize the court. By observing court as it is performed, this thesis will develop a better understanding of both the different actors' performances and the relationship of those performances to the concept of law. This requires a discussion of law as a symbolic structure.

A growing body of literature questions the view that law is an autonomous set of guidelines used to insure social order (Lewis, 1994). Legal decisions may

be less about the discovery of some underlying truth than about negotiated meaning and invention (Hasian, 2000). However, many individuals come to court with a perception of law as a symbolic structure. People utilize the court to seek redress precisely because they view it as a distinct entity that will bring about a solution. The entity of law is described from three aesthetic lenses: grid, energy, and perspectivist (Schlag, 2002). These three are not all-inclusive of the many lenses through which law has been or could be viewed but the first two are the most common lenses and the last one is the view taken by this thesis. Therefore, this review will briefly discuss the grid, energy, and perspectivist views of law.

Law as Grid

The grid lens compartmentalizes law into distinct categories of stable, predictable, and uniform legal concepts (Schlag, 2002). A judge is expected to gather the facts and then apply the law that has already been established and bounded by precedents. The self is kept separate from the law and allows the judge to maintain a detachment from the consequences of the actions taken in the court (Schlag, 2002). The judge takes no personal responsibility for the decisions rendered. This is evidenced in Supreme Court Justice Scalia's statements of his personal views that cross burning was reprehensible but that the application of the First Amendment protections was tantamount (Butler, 1995). This view holds that law is amoral and free of the vulnerabilities of self and self-interest. It is comparable to a journalist who asks people to not shoot the messenger simply because people do not like the message. Law is fixed, static, and separate from the everyday world but also unfeeling and merciless.

Law as Energy

Taking a completely opposite view, the law also is viewed as energy or motion (Schlag, 2002). Here, law is viewed as an enterprise whose precedents are not made to define boundaries; rather they have the purpose of moving law toward a goal of reform or transformation or progress (Dworkin, 1976). Clearly, there are many different goals to law which may be at odds. Individuals may seek better protection for property rights or recompense for predatory lending practices. Judges apply the law not through the use of an autonomous grid but rather by the assessment and comparison of a variety of factors and values in an attempt to achieve balance between conflicting energies (Schlag, 2002). When law is viewed as energy, the self cannot be separated from the application. Balancing requires the judge to make evaluations and attach meanings to the various factors presented (Schlag, 2002). Law is dynamic and considerate but also totally reliant on the views and sensitivities of the individual judge which makes consistency in findings nearly impossible.

Law as Perspective

The perspectivist view takes the stand that law cannot be extracted from the complex social structures at play within the decision-making process (Schlag, 2002). Courtrooms are not autonomous and distinct entities; rather they are products of the cultural milieu. Law's significance does not reside in legal decisions rather from the effect of the enactment and performance that takes place within the courtroom (Butler, 1995). Returning to Hasian's (2000) work on John Brown, the trial of John Brown set no legal precedent but it clearly had an

effect on the culture and eventual overturning of many practices and laws with regard to the legal status of slaves. Law, then, is contextualized within the culture and every legal decision restructures the law itself (Schlag, 2002).

Performance study holds the perspectivist view of the law as evidenced in Hasian's (2000) work. However, most judges and claimants will hold the view of either grid or energy and think of them in either/or categories (Schlag, 2002). People use the court to either have an unchanged amoral law imposed (grid) or to seek justice and change society (energy). These views are dialectically opposed. This study will examine both of these views of law from a perspectivist point of view in order to develop an understanding of the culture that (re)produces these views.

Research Question

Building on Hasian's (2000) investigation of jurisprudence as performance and Nolan's (2001) examination of drug courts as theater, this thesis examines the performance of law in Small Claim Courts. Specifically, this thesis will be guided by the following research question:

"How is law performed in Small Claims Court?"

In order to answer this question, this examination will draw on the work of all four major theorists in a bricolage fashion in order to achieve a fuller understanding of the complex cultural artifacts at play within the courtroom. In order to accomplish this understanding, this thesis will use performance ethnography methods to examine episodes of performance in Small Claims

Court over a period of two months. This examination will include a critical evaluation of the Small Claims Court for the effects it has on the society.

Conclusion

This chapter has reviewed the relevant literature necessary to conduct a performance study of Small Claims Court. Performance and performance study have been defined. To illuminate performance study, this chapter reviewed four foundational theorists; namely Kenneth Burke, Erving Goffman, J.L. Austin, and Victor Turner, and discussed their distinctive contributions to the discipline. Next, law as performance was introduced. The two chief metaphors of law as grid and law as energy were discussed as well as the overarching metaphor used by this study; law as perspective. The following chapters will delve into method, then analysis, and conclude with interpretations and conclusions.

Chapter Three: Methodology

Introduction

A researcher has at his or her disposal a variety of methods to examine a particular phenomenon. The most basic distinction between methods is social science and humanist methodologies. Social science methodologies focus on the testing of a theory by hypotheses in order to approximate objective truth (Beatty, 1996). Humanist methodologies, conversely, take a more subjective approach and test a theory “in light of daily events, in commonly-placed situations, framed by the interaction of their participants” (Anderson, 1996, p. 45). This study follows the humanist tradition since its purpose is not to seek some objective and definable truth about interactions in Small Claims Court, but to understand the complex relationship between the court, the claimants and the culture.

This chapter details the methodology used in this study to understand and examine the relationships in Small Claims Court. This will begin with a description of ethnography, including a brief history of the method, then focus more specifically on performance ethnography. The section on ethnography will be followed by the specifics of this study which starts with a description of the location and a reflection on the researcher’s relationship to this location. Then, the chapter details the implementation of the method and concludes with the expectations for the study.

Ethnography

Ethnography is a methodology that utilizes both participation and observation in the arena the researcher examines (Conquergood, 1991). As a

methodology under the naturalistic paradigm, ethnographic research examines people in their natural context behaving naturally (Frey, Botan, & Kreps, 2000).

As Kvale (1996) states,

If you want to study people's behavior and their interaction with their environment, the observations of field studies will usually give you more valid knowledge than merely asking subjects about their behavior. (p. 104)

The researcher, then, becomes the principle instrument in the research process by both participating in the culture being studied and observing aspects of that culture. These aspects may be conscious components of communication but also the deeper, unconscious components such as cultural process, power, and hermeneutics (Conquergood, 1991). Because the researcher is the principle instrument, it requires a phenomenological approach, one without preconceived notions about what will be found in the field (Frey et al., 2000).

The fact that the researcher avoids preconceived notions, however, does not mean that he or she is a blank slate. Researchers do not reside in a cultural vacuum. They come to the field with their own cultural background, views, and morals. In order to recognize the culture of the researcher, Potter (1996) puts forth the concept of "bracketing." He suggests an acknowledgement of the researcher's own views, positions, and expectations in order to put these preconceptions in contrast with the research work but then to set these views aside so that the ethnographer can see through the eyes of the people being researched, to become an insider in the culture. This means a researcher must

become immersed in the culture being studied to the point of becoming and being accepted as a participant inside that culture (Conquergood, 1991). It is only after this cultural immersion that the ethnographer can interpret the aspects of the culture being studied. Interpretation values all the views gained in the research process (Frey et al., 2000). The scholar weaves the perspectives learned from his or her immersion in the field, from the voices of the people being studied, and from the knowledge the researcher brings with him or her, to give meaning to a particular aspect of the culture.

