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Mock Trials and Real Justices and Judges

Richard A. Posner

MOCK TRIALS AND REAL JUSTICES AND JUDGES

Richard A. Posner†

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INTRODUCTION

Mock trials—dramatizations that have the form of a trial, or of an appellate proceeding (for simplicity I'll use the term "mock trial" to cover both), but are not actual legal proceedings—are an age-old feature of Western culture, and in today's America come in many varieties. There are fictional trials found in novels and films and other literary or entertainment formats. I have discussed them at length elsewhere.[1] Many are of high quality, and some are significant contributions to

† Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. I thank Michael Kenstowicz, Adina Goldstein, Sonia Lahr-Pastor, Emily Rush, and Adam Solomon for their excellent research assistance. The research assistants, under the leadership of Kenstowicz, prepared the tables, the figure, the bibliography, and the online appendix (posted as an appendix to this Essay at http://www.cardozolawreview.com/content/34-6/MockTrialAppendix.pdf), under my general direction and with my editorial assistance; I did, however, edit the research assistants' evaluations of the trials; see Part IV of this Essay. I also wish to acknowledge the helpful comments of Charlene Posner on a previous draft of this Essay, and to thank Eric C. Bailey, Special Events Manager at the Shakespeare Theatre Company of Washington, D.C., and Lindsay Tolar, Publicist at the company, for providing information about the Theatre's mock trials, and DVDs and programs of its recent such trials.

1 *See* RICHARD A. POSNER, LAW AND LITERATURE (3d ed. 2009).

jurisprudence. There are also mock trials in high schools, law school moot courts, law school trial advocacy courses utilizing the excellent trial folders of the Institute of Trial Advocacy as the basis for realistic mock trials, and public mock trials presided over by real judges, most often Supreme Court Justices. Really the genre is inexhaustible; it includes a trial of stuffed animals on *Sesame Street*, presided over by Supreme Court Justice Sotomayor,[2] and the recent mock prosecution of Punxatawney Phil (the famous groundhog) for erroneously predicting that this year spring would come early.[3]

My subject is the mock trial presided over by one or more real judges. I'll call it the "public mock trial," but where it is clear that that's the type of mock trial I'm discussing I'll drop the "public." I have not been able to find any previous academic treatment of public mock trials. The bibliography at the end of this Essay lists all the publications, whether printed or online, that I have been able to find that have discussed the public mock trial; none is an academic publication.

I. DESCRIPTION

The public mock trial takes four forms. One is the reenactment of an actual trial, such as the trial of Socrates in 399 B.C., which is the only public mock trial I've participated in, and which I discuss at length in Part V. A second form is the trial of an actual historical event that might have been considered a crime or other legal wrong, such as the slaughter

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2 *See* Jonathan Ringel, *In the Case of Baby Bear v. Goldilocks . . .*, ATLAW (Jan. 29, 2012), http://www.atlawblog.com/2012/01/in-the-case-of-baby-bear-v-goldilocks/; *Sesame Street: Sonia Sotomayor: "The Justice Hears a Case,"* YOUTUBE, http://www.youtube.com/watch?feature=player_embedded&v=FizspmIJbAw (last visited Apr. 14, 2013). I emphasize that none of the criticisms of the public mock trial that I make in this Essay are applicable to the *Baby Bear* case, which was aimed at a television audience of young children.

3 Jason Samenow, *Ohio Prosecutor Seeks Death Penalty for Punxsutawney Phil After Bad Forecast*, WASH. POST (Mar. 21, 2013, 4:38 PM), http://www.washingtonpost.com/blogs/capital-weather-gang/wp/2013/03/21/ohio-prosecutor-seeks-death-penalty-for-punxsutawney-phil-after-bad-forecast/?tid=pm_pop. The indictment, according to the local prosecutor who obtained it, Michael Gmoser, states that:

> Punxsutawney Phil did purposely, and with prior calculation and design, cause the people to believe that Spring would come early. Contrary to the Groundhog day report, a snowstorm and record low temperatures have been and are predicted to continue in the near future, which constitutes the offense of MISREPRESENTATION OF EARLY SPRING, a Unclassified Felony, and against the peace and dignity of the State Of Ohio. SPECIFICATION: The people further find and specify that due to the aggravating circumstances and misrepresentation to the people that the death penalty be implemented to the defendant, Punxsutawney Phil.

Id. "Gmoser said in a phone interview that 'waking up to snow and temperatures in the teens on the second day of spring served as motivation for the indictment . . . . When he betrays us like this, something has to be done.'" *Id.* "Gmoser expects Phil to appeal the indictment. 'His defense will be he didn't know his rear end from a hole in the ground,' Gmoser said." *Id.*

of French prisoners by order of Henry V at the Battle of Agincourt, but was not the subject of an actual legal proceeding; another example is the court martial to which George Custer might have been subjected had he survived the Battle of the Little Big Horn, which he muffed. Although I am dubious about such mock trials, there is one shining exception—a mock trial of Richard III for the murder of his prince nephews; see the grade given it in Table 4.[4]

The third form of the public mock trial is the trial of a fictional character for a crime that the character might have been charged with had he been a real person and done the same thing the character did; an example is the trial of Hamlet for murdering Polonius. Again I am skeptical. But Justice Kennedy devised, and has several times presided over, a trial of Hamlet limited to the question of a possible defense of insanity; and it is one of the most successful of the public mock trials.[5] The fourth form is the trial of a historical controversy unrelated to law, such as whether Shakespeare was the author of the plays attributed to him. This is the most dubious form, as I'll argue.

In format the mock trials differ markedly from conventional American trials. Most of them are appellate rather than trial proceedings, though there are exceptions (notably the Hamlet trial). Almost always there is a plurality of judges, and invariably each side has two lawyers, who divide the argument. The lawyers' arguments resemble oral arguments in appeals even when the mock trial takes the form of a trial rather than an appeal. Rarely are there witnesses or jurors, though there was a witness (a psychiatrist) and a jury of twelve in the Hamlet trial.

Table 1 summarizes some of the information I've been able to obtain about each public mock trial, arrayed by different court systems and within each system by the number of trials (other than zero) in which each judge has participated. There are forty-one trials in the table. (The total number is forty-three, but Tables 1 and 2 omit the two trials that took place before 1994, as their inclusion would give a misleading impression of the participation rate of judges and Justices.) The table lists the judges in each trial and the frequency with which the judge has participated in mock trials. It also indicates which trials were sponsored by the Shakespeare Theatre Company in Washington, D.C., the most frequent sponsor (and site) of such trials. Notice that all four species of public mock trial that I described earlier are represented in the table. So far as I have been able to determine, the earliest trials, with only two

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[4] And also the excellent description, and full transcript, of the trial in THE TRIAL OF RICHARD III (Fred H. Cate & David C. Williams eds., 1997), published by the Indiana University School of Law (Bloomington campus), the sponsor of the trial.

[5] I base this judgment on the 2007 trial sponsored by the Shakespeare Theatre Company, the only trial of Hamlet that I've watched.

exceptions (both being trials of Shakespeare's authorship), took place in 1994, when the Shakespeare Theatre Company first sponsored such a trial. Of the forty-one mock trials, nineteen have been sponsored by the theatre.

Table 1
Public Mock Trials

U.S. Supreme Court Justice	Number of Appearances as Judge	Mock Trial(s) ("ST" = sponsored by Shakespeare Theater)	Mock Trials per Year of Judicial Service Since 1994 (Years of Judicial Service Since 1994)
Ruth Bader Ginsburg	14	*Richard III* (1997, ST; 2003, ST); *Court Martial of General George Custer* (1998), based on lawyers' briefs presenting historical evidence; *Merchant of Venice* (1999, ST); *Henry IV: Parts I and II* (2004, ST); *Othello* (2005, ST); *An Enemy of the People* (2006, ST), a play by Henrik Ibsen; *Edward II* (2007, ST), a play by Christopher Marlowe; *Muller v. Oregon* (2008); *Twelfth Night* (2009, ST); *Henry V* (2010, ST); *An Ideal Husband* (2011, ST), a play by Oscar Wilde; *Much Ado About Nothing* (2012, ST); *Coriolanus* (2013, ST)	0.70 mock trials per year (20 years)
William Rehnquist	5	*Trial of Thomas Jefferson for Hypocrisy* (1994), based on testimony of historical experts; *Richard III* (1996; 1997, ST); *Trial of Lizzie Borden* (1997), based on case record; *Youngstown Sheet & Tube Co. v. Sawyer* (2002)	0.43 mock trials per year (11.5 years)

Samuel Alito	7	*Trial of Socrates* (2008, ST), based on the *Apology* and *Crito* by Plato, and *Memorabilia* and the *Apology* by Xenophon; *Twelfth Night* (2009, ST); *Henry V* (2010, ST); *Ware v. Hylton* (2010); *An Ideal Husband* (2011, ST), a play by Oscar Wilde; *Much Ado About Nothing* (2012, ST); *Coriolanus* (2013, ST)	0.35 mock trials per year (20 years)
Stephen Breyer	6	*Richard III* (1997, ST; 2003, ST); *Coriolanus* (2000, ST; 2013, ST); *Othello* (2005, ST); *Twelfth Night* (2009, ST)	0.30 mock trials per year (20 years)
Anthony Kennedy	6	*Hamlet* (1994, ST; 1994; 1996; 2007, ST; 2011); *King Lear* (2001, ST)	0.30 mock trials per year (20 years)
Elena Kagan	1	*Much Ado About Nothing* (2012, ST)	0.29 mock trials per year (3.5 years)
Sandra Day O'Connor	3	*Trial of Lizzie Borden* (1997), based on case record; *King Lear* (2001, ST); *Youngstown Sheet & Tube Co. v. Sawyer* (2002)	0.25 mock trials per year (12 years)
Antonin Scalia	3	*Mock Trial of the Bicentennial of the Louisiana Purchase* (2003), based on testimony of actors playing Thomas Jefferson, charged with prolonging slavery, and Napoleon, charged with abandoning the people of Louisiana; *Trial of Aaron Burr* (2006); *Texas v. White* (2011)	0.15 mock trials per year (20 years)
Sonia Sotomayor	2	*An Ideal Husband* (2011, ST), a play by Oscar Wilde; *Flood v. Kuhn* (2013)	0.10 mock trials per year (20 years)
John Paul Stevens	2	*Authorship of Shakespeare's Plays* (1987; 1998, ST)	0.06 mock trials per year (16.5 years)
Harry Blackmun	1	*Authorship of Shakespeare's Plays* (1987)	0 mock trials per year (0.5 years)
William Brennan	1	*Authorship of Shakespeare's Plays* (1987)	0 mock trials per year (0 years since 1994)

U.S. Court of Appeals Judge (Circuit)	**Number of Appearances as Judge**	**Mock Trial(s) ("ST" = sponsored by Shakespeare Theater)**	**Mock Trials per Year of Judicial Service Since 1994 (Years of Judicial Service Since 1994)**
Brett Kavanaugh (D.C. Circuit)	6	*Trial of Socrates* (2008, ST), based on the *Apology* and *Crito* by Plato, and *Memorabilia* and the *Apology* by Xenophon; *Twelfth Night* (2009, ST); *Henry V* (2010, ST); *An Ideal Husband* (2011, ST), a play by Oscar Wilde; *Much Ado About Nothing* (2012, ST); *Coriolanus* (2013, ST)	0.80 mock trials per year (7.5 years)
Paul Michel (Federal Circuit)	5	*An Enemy of the People* (2006, ST), a play by Henrik Ibsen; *Edward II* (2007, ST), a play by Christopher Marlowe; *Trial of Socrates* (2008, ST), based on the *Apology* and *Crito* by Plato, and *Memorabilia* and the *Apology* by Xenophon; *Twelfth Night* (2009, ST); *Henry V* (2010, ST)	0.30 mock trials per year (16.5 years)
Merrick Garland (D.C. Circuit)	5	*Henry IV: Parts I and II* (2004, ST); *Henry V* (2010, ST); *An Ideal Husband* (2011, ST), a play by Oscar Wilde; *Much Ado About Nothing* (2012, ST); *Coriolanus* (2013, ST)	0.29 mock trials per year (17 years)
David Tatel (D.C. Circuit)	4	*Bradwell v. Illinois* (1998); Henry V (2010, ST); *An Ideal Husband* (2011, ST), a play by Oscar Wilde; *Much Ado About Nothing* (2012, ST)	0.21 mock trials per year (19 years)
Douglas Ginsburg (D.C. Circuit)	4	*An Enemy of the People* (2006, ST), a play by Henrik Ibsen; *An Ideal Husband* (2011, ST), a play by Oscar Wilde; *Much Ado About Nothing* (2012, ST); *Coriolanus* (2013, ST)	0.20 mock trials per year (20 years)

Alan Lourie (Federal Circuit)	2	*An Enemy of the People* (2006, ST), a play by Henrik Ibsen; *Edward II* (2007, ST), a play by Christopher Marlowe	0.10 mock trials per year (20 years)
Pauline Newman (Federal Circuit)	2	*An Enemy of the People* (2006, ST), a play by Henrik Ibsen; *Edward II* (2007, ST), a play by Christopher Marlowe	0.10 mock trials per year (20 years)
Kent Jordan (Third Circuit)	1	*Hart v. University of Kentucky* (2008), a fictitious case created by Yale law students about the legality of a proposed affirmative action policy	0.09 mock trials per year (11 years)
Robert King (Fourth Circuit)	1	*West Virginia v. Virginia* (2003), a fictitious case about the constitutionality of the admission of West Virginia based on attorney briefs addressing historical evidence	0.07 mock trials per year (15 years)
Martin Blane Michael (Fourth Circuit)	1	*West Virginia v. Virginia* (2003), a fictitious case about the constitutionality of the admission of West Virginia based on attorney briefs addressing historical evidence	0.06 mock trials per year (17 years)
Janice Rogers Brown (D.C. Circuit)	1	*Henry V* (2010, ST)	0.06 mock trials per year (17.5 years)
William Bauer (Seventh Circuit)	1	*Retrial of Socrates* (2013), based on the *Apology* by Plato	0.05 mock trials per year (20 years)
Harry Edwards (D.C. Circuit)	1	*Richard III* (2003, ST)	0.05 mock trials per year (20 years)
Dennis Jacobs (Second Circuit)	1	*Trial of Socrates* (2011), based on the *Apology*, *Crito*, *Euthyphro*, and *Phaedo* by Plato, *Memorabilia* by Xenophon, and *The Clouds* by Aristophanes	0.05 mock trials per year (20 years)
Richard Posner (Seventh Circuit)	1	*Retrial of Socrates* (2013), based on the *Apology* by Plato	0.05 mock trials per year (20 years)

Jane Richards Roth (Third Circuit)	1	*Hart v. University of Kentucky* (2008), a fictitious case created by Yale law students about the legality of a proposed affirmative action policy	0.05 mock trials per year (20 years)
Judith Rogers (D.C. Circuit)	1	*Bradwell v. Illinois* (1998)	0.05 mock trials per year (20 years)
Laurence Silberman (D.C. Circuit)	1	*Othello* (2005, ST)	0.05 mock trials per year (20 years)
Delores Sloviter (Third Circuit)	1	*Hart v. University of Kentucky* (2008), a fictitious case created by Yale law students about the legality of a proposed affirmative action policy	0.05 mock trials per year (20 years)

U.S. District Court Judge (District)	**Number of Appearances as Judge**	**Mock Trial(s) ("ST" = sponsored by Shakespeare Theater)**	**Mock Trials per Year of Judicial Service Since 1994 (Years of Judicial Service Since 1994)**
Rosemary Collyer (District of Columbia)	2	*Trial of Socrates* (2008, ST), based on the *Apology* and *Crito* by Plato, and *Memorabilia* and the *Apology* by Xenophon; *Twelfth Night* (2009, ST)	0.18 mock trials per year (11 years)
Gladys Kessler (District of Columbia)	2	*Taming of the Shrew* (1995, ST); *Henry IV: Parts I and II* (2004, ST)	0.10 mock trials per year (20 years)
Richard Leon (District of Columbia)	1	*Trial of Socrates* (2008, ST), based on the *Apology* and *Crito* by Plato, and *Memorabilia* and the *Apology* by Xenophon	0.07 mock trials per year (14 years)
Carol Bagley Amon (Eastern District of New York)	1	*Trial of Socrates* (2011), based on the *Apology*, *Crito*, *Euthyphro*, and *Phaedo* by Plato, *Memorabilia* by Xenophon, and *The Clouds* by Aristophanes	0.05 mock trials per year (20 years)

Loretta Preska (Southern District of New York)	1	*Trial of Socrates* (2011), based on the *Apology*, *Crito*, *Euthyphro*, and *Phaedo* by Plato, *Memorabilia* by Xenophon, and *The Clouds* by Aristophanes	0.05 mock trials per year (20 years)
Frederick Stamp, Jr. (Northern District of West Virginia)	1	*West Virginia v. Virginia* (2003), a fictitious case about the constitutionality of the admission of West Virginia based on attorney briefs addressing historical evidence	0.05 mock trials per year (20 years)
James Zagel (Northern District of Illinois)	1	*Retrial of Mary Surratt* (2011), based on testimony of actress playing Mary Surratt	0.05 mock trials per year (20 years)
Edward Harrington (District of Massachusetts)	1	*Authorship of Shakespeare's Plays* (1993)	0 mock trials per year (20 years)

State Appellate Court Judge (Court)	**Number of Appearances as Judge**	**Mock Trial**	**Mock Trials per Year of Judicial Service Since 1994 (Years of Judicial Service Since 1994)**
Judith Kaye (New York Court of Appeals)	1	*Hart v. University of Kentucky* (2008), a fictitious case created by Yale law students about the legality of a proposed affirmative action policy	0.07 mock trials per year (15 years)
Randall Shepard (Indiana Supreme Court)	1	*Richard III* (1996)	0.06 mock trials per year (18 years)
Thomas Appleton (Illinois Fourth District Appellate Court)	1	*Retrial of Mary Surratt* (2011), based on testimony of actress playing Mary Surratt	0.05 mock trials per year (20 years)

Ronald Castille (Pennsylvania Supreme Court)	1	*Hart v. University of Kentucky* (2008), a fictitious case created by Yale law students about the legality of a proposed affirmative action policy	0.05 mock trials per year (20 years)
Peggy Quince (Florida Supreme Court)	1	*Marital Woes of Henry VIII* (2000), a mock trial that involved lawsuits by the six wives of Henry VIII who argued that they suffered marital torts under contemporary American law	0.05 mock trials per year (20 years)
Frank Sullivan (Indiana Supreme Court)	1	*Court Martial of General George Custer* (1998), based on lawyers' briefs addressing historical evidence	0.05 mock trials per year (18.5 years)

State Trial Court Judge (Court)	**Number of Appearances as Judge**	**Mock Trial**	**Mock Trials per Year of Judicial Service Since 1994 (Years of Judicial Service Since 1994)**
Anna Demacopoulos (State of Illinois, Circuit Court of Cook County)	1	*Retrial of Socrates* (2013), based on the *Apology* by Plato	0.20 mock trials per year (5 years)
Ida Chen (State of Pennsylvania, Philadelphia Court of Common Pleas)	1	*Hart v. University of Kentucky* (2008), a fictitious case created by Yale law students about the legality of a proposed affirmative action policy	0.05 mock trials per year (20 years)

District of Columbia Court of Appeals Judge	Number of Appearances as Judge	Mock Trial(s) ("ST" = sponsored by Shakespeare Theater)	Mock Trials per Year of Judicial Service Since 1994 (Years of Judicial Service Since 1994)
Frank Schwelb	3	*Othello* (2005, ST); *An Enemy of the People* (2006, ST), a play by Henrik Ibsen; *Edward II* (2007, ST), a play by Christopher Marlowe	0.15 mock trials per year (20 years)
Stephen Glickman	1	*Edward II* (2007, ST), a play by Christopher Marlowe	0.07 mock trials per year (14.5 years)
Noel Kramer (on D.C. Superior Court in 1998)	1	*Bradwell v. Illinois* (1998)	0.06 mock trials per year (17.5 years)
Vanessa Ruiz	1	*Bradwell v. Illinois* (1998)	0.05 mock trials per year (19 years)

District of Columbia Superior Court Judge	Number of Appearances as Judge	Mock Trial	Mock Trials per Year of Judicial Service Since 1994 (Years of Judicial Service Since 1994)
Eugene Hamilton	1	*Bradwell v. Illinois (*1998)	0.06 mock trials per year (18 years)
Rufus King III	1	*Bradwell v. Illinois* (1998)	0.05 mock trials per year (20 years)
Stephen Miliken	1	*Bradwell v. Illinois* (1998)	0.05 mock trials per year (20 years)

The online appendix[6] contains additional information about each of the mock trials. Here is an example:

Trial of Thomas Jefferson

Sponsoring Organization; Location of Mock Trial	Association of the Bar of the City of New York; New York, NY
Date of Mock Trial	June 14, 1994
Average Grade	D
Does the mock trial use actors? (number of actors)	No
Is the mock trial based on fabricated events?	No
Is the mock trial based on historical counterfactuals?	No
Number of Participating Judges; Name of Participating Judge	1; William Rehnquist
Number of Participating Trial Attorneys; Names of Participating Trial Attorneys	2; Charles Ogeltree and Drew Days
Number of Jokes by Judges	1
Number of Jokes by Trial Attorneys	5
Nepotism? (Did any of the trial attorneys clerk for one of the participating judges?)	No
Is the mock trial held on a stage?	Yes

[6] *See* APPENDIX CHARTS TO "MOCK TRIALS AND REAL JUSTICES AND JUDGES" (2013), http://www.cardozolawreview.com/content/34-6/MockTrialAppendix.pdf.

Is the mock trial set in modern times and if not, does it refer to modern times?	Yes; The prosecution refers to modern ideas regarding slavery, the status of women, and free speech. The defense points out the issue of applying modern ideas to historical standards.
If not set in modern times, does the mock trial refer to modern law?	N/A
Does the mock trial have witnesses? (number of witnesses)	Yes (2)
Is there a jury and if so, is it the audience?	Yes; Yes
Source	C-SPAN Video Library, *Trial of Thomas Jefferson*, Jun. 14, 1994, http://www.c-spanvideo.org/program/57787-1 (watched Feb. 19, 2013).
Length of Mock Trial	2 hours and 11 minutes
Nature of the Case	Thomas Jefferson was charged with hypocrisy and faced the following counts: 1) subverting the independence of the federal judiciary; 2) siving in the lavish manner of Louis XIV and not following agrarian ideals; and 3) inadequate fidelity to the Bill of Rights.
First RA Grade & Comments	D; The concept of trying Thomas Jefferson for hypocrisy is a bit odd. Apart from courtroom procedure, there is no clear body of law governing a trial for hypocrisy. The historical information conveyed during the trial was accurate.
Second RA Grade & Comments	D; This case is ridiculous for several reasons. Jefferson is charged with hypocrisy as if it is a criminal charge and the audience jury is employed to determine the truth of this charge and whether it substantially impairs Jefferson's historical legacy but there is little substantive discussion of Jefferson's legacy. Additionally, it seems unfair to evaluate charges of hypocrisy against Jefferson roughly two centuries after he lived. Finally, Chief Justice Rehnquist interrupted the examination of the defense's witness with a question of his own and also decided the jury's verdict by clumsily counting the many hands of the audience from his bench.

It is apparent from Table 1 that most of the judges in public mock trials are Supreme Court Justices. Table 2 nails down this point by reporting the average participation rates of judges in the different court systems that have contributed judges to such trials.

Table 2
Average Participation Rates by Court System

Court Level	Number of Participating Justices or Judges	Average Number of Mock Trials per Year of Judicial Service by Participating Justices or Judges Since 1994
U.S. Supreme Court	10	0.29 mock trials per year
U.S. Court of Appeals	19	0.14 mock trials per year
State Trial Court	2	0.13 mock trials per year
U.S. District Court	7	0.08 mock trials per year
District of Columbia Court of Appeals	4	0.08 mock trials per year
State Appellate Court	6	0.05 mock trials per year
District of Columbia Superior Court	3	0.05 mock trials per year

Table 3 presents a number of summary statistics for the sample. Notice the frequency of jokes—one almost every five minutes, on average.