Historically, ethnography can be traced back to ancient Greece where Herodotus traveled from place to place documenting the unique cultural practices of people in the Third Century B.C. (Clair, 2003). During the European expansion into the Americas and Africa, ethnography reemerged as an opportunity to save and preserve cultures that were being destroyed by imperialism as well as providing information to the colonial European countries so they could further dominate the colonized countries (Clair, 2003). The end of the colonial period of history led to a transformation in ethnographic research. Scholars viewed their subjects in a radically different way by altering and blurring the relationship between the researcher and the researched (Conquergood, 1991). This has led to new ethnographies that are not content to simply observe and interpret but, in the case of critical ethnography, also to take action on behalf of people (Frey et al., 2000).

As a methodology used for scholarly research, ethnography has its beginnings in anthropology (Frey et al., 2000). Historically, ethnography was

used to describe societies different than those of the researcher and showed that what was thought to be “human nature” was due more to culture than nature (Frey et al., 2000). In the 1960's, Hymes (1962) broadened the idea of ethnography to include ethnographies of speaking. This ethnographic practice is now referred to as the ethnography of communication (Keating, 2001). Hymes (1962) asserts that “the ethnography of speaking is concerned with the situations and uses, the patterns and functions, of speaking as an activity in its own right” (p. 16). This expanded the unit of analysis for potential communication ethnographers to include speech events which are defined as everyday, routine interactions (Keating, 2001).

Today, most ethnographies are about the researcher's own culture (Frey et al., 2000). Philipsen (1975) wrote the seminal communication ethnography “Speaking ‘like a man’ in Teamsterville: Culture patterns of role enactment in an urban neighborhood.” In so doing, he worked as a social worker for 21 months in a blue-collar, low-income White neighborhood then returned a year later as a researcher. This research displays the naturalistic tendencies of ethnographic research. People were studied in their natural settings. Consequently, Phillipsen was simultaneously a participant/social worker, and an observer/researcher. He attempted to see from the perspective of the people being researched, in this case learning that blue-collar workers did not value speaking, while incorporating the knowledge he was bringing to the research: that people in different social environments value different communication tactics.

Performance Ethnography

Cultural performance ethnography is a specific type of ethnography that examines face-to-face encounters situated in their environments (Conquergood, 1991). This paradigm privileges the participatory and dynamic experience grounded in the historical process and ideology (Warren, 2001). It is culture performing culture. Individual performances are the product of culture while at the same time the performance either remakes or reinforces the culture out of which it was born. Performance ethnography, then, assumes that individuals are continually making and remaking their identities within their given culture (Turner, 1982).

Performance and identity are entwined. Bauman's (1986) work on oral narratives views performance as a way of speaking and shows how the stories told by Texans are given significance based on their social context. In another example, Schechner (1993) examines "The street as stage" with regards to parades and political protest, both planned and unplanned, as theater and cultural performance. Jackson (1993), conversely, discusses performance in the smaller setting of a women's self-defense class and how each performance (i.e., warm-ups, rape encounters, etc) works to transform identity from powerless to powerful. Conquergood (1994) demonstrates that the performance aspect of Chicago Latino gang identity is the most important function of the gang as they create a very organized "cultural space" for protecting their members from what is viewed as a hostile society. Similarly, Warren (2001) describes the performance of racial identities in the classroom during a moment of social

drama when a student speaks a term of racial bias during a classroom conversation. All these studies mingle identity and performance though identity is not necessarily the focus of each study. Performance study examines how people present themselves and repeat those presentations (Striff, 2003). Those presentations are identity. In this sense, any performance is a performance of identity.

Since performance ethnography is a specific method of observation that focuses on face-to-face interactions, the focus of my study will be to examine episodes during the normal routine of Small Claims Court. This will include the performances of the judge, plaintiff, defendant, and the audience. These performances will be detailed and discussed in Chapter Four and interpreted critically for their cultural significance in Chapter Five.

Location and Research Reflexivity

This study will seek to address the research question through field research at Small Claims Court held in Superior Court X in a small town in the Midwest with an approximate population of 52,000 (All proper names in this thesis are pseudonyms). Cases generally involve landlord / tenant disputes, rental agreements (such as rent to own type companies), personal loans, and business / customer disputes. As part of my initial investigations into this thesis, I did one observation in Superior Court X during the summer of 2003 where I witnessed the scene described in the introduction. I also have worked in this courtroom as a mediator. This previous employment gives me a sufficient

amount of time in the field to be accepted as an insider within the culture (Conquergood, 1991).

Because ethnographic research requires the researcher to be a tool in the research process, the researcher must recognize and contend with his or her own relationship to the field being studied. We must question our own complicity and self-interest in the research process (Montgomery & Baxter, 1998). As stated, I worked for 2 and one-half years as a community mediator in Small Claims Court in Superior Court X and other area courts. I did not work for the court directly but for a non-profit organization that provided mediation services to the court. I developed a positive rapport with the Judge, his staff, and the many workers in the courthouse, a relationship that continues to this day. I left that position 2 years ago to continue my education, the culmination of which is this thesis.

My personal bias is one of mediation over adjudication. Though the focus of my research is performance in the courtroom, my years of work as a mediator have given me a strong moral conviction that individuals working out their conflicts privately is preferable to a public display where a third-party imposes a decision. Research suggests that mutually agreed upon mediated decisions reap higher levels of satisfaction, include non-monetary options, and improve the post-court attitude of the other party (Wissler, 1995). I have a personal conviction against taking anyone I am in conflict with to court and would work aggressively toward a private resolution with anyone who wishes to take me to court. This bias may be a disadvantage to my study. While Bickman and Rog (1998, p. 473)

argue that the preconceived notions held by the ethnographer about the behavior and attitude of the people observed can potentially undermine the quality of the research, no researcher is moral free. I recognize that my own moral conviction against lawsuits could bias me in one direction, but I also recognize that if I had no moral conviction against lawsuits, that would also bias me in another direction.

To address this bias, I will use a “nonjudgmental orientation” as suggested by Bickman and Rog (1998, p. 477). Researcher biases are made explicit to help mitigate their effect. This bias against the use of lawsuits to settle disputes is a bias against both parties. Therefore, it is a bias that does not favor either claimant. If I believed court to be a moral choice, I might be inclined to choose sides and wish for a particular outcome. However, I am not interested in the outcomes of a specific case as much as I am interested in the complex relationships that occur in the process. I have found in my years as a mediator that I can separate my own values from the value of mediating the case. Occasionally, I did find that a case awakened my judgmental side when I felt one party was excessively taking advantage of another through the mediation process. However, this judgmental awakening is valuable to critical ethnography as the researcher attempts to confront the ways power is produced and reproduced (Kincheloe & McLaren, 2003). Additionally, my time as a mediator supplied me with insight to understand the needs of plaintiffs and defendants. Even though I have a moral inhibition against lawsuits, I also have an empathy for claimants who find themselves in the courtroom.

Method

This study will use performance ethnography methods in three stages. The first stage, which Chapters One, Two, and Three of this thesis are a part of, is preparing the study and familiarization with the field. The second stage will be direct observation in the courtroom and preliminary theorizing. The final stage will be an analysis of the data, report of the findings, and a critical interpretation.

Stage One

Stage one incorporates the preparation for the study. This includes the time previously spent in the court room as a participant which serves to create the immersion in the culture necessary to interpret data (Conquergood, 1991). I also have reconnected with the staff, having several conversations with the Judge about this research. This included one day of observation as an introduction to the work.

Ethnography requires the researcher to be both participant and observer in the culture he or she studies (Frey et al., 2000). Different fields and different researchers act at different levels of participant and observer. This study will be similar to Phillipsen's (1975) study of blue collar workers. Phillipsen was a participant in the community for years as a social worker then returned to observe the community as a researcher. Likewise, I participated in this courtroom and now return as an observer. Therefore, I am observer – participant. Observer – participants act as marginal members of the group being studied (Frey et al.,

2000). I will sit in court along with the rest of the claimants and experience the court as they experience it. My observations will not affect the behavior of the claimants because the claimants are already being observed. However, I will never be called before the Judge. The extent of my participation ends with the role of audience. This stage culminated in a literature review presented in Chapter Two and the development of method for study articulated in this chapter.