Table 3
Summary Statistics

Number of Mock Trials (Including Appeals)	43
Number That Were Trials Rather Than Appeals	23
Number That Were Appeals	17
Average Length of Mock Trials	88 minutes
Average Number of Judges Participating	2.74
Average Number of Jokes by Judges	5.88
Average Number of Jokes by Lawyers	10.33
Average Number of Minutes Between Jokes (Average Length of Trial in Minutes Divided by Average Number of Judge Plus Lawyer Jokes Per Trial)	5.43
Percentage of Mock Trials with Juries	40.0%
Percentage of Mock Trials with Witnesses	37.5%
Percentage of Mock Trials with Briefs by Lawyers	33.33%
Percentage of Trials That Defendant Won	43.48%
Percentage of Trials That Defendant Lost	39.13%
Percentage of Trials That Ended in Ties or No Decision	17.39%
Percentage of Appeals That Appellant Won	50.0%
Percentage of Appeals That Appellant Lost	42.86%
Percentage of Appeals That Ended in Ties or No Decision	7.14%
Average Grade per Mock Trial	C

Notes:
1. I was unable to determine whether three trials were trials or appeals, whether there were juries or witnesses in those trials, and the decisions in them. They were *Coriolanus* (2000), *Richard III* (2003), and *Henry IV: Parts I and II* (2004).
2. As of the writing of this Essay, I was also unable to discover the decisions in three other mock trials. The Shakespeare Theatre's upcoming *Coriolanus* mock trial and the Supreme Court Historical Society's reenactment of *Flood v. Kuhn* will occur in May 2013 and therefore the decisions in these cases have yet to be issued.

In addition, the verdict is not known in Iago's 2005 appeal of his conviction of murder for aiding and abetting the deaths of Othello and Desdemona, because the DVD that we received from the Shakespeare Theatre Company ended when the judges recessed for deliberation.

3. The average number of jokes by judges and lawyers and the average grade per mock trial were extrapolated from the mock trials for which videos or transcripts were available.

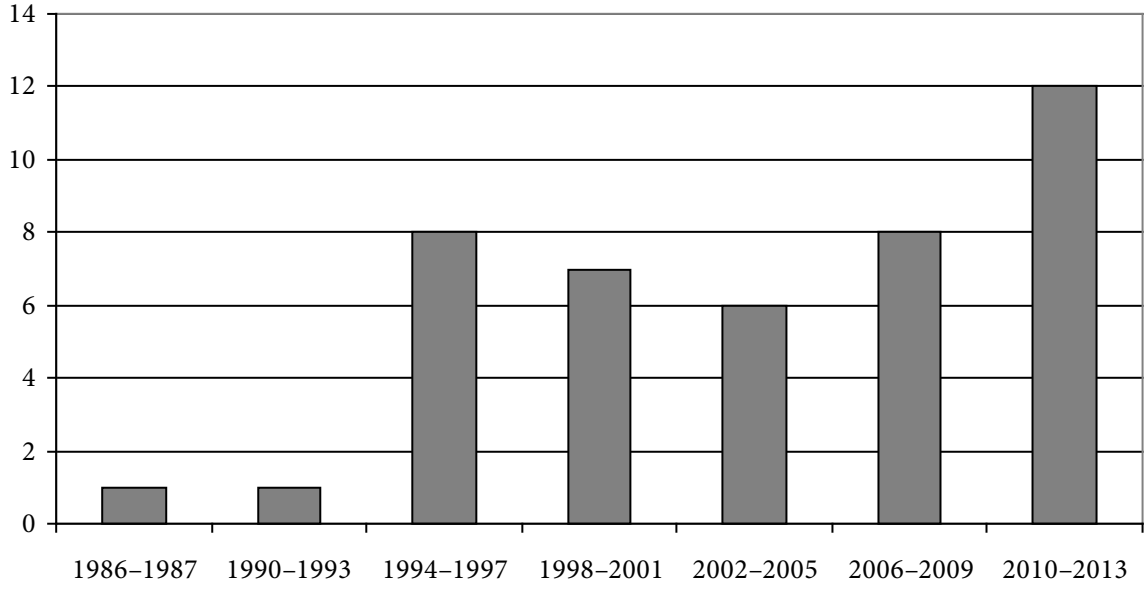
4. The percentage of mock trials in which there were lawyers' briefs was obtained by a similar extrapolation.

5. And likewise the average length of the mock trials.

II. TREND

As shown in Figure 1, the number of public mock trials took a huge jump beginning in 1994, and after a decline, has increased significantly over the last decade.

Figure 1
Mock Trials Since 1986



Although the role of the Shakespeare Theatre Company has undoubtedly been important in the rise of the public mock trial phenomenon, judges and Justices are constantly being asked to participate in extrajudicial activities, and frequently they decline; why are they willing to participate in public mock trials? Why in particular are Supreme Court Justices willing, and indeed more willing, than other judges to participate? The obvious answer to the second question is that promoters of mock trials prefer Justices to judges and so bombard the former with invitations; but nothing forces them to accept. I am not sure why they accept, but I suspect it's the same reason why nowadays Supreme Court Justices engage in book tours and ethnic-pride activities, write autobiographies and memoirs, authorize biographies, give talks to high school students, give interviews to journalists, debate with other Justices on television, and speechify all over the world.[7] They have succumbed to the celebrity culture that has become so conspicuous a feature of modern American society. "[T]here are no more wallflowers on the Supreme Court."[8]

A combination of the Court's light caseload of recent years, the decline in the value attached to dignity and formality in today's America, the diminished respect for authority, and the growth of the electronic media, which has increased the access of officials including judges to the media, has eroded the culture of oracular reticence and remoteness that judges and Justices once embraced. An additional factor is that modern technology enables a video to be made of a mock trial, with good production values, at very little cost, enabling the trial to become a media event with a much larger potential audience than a courtroom or studio performance. However, as far as I can determine, the audience for these videos is actually very small.

III. CRITIQUE

I move now from description and explanation to critique. I begin with a concern that is common to all four types of public mock trial: deportment. The lawyers in these trials usually take their roles seriously,

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7 *See* RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT IN THE MEDIA AGE (2011); *see also* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 37–39 (2013); WILLIAM HALTOM, REPORTING ON THE COURTS: HOW THE MASS MEDIA COVERS JUDICIAL ACTIONS (1998); ELLIOT E. SLOTNICK & JENNIFER A. SEGAL, TELEVISION NEWS AND THE SUPREME COURT (1998); Adam Liptak, *Justice Stevens Is off the Bench but Not out of Opinions*, N.Y. TIMES, May 31, 2011, at A14; Adam Liptak, *$1.175 Million to Sotomayor for Memoir, Forms Reveal*, N.Y. TIMES, May 28, 2011, at A16.

8 Richard A. Posner, *The Court of Celebrity*, NEW REPUBLIC, May 5, 2011, at 23, 25.

for obvious professional reasons: especially but not only if a video is made of the trial, the trial gives them an opportunity to advertise their forensic skills and to be seen to associate with judges, especially Supreme Court Justices. Some even list participation in a mock trial in their curricula vitae. There have been some outstanding oral arguments by lawyers in mock trials, such as the argument by Washington lawyer Abe Krash on behalf of Socrates in the 2008 trial of Socrates.

The judges and Justices tend not to take their role in the mock trials as seriously as the lawyers do, though there are exceptions, such as Justice Alito in that same trial of Socrates. Often they joke and clown—and when they do, the lawyers often take this to be an invitation, which they gladly accept, to join in the fun, provoking laughter by the audience. This is low comedy, and I find it distasteful. I understand the temptation: the trials are generally remote in time and culture from modern America, and the contrast with modern law and modern legal procedures invites cheap humor. By "cheap humor" I mean the kind of jokes that circumstances enable someone who is not witty to make. It is a type of joking that demeans the joker, even if he or she wears a robe. But we live in a joking culture; and it is a remarkable feature of American society that highly educated businessmen and even professionals, including judges and other government officials, often have the tastes and manners—the culture—of the common man and woman. They ape their intellectual inferiors.

My saying that the lawyers take mock trials more seriously than the judges do may seem inconsistent with the statistics on jokes in Table 3, which show a much higher average number of jokes per trial by lawyers than by judges. But this is misleading: the lawyers do much more talking in the trials than the judges do, and so tell more jokes, yet less frequently. Also, as shown in the next table, the ratio of judge to lawyer jokes differs crucially in trials and appeal, but again this is misleading—the judges talk more in appellate proceedings and also there usually are more judges in those proceedings.

Table 4
Judge Jokes in Mock Trials

	Number of Mock Trials Watched by RAs	Average Number of Jokes by Judges
Mock Trials That Were Trials Rather Than Appeals	10	2.70
Mock Trials That Were Appeals Rather Than Trials	8	9.88
Mock Trials Sponsored by the Shakespeare Theatre Company	8	8.38
Mock Trials Not Sponsored by the Shakespeare Theatre Company	10	3.90

Of the four types of public mock trial (the reenactment of a real trial; the trial of a historical event that might have been charged as a crime or other legal wrong but wasn't; the trial of a fictional character for a crime he might have been charged with had he been a real person; and the trial of a historical controversy unrelated to law), the last is the most questionable. The use of the trial format to answer a historical question misunderstands the limits and function of legal trials, and thus plays into the hands of, for example, Holocaust deniers, who "evoke the rhetoric of attorneys practiced in the art of adversarial litigation . . . By casting the trial as a truth-seeking device, the [deniers] are thus able to present the most tendentious and partisan hyperbole as a proper contribution to public debate and historical instruction."[9] As Lawrence Douglas, whom I am quoting, points out, criminal justice (and civil as well) "has long been dedicated to values such as protecting the dignity and autonomy of the accused that may actually disable the pursuit of truth in a particular case."[10] In other words, the trial suffers from the same epistemological inadequacies as narrative, which it employs and resembles. The rules of evidence truncate the narrative of guilt in a trial.

9 RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE 371 (1st paperback ed. 2003) (alterations in original) (quoting Lawrence Douglas).

10 Lawrence Douglas, *The Memory of Judgment: The Law, the Holocaust, and Denial*, 7 HIST. & MEMORY 100, 110 (1995).

Supreme Court Justices who participate in mock trials of Shakespeare's authorship[11] confer legitimacy on a misuse of trial procedure that undermines standards of historical accuracy. It also invites extraordinary presumption. Justices who would think it absurdly presumptuous for literary scholars to opine on a legal question deliver confident denials of Shakespeare's authorship of the plays attributed to him, ignorant of or indifferent to the opinion of the experts that the denial of his authorship is a project of cranks.[12]

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11 Irvin Molotsky, *You-Know-Who Wrote the Plays, Judges Say*, N.Y. TIMES, Sept. 26, 1987, at 1; Amy E. Schwartz, *Three Justices, a Poetry-Starved Crowd and Shakespeare*, WASH. POST, Oct. 14, 1987, at A19; *see also* Jess Bravin, *Supreme Night Court: Judges Relax by Trying the Fictitious and the Dead*, WALL ST. J., Mar. 14, 2011, at A1; Ray Moseley, *After More Than 400 Years, Wives of Henry VIII Have Their Day in Court at Mock Trial*, TRIB. NEWS SERV., July 18, 2000; Veralyn Kinzer, *Not Guilty! Chief Justice, IU Law Prof Exonerate Richard III*, IND. UNIV. HOMEPAGES, July 8, 2008, http://www.iuinfo.indiana.edu/homepages/1108/1108text/king.htm.

12 The scholarly literature debunking denials of Shakespeare's authorship is extensive and utterly convincing. *See, e.g.*, H.N. Gibson, *The Shakespeare Claimants: A Critical Survey of the Four Principal Theories Concerning the Authorship of the Shakespearean Plays* (1971) (noting the illogicality of assuming that someone other than Shakespeare wrote his plays). No concealed playwright would have rationally chosen Shakespeare for public attribution because he was a member of the company producing the plays attributed to him.

> He would constantly find himself in embarrassing situations, such as being called upon to elucidate some obscure point or to rewrite part of a scene on the spot, and the recipient of other similar requests with which he would be totally unable to comply. If the "true author" had employed a cover at all, he would have selected for the purpose some minor man of letters who had no connection whatever with the practical side of theatre.