Stage Two

The second stage involves the direct observations. Small Claims Court occurs every Tuesday morning in Superior Court X. Observations will be between one to three hours in length, depending on case load. The study will take place over 6 weeks, with a goal of fifteen hours of observation. Observation will be unobtrusive as I will sit with the audience to watch the proceedings. Notes will be written on a legal pad, which is a common sight in the courtroom and should garner no attention from the claimants. Permission was received by the Judge to utilize the courtroom though permission was unnecessary for the claimants due to the public nature of the proceedings. It should be noted that the Judge was aware of the research and my observations may have affected his behavior though I saw no indication that it did.

Field notes will be organized into Turner's (1980) four aspects of a social drama: breach, crisis, redress and reintegration or separation. Notes will be taken during the court proceedings about performance and will include all the actors in the performance; the claimants, the audience, and the Judge. This will include the actual words said in court. In the field notes, I also will note the

individual symbolic creations of law (Burke, 1954) which includes the view of law as grid and law as energy (Schlag, 2002) and enacted roles (Goffman, 1959). For example, the defendant (role) may speak a like a victim (role) seeking the Judge to do the right thing (energy) because the law should protect people (symbolic creation). Field notes will then detail my observations concerning these presentations as well as how individuals present the other actors (i.e., what role do they think the other actors play or how do they think the other actors view law). Finally, all these diverse views will be pulled together in stage three to answer the research question.

Stage Three

Stage three will be comprised of analysis and reporting of findings. The coding and analysis will be conducted by the researcher. Data first will be unitized into performance episodes. A performance episode is a distinct, identifiable construct with both structural and experiential unity, meaning the episode has both the form and feel of a performance (Pacanowsky & O'Donnell-Trujillo, 1983). As many cases in small claims are adjudicated quickly with little interaction from the claimants, the number of episodes is expected to be small. These episodes then will be viewed through the metaphoric lens of performance and distinct portions will be compared and contrasted in order to answer the research question: "How is law performed in Small Claims Court?"

Conclusion

This chapter has covered the methodology necessary to examine the enactment of Small Claims Court. It began with a brief look at the history and

fundamentals of ethnographic research then turned to a more specific discussion of performance ethnography. A discussion of location, including the researcher's relationship to the location, established the background of the Small Claims Court to be researched. The specific method of this study was detailed in a three stage process. Chapter Four will follow and detail the findings of the research. Finally in Chapter Five, I will interpret the meaning of these exchanges as cultural performances. I also will discuss the limitations, and questions raised by this research.

Chapter Four: Analysis

Introduction

Small Claims Court X occurs every Tuesday at 9 o'clock in the morning in a small Midwestern town. The courtroom is arranged much like a theater stage with five rows of chairs for the audience located near a mirrored door. The door leads out into the hallway. Directly across from the audience, there is another door leading to the judge's chambers. To the right of this door, from the perspective of the audience, resides a large wooden bench where the judge will sit, high enough to be above eye level to a six foot tall man. Along the left wall across from the bench, there are two rows of chairs inside the jury box. The jury box is not used by jurors in Small Claims Court but by the County Sheriff when jail inmates are summoned to appear before the court. These inmates are kept in the juror box, separate from the rest of the court. The acting area is approximately 20 feet by 30 feet and is circumscribed by the bench, audience, and jury box. The seating for the audience is separated from this area by a low wall, two feet high. Directly in front of this wall, there are two tables. In trials, these tables are used by the plaintiff and defendant, but in Small Claims Court the claimants approach the bench to be heard. Nobody sits at these tables except lawyers. The performance happens right in front of the bench, a few feet away from the judge.

Painting a Performance

In this courtroom, there is a painting on the wall between the entry door and the judge's bench to the right of the audience. The painting is by a local artist

and is a rendition of the construction of a local dam. It depicts a couple dozen workers reminiscent of characters from Mark Twain's *Life on the Mississippi* in a wooded scene along the riverside. Nearby, approximately a dozen Native Americans watch the workers as they build their dam. The workers are all adult White males. The Native Americans are male and female; adults, children, and infants. The workers are depicted in active motion. The Native Americans are depicted as passive. The painting is situated so that the industrious workers reside near the bench where the judge sits and the Native Americans who watch reside near the audience. This painting has interesting metaphorical implications for the research done in this court in two ways.

The first implication is drawn from the clear divide between the industrious White male workers and the observing ethnic minority. The civil court system is a symbolic structure in the Burkean sense (Burke, 1954); a human invented institution descended from the judicial systems of Europe. The judge in this court is an older White male. During the time I observed court, the plaintiffs were overwhelmingly White. The defendants are both Black and White. In terms of economic status, the majority of cases observed were conflicts that pertained to lease agreements between richer land owners and poorer tenants. A majority of Small Claims Court cases are landlord v. tenant disputes over rental property. Landlords often are the plaintiffs who sue for reclamation of property, damages to property, and unpaid rent. The tenants typically are the defendants who, in the eyes of the landlord, must be evicted from property or coerced to pay unpaid rent and damages. As will be shown in this study, this is pertinent to understanding

the performance of Small Claims Court and the interactions between actors and audience.

The second way the painting represents the Small Claims Court is in the relationship between actor and audience. The bench is a place of action. It is the stage where the legal system constructed by White male Europeans is enacted just as those White male Europeans construct that dam. In times past when I worked in the courtroom, I sat on that stage near the judge. Now, I sit at the back of the audience looking toward the bench in much the same way the Native Americans look toward the dam. Before, I felt on stage with the actors as if the audience also watched me but now the role of audience member is more prominent. The man hired to take my place as mediator sits near the front, on the courtroom stage. He is now a performer. I am now an audience member. The court reporter enters and states the familiar "All rise." The judge walks in with his stack of folders. He is a thin White man with thin grayed hair in his mid-sixties dressed in the standard black robes of his office. He takes his seat at the bench, and informs the court "You may be seated." He then says his familiar opening words, "Welcome to Superior Court [X]. My name is Judge [Smith]. As your name is called, please approach the bench." The performance begins.

The previous chapters have introduced the idea of performance, discussed the performance literature including the performance of law, and detailed the methodology used to study performance. This chapter will report the results of this study. It is organized based upon Turner's (1982) concept of the social drama. It will begin with an analysis of the scene where court is performed.

This will lead to a discussion of the overarching performances of Small Claims Court. In the process, this chapter will examine a number of specific episodes of performances. The four parts of the social drama; breach, crisis, redress, and reintegration will frame the discussion of the typical way law is performed in Small Claims Court. The fifth and final chapter will discuss the importance of this work and the future of performance research.

Analysis

The Stage

As stated in the introduction, Small Claims Court is a human created symbolic structure. It is a judicial machine designed to churn out cases in a less formal atmosphere where many of the normal rules connected with civil court are relaxed. This allows the Small Claims Court judge to expedite cases through the court more quickly which saves time and money. It also allows individuals to represent themselves in the courtroom, foregoing the time and expense of a professional lawyer. The relaxation of the rules frees the court from many of the burdensome and time-consuming requirements to which the civil courts must adhere. This does not mean that cases are adjudicated in as expedient a manner as claimants would prefer. Often, it takes at least two appearances in front of the judge over several months before a case is adjudicated which usually is followed by several years of attempts to collect the judgment. The lack of formal rules does empower claimants to determine the course of their case which, as will be shown, greatly depends on the dexterity of the performers to adhere to the conventions of the court system. The reduction of formal rules also elevates the

informal unwritten rules that govern the court system; they are determined more by the judge than by legislation.