Id. at 301. Gibson concludes that the doubting "theorists' cases therefore all fall completely to the ground [because] most of their arguments can only be described as puerile or absurd, and those that rise above this level never attain to the status of evidence, only of an opinion about the interpretation of certain facts." *Id.* at 305.

Scott McRae lists the improbable assumptions underlying the Oxfordian theory (the theory that Edward DeVere, the Earl of Oxford, as the author of Shakespeare's plays:

> 1. For some reason yet to be determined, writing plays and narrative poems anonymously was unsatisfactory for the earl, so he enlisted William Shakespeare as his front man.
>
> 2. All evidence of any connection between the two has been either lost or destroyed.
>
> 3. People acquainted with the semi-literate actor never realized he couldn't write the witty and elegant plays, or if they did, they kept their mouths shut. Shakespeare was able to convince all those around him of his authorship or to enlist them in the plot.
>
> 4. And what a plot it must have been! Beginning in 1593, when the name "William Shakespeare" was first attached to a production of the Author's quill (the narrative poem *Venus and Adonis*), the hoax continued for decades, after the Author's death, after the death of the front man, after the publication of the First Folio–as long as anyone who knew the truth survived. The scheme was so successful that no public doubts about Shakespeare's authorship arose for 232 years and the actual Author was not identified for 72 more.
>
> 5. As a poet, the earl [of Oxford] made huge leaps, including changing his characteristic rhyming pattern. The extant poems by de Vere, all of which are plainly inferior to the Author's, must have been composed when the earl was a young man.

I also have reservations about the second and third varieties of the public mock trial. A trial of a historical personage's actions that didn't result in a trial, or a trial of a nonexistent person's actions, is unanchored in the record of a legal proceeding. To impart any realism—any educational value—to such a trial requires a degree of research disproportionate to the occasion. Often the trial is of conduct that cannot be situated in the chosen historical or fictional context, as in the mock trial of Jefferson for hypocrisy or of Hamlet for murdering Polonius. There was no defense of insanity in medieval Denmark, where the play of *Hamlet* is set, or in early modern England, where the play was written and performed. And while Hamlet has bouts of wild talk—

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6. In his forties, he wrote dedications to the Earl of Southampton, a man whom he was trying to marry to his daughter, first pretending to be a solicitous poet and then pretending their relationship had grown closer.

7. He wrote plays for one company of actors while patronizing another, denying his own players [sic] popular works like *Hamlet*.

8. As a writer, he was not influenced by Beaumont, or Fletcher, or Johnson, or Middleton, or Stuart court masques.

9. Topical references that date some plays to the late 1590s were added at the time of the performance, not when the plays were written.

10. The order of composition of the plays, as determined by the development of their poetry, is wrong. *Othello*, *King Lear*, *Macbeth*, *Measure for Measure*, and *The Tempest* must have been his last plays, all written in the final year of his life, while plays conventionally dated between 1604 and 1611, like *Antony and Cleopatra*, *Coriolanus*, *Cymbeline*, and *The Winter's Tale*, were really composed earlier.

11. Plays like *Timon of Athens*, *Pericles*, *Henry VIII*, and *The Two Noble Kinsmen* were not collaborations, but were left unfinished at the time of his death and completed by other hands.

12. The evidences that the Strachey letter of 1609 was a principal source for *The Tempest* are just astounding coincidences.

13. Shakespeare released the plays at a rate of about two a year even after Oxford's death, thus *The Winter's Tale* was not licensed until 1610 and *Henry VIII* was called a "new" play in 1613.

14. Shakespeare or someone else changed Oxford's characteristic spelling for every published work.

SCOTT MCCREA, THE CASE FOR SHAKESPEARE: THE END OF THE AUTHORSHIP QUESTION 215–16 (2005); *see also* JACK LYNCH, BECOMING SHAKESPEARE: THE UNLIKELY AFTERLIFE THAT TURNED A PROVINCIAL PLAYWRIGHT INTO THE BARD (2009); IRVIN LEIGH MATUS, SHAKESPEARE, IN FACT (1994); JAMES SHAPIRO, CONTESTED WILL: WHO WROTE SHAKESPEARE? (2010); FRANK W. WADSWORTH, THE POACHER FROM STRATFORD: A PARTIAL ACCOUNT OF THE CONTROVERSY OVER THE AUTHORSHIP OF SHAKESPEARE'S PLAYS (1958); *Shakespeare Authorship Question*, WIKIPEDIA, http://en.wikipedia.org/wiki/Shakespeare_authorship_question#CITEREFGibson2005 (last modified June 7, 2013).

Yet of the Justices past and present who have opined on the question, four claim that Shakespeare was not the author of the plays attributed to him (Blackmun, O'Connor, Scalia, and Stevens), of whom all but O'Connor attribute the plays to DeVere, while three—Brennan, Breyer, and Kennedy—believe that Shakespeare was the author. *See infra* text accompanying notes 19–20.

may even be slightly bipolar—his desire to kill Claudius, the murderer of Hamlet's father and seducer of Hamlet's mother, is sane, and he kills Polonius instead only because he mistakes him for Claudius. Polonius is behind a drape when Hamlet, hearing him shout, stabs him through the drape with his sword, killing him. All this said, the lawyers in the Shakespeare Theatre Company's 2007 trial of Hamlet, and the psychiatrist witness, managed to accomplish what I would have thought impossible—make an imaginary trial an occasion for serious reflection on issues of criminal responsibility.

Reenactments of real trials are the most promising form of the public mock trial, though they too often miscarry. The participants, notably including the judges, find it almost impossible to refrain from joking and to avoid anachronism—that is, to avoid trying the case in whole or part under modern law. The anachronism is the basis of the jokes—the cheap humor that pervades the mock trial genre. Unless the participants in reenactments of historical trials stick as close to the record of the original trial, and the legal forms, rules, and culture that governed that trial, as circumstances permit, the trial is likely to be not a reenactment but a low comedy.

Table 4 provides letter grades of the eighty-seven mock trials of which my research assistants and I were able to obtain in DVDs, online videos, or, in one case, a complete transcript of the trial as well. Each trial was graded by two of my research assistants. I had time to view only eight of the DVDs. I gave the trials grades (indicated below the research assistants' average grades, in the second column of the table) without looking at the grades the research assistants had given them. For obvious reasons, the trial of Socrates at which I presided is not graded. The trials are listed in order (from top to bottom) of the grades given by the research assistants.

Table 4
Grades for Eighteen Mock Trials

Mock Trial	Average RA Grade	RA Grades 1 & 2	DVD, Web Link to Video, or Transcript
Richard III (1996)	A (4) A (4)	A, A	THE TRIAL OF RICHARD III (Fred H. Cate & David C. Williams eds., 1997) (transcript). *Trial of Richard III*, C-SPAN VIDEO LIBRARY (Oct. 26, 1996), http://www.c-spanvideo.org/program/76271-1
Hart v. University of Kentucky (2008)	A− (3.7)	A−, A−	*Racial Preferences in Higher Education*, C-SPAN VIDEO LIBRARY (Mar. 7, 2008), http://www.c-spanvideo.org/program/Prefer
Trial of Lizzie Borden (1997)	B+ (3.3)	B+, B+	*Lizzie Borden Moot Court*, C-SPAN VIDEO LIBRARY (Sept. 16, 1997), http://www.c-span video.org/program/91387-1
Richard III (1997)	B+ (3.3)	B+, B	*Inheritance Rights of Richard III*, C-SPAN VIDEO LIBRARY (June 4, 1997), http://www.c-spanvideo.org/program/Inhe
Trial of Socrates (2008)	B (3)	B+, B−	Shakespeare Theatre Company, *Trial of Socrates: City of Athens v. Socrates* (Sept. 16, 2008)
Trial of Socrates (2011)	B (3) B− (2.7)	B+, B−	Onassis Foundation, *Trial of Socrates* (May 12, 2011) (Onassis Foundation DVD)
Bradwell v. Illinois (1998)	B− (2.7)	B, C+	*Book Discussion on* Bradwell v. Illinois, C-SPAN VIDEO LIBRARY (Apr. 4, 1998), http://www.c-spanvideo.org/program/103281-1
Hamlet (2007)	C (2) A (4)	C−, C+	Shakespeare Theatre Company, *Hamlet Mock Trial* (Mar. 15, 2007)
Hamlet (1994)	C (2)	C+, D−	*Trial of Hamlet*, C-SPAN VIDEO LIBRARY (Mar. 17, 1994), http://www.c-spanvideo.org/program/55363-1
Shakespeare: Author or Pseudonym (1987)	C− (1.7)	D, C	*Shakespeare: Author or Pseudonym?*, C-SPAN VIDEO LIBRARY (Nov. 25, 1987), http://www.c-spanvideo.org/program/618-1
An Enemy of the People (2006)	C− (1.7) C (2)	D+, C−	Shakespeare Theatre Company, *An Enemy of the People:* Stockholm v. Stockholm (Oct. 18, 2006)

Court Martial of General George Custer (1998)	D+ (1.3)	D−, C	C-SPAN Video Library, *Court Martial of General Custer*, Sept. 18, 1998, http://www.c-spanvideo.org/program/Martia
Shakespeare Authorship Trial (1993)	D+ (1.3)	C−, D	*Boston Bar Association Mock Trial*, PBS: FRONTLINE (Nov. 12, 1993), http://www.pbs.org/wgbh/pages/frontline/shakespeare/debates/bostondebate.html (transcript)
Retrial of Mary Surratt (2011)	D+ (1.3)	D+, D	*Re-trial of Mary Surratt*, C-SPAN VIDEO LIBRARY (Sept. 23, 2011), http://www.c-span video.org/program/301727-1
Trial of Thomas Jefferson (1994)	D (1)	D, D	*Trial of Thomas Jefferson*, C-SPAN VIDEO LIBRARY (Jun. 14, 1994), http://www.c-span video.org/program/57787-1
Othello (2005)	D (1) C+ (2.3)	D, D	Shakespeare Theatre Company, *Othello:* Iago v. Republic of Venice (Oct. 18, 2005)
Edward II (2007)	D (1) D (1)	D−, D	Shakespeare Theatre Company, *Edward II* (Nov. 14, 2007)
Henry V (2010)	F (0) F (0)	F, F	*Judgment at Agincourt*, C-SPAN VIDEO LIBRARY (Mar. 16, 2010), http://www.c-spanvideo.org/program/292554-1

To compute an average of the average grades for all eighteen mock trials required fixing a numerical equivalent to a letter grade. The numerical equivalent was 0 for F, 1 for D, 2 for C, 3 for B, and 4 for A. A plus grade added 0.3 (so C+ = 2.3) and a minus grade subtracted 0.3 (so B− = 2.7). For all eighteen mock trials, the average of the average grades given by the research assistants was 2.02—a C.

The research assistants graded slightly more harshly than I did the eight trials that I also graded. Notably they gave the 2007 trial of Hamlet a C; I gave it an A. My average grade for the eight trials was 2.4 (C+); their average grade for the same trials was 2, that is, C. But these are all very small samples. Indeed without the discrepancy in the grading of the trial of Hamlet, my average grade would have been 2.1, and thus C, to the research assistants' 2, and thus also C.[13]

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13 The research assistants' narrative evaluations for the trial of Hamlet are worth reading: First Research Assistants' Grade & Comments:

> C−; This principal issue in this case was whether Hamlet had "schitzoaffective disorder" and experienced delusions, hallucinations, and thought-disorientation in addition to depression. While the arguments were serious, it seems silly to use modern clinical standards to diagnose a literary character from over four centuries

The worst trial of the half dozen that I viewed, which both the research assistants and I gave a grade of D to, was the trial of fictional U.S. President Edward Plantagenet, Jr., loosely modeled on King Edward II in Christopher Marlowe's play of that name. The comments of the research assistants about this mock trial are worth quoting in full:

> Nature of the Case: The principal issue in this case was an impeachment trial of President Edward Plantagenet, Jr. in the U.S. Senate for an adulterous homosexual affair with his Attorney General that allegedly resulted in the President's failure to faithfully execute the laws of the U.S. The President was also prosecuted for firing three U.S. Attorneys without just cause.
> First Research Assistant's Grade & Comments: D–; This mock trial is absurd because it conflates aspects of *Edward II* with events from the Bush administration relating to the political firing of U.S. Attorneys. More ridiculous still, the record assumes the counterfactual that the United States was invaded by the French, Irish, and Danish and assumes that the First Lady engaged in an affair with President Plantagenet's Vice President while he made several assassination attempts on the administration's Attorney General. What a soap opera! The time period for this mock trial's setting was also unclear.
> Second Research Assistant's Grade & Comments: D; Once again, we have a mock trial that decimates a canonical work by transposing it into the 21st century. Edward II is President, and his lover is the Attorney General. The proceedings don't elucidate the play. Rather the play functions to add humor to the proceedings. As Justice

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ago. Several other weak points for this trial were 1) Justice Kennedy asked an expert witness two questions during his testimony; 2) there was an American flag and an incredibly large banner of William Shakespeare on stage; 3) Dr. Alan Stone offered a humorous plug for his new book during his testimony; 4) an actor played Hamlet and exhibited defiant and cocky body language while he sat between the opposing trial attorneys; and 5) since the jury was deadlocked at six-six, Justice Kennedy "remand[ed] the case to the pages of literary heritage," so Hamlet could be tried yet again.

Second Research Assistant's Grade & Comments:

> C+; This trial started terribly. Renaissance music plays as the parties enter the stage. Then Hamlet arrives in costume, sulking of course. Justice Kennedy immediately makes the familiar jokes about how we're all citizens of Renaissance Europe, telling the jury about the foreign land of California, etc. As the trial moves forward, however, things improve. Justice Kennedy provides clear instructions to the jury and lays out the burden that must be met, which provides a great roadmap for the audience. There is no jumping back and forth between Renaissance and modern law. The lawyers and expert witnesses keep their arguments close to the text, analyzing the language not just the basic plot. The expert witnesses provide interesting lessons on the relationship between psychology and law. Of course, there are still silly pieces. One of the expert witnesses uses the trial as an opportunity to advertise his new book. Kennedy and the lawyers make a few jokes, but most of Kennedy's jokes are rather clever. I especially enjoyed when he remanded the case "to the pages of our literary heritage."

> Ginsburg acknowledges in the first five minutes, this mock trial doesn't represent a proper modern impeachment trial. Justice Ginsburg will ask questions and vote, and only a handful of senators are present. As a result, the viewers don't even learn about the American impeachment process. The arguments are silly. The judges and parties can't stop laughing about whether adultery with one's Attorney General is part of executive privilege. When they aren't laughing about that, they're busy making bad jokes about historical sex scandals.

In the one trial that the research assistants rated an F, and I as well, the issue was whether Henry V had violated the Alien Tort Statute (which of course was not enacted until three hundred years later) by executing French prisoners of war at the Battle of Agincourt. Apparently Henry feared that the French army was regrouping for a further attack on his very small force (the first attack having failed as a result of the skill of the English archers, and the muddy field) and that while the English were defending against that attack the prisoners would pick up weapons strewn on the field of battle and attack the English from the rear. The mock trial was a fifteenth-century appeal by the nonexistent French Civil Liberties Union to the nonexistent Supreme Court of the nonexistent Amalgamated Kingdom of England and France. Here are the research assistants' grades and pointed comments:

> First Research Assistant's Grade & Comments: F; The judges very frequently laughed at the jokes of the trial attorneys and made jokes about the facts of their case that prompted applause and laughter from the audience. Some of the judges' jokes were inappropriate because they openly poked fun at divisive political statements or discredited judges' authority through unprofessional or especially superficial comments. The judges had the opportunity to offer so many jokes because the law in force was confusingly unclear in this case. The trial attorneys based their arguments on Salic Law, the Alien Tort Statute, and flattering deference to Justice Ginsburg's [she was the presiding judge] interpretation of the Equal Protections clause.
>
> Second Research Assistant's Grade & Comments: F; This is amongst the silliest videos I've ever seen. From the bribe gift basket that the Archbishop sent the Justices to the translation of "*l'état c'est moi*" as "sue me, and I'll have you beheaded," the whole thing felt like an absurd piece of dinner theater. It was enjoyable to watch but thoroughly devoid of serious content.

Silliness is an all too frequent feature of the public mock trial. I will give a few more examples:

In the trial based (loosely) on Ibsen's play *The Enemy of the People*, the lawyer representing Secretary of Housing and Urban Development Peter Stockmann in his wrongful termination suit filed by Dr. Thomas

Stockmann, offered the following hypothetical example in his discussion of the *Garcetti* rule:[14]

> One way to explain the way this rule works is to look at one of the most famous whistle blowers in our history. Under the *Garcetti* rule, if Chicken Little works for the Federal Trade Commission or the Food and Drug Administration, Chicken Little as a citizen is free to give interviews to cable television, to talk to the tabloids, to run through the streets of Washington, D.C. protected by the Constitution . . . . [If] I, I had actually created a bureau of national calamities with a division of falling sky, he would be the deputy. And if he worked for that particular agency of government, he would not be free and protected by the Constitution without the permission of his superiors.

In the trial of President Plantagenet, one of the judges asked one of the lawyers:

> Well, counsel, speaking of adultery [the affair between the President and his Attorney General], if we replace, if we remove President Plantagenet [for ignoring his duties as President, which resulted in the loss of American territory in Ireland, Scotland, and France], we will replace him with an adulterer, we will replace him not only with an adulterer but the person who committed adultery with the President's wife and who committed high crimes and misdemeanors that dwarfed the adultery, leading an insurrection, assault with attempt to kill the Attorney General while armed and numerous other offenses. Do you, does the House want us to go from bad to worse?

And here is an exchange between Supreme Court Justices and one of the lawyers in the trial of Henry V:

> Justice: I must ask you why not the Bible [as evidence that Salic Law did not apply to Henry's legal justification for invading France.]. I mean, I think you would say, "the Bible is it." It is not just some extra thing that the Archbishop added on. He ended his whole presentation with the Book of Numbers.
>
> Lawyer: Well that is correct and we would certainly say that the passage from Numbers is one of two broader principles of law that trump Salic Law, the other being the principle of Equal Protection as most famously articulated by Justice Ginsburg, I don't know if she has any relation on the American Supreme Court . . . .
>
> Justice: Are you asking us to take Justice Ginsburg's 1996 decision and hold it retroactive to the fifteenth century?

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14 *Garcetti v. Ceballos* holds that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. 410, 421 (2006).

> Lawyer: Well, this Court has always, this Court has been very foresightful in the past and has been willing to look at certain sources of foreign law and, by that I mean respected sources, such as the American Supreme Court. And not to bodies of French or Dutch law.
>
> Another Justice: Let me raise this irrelevant point. As to the treatment of women, how old was Catherine [of Valois; Henry V's wife] at the time of these events?
>
> Lawyer: She was relatively young but not by the standards of the day.
>
> Justice: Your client is a pedophile.
>
> Lawyer: Well, I will point out that this marriage was arranged by her father so . . . .
>
> Other Judge off camera: Consent is not really a defense.
>
> Justice: Can I ask you a preliminary question? I want to show you and the audience the brief of the petitioner which is this [holding up brief], very nicely bound, blue. And now here is your brief [stapled legal paper with black text]. Now I assume that you are moving to proceed in forma pauperis. And this is because your client is a rash young man who has bankrupted his country.
>
> Lawyer: Well, at least in regard to the Archbishop, after he made his donations to the Global War Crimes Tribunals and paid for your gift baskets [to bribe the judges] he really had no money left over.
>
> Justice, delivering the Court's verdict: I must tell you that we deliberated first on the justification for the war and we were about to report to you a decision when one of us found a huge package from the Archbishop [another judge off screen says "this went too far"] and on that basis the Court is evenly divided.

The reference to pedophilia is absurd, quite apart from the fact that Catherine was eighteen when Henry V married her. Royal marriages were acts of State, and child brides of kings were not uncommon. For example, Isabella of Valois was only six when King Richard II married her. There was no expectation of sex with a child bride.

Just two more examples of mock trial silliness:

At the Supreme Court Historical Society's 2010 reenactment of *Ware v. Hylton*,[15] a case decided by the Supreme Court in 1796, the presiding Justice "surrounded himself on the bench with a semicircle of Green Bag Bobbleheads, including Justices Wilson, and Cushing; the bobblehead of Chief Justice Jay to represent Justice Iredell; and the bobblehead of Chief Justice Rutledge to represent Justice Chase."[16]

At the court martial of General Custer, the judges entered and left

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15 3 U.S. (3 Dall.) 199 (1796).

16 Josh Blackman, *Supreme Court Historical Society Frank C. Jones Reenactment Series Lecture of* Ware v. Hylton, JOSH BLACKMAN'S BLOG (Oct. 22, 2010), http://joshblackman.com/blog/2010/10/22/supreme-court-historical-society-frank-c-jones-reenactment-series-lecture-of-ware-v-hylton.

the courtroom to the music of the Seventh Cavalry Regiment's battle song, the "Garryowen," and wore military uniforms characteristic of the 1870s.

IV. THE TRIAL OF SOCRATES, 2013

I will describe the trial of Socrates in which I participated in some detail, in an effort to convey my view of how best to make a public mock trial a dignified, serious, and educational entertainment.

The trial, a benefit for the National Hellenic Museum in Chicago, was conducted on the evening of January 31, 2013, in the ballroom of the Palmer House, a well-known Chicago hotel; the audience was too large to accommodate in a courtroom. I was asked to be the presiding judge on a panel of three judges. The other two judges were my Seventh Circuit colleague William Bauer[17] and Cook County Circuit Judge (that is, a state trial judge) Anna Demacopoulos. The organizers had lined up outstanding Chicago lawyers to be the trial lawyers: for the prosecution, Patrick Fitzgerald (until recently the U.S. Attorney in the Northern District of Illinois) and Patrick Collins, and for the defense Dan Webb (another former U.S. Attorney for the Northern District of Illinois) and Robert Clifford (the President of the Chicago Bar Association). The distinction of the lawyers, and the vitality of Chicago's Greek-origin community, explain the large audience: 850 tickets were sold, most at the posted price of $100 per ticket, though a number of complimentary tickets were given out.

The organizers had also appointed fourteen well-known Chicago lawyers and officials, including aldermen, to be the jury.

As presiding judge, I felt entitled, perhaps presumptuously, to set forth ground rules to govern the trial. I wanted it to be as realistic as circumstances permitted, which meant that there would be no references to modern law, or indeed to any event that occurred after 399 B.C. Complete realism was unattainable. For there were no judges or lawyers in ancient Athens, no rules of evidence, and the barest rules of procedures, and most Athenian law was customary rather than codified. The accusers, private citizens, debated the accused; occasionally there would be witnesses; the outcome of the trial would be decided by majority vote of a large number of jurors (depending on the accusation—500 in a case in which the death penalty might be imposed) of randomly selected Athenian citizens (all male—women weren't

[17] Judge Bauer is a federal court of appeals judge in senior status; I am an active-service judge, which I imagine is why I was designated to preside. Actually, Judge Bauer carries a full caseload, though as a senior judge he is required to carry only one-third of an active judge's caseload.

citizens). The jurors did not deliberate before voting. In a criminal case there would be an indictment drawn up by the accusers but, because there were no judges, there were no jury instructions.

Our mock trial could have dispensed with a judge or judges, though someone would have been needed to explain the accusation and trial procedure to the audience. But we could not have done without lawyers, for the alternative of hiring actors to play Socrates' accusers and Socrates himself was infeasible. Moreover, having prominent lawyers arguing the case was a big part of the attraction of the event to the potential audience. I suspect that a majority of the members of our audience were lawyers.