The Judge in Superior Court X subscribes to the grid metaphor of law. He states before each Small Claims Court trial that the only thing he expects each claimant to do is “tell your story; I’ll decide any issues of fact, and then apply the proper law.” Story-telling is the primary method of argument in Small Claims Court (Hollihan, Rily, & Freadhoff, 1986). Since claimants represent themselves before the judge without the assistance of a lawyer, arguments in a formal forensic sense are rare, though arguments in the colloquial sense are quite common. The statement “apply the proper law” indicates the static, fixed view of law held by the judge. The judge sifts facts from the stories told by the claimants so that they can be evaluated by already established laws. In a way, this perspective on the law is similar to accounting. The judge takes the facts and plugs them into an equation and receives an answer. The application and responses to the judge’s grid view of law will be discussed in detail later in this chapter. First, there are some interesting performances of this grid metaphor by the judge that help to identify some of the unwritten conventions in this Small Claims Court.

An Overarching Performance: Scripts

The first overarching performance to be discussed is the judge’s well-developed scripts that are used in the courtroom. Cases that are there for their initial hearing follow a very clear blueprint. After calling the case, the claimants approach the bench. The judge then asks the plaintiff if the claim is still for the

dollar amount stated at the time of filing. The plaintiff responds in the affirmative, or offers an explanation as to why the dollar amount is now different. The judge then turns to the defendant and states, "The plaintiff claims you owe them (said) dollar amount. Do you agree?" If the defendant agrees, the judge enters an agreed judgment against the defendant and discusses payment arrangements. If the defendant disagrees, the judge then asks: "Is it your view that you don't owe anything or something but not (said) dollars?" The defendant responds. The judge either decides to set it over for trial next month or states: "Then what I will ask you to do is to talk with one of our mediator/fact finders to find out how you come up with.... After he's finished talking with you, he'll either ask you to sign something or bring you back into the courtroom." The mediator then takes the parties out of the courtroom and off the courtroom stage. Mediations happen in private; not in front of the courtroom audience. The judge does not send all cases to mediation but generally landlord v. tenant cases are sent.

The judge adheres closely to this overarching script. The questions are all closed-ended so as to elicit the information desired by the judge. If a defendant or plaintiff attempts to make his or her case before the judge at this stage, the judge at an opportune moment cuts him or her off and returns to the question at hand. The judge is interested only in responses that move the case forward toward resolution. Since law under the grid metaphor is compartmentalized, there are a limited number of compartments into which facts can be categorized. The judge frames his questions to get the information necessary to use the proper box. Therefore, a claimant who raises ancillary issues which do not fit into these

categories from the point of view of the judge only wastes the time of the court, which is counter to the purposes of the Small Claims Court.

An Overarching Performance: Ideal Plaintiff

A second overarching performance is the role of ideal plaintiff. The choices made by the judge in creating a system of law privilege some performances over others. Just as the waiter in Sartre's (1966) example in the previous chapter is defined by the restaurant and the customers, the role of the plaintiff, as well as the defendant whose role will be discussed later, is defined by the system in which he or she operates. Since Small Claims Court is a symbolic system designed to redress conflicts in a community, the goal of the process is to find a remedy to the conflict. According to Burke (1954), the replication of the symbolic structure itself also can become a goal. This means that the court processes themselves become as important as the ends that they achieve. When the court system is coupled with the grid metaphor, value is placed on conformity to the scripts or rules used in the courtroom apart from the actual remedy. Claimants who adhere to these scripts and rules are rewarded while those claimants who do not may be subject to sanctions. Based on observation, the role of the ideal plaintiff in this courtroom is one that has all his or her papers in order yet rarely speaks. This role works both toward the favor of the plaintiff and the court. A conflict between the judge and the plaintiff will occur if the plaintiff is lacking a document in the case file or has filed an unclear claim. With all papers appropriately filed, the plaintiff need say little since anything he or she could add is ancillary. Plaintiffs who have become learned in the ways of the court are

identified easily in court by their stacks of papers and few words in front of the judge.

An Overarching Performance: Ideal Defendant

The role of the ideal defendant, a third overarching performance, is more complicated. There are two possible roles for the ideal defendant. On the one hand, an ideal defendant could be described as the one who quickly agrees with a claim and will pay it promptly. This requires a minimum of effort from the court. This role was evidenced by one defendant who appeared before the court in a very apologetic and humbled manner. He was a heavy-set, older fellow who had been evicted from his low rent apartment. Profusely, he apologized to the court for “falling on hard times,” equating poverty with immorality. He stated, “I was hoping to have this paid before we even got here.” He is guilt-ridden and shamed to be in the courtroom. Often, this ideal defendant role refashions the civil case into a criminal prosecution. The plaintiff is defined as the role of a victim and the defendant acts as a perpetrator. Clearly, this ideal role does not work toward the favor of the defendant nor does the defendant utilize the apparatus of the court to protect his or her own interests. The defendant in this scenario surrenders in order to avoid any further interactions with the court.

An alternative and more apt ideal role for the defendant is a defendant who follows the rules of the court even though he or she may not fulfill the requirements of the judgment. An example of this comes from a case that apparently had gone on for many years. The plaintiff was frustrated by the lack of payment from the defendant. The defendant, largely due to poor health, had

been unable to keep a job. The judge, unable to order another payment arrangement due to a lack of income, made the comment, "I do commend you for regularly letting the court know about your change in address." At the surface level, this may seem like a desperate attempt by the judge to find something to offer as a compliment to the defendant. The judge is under no requirement to do so. He made the choice to state in open court his appreciation for adherence to the rule even though the defendant had not followed through on the redress. Thus, the ideal defendant role is similar to the plaintiff role. The defendant's appropriate use of the apparatus of the court is distinct from the purpose of the court. Like the plaintiff who has all his or her papers in order, the defendant also in a sense has all of his or her papers in order.

It is apparent in this cursory examination of Small Claims Court how the grid metaphor extends not only to the application of law but also to the performance of law in the courtroom. In the aforementioned example, all parties adhered to the grid view of law which values order over morality. Everyone followed the same rules and the court process moved smoothly without emotional or moral conflict, though the plaintiff obviously was not happy about the failure to pay. However, it is not always the case that all parties in the courtroom share the same view of law. In the following examples, the metaphoric lens will be applied directly to episodes where defendants approached the bench with the energy view of law in mind while the judge and plaintiff still maintained their grid view.

Episode One: The Scene

The episode that will be examined is a landlord v. tenant dispute. The plaintiff is a mid-50's White male of average height. He is in Small Claims Court regularly but not as much as others. The defendants are a married couple; a mid-40's White female who walks with a great deal of attitude and her husband who remains largely silent through out the performance. Their case is before the judge in order to arrange payment. The defendants no longer reside in the property and the landlord seeks to collect the money the court has already awarded him. Upon arrival before the bench, the judge informs the defendants that "the plaintiff is attempting to collect a judgment against you.... What is your ability to pay?" The defendants are a little shocked to find out a judgment was entered against them and the mid-40's White female immediately begins explaining the situation to the judge and the performance of a social drama follows. This social drama episode, as well as the next, will be examined by parceling the episode down into the four parts of Turner's social drama: breach, crisis, redress, and reintegration or separation.