I wanted no humor in our reenactment, in part on general principles sketched earlier in this Essay but also because the trial of Socrates was a capital trial that ended in a death sentence, and the defendant had been executed: not a laughing matter. The lawyers were unhappy with my suggested ban on references to modern circumstances, and other planners of and participants in the event agreed with them. That led me to modify the ground rules. The rules, together with the opening statement that as presiding judge I gave at the start of the trial, took final form the day before the trial, and were as follows:

> Further Revised Ground Rules for
> Trial of Socrates, Jan. 31
> (with Draft of Introductory Statement)
>
> As this is a benefit for a museum, we want it to be a serious, and so far as possible a realistic, reenactment of Socrates' trial. We want to avoid confusing ancient Athenian law with modern American law, and also to avoid levity; this is a capital case, and the defendant was in fact sentenced to death and executed.
>
> So no relying on the free speech clause of the First Amendment or on modern rules of evidence. Athens had *no* rules of evidence, no burdens of proof, no hearsay rule, no nothing. So, for example, although Athens had amnestied participants in the reign of the Thirty Tyrants (an eight-month, 404 to 403 B.C., tyranny at the end of the Peloponnesian War, ending in the restoration of democracy), there is nothing to prevent comment on Socrates' role as the teacher of Critias and Alcibiades, who were leaders of the tyranny, because there was no counterpart in Athenian law to Fed. R. Evid. 403.
>
> There will be unavoidable departures from realism in our trial, arising primarily from the fact that there were no lawyers or judges in Athens, just parties, witnesses, and jurors. In a trial, speeches, often combining advocacy with testimony, were the only form of evidence or argument permitted. The accuser or accusers (there were no public prosecutors) and the defendant would be the only advocates and often the only witnesses. We do not have actors to play the

accusers or Socrates, and so we must substitute lawyers, and the lawyers' advocacy will take the form of closing arguments. The lawyers will have the biggest speaking roles in the trial.

We need a record as the basis for the lawyers' arguments. That record is by default Plato's *Apology*, essentially the only record of the trial that exists. The *Apology* is incomplete—the speeches of the three accusers are omitted—and it probably is quite inaccurate, since Plato was a biased observer of the trial. Nevertheless, for want of an alternative, the lawyers shall assume that Socrates' statements are accurately reported, as if the *Apology* were a transcript. But the lawyers are free to refer to earlier Greek works, such as Pericles' Funeral Oration (available online—just type Pericles Funeral Oration into Google)), Aristophanes' play *The Clouds* (which the Museum has given you), and Xenophon, *Memorabilia: Recollections of Socrates*, Book I, http://ebooks.adelaide.edu.au/x/xenophon/x5me/contents.html. Xenophon's recollection of *Socrates* is a particularly valuable resource. He was a friend of Socrates but also a pretty straight shooter. The excerpt from Xenophon in the pamphlet you were given is valuable too but incomplete.

The judges' role is limited. One will give an introduction to the trial; I have appended a draft (which is quite repetitious of this "ground rules" document, but includes an effort to explain the relevance of this ancient trial to modern America, and incorporates the lawyers' suggestions). We have agreed that the lawyers, in arguing the case, can (though infrequently) tell the audience that they are stepping out of a character for a moment to point out an illuminating parallel or affinity between Athenian and modern American legal justice. Pat Fitzgerald gave the example of how Athens after the Peloponnesian War and the U.S. after 9/11 felt pressure to tighten security measures, resulting in prosecutions for conduct that in more placid times would not have been thought dangerous. The defense might point out excesses that result in such times, notably in the Cold War even after the FBI had (in the late 1940s) eliminated Soviet espionage in the United States. These are merely examples, and are not intended to be exhaustive.

One of the judges will give the juror oath: "I will cast my vote in accordance with the laws and decrees passed by the Assembly and Council. On any point where the law is silent I will give judgment in accordance with my sense of what is most just, without favor or enmity. I will vote only on the matters raised in the charge, and I will listen impartially to accusers and defenders alike."

One of the judges will read the jurors the indictment: "The following is the indictment and affidavit of Meletus son of Meletus of the deme of Pittheus against Socrates son of Sophroniscus of the deme of Alopeke. Socrates is a felon in that he does not observe the gods the city observes, but brings in new gods. And he is a felon in that he corrupts the youth. The penalty is to be death." We will have, as the judges will explain, two juries: the audience, which will be very

much like an ancient Athenian [jury], because large, not screened, and not deliberating. And a much smaller jury whose members will, following the vote by the audience, each deliver a brief explanation of his or her vote.

The offenses that Socrates was charged with committing are not crisply defined anywhere (the juror oath implies that). They were part of Athenian customary law rather than of statutory law (Athens had both). They were what we would call (and reprobate) common law crimes. How firmly the particular offenses with which Socrates was charged were established in Athenian customary law is unclear; very few prosecutions of such offenses are recorded, but of course the records are incomplete. These are questions the lawyers can argue about at the trial.

The judges will instruct the two juries very briefly after the lawyers complete their arguments. The juries will bring in a verdict of guilt or innocence. There will then be (even if the jurors vote to acquit) a brief penalty hearing, at which prosecution and the defense will each propose a penalty. The prosecution will propose death; the accuser mentioned in the *Apology*, [M]eletus, proposed death in the indictment and would doubtless, as of course happened at the actual trial, propose death in the penalty hearing. Socrates proposed free meals for life and later a fine. So the defense will have to defend one or both of those alternatives to a death sentence. The two juries will then vote on the penalty.

After the juries' vote, the judges will give their own verdicts, speaking briefly seriatim.

Here is a schedule of the trial based both on my earlier tentative schedule and the conference call discussion; I include a suggested division of labor by the judges in the appended opening statement:

1. opening statement by Northwestern political science Professor S. Sara Monoson: 7 minutes.
2. one of the judges gives opening statement as indicated above and in the appendix (7 minutes). The opening statement includes the indictment.
3. another judge gives the jury oath: 3 minutes.
4. prosecutors' opening statement: 30 minutes.
5. defense lawyers' response 35 minutes.
6. prosecutors' rebuttal: 5 minutes.
7. judge instructs juries: 5 minutes.
8. audience jury votes on guilt: 7 minutes.
9. small jury votes on guilt with very brief statements of reasons: 10 minutes.
9. prosecutors present case for death penalty: 5 minutes.
10. defense argues for alternative punishment: 5 minutes.
11. judge instructs jury on punishment: 3 minutes.
11. juries vote on punishment (just raised hands): 5 minutes.

12. judges give their verdict, speaking seriatim, each for 5 minutes: 15 minutes.

Total: 142 minutes

Judges' Opening Statement

I'm going to elaborate briefly on Professor Monoson's introduction. As this is a benefit for a museum, we've planned it to be a serious, and so far as possible a realistic, reenactment of Socrates' trial. We want to avoid confusing ancient Athenian law with modern American law, and also to avoid levity; this is a capital case, and the defendant was in fact sentenced to death and executed.

So the lawyers will not be relying on the free speech clause of the First Amendment or other provisions of modern law or on modern rules of evidence. Athens had no rules of evidence, no burdens of proof, no hearsay rule, no nothing. For example, Athens had amnestied participants in the reign of the Thirty Tyrants (an eight-month, 404 to 403 B.C., tyranny at the end of the Peloponnesian War, ending in the restoration of democracy). But there is nothing to prevent the lawyers from commenting on Socrates' role as the teacher of Critias and Alcibiades, who were leaders of the tyranny.

I imagine you'll hear more in the course of the lawyers' presentations about the Peloponnesian War. It was a disaster for Athens. When the war began, Athens had a great empire, a great navy, was rich, powerful, envied and arrogant. It ended in 404 B.C. with Athens' total defeat, loss of empire and navy, and occupation by Sparta. It was Sparta that installed the government of the Thirty Tyrants, though as I said the Athenian democracy was soon restored. The trial of Socrates was five years after the end of the war, and four years after the fall of the regime of the Thirty Tyrants.

The trial will be conducted as closely as possible to a reconstruction of how it would have been conducted in Athens, but with some limitations that I'll explain. You (as jurors in this [trial], as I'll explain shortly) will not follow, or be asked to follow, any of the laws that were not in place in 399 B.C. If the lawyers make any references to our modern legal system, it will be only for the purpose of explaining to you that certain modern rules that we take for granted do *not* apply to this trial. Similarly, if they step out of character to make brief parallels to the modern legal system, they will only be pointing to timeless principles, not at all seeking to bring into this proceeding, set in ancient Athens, any legal doctrine that came later.

I mentioned limitations on our effort at historical reconstruction. There will be unavoidable departures from historical realism, resulting primarily from the fact that [there] were no lawyers or judges in Athens. The only participants in trials were parties, witnesses, and jurors. In a trial, speeches, often combining advocacy with testimony, were the only form of evidence or argument

permitted. The accuser or accusers (there were, as Professor Monoson mentioned, no public prosecutors), and the defendant, would be the only advocates and often the only witnesses. We do not have actors to play the accusers or Socrates, and so we must substitute lawyers, and the lawyers' advocacy will take the form of closing arguments. The lawyers are very distinguished members of the Chicago legal community. They will have the biggest speaking roles in the trial.

A trial record is needed as the basis for the lawyers' arguments. That record is by default Plato's *Apology of Socrates*, essentially the only record of the trial that exists. The *Apology* (a word that in this context means explanation, rather than statement of regret) is incomplete—the speeches of the three accusers are omitted—and probably quite inaccurate, since Plato was a disciple of Socrates and therefore a biased observer of the trial (he was present at it, though). Nevertheless for want of an alternative the lawyers shall assume that Socrates' statements are accurately reported, as if the *Apology* were a transcript. But the lawyers are free to refer to earlier Greek works as well.

I remind you that from time to time one of the lawyers may tell you that he is stepping out of character for a moment to point out an illuminating parallel or affinity between Athenian and modern American legal justice. The prosecution might for example point out how Athens after the Peloponnesian War, like the U.S. after the 9/11 terrorist attacks, felt pressure to increase national-security measures, resulting in prosecutions for conduct that in more placid times would not have been thought dangerous. The defense might counter by noting the punitive excesses that can result in such times, for example during in the Cold War even after the FBI had (in the late 1940s) neutralized Soviet espionage in the United States.

Remote in time as ancient Athens is from twenty-first century America, and different as their legal system is from ours, you will I'm sure, even without prompting by the lawyers, notice many parallels between the trial of Socrates and modern legal proceedings, and, more broadly, between the public or political culture of fourth-century B.C. Athens and of twenty-first century A.D. America. Athens was a democracy (the first democracy, I believe, in recorded history; America is a democracy). Athens had security problems; we have security problems. We have religious sensitivities; they had religious sensitivities. They believed in free speech but within limits set by competing values; we do the same. The parallels are imperfect, and the legal framework and procedures radically different. Otherwise the outcome of this trial might be predictable. It isn't.

Remember Professor Monoson's remark about the immensity of Athenian juries? In a capital case there were 500 jurors, drawn randomly from Athenian citizens, not screened, and they voted without deliberating. There was of course no requirement of unanimity. A simple majority was sufficient for conviction. We've

> gone the Athenians one better: *you* are the jurors, and there are more than 500 of you, and since you are the jurors we ask you to pay very close attention to the trial. We have a much smaller jury as well, who will give brief statements of the reasons for their votes.
>
> Judge Demacopoulos will now give you the juror oath: you will repeat, sentence by sentence, after the judge: "I will cast my vote in accordance with the laws and decrees passed by the Assembly and Council. On any point where the law is silent I will give judgment in accordance with my sense of what is most just, without favor or enmity. I will vote only on the matters raised in the charge, and I will listen impartially to accusers and defenders alike."
>
> I will now read you the indictment: "The following is the indictment and affidavit of Meletus son of Meletus of the deme of Pittheus against Socrates son of Sophroniscus of the deme of Alopeke. Socrates is a felon in that he does not observe the gods the city observes, but brings in new gods. And he is a felon in that he corrupts the youth. The penalty is to be death." When the indictment says "The penalty is to be death," please understand that that's what Meletus, the accuser, wants. It doesn't mean that you, the jurors, have to impose that penalty if you find Socrates guilty.
>
> The trial, as Professor Monoson mentioned, has two phases: first guilt or innocence, then the penalty. We will say more about the penalty phase later. In considering the guilt or innocence of the accused, you are not to concern yourselves about what penalty could or would be imposed.
>
> The offenses that Socrates is charged with committing are not crisply defined anywhere (the juror oath implies that). They are part of Athenian customary law rather than of statutory law (Athens had both). They are what we would call (and do not permit) common law crimes. How firmly the particular offenses with which Socrates was charged were established in Athenian customary law is unclear; very few prosecutions of such offenses are recorded, but of course the records are incomplete. These are questions the lawyers will I'm sure discuss at the trial. If you find that Socrates is guilty of either of the offenses he's charged with—the religious offense or the corruption (that is, leading astray) of young Athenians, then you should vote to convict. Otherwise you should vote to acquit.
>
> The judges will instruct the juries very briefly after the lawyers complete their arguments in both the guilt and the penalty phases, and you will then vote. I will instruct in the guilt phase, and Judge Bauer will instruct in the penalty phase.
>
> After the juries have voted on both guilt and penalty, the judges will give their opinions, very briefly, about how they think the case should have been decided.