Episode One: The Breach

A social drama begins with a breach of a rule, norm, moral, or custom in a public setting (Turner, 1982). In the case of landlord v. tenant disputes, the social drama begins with the breach of a lease agreement. A lease is a contract between landlords and tenants that details the rights and responsibilities for both parties. A landlord and the tenant have a business relationship that concerns property. Generally, the tenant has a responsibility to pay a deposit and the

monthly rent in a timely basis as decided by the landlord. The landlord has a responsibility to maintain the property apart from normal wear and tear. Usually, this relationship works smoothly for many middle class tenants. However, poorer working class tenants often are abused by this relationship. As will be shown, tenants in Small Claims Court often have valid complaints against their landlords for breach of their responsibility.

In this episode, the tenant expressed this complaint quite clearly. The tenant owed the landlord for back rent and damages to the property. In referring to the plaintiff's claim for damages, the mid-40's White female defendant made the accusation, "He left us without electricity in the kitchen for two weeks. That's a fire hazard!" The defendant glared at the plaintiff and stood confidently, certain that her comments gave the landlord a moral slap in the face. Though plaintiffs such as the one in this episode regularly portray themselves as a victim who was robbed of unpaid rent, a defendant also can act the part of a victim who was mistreated by the more powerful landowner. Landlords can breach the norms of the relationship through neglect of property and misrepresentation. This especially is true of poorer tenants who have low credit scores and must rent property from less reputable landlords. These tenants often pay higher deposits and higher monthly rates for less valuable property in higher crime neighborhoods. They also are subject to horrendous late fees. These tenants are more willing to move into a property that needs attention and they fix the property for the landlord without recompense.

It should be noted that landlords who choose to rent to tenants with bad credit take on a greater risk. These tenants tend to earn less income because they work low-paying jobs. In addition, their low credit scores represent a failure to make payments to past creditors. Landlords who choose to rent to these tenants take a significant risk that they may not be paid. They may charge higher deposits and late fees, precisely to discourage tenants from late payments. They also may require a tenant to pay weekly as opposed to monthly; this increases the opportunity for a missed payment. This means that those who earn the least and have the fewest resources available to them tend to be charged the most and penalized the hardest for financial mistakes. It is a relationship ripe for a breach.

Episode One: The Crisis

It is easy to see how a breach develops into a crisis in this relationship. Poor tenants obviously earn less money and have less fiscal responsibility, so it is not uncommon for them to miss a payment which then incurs a late fee. This late fee often is applied per day. The late fee increases the amount the tenant owes to the landlord the next week on top of that week's rent. For example, if a tenant misses a week's rent of \$100, he or she is penalized with a \$25 per day late fee. The next week the tenant must pay a total of \$375. Anything less than this amount and the late fees continue to accrue. If the tenant cannot make up the late payment plus the late fee plus the rent for the current week, then he or she continues to fall behind and the downward spiral continues week after week until the landlord finally evicts the tenant for failure to pay. This is not to say that

all landlords utilize such draconian tactics; rather, these measures are used by most landlords with varying degrees of severity.

However, as stated earlier, failure to pay rent is not the only breach. In this case, the breach led to a crisis where the landlord would not fix the property until the tenant paid and the tenant would not pay until the property was fixed. A crisis develops in which the struggle becomes exposed as both a conflict between the individuals and a conflict between the social groups they represent (Turner, 1980). The landlord may view this as a struggle between honest businessmen who provide a valuable service to the community and lazy freeloaders who try to take advantage of that service. The tenants may view this as a struggle between poor working class families who cannot get a break and predatory slumlords who take advantage of them. However, landlords have one all-powerful tool: the eviction notice. Subsequently, the tenant in this case was evicted from the property and sued by the landlord for back rent and damages.

For some unknown and unstated reason, the defendants in this episode did not appear for their initial hearing or the next three hearings concerning their case. This means that the case was in limbo for at least five months. However, the court apparently found at some point that the defendants received proper notification and should have made an appearance before the court. As redress for the conflict, a judgment was entered against the absent defendants.

Episode One: The Redress

A *redress* is a mechanism used to limit the spread of a breach (Turner, 1980). Small Claims Court is a system of redress. When a conflict such as

landlord v. tenant disputes come before the court, the court places certain limits on the spread of the conflict. First and foremost, the court limits the parties involved to only those in contract over the property. Once a judgment is entered, landlords can no longer tack on late fees, though they do get a modest interest rate. Additionally, the court acts as a go between. It collects the payment from the defendant, records it, and sends it to the plaintiff.

The judgment entered in this case limited the spread and began the process to redress the conflict. However, redress is not complete. The judgment was entered without the approval or knowledge of the defendant and had not been paid. The defendant's concerns had not been heard. During the episode, the defendant stood before the judge wanting to argue her case. She complained about the electricity and other problems. As the defendant stated her accusation "He left us without electricity...", the plaintiff ignored her comments and looked only at the judge. The judge responded, "The court is only interested in the judgment." The judge's statement was designed to end the discussion of ancillary matters. The tenant's complaint is considered ancillary for several reasons. First, a judgment already has been entered in favor of the plaintiff so the only issue that matters to the court is the payment of the judgment. Second, even if the judgment had not been previously entered, the defendant would have to file a counter-suit against the plaintiff for damages the tenant may have incurred because of the landlord's actions. Without a counter-suit, the judge will not hear the issue. The plaintiff filed suit for back rent and damages to the property. His possible negligence in refusing to fix the electricity in the kitchen has nothing to

do with the unpaid rent in the eyes of the court. They are not considered mitigating factors but completely separate issues.

Here, the distinct metaphors of law as grid and law as energy collide. The defendant expects the court to render justice and assumes the judge will hear all sides of the case and deliver a decision that is morally fair. Claimants who hold an energy view of law expect the court to work like a moral ledger. The plaintiff tells his or her story and this is added up in one column; the defendant then tells his or her story and that is added up in another column. Finally, claimants who hold an energy metaphor expect the judge to tally these columns and subtract one from the other in order to deliver a judgment that is proportional to the moral value of their case. However, this Small Claims Court is not a court that practices the energy view of law. The defendant fails to follow the scripts of the court as constructed by the grid view of law. She is improvising on a stage that does not allow improvisation. The director, meaning the judge, opportunely stops the improvisation and returns her to the script: "What can you do to pay the judgment?"

Episode One: The Reintegration or Separation

A social drama ends with either *reintegration* or *separation* (Turner, 1980). The plaintiff in this episode showed no desire to reintegrate. He knew the court would not give heed to the defendant's complaints. He is experienced enough with this court system to know that these ancillary issues will not sway the judgment of the court. He stood stone faced without guilt or ignominy when the defendant made her accusation before the judge and the courtroom audience.

Recognizing that performance is always for an audience who recognizes and validates the performance (Burke, 1969b; Carlson, 1996), each claimant performs before the same audience, but seeks validation from different audiences. The audience is not a uniform cohesive group but is made up of divisions. The audience members are claimants who have come to court with different purposes whether they are plaintiffs or defendants. Claimants identify more with those of shared purpose. The audience for the defendant and the audience for the plaintiff are completely different viewers of the performance though they share a common location in the courtroom.

The plaintiff in this episode is focused on the goal of getting the money he feels is his due. Because this is his goal, he selectively tailors his performance for the audience that validates this goal. His goal is an acceptable one within this court system because this also is the purpose of the system: to redress a broken contract. Therefore, his primary audience is the judge. The landlord remains largely silent, except when he questions the defendant in order to get information to collect the judgment. He does not respond or even give notice to the comments made by the defendant. The plaintiff does not construct a performance for the defendant because he does not consider the defendant to be an audience. He only pursues the remedies available to him through the court, such as garnishment of wages, and when that does not offer much hope of quick payment, he seeks the seizure of assets; namely, a boat trailer. In addition, there is a secondary audience. The plaintiff starts to leave after accomplishing little toward his goal and another landlord offers his support by a simple nod of the

head. This small validation is important. Through the positive review, the plaintiff does not leave with a sense of failure but one of shared purpose. His head is up and he smiles at the other landlord. Though he has failed in his immediate goal, he has shared a purpose with many other members of the audience; this counterbalances his momentary set-back. Though he intends his performance to be for the judge, it is validated by other landlords as a good performance.

The defendant, unlike the plaintiff's focused intent, clearly has a larger audience in mind. Her personal attacks on the plaintiff's character are an attempt to affect not only the judge but also the courtroom audience and perhaps even the plaintiff. The defendant functions under the energy metaphor of law. Therefore, the moral implications of the landlord's actions are important to her and, from her point of view, should be important to the court. Her repeated shifts in focus between the judge and at the plaintiff show that her comments were made to both persuade the court and to chastise the landlord. Her goal is to bring into question the moral character of the plaintiff. Though this goal is unacceptable to the court and is rebuffed by the judge, it clearly has an effect on the audience that watches the proceedings.

By comparison to the plaintiff's silent audience, the defendant's audience is more sympathetic to the defendant's case and also is more vocal. People verbally comment about landlord abuses, shake their heads, and vocalize their disgust. Though the court did not listen to her moral attack, her fellow defendants in the audience certainly did. They gave the defendant their vocal support. Her attacks, though generally ignored by the plaintiff, also affect the plaintiff's

audience of fellow landlords who felt it necessary to offer their support to the plaintiff when he left. It is common to see people lend some sort of nonverbal support to defendants as they leave court but very rare to see this done to a plaintiff. The plaintiff's audience must have felt it necessary to remind the plaintiff that he won despite the defendant's attempt to question his morality.

Though this conflict is not over until the either the judgment is paid or set aside, clearly reintegration is not an option. The two parties must permanently separate and the reactions of the audience show the lack of middle ground between the larger social groups of landlords and tenants. The second episode will highlight the rift between social groups.

Episode Two: The Scene

In a different case on the same day, another landlord v. tenant dispute brought the rift between these social groups into focus. Unlike the previous episode, this case was before the judge for an eviction hearing. The landlord was a mid-40's White female who often was in court and, in fact, had several cases before the judge that day. She regularly dressed in a business stylish manner that appeared more harlequin than professional. When strolling through the halls of the court, her demeanor was genuinely warm and friendly. However, her tenants might think her a "dragon lady," a well-deserved epitaph considering her tendency to use cutthroat tactics during court. The defendant was a tall, thin Black male, most likely in his mid 30's. Though he appeared alone in court, he stated he was married and had a family. Even approaching the bench, his nervousness was apparent to everybody.

Episode Two: The Breach

Like all landlord v. tenant conflicts, the issues in this case centered on unpaid rent and damages to the home. Since this was at the eviction stage, damages were not included yet since they cannot be determined until the landlord regains control of the property and could assess damages. The tenant was several thousand dollars behind in rent and late fees. Dollar amounts of \$2,000-\$3000 are not uncommon, due to the parasitic cycle described earlier. In addition, landlords often “work with” their poor credit tenants when they get behind in rent. This means that a tenant sometimes will not get evicted until he or she is several months behind and has accrued late fees the entire time. This is unlike more reputable landlords who will evict a tenant for missing one month's rent, in order to mitigate losses. Thus, when the breach rises to the point of a crisis, it is a substantial dollar amount hanging over the head of the tenant.

Episode Two: The Crisis

At some point, the landlord decided to evict this tenant. They had been in court previously for an initial hearing. An eviction order was issued by the court to have the tenant removed from the home but withheld on the tenant's promise to pay. This promise was accepted by the landlord. It also means that the eviction can be served at any time. Generally, an eviction notice gives the tenant 48 hours to move, but since this notice was withheld pending further action, it would be immediate. Apparently, the tenant believed he would be able to prevent the eviction and did not take the time to move out of the property. In this case, the

tenant needed to come up with several thousand dollars in order to retain possession of the property.

Episode Two: The Redress

The defendant owed a lot of back rent and stated that did his best to pay it but did not manage to pay it in full by the next court date. The plaintiff went forward with the eviction. The defendant was given less than 48 hours to be out of the house. He was visibly distraught by this order and pleaded his case to the judge. In order to fulfill the agreement, he paid thousands of dollars but fell short by hundreds. He was afraid for his family, including two small children, having no place to go on such short notice. However, the plaintiff was within her rights to have him evicted. The court could and would do nothing to stop the eviction. He asked the plaintiff for more time but she was unwilling to grant it to him. She reminded him that the Sheriff could be out there that day to remove him from the house.

Episode Two: The Reintegration or Separation

Upon hearing the tenant had less than 48 hours to move, all the Black members of the audience shook their heads and many let out audible statements of disbelief. Many of the landlords in the audience just stared straight ahead, motionless and silent. The defendant turned to walk out. Tears poured down his face. People were visibly concerned for him as he looked about the room for a friendly face. The courtroom door closed behind him and the audience was left to gossip. The plaintiff returned to her seat near a few other landlords, all with a face as stony as the sidewalk outside. Clearly, though the court had instituted a

redress between the individuals, the conflict between the social groups they each represented was far from settled.

Landlords who understand the system are able to take full advantage of it and avoid scrutiny of their actions while defendants remain ignorant of the system and plead for justice based on morality in a court in which morality is not a relevant consideration. This court is not interested in justice but in order.

Though the parties separate today, a solution eventually will be reached that will be orderly and consistent with other landlord v. tenant cases, though fairness, justice, compassion, and morality might not be included in the calculus.

Conclusion

This chapter has applied the performance metaphor to processes of Small Claims Court. First, several scripts used by the Judge were identified. These scripts showed the judge's predilection toward the grid view of law. Next, the roles of ideal plaintiff and ideal defendant were discussed in light of the grid view of law. These roles were similar in that they both required strict adherence to the dictates of the court. Then, a specific performance episode was broke down into the four parts of a social drama: breach, crisis, redress, and reintegration or separation. The breach section focused on the different breaches landlords and tenants commit and detailed the complex relationship that often leads to these breaches. In the crisis section, the relationship came to a close with the use of the eviction notice. Also, the parties begin to take on roles as part of a larger social group. The redress stage occurs in the courtroom. In this court, the redress process is clearly defined and deviations from this process are

squelched quickly. Finally, the court fails to reintegrate parties but permanently separates them due to the irreparable harm. The reactions of the audience display the rift between the social groups, a rift the court has only exacerbated.

In the fifth and final chapter, the rift between the social groups will be discussed further as an outcome of the social drama. The success of the redress will be evaluated and a brief recommendation for alternative options will be put forth. Additionally, limitations to this study will be discussed which will lead to suggestions for further research.

Chapter Five: Interpretations and Conclusion

Introduction: Interpreting the Introductions

This thesis opened with two stories that involved a body attachment; that is, an arrest warrant to produce the defendant in court. One plaintiff represented a local school and the other plaintiff represented a local used car company in nearly identical situations; the defendants owed less than \$200 and had failed to pay over several months. The plaintiff who represented the school did not take the body attachment and the defendant was given another opportunity. In the second case, the defendant would be arrested and held until he or she either posted the bond of \$200 or was produced before the judge several days later. Both plaintiffs were in similar situations in the same court before the same judge but made choices that produced drastically different outcomes.