And so the trial began. The lawyers did an excellent job, as expected, though (as also expected) they drew modern parallels to the facts of the trial more frequently than I would have liked. But their

violations of the ground rules were not flagrant, with the possible exception of the statement by one of the prosecutors that there was an anti-democratic movement in Athens in 399 B.C.; there's no evidence of that, and it's unlikely in view of what had happened to the Thirty Tyrants. We judges did not interrupt the lawyers; that would have lengthened the trial, reduced its realism (because remember Athens had no judges), and probably confused the audience.

At the end of the trial, first the picked jurors each gave his or her vote and a brief statement (and their statements were excellent). They split on guilt 7-7 (tie votes are not uncommon in mock trials) and so did not opine on penalty. Then the audience-jury voted. Because it would have taken a long time to count 850 hands, the organizers of the trial had decided ingeniously to bring an old-fashioned balance scale into the ballroom. Each member of the audience was given a white (innocent) and blue (guilty) chip. At the end of the trial the ushers passed around two bags, one for white chips and the other for blue, placed the bags on the balance scale—and the blue bag weighed more; Socrates had been convicted. (In ancient Athens, each juror was given a bronze disc, and voted by placing the disc in either the urn designated for the accusers or the urn designated for the accused. The method used in our mock trial was equivalent.)

On the second vote, however, the majority voted for a fine (the big fine that Plato and Socrates' other rich friends had offered to pay, in the real trial) rather than execution (or free meals for life!).

Then the judges voted, on the theory that the audience might be curious about what "real" judges thought. We split. Judges Bauer and Demacopoulos voted to convict, and regarding the penalty Judge Bauer voted for the death penalty and Judge Demacopoulos for the fine. I voted to acquit.

I cannot resist a brief discussion of the merits, although it's really to one side of my purpose in this Essay. The indictment made three charges against Socrates: introducing new gods into Athens, disrespecting the existing gods of Athens (local gods, such as Demos, not the Olympians), and corruption of youth, which was largely a pendent to the disrespect charge; if Socrates' teaching included, as doubtless it did, his theological views, it would be per se corruption of his students—analogous to what we would call contributing to the delinquency of a minor. But there was more to the corruption charge: Socrates criticized democracy.

The charge of introducing new gods was based on Socrates' claim to receive advice from his *daimonian*, who would tell him from time to time not to do something that Socrates was inclined to do. This was a feeble charge. All gods had once been new. The Greeks did not have the concept of an eternal god—Zeus, for example, was a usurper. Anyway

Socrates' *daimonian* was more like what we call conscience or morality or values than it is like the gods whom the ancient Greeks worshipped.

The prosecution emphasized the parlous state of Athens in 399 B.C. as a result of its defeat by Sparta five years earlier, and that the changed circumstances (which the prosecution compared to America's enhanced concern with security in the wake of the 9/11 terrorist attacks) had caused Athenians to rethink their view of Socrates as a harmless crank—good for a laugh, as Aristophanes had portrayed Socrates many years earlier in his play, *The Clouds*. The prosecution also blamed Athens's defeat in the Peloponnesian War on Socrates' disrespect of the local deities (the second charge in the indictment, remember), arguing that the local gods had deserted Athens in anger at Socrates. But I suspect that what actually induced the jury, both in 399 B.C. and in 2013 A.D., to convict Socrates was his association with Critias and Alcibiades (two favorite students of Socrates—and leading figures in the rule of the Thirty Tyrants) and also that his "Socratic" teaching method encouraged kids to try it on their parents. The essence of the method was to put questions to a person that he was bound to sound stupid trying to answer. To invite kids to treat their parents that way in a patriarchal society must have seemed subversive.

The prosecution had a respectable case, for we must bear in mind that the trial was conducted under ancient Athenian, not modern American, law; but I was not persuaded by it. The claim that Socrates, who was hostile to democracy (because he believed that the best people, not the masses, should rule), had become a danger because in the wake of the defeat of democratic Athens by the Spartan dictatorship Athenian democracy was embattled was unpersuasive. The dictatorship of the Thirty Tyrants—overthrown after only eight months—had discredited dictatorship as an alternative to democracy.

As for the local gods: if you were a local god and got angry with Socrates, would you destroy your city? Why not kill Socrates instead? To be a local deity, as distinct from an Olympian god, must have been rather small beer; there were innumerable such deities, and they lacked the scope and power of the Olympians. If, however, your city was Athens, the center of a great empire, you would be *primus inter partes* in the local-deity circuit. It wouldn't make sense to destroy the Athenian empire because a nobody like Socrates had badmouthed you.

And finally even in ancient Athens it can't have made much sense to blame teachers for the adult misconduct of their former students, and thus to blame Socrates for the misbehavior of Critias and Alcibiades. Ancient Athens didn't have a First Amendment, but it did have a concept of freedom of speech, without which it could not have been a democracy.

In retrospect it is plain that convicting and executing Socrates did nothing for Athens.

CONCLUSION

What, if anything, can we learn from this survey and analysis of the public mock trial? Its recent origin and rapid growth, certainly; and its extraordinary variance in quality, reflecting a lack of norms. Washington D.C.'s Shakespeare Theatre Company, which has produced almost half the public mock trials that I've been able to identify—far more than any other organization—might have been expected to establish norms that would assure a respectable threshold of quality. But if it has tried to do that, it has failed. Of the six trials sponsored by the Company out of the total of eighteen in Table 4, one was excellent (*Hamlet* 2007, if the reader accepts my grading), one was good (*Socrates* 2008), two were mediocre (*An Enemy of the People* and *Othello*), and two were bad (*Edward II* and *Henry V*). A glance back at Table 4 reveals that there is far more joking around at mock trials sponsored by the Company than at the other mock trials. And lack of realism and cheap humor are the commonest causes of the low quality of so many of the mock trials.

The lawyers who perform in these trials don't want that. They want to showcase their legal talents. They'll joke around with the judges if that's what the judges want, but I'm pretty sure it's not what the lawyers want. It seems that many, perhaps most, of the judges want to show how sharp and funny they are, and that many, perhaps most, of the members of the audiences for the mock trials are looking for a good time. If low comedy is what the mock-trial market wants, so be it. My own view, marking me no doubt as a grinch or sourpuss, is that the only possible value of a mock trial is educational—educating an audience about legal history and forensic methods (and their limitations). If this is right, then steps should be taken to assure a decent minimum level of quality, and avoid making a laughing stock of the genre. These steps are 1) maximum realism, a desideratum that limits the choice of suitable trials and is most likely to banish cheap humor and maximize the educational value of a mock trial; 2) minimizing the role and number of judges, and using a jury wherever possible (and where there is a jury, one judge is enough); 3) enlisting the audience as the jury, as done in the trial of Socrates over which I presided—it was evident from discussion with members of the audience after the trial that inhabiting the role even of a make-believe juror increases the attention and seriousness of the audience and makes the trial a more memorable experience for them; 4) requiring (as I regret having failed to do in the trial of Socrates) the lawyers to submit briefs, as was done in the excellent trial of Richard III

for murdering his prince nephews;[18] 5) holding a planning meeting, well in advance of the trial, attended by all the trial participants except jurors, to assure that everyone is well prepared and understands the ground rules.

APPENDIX: BIBLIOGRAPHY OF ARTICLES (BRIEFLY SUMMARIZED) ON MOCK TRIALS

Laurie Asseo, *Washington Today: Et Tu American-Style*, ASSOCIATED PRESS (Mar. 22, 1996), http://www.apnewsarchive.com/1996/WASHINGTON-TODAY-Et-Tu-American-Style/id-9a1a363789a90957b240779d1f7b0132 (last visited Feb. 24, 2013). (Describes the Shakespeare Theatre's 1996 Senate hearing regarding the death of Julius Caesar. Senator Alan Simpson chaired a panel that questioned the actors playing Brutus and Antony. There were no judges.).

Suzanne M. Bolton, *Law-Related Education in Action: Mock Trials in Schools*, 71 MICH. B.J. 34, 35 (1992). (Describes moot court programming in Michigan and its educational benefits for grade school and high school students.).

SHAKESPEARE THEATRE CO., THE ROBERT CHILTERN AFFAIR: 2011 MOCK TRIAL (2011); Jess Bravin, *An Ideal Trial?*, WASH. WIRE (Apr. 12, 2011), http://blogs.wsj.com/washwire/2011/04/12/an-ideal-trial; Tim Treanor, *Supremes Reject Widely Imaginative, Throw Booklet at Ideal Villain*, D.C. THEATRE SCENE (Apr. 12, 2011), http://dctheatrescene.com/2011/04/12/supremes-reject-wildely-imaginative-arguments-throw-booklet-at-ideal-villain. (Describes the Shakespeare Theatre's 2011 mock trial that involved an appeal by *An Ideal Husband*'s Laura Cheveley of her conviction for blackmailing Representative Robert Chiltern about his criticism of a proposed tunnel between New York and New Jersey. Bravin mentions that this "event . . . featured a lecture by New York University [P]rofessor Kenji Yoshino praising the mock trial hobby.").

Jess Bravin, *Justice Stevens Renders an Opinion on Who Wrote Shakespeare's Plays—It Wasn't the Bard of Avon, He Says; 'Evidence Is Beyond a Reasonable Doubt*,' WALL ST. J., Apr. 18, 2009, at A1. (Relying primarily on the absence of books from Shakespeare's house and a dearth of correspondence attributed to Shakespeare and the fact that he was a commoner, Justice John Paul Stevens said: "I think the evidence that [Shakespeare] was not the author [of the works attributed to him] is

[18] The briefs are reprinted in *The Trial of Richard III*, *supra* note 5, at 59–103.

beyond a reasonable doubt."[19]). Bravin also provides the following charts detailing who former and current Justices believe wrote the plays attributed to Shakespeare. There is a positive correlation for ten of the twelve Justices between speculation on the authorship of Shakespeare's plays and frequency of participation as judges in mock trials. The exceptions are Justice Alito and possibly Justice Ginsburg, who says that she has "no informed views" about who wrote Shakespeare's plays yet advocates conducting research on John Florio, a linguist and tutor whose life overlapped Shakespeare's,[20] as a possible author of them.

Active Justices	
Roberts	No comment.
Stevens	Oxford
Scalia	Oxford
Kennedy	Stratford
Souter	"No idea."
Thomas	No comment.
Ginsburg	"No informed views."
Breyer	Stratford
Alito	No comment.
Retired or Deceased Justices	
O'Connor	Not Stratford
Blackmun	Oxford
Brennan	Stratford

Jess Bravin, *Supreme Night Court: Judges Relax by Trying the Fictitious and the Dead; Justice Kennedy Puts Hamlet in the Dock; Lights, Action, and in This Case, Cameras*, WALL ST. J., Mar. 14, 2011, at A1; Lynette Clemetson, *Was Dane's Madness Just Method? Jury to Decide*, N.Y. TIMES, Mar. 10, 2007, at B9; *Playbill: The Trial of Hamlet*, "Meet the Artists: Anthony M. Kennedy," Mar. 15, 2007. (Highlights the Justices' mock trial participations and focuses on the play that Justice Kennedy designed featuring a mental competency hearing for Hamlet during his trial for the murder of Polonius. After earlier performances in

19 Preposterous!

20 *See* FRANCIS A. YATES, JOHN FLORIO: THE LIFE OF AN ITALIAN IN SHAKESPEARE'S ENGLAND (2010).

Washington D.C., Chicago, and Boston, Kennedy took his show on tour to Los Angeles and filled the University of Southern California's 1200 seat Bovard Auditorium for the trial.)