The divergent outcomes point to the different motives on the part of the plaintiffs. The purpose of a school is to educate and care for students, not to reap a profit. It is not surprising, then, that the agent or plaintiff in this case was a school office employee. This relationship to the school and its purpose transfers to the scene of court the values of the scene of school. Therefore, it follows that the plaintiff in this case would act in a more caring way and does so by not having the parent of a student arrested. In the other case, the purpose of a used car company is to make money; hence, the company is represented by a financing agent. The courtroom is a scene much like a showroom floor: an opportunity to profit. Consequently, it is understandable for this plaintiff to ask for a body attachment as it is the most expedient way available to retrieve the

money owed. The different outcomes not only show two different motives but two different performances in the same venue that have different meaning.

The distinctions between the school plaintiff and the used car plaintiff point to the variety of performances that occur in Small Claims Court. Though the cases in Small Claims Court primarily are concerned with money and property, the motives of the claimants may not have as strong a profit purpose. This profit purpose is the main motivation for the used car company performance as well as the landlords discussed in Chapter Four. This thesis has discussed three approaches to the study and application of law—the metaphors of grid, energy, and perspective. The grid and energy metaphors are common in the courtroom. The perspective metaphor, conversely, is used by scholars and critics to examine the court within the context of its culture. This final chapter will interpret the scripts and episodes used by participants in the drama that is Small Claims Court. It will include an evaluation of the redress process as it occurs in court. Additionally, limitations to this study and suggestions for further research will be articulated.

Interpretations

The research question posed in this thesis asked:

“How is law performed in Small Claims Court?”

Small Claims Court is a place where culture is enacted and the fractures between social groups percolate. Building on the work of Nolan (2001), this study adds to the understanding of the performance of law in a courtroom by identifying scripts and roles used in a Small Claims Court milieu. Scripts, in particular, were

found to be a means of control; that is, they are a vehicle by which power is used to limit the issues raised in court. Claimants, unlike actors, cannot step down from the stage but the roles they play in court have very real implications for their lives. The performances in court make salient the boundaries of the symbolic world in which they reside. Two boundaries that appear in Small Claims Court are the profit purpose and the remaining rift.

The Profit Purpose

Like the court room painting of the White settlers building a dam while the Native Americans watched, the landlords represented in these episodes primarily are driven by the profit purpose. The profit purpose places the collection of money above all other motives. The landlord's original purpose in the renting of property is to earn income and the choice to rent to tenants with low income and bad credit might appear to be a foolish one. On the one hand, these tenants have less money available to them; this makes collection of rent and judgments difficult. On the other hand, this same lack of finances make these tenants more susceptible to predatory practices such as high deposits and exorbitant late fees. The court, then, is used when there is a breach of the lease agreement, whether it is failure to pay or there are damages to a property. As such, it is a mechanism used by landlords to produce economic gain. In other words, the court is a means for either recouping loss or gaining additional income. The landlord acts as his or her own agent in court due to the purposeful absence of lawyers from the small claims process. Therefore, the agent is very closely related to the

purpose. This agent/purpose ratio creates a motivation that supersedes all other motivations; namely, the profit purpose.

This profit purpose held by landlords fits nicely with the grid metaphor of law. In episode two where the tenant fell short of money and left the court in tears after being evicted, however, brings into question the morality of the profit purpose. The tenant apparently had tried hard to meet the expectations of the plaintiff and the court but fell slightly short. The performance of the tenant indicated a desire to work with the landlord to stay in the property. This performance could be entirely false with the tenant in the past abusing the kindness of the landlord or the court in order to maintain possession of the property. However, the performance is believed by the audience. In their minds, compassion should step in and offer the tenant at least a nominal amount of time to move out. However, law under the grid view is free from morality. The law gives the right of eviction to the landlord and the landlord can exercise that right regardless of the morality of the decision. For the landlord, there is not as much profit in allowing the tenant to stay as there is in evicting him or her.

Likewise, the profit purpose is easy for the court to manage and as such, fits the primary scripts and conventions of the court well. The exchange of money is the primary transfer that the court can order and monitor without much effort (Davidson, Knowles, & Forsythe, 1998). Other purposes, such as requiring a landlord to fix a property or to work with a tenant are more difficult to manage and require more time of the court. When a claimant raises issues such as these, the court process grinds to a halt because the court is not equipped to deal with

these issues after eviction. Issues such as fixing a property can be addressed while the tenant is still in possession of the property since the court can order a reduction in rent (Davidson et al., 1998). However, these options are not available post-eviction since the tenant no longer pays rent. Therefore, the court has no apparatus to address these conflicts. Just as the profit purpose encourages the landlord to make decisions to evict or request a body attachment, the grid view of law as applied in court also is comfortable with it and does not question its motives.

It is easy to understand why poor tenants, many of whom are African-Americans, feel disenfranchised by the court system. Their purpose in being before the court often is something other than profit, such as a landlord's negligence in fixing the property in a timely manner. The court has difficulty assigning a dollar amount to this negligence and the landlord often remedies the problem before the court appearance. Additionally, the defendant is no longer in possession of the property so requiring the landlord to fix the property is of no benefit to the defendant. The only issue that remains current and tenable is the unpaid rent and damages a plaintiff requests. Tenants often fail to appear for court, perhaps, in an attempt to stave off the inevitable. The court system brings redress to a monetary breach but perpetuates a greater ethical breach by tacitly sponsoring the predatory practices of the landlord and downplaying the concerns of the tenant. This leaves low-income tenants at the mercy of the rapacious practices of the more knowledgeable and cunning landlords. In turn, there is an

ever-widening rift between landlords and tenants but never a complete separation.

The Remaining Rift

The performances the judge and the claimants during episode one and two as discussed in Chapter Four show that the courts are a social drama designed to bring a monetary resolution to conflict; however, the negative reviews offered by the audience indicate that the court system does not succeed in accomplishing a lasting resolution between the larger social groups. A social drama ends with either *reintegration* which leads to a healing between the parties or *recognition* of irreparable differences in which the parties in the conflict must separate (Turner, 1980). Rarely does the court bring healing to a conflict. The adversarial nature of Western judicial systems, especially the United States' civil court system, does not encourage cooperation but competition and combat. Separation due to irreparable differences is the final solution to most of the conflicts that are adjudicated in court. Since the parties cannot heal their relationship, the court imposes a dollar amount to transfer from one party to the next in order to remedy the situation. This generally leaves plaintiffs who feel vindicated and defendants who feel victimized. In the landlord v. tenant case represented in this study, true separation is difficult to achieve. Hence, there is a remaining rift between the tenants and the landlords.

In a social drama, individuals not only represent themselves in a conflict but also the larger social groups to which they are members (Turner, 1980). These landlords who rented to poorer tenants with bad credit file their cases in

order to evict their tenants and sue for lost rent, late fees, and damages. As the previous tenant is evicted, the landlord will rent the property out again to another poor tenant with bad credit. The names on the lease change but the relationship typically stays the same. The landlord most likely will have to evict the new tenant, too. Likewise, the evicted tenant will have to move and does not have the money for a down payment on a home nor good enough credit to rent property in a nicer neighborhood with a more reputable landlord. Hence, the tenant rents another property from a landlord similar to the one the tenant just left. Most likely, this tenant owes money as a result of the lawsuit from the previous landlord in addition to having to come up with the exorbitant requirements for the new landlord. It is only a matter of time before the tenant will be evicted from the current property for failing behind in payment. Despite being free from one landlord or tenant, the only option available to the parties is to continue the relationship with another landlord or tenant in the same social group. The landlords are similar to a faction of vampires who prey on the weak members of society and even pass their victims off to other members of their faction. It is common to find a tenant with several cases pending against them from many different landlords. The parasitic cycle continues in a self-perpetuating manner.

This is not to say that all landlords who rent to poor tenants are abusive. However, even if the landlord does not intend to intentionally prey on his poor tenants, the landlord is stuck within the parasitic system as much as the tenant. The process requires the landlord to rent to tenants who will most likely breach the lease and, as a result, the landlord will lose money. Eventually, the landlord

will resort to more draconian methods such as harsh late fees to prevent the loss of income. The decision for these landlords to use aggressive methods may be based more on protecting wealth than predatory practices. The parasitic system, though, remains. In the end, the landlord has a choice and a way out of the system: he or she can sell the property.

Tenants, however, once in this system often lack the resources to break free of it. Many tenants deserve their low credit scores for lack of payment to past debts and are a risk to any landlord. Yet, even tenants with the best of intentions will likely fall into the cyclical process. Since these poor tenants have low wage jobs, it is common that they are laid off or fired for any number of reasons. Once this occurs, the system takes over and they miss a payment and then start accruing late fees and so on. This process clearly disenfranchises the poor tenant who provides the money that feeds the cyclical engine. The landlord has a parasitic need for these tenants to remain in the system since wealthier tenants avoid the bad neighborhoods and exorbitant fees charged by the landlord. In addition, the court system is stacked in favor of the landlord. Laws are written with the intent to protect capital and property; few laws exist to protect tenants, especially after they have been evicted.

One possible resource that can assist poor tenants who want to break the cycle is to provide affordable legal aid to tenants. In New York City, an evaluation of a legal aid program found that 51% of low-income tenants who did not receive representation had judgments entered against them while 22% of low-income tenants who received representation had judgments entered against them

(Seron, Frankel, & Ryzin, 2001). Additionally, this evaluation discovered fewer evictions of those who had legal representation. This suggests that poor tenants who tend to lack knowledge of their rights are taken advantage of in the courtroom and would benefit from increased legal assistance. However, legal representation runs counter to the intents of Small Claims Court. As a result, this system not only disenfranchises poor tenants, it also does not serve their interests.

Mediation as Alternative

The court system is not the most appropriate means to redress landlord v. tenant conflicts. It clearly privileges one claimant over the other. The performances described in this study detail the failings of the court system. No system of redress is perfect; however, alternative systems of redress such as mediation offer the opportunity for all parties to discuss all issues of the conflict. Additionally, mediation moves the power to decide the solution from the judge back to the hands of the claimants who can decide for themselves the principles that apply to their case (Henikoff & Kurtzberf, 1997).

Mediation is advantageous to the plaintiff. Mediated settlements have twice the level of compliance over settlements imposed by a court (McEwen, 1984). This leads to greater levels of satisfaction with the outcome and better relations between the parties that is due to the effectiveness of the process (Wissler, 1995). This means that mediation can deal with not only the conflict at hand but start to address the larger conflict between the social groups. As Littlejohn states, "If the parties learn new ways to relate to others in the process

of mediation, then a larger social end is being achieved” (Littlejohn & Domenici, 2001, p. 62). This is not to suggest that mediation is a cure-all. However, mediation offers a helpful vehicle by which to confront the profit purpose in a manner that serves the interests of both parties and does not perpetuate the remaining rift.

Limitations and Further Research

No research is ever complete. Choices in the research process provide direction but also create limitations. One limitation of this study is its scope. First, only a very small number of cases were examined. More cases, especially in different courts and with different issues, possibly would reveal different performances that may bring to light other boundaries, strengths, and weakness of the court system. Additionally, the review of literature did not include specifics as to the history or background of landlord and tenant relationships in the United States of America. Though it was not planned, these landlord v. tenant conflicts had the richest data and performances in the Small Claims Court observed and so were chosen for study. Clearly, an examination of the history may provide a valuable insight into nature of these types of conflicts, especially to the preferential treatment of landowners. Future research should focus more on the nature of landlord v. tenant conflicts in American society to embed the court performances in their historical and cultural context. There clearly is a great deal of research needed on the remaining rift between landowner and renters.

Finally, this study did not examine the backstage of the performance. A judge makes numerous decisions before stepping into a courtroom that affect the

performances. These may include proceedings in judge's chambers, the manner in which cases are called, and decisions as to when to use mediators.

Additionally, performances happen in the court reporter's office as plaintiffs and defendants interact with the judge's staff. Further research could examine the way in which the staff and judge prepare for court as well as the relationships between judge and staff or staff and claimants.

Conclusion: A Final Story

There is a bedtime story told to many children. It is the story of a miller's daughter who was required to spin straw into gold because of a boasting father. Obviously, the boast was a fiction because straw cannot be spun into gold. However, the King believed the boast and declared that he would marry the daughter if she spun straw into gold or kill her if she did not. The miller's daughter, unable to accomplish this task, was certain the King would kill her when the most unlikely assistance arrived, a little man who claimed to know magic. He would do this impossible task for the miller's daughter and in exchange he required her first born child. Faced with certain death, she agreed. He spun the straw into gold as promised. The miller's daughter married the King and a year later they had a child. The little man returned to collect on the debt but now understandably she was unwilling to part with her child, so the little man having some pity for her, offered the Queen a way out. If the Queen should learn his name in three days, he would release her of the obligation. By luck, on the second night, the Queen overheard the little man boasting that he would take the Queen's child because she would never guess that his name was

Rumplestiltskin. The next day she told the little man his name which sent him into such a rage that he tore himself in half.

I often have found this story difficult to understand. On the one hand, the miller's daughter had made a deal and should be required to fulfill her end of the bargain. On the other hand, it is a mother's responsibility to protect her child. It is abhorrent that the miller's daughter would make such a deal. Perhaps the real moral of the story lay in Rumplestiltskin's request. It is clear the miller's daughter was in an untenable situation and Rumplestiltskin provided a way out for her but his request for her first child was excessive. If the miller's daughter refused the deal, the king would kill her. If she accepted, she reasoned in the story that she may or may not have a child since nothing is certain. So, she accepted his proposal. She chose to live. However, Rumplestiltskin's demand of her first child was clearly predatory. The greed of the miller and the King put the miller's daughter in a position to be preyed upon by Rumplestiltskin, a man whose actions are reprehensible. He cloaked himself in the virtue of assisting a woman in need but his excessive request revealed his underlying cruelty and greed.

The landlords represented in this thesis are similar to the character of Rumplestiltskin. They clothe themselves as good upright citizens who provide a valuable resource to those in need but the price they exact from the needy is too high. This thesis has provided valuable knowledge about the performance of law in Small Claims Court, specifically with regards to landlord v. tenant disputes. The rift between landlords and tenants as revealed in this examination is perpetuated both by the profit purpose and the view of law as grid. Power resides

largely with the landlord and the courts appear to exist to protect property ownership over the needs of tenants. The courts are intended to be a place of justice but, unfortunately, are another apparatus individuals such as the fairy tale character Rumpelstiltskin use to prey upon the misfortunes of others.

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APPENDIX

Approval Letter from the Human Subjects Institutional Review Board

Date: September 21, 2004

To: Keith Hearit, Principal Investigator
Michael Muhme, Student Investigator for thesis

From: Amy Naugle, Ph.D., Interim Chair

Re: HSIRB Project Number 04-09-09

This letter will serve as confirmation that your research project entitled "Any Given Tuesday: Law as Performance in Small Claims Court" has been **approved** under the **exempt** category of review by the Human Subjects Institutional Review Board. The conditions and duration of this approval are specified in the Policies of Western Michigan University. You may now begin to implement the research as described in the application.

Please note that you may **only** conduct this research exactly in the form it was approved. You must seek specific board approval for any changes in this project. You must also seek reapproval if the project extends beyond the termination date noted below. In addition if there are any unanticipated adverse reactions or unanticipated events associated with the conduct of this research, you should immediately suspend the project and contact the Chair of the HSIRB for consultation.

The Board wishes you success in the pursuit of your research goals.

Approval Termination: September 21, 2005