THE TRIAL OF RICHARD III (Fred H. Cate & David C. Williams eds., 1997); Veralyn Kinzer, *Not Guilty! Chief Justice, IU Law Prof. Exonerate Richard III*, IND. UNIV. HOMEPAGES, (Mar. 11, 2008, 12:22 AM), http://web.archive.org/web/20080311002218/http://www.iuinfo.indiana.edu/homepages/1108/1108text/king.htm (accessed by searching for http://www.iuinfo.indiana.edu/homepages/1108/1108text/king.htm in the Internet Archive). (Describes mock trial of Richard III who was indicted for the murders of his nephews; *The Trial of Richard III* includes a transcript of the trial, the attorneys' briefs, the indictment, the applicable criminal code, and a bibliography of sources about Richard III.).

Beth J. DeLuco, *State-wide High School and Middle School Mock Trial Programs Celebrate Anniversaries*, 17 CONN. LAW. 14 (2006). (Celebrates thirtieth anniversary of Connecticut's High School Mock Trial Program (moot court competitions). The finals are held before Connecticut Supreme Court Justices in the state supreme court. During the 2005–2006 competition, 800 students from more than sixty Connecticut high schools participated in this program.).

Beth E. Farnbach, *Selecting, Preparing, and Using Judges*, *in* PUTTING ON MOCK TRIALS 17 (Margaret E. Fisher ed., 2002), *available at* http://lre.ncbar.org/media/27617684/mocktrialguide.pdf. (Booklet published by the American Bar Association that provides guidance on how to organize mock trials or moot courts. Includes brief discussion of the value of recruiting real judges to preside over moot courts.).

Eric Fingerhut, *Bard No Longer Villain to Jews*, JEWISH WORLD REV., (June 1, 1999), http://www.jewishworldreview.com/0699/bard.html. (Describes the Shakespeare Theatre's 1999 mock trial that addressed the question of whether Shakespeare intended to harm Jews in his anti-Semitic portrayal of Shylock in *The Merchant of Venice*. The trial concerned a university's forbidding a drama society to perform Shakespeare's play. The jury ruled that Shakespeare did not intend harm.).

Aaron Burr and Antonin Scalia, Acting Chief Justice, ORINKERR.COM (Mar. 27, 2006), http://www.orinkerr.com/2006/03/27/aaron-burr-and-antonin-scalia-acting-chief-justice. (Describes the reenactment in the courtroom of the U.S. Supreme Court of Aaron Burr's trial for treason.

Justice Scalia played Chief Justice Marshall and Justice Scalia's son Eugene Scalia argued for the United States.)

Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178 (1997). (Argues that "by creating a situation where competitions have a distinct air of unreality, far removed from real court room experiences, moot court not only fails to teach many of the skills lawyers will need when making appellate arguments, it teaches many of the wrong lessons that must be unlearned—if at all—by bitter experience." He recommends several reforms to mock trials, including that students argue actual pending appellate cases and that the winners of moot court cases be announced because currently only the participants who make the best arguments are announced.).

Charles Lane, *The First Thing We Do, Let's Hire All the Lawyers*, WASH. POST, June 15, 2001, at C1; Elaine Sciolino, *Lear Gets a Break from Supreme Court Justices Who Think the Play's the Thing*, N.Y. TIMES, June 16, 2001, at B19. (Discusses the Shakespeare Theatre Company's 2001 mock trial of whether King Lear was mentally competent when he disinherited Cordelia and whether this decision could be voided by the judges because Cordelia's sisters, Goneril and Regan, failed to provide the promised abode for King Lear and his knights.).

Abraham Mahshie & John Ford, *Socrates on Trial*, LEGAL BISNOW, (Sept. 19, 2008) http://www.bisnow.com/dc-legal/socrates-on-trial; Press Release, Shakespeare Theatre Co., The Shakespeare Theatre Company Presents the Trial of Socrates (Aug. 18, 2008), *available at* http://www.shakespearetheatre.org/_uploaded/socrates_release.pdf. (Provides a few anecdotes about the Shakespeare Theatre's 2008 trial of Socrates, including that Socrates' defense lawyer argued for a de novo standard of review and that a prosecutor showed a slide show that included several images of Socrates with prostitutes.).

SHAKESPEARE THEATRE CO., THE LAWYERS COMMITTEE FOR THE SHAKESPEARE THEATRE COMPANY: ANNUAL MOCK TRIAL (2007); Marisa McQuilken, *Scandal! Impeachment!; The Shakespeare Theatre Company's Annual Mock Trial Pokes Fun at Political Power Grabs Then and Now*, LEGAL TIMES, Nov. 26, 2007, at 26. (Describes the Shakespeare Theatre's 2007 mock trial based on *Edward II*. The mock trial was an impeachment trial of President Edward Plantagenet, Jr. in the U.S. Senate for having an adulterous homosexual affair with his Attorney General and for firing U.S. Attorneys for political reasons.).

SHAKESPEARE THEATRE COMPANY, MALVOLIO'S REVENGE: 2009 MOCK TRIAL (2009); Tony Mauro, *In* Twelfth Night *Mock Trial, Malvolio Loses*, BLOG OF THE LEGAL TIMES (Apr. 7, 2009), http://legaltimes.typepad.com/blt/2009/04/in-twelfth-night-mock-trial-malvolio-loses.html; Ceila Wren, *As You Litigate It: D.C. Attorneys Have Forgiven Shakespeare That "Kill All the Lawyers Line*," 26 AM. THEATRE, no. 6, at 42. (Describes the Shakespeare Theatre's 2009 mock trial that considered an appeal of Malvolio's punitive damage award of $10 million for false imprisonment and emotional distress. The Justices and judges ruled in Olivia's favor and overturned Malvolio's award because they ruled that Olivia had "official immunity.").

Tony Mauro, *Re-Envisioning* Mueller v. Oregon, BLOG OF THE LEGAL TIMES (Dec. 16, 2008), http://legaltimes.typepad.com/blt/2008/12/reenvisioning-muller-v-oregon.html; Muller v. Oregon (1908) [Reenactment], 31 SUP. CT. HIST. SOC'Y Q., no. 2, 2009, at 6. (Describes the Supreme Court Historical Society's first Frank C. Jones Reenactment mock trial, a reenactment of *Muller v. Oregon*. Justice Ginsburg remarked that the decision in this case served as an "opening wedge" for regulations protecting workers and therefore that "were I sitting on this court in 1908, I would be in the majority in *Muller*.").

Irvin Molotsky, *You-Know-Who Wrote the Plays, Judges Say*, N.Y. TIMES, Sept. 26, 1987, at 1; Amy E. Schwartz, *Three Justices, a Poetry-Starved Crowd and Shakespeare*, WASH. POST, Oct. 14, 1987, at A19. (Describes Justices William Brennan, Harry Blackmun, and John Paul Stevens considering arguments about the authorship of Shakespeare's plays. Justice Brennan and Justice Blackmun ruled that Edward de Vere did not write the Shakespearean canon but Justice Stevens decided that, while there was insufficient proof that someone other than Shakespeare authored the plays attributed to him, "I don't think the contrary view is wholly frivolous.") Ray Moseley, *Royal Reckoning: After More Than 400 Years, the Wives of Henry VIII Get Their Due at Mock Trial*, GAZETTE, July 19, 2000, at A1. (Describes a mock trial sponsored by the American Bar Association that involved lawsuits by the six wives of Henry VIII who sued him and claimed marital torts under contemporary American law.).

Don Oldenburg, *Shakespeare in Trouble; Who Was Will Shakespeare? And Why is Peter Dickson Saying Such Terrible Things About him? By Whom?*, WASH. POST, Jan. 24, 1999, at F1. Aaron Tatum, *Justice Stevens Casts Deciding Vote for Oxford in an Oxfordian Victory at D.C. Authorship Trial*, 34 *Shakespeare Oxford Newsletter*, no. 2, Summer 1998, at 8. (Discusses the Shakespeare Theatre Company's 1998 mock

trial regarding Shakespeare's authorship. Justice Stevens presided at this mock trial and Justice Ginsburg served as a juror. The twelve-member jury was deadlocked, so Justice Stevens decided the case, ruling that the Earl of Oxford (Edward DeVere) was the author of the plays attributed to Shakespeare.).

Andrew Ramonas, *Justices Ponder Shakespearean Divorce and a "Weak-Minded Gigolo*," BLOG OF THE LEGAL TIMES, May 1, 2012, http://legaltimes.typepad.com/blt/2012/05/justices-ponder-shakespearean-divorce-and-a-weak-minded-gigolo.html. (Discusses Shakespeare Theater Company's 2012 mock trial, hear the divorce case of Count Laudio and Lady Hero of Messina in Shakespeare's *Much Ado About Nothing*. The Justices and judges ruled that Lady Hero was not entitled to alimony but awarded her divorce and a dowry.).

Shakespeare Theatre Company Mock Trial 2010: "Judgment at Agincourt," SHAKESPEARE THEATRE CO., http://www.shakespearetheatre.org/_pdf/Mock_Trial_Scenario.pdf (last visited Feb. 21, 2013). (Describes the scenario of the Shakespeare Theatre Company's 2010 mock trial, in which the "Supreme Court of the Amalgamated Kingdom of England and France" considered whether Henry V had violated the Alien Torts Statute by executing French POWs at the Battle of Agincourt.).

Special Events: Mock Trial: Estate of Caius Maritius v. Latin Herald, SHAKESPEARE THEATRE CO., http://www.shakespearetheatre.org/_pdf/Mock_Trial_Scenario_2.pdf (last visited Mar. 1, 2013). (Describes the background, evidence, and legal questions presented in the Shakespeare Theatre's 2013 mock trial based on *Coriolanus*. The principal issue was whether a magistrate had erred as in determining that a newspaper that published attacks on Coriolanus "retained its press freedom protections despite its political and financial connections to the authors of the published attacks.").

Divorce Drama Adds New Twist to Shakespeare Play, TIMES-PICAYUNE, Mar 16, 1995, at A2. (Discusses the Shakespeare Theatre's 1995 mock jury trial of Katherine's action for separation from Petruchio. When the jury deadlocked, Judge Gladys Kessler ruled that Petruchio and Katherine had to live together for one year and one day and would be thrown into a dungeon if they did not learn during that period to love each other.).

Texas v. White (1862) [Reenactment], 34 SUP. CT. HIST. SOC'Y Q., no. 1, 2012, at 6. (Recounts the third Frank C. Jones Reenactment of *Texas v.*

White, 74 U.S. (7 Wall.) 700 (1868) and Professor Melvin Urofsky's lecture about this case. Justice Scalia presided at the mock trial.).

The Lawyers Committee for the Shakespeare Theatre Company Presents Its Annual Mock Trial, HULIQ NEWS, Dec. 20, 2006, http://www.huliq.com/2604/the-lawyers-committee-for-the-shakespeare-theatre-company-presents-its-annual-mock-trial (last visited Feb. 27, 2013). (Discusses the Shakespeare Theatre's 2006 mock trial based on Ibsen's play *An Enemy of the People*. The principal issue was whether the termination of Dr. Thomas Stockmann, Chief Medical Officer at the Department of Housing and Urban Development, violated his right to free speech when Secretary of Housing and Urban Development Peter Stockmann fired Thomas (an employee of HUD) because he spoke about the health hazards at a park that the Department had funded.).

Ware v. Hylton (1796) [Reenactment], 32 SUP. CT. HIST. SOC'Y Q., no. 4, 2010, at 6. (Discusses the second Frank C. Jones Reenactment of *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), in the courtroom of the U.S. Supreme Court. Justice Alito presided and pretended to be Associate Justice William Paterson who heard this case in 1796 and was also from New Jersey.).

J. Wynn Rousuck, *Power Play; The Shakespeare in Washington Festival Capitalizes on the City's Attraction to Themes of Intrigue, Influence*, BALT. SUN, Jan. 7, 2007, at 1E. (Mentions several of the Shakespeare Theatre's past mock trials and then notes that Chief Justice Rehnquist read the prologue and Justice O'Connor read the epilogue of a 1996 Shakespeare Theatre production of Henry V. During the 1997 season, Justice Ginsburg assumed the role of Dick from Henry VI and delivered the line, "First thing we do, let's kill all the lawyers.").