

Preposterous trickster: myth, news, the law and John Marsden

Marcus O'Donnell¹

Recent scholarship has explored the mythical function of news reporting. A diverse set of studies has shown that when news takes mythic shape it can perform both a community building cultural role and/or a boundary setting ideological role. This article looks at theories of myth and the way it functions in both journalism and law. This mythical understanding is contrasted with the widely held views of journalism and law as truth seeking and fact based institutions. The public identity of any plaintiff in a defamation case will necessarily come under challenge. The adversarial system necessitates the construction of competing tales of who that person is and how he or she customarily behaves. This process seems to have been exacerbated in the case of Sydney solicitor John Marsden, the longest running defamation case in Australian legal history. Powerful archetypal patterns shaped the telling of the Marsden story, which takes it well beyond the realm of the controversial and into the realm of the mythical. Mythical images of hero, villain, martyr and initiate are identified as operating in the Marsden trial and its reporting. But the image of the mercurial Trickster is identified as a key myth in understanding the Marsden story.

It was the culmination of a six year battle and although the man at the centre of it all tried to maintain the rage, with rhetorical swipes at the Premier, the police commissioner and the radio shock jocks who 'control' them, it was obvious to the assembled crowd outside the Supreme Court of NSW on 27 June 2001 that John Marsden was anything but jubilant in victory. Marsden had just been awarded \$525,000

1 Marcus O'Donnell is the editor of *Sydney Star Observer* and is currently completing his Masters in Journalism in the Department of Writing, Journalism and Social Inquiry, University of Technology Sydney. As editor of the *Star Observer* I followed the Marsden trial, working closely with the paper's reporter David Mills who filed weekly reports for much of the trial. Mills and the *Star* even became bit players in the Marsden drama when Marsden was charged with contempt of court for revealing the name of a protected witness to several journalists, including Mills. Thanks to David for our endless discussions of the trial, which have undoubtedly informed my thinking on the case and to the anonymous reviewer whose excellent suggestions on an earlier version of this article helped me more clearly focus some of my ideas.

in damages for allegations that he was a paedophile broadcast by the Channel Seven Network current affairs program *Today Tonight* in 1995 and again by *Witness* in 1996. 'Although I have won, I have lost,' Marsden told assembled media, friends and family. 'But more importantly, society has lost. This case should serve as a warning to every person here today; to every family and to every politician, that the price of justice in Australia today has become so expensive, that most people simply cannot afford it.'

'No amount of money can compensate the anguish, the pain and the humiliation of the past few years. No sum will restore me in any way to the position I was in before these outrageous, false and homophobic allegations. I will remain forever tainted by the false claim that I was a pederast,' Marsden told the crowd.²

Marsden's ordeal began in March 1995 when Channel Seven's newly revamped flagship current affairs program *Today Tonight* broadcast the accusations that former NSW Law Society President and campaigning gay solicitor, John Marsden, was a paedophile. Marsden issued strong denials the day after. But over a year later in May 1996 the allegations were repeated in even more detail on Seven's new program *Witness*. In February 1999 a jury found that both programs had defamed Marsden and in June 2001 Justice Levine of the NSW Supreme Court awarded Marsden \$525,000 in damages. But various appeals by both Marsden and Seven would extend the process for another two years before Seven and Marsden finally settled out of court for an undisclosed sum which commentators have put at between \$6 million and \$9 million.³ Legal commentator Richard Ackland has described the case as 'without doubt the largest, longest and most comprehensive defamation case in the history of Australia. And probably one of the biggest in the history of the common law world.'⁴

The sense that Marsden had both won and lost was reflected in numerous media analyses that followed Justice Levine's 2001 judgment. Various reports speculated as to whether he could rebuild his once thriving law practice, whether he would ever be invited to sit on government committees again, whether his rich and powerful friends would once again welcome his phone calls. Other reports took up Marsden's comments about the cost of justice and speculated on the need for defamation law reform.

In a memorable part of his three page victory statement,⁵ Marsden refers to himself as having 'fought a David and Goliath battle in which the might of corporate wealth was used to delay, obfuscate and frustrate'. It was this comment that was widely used by media reporting the decision. Although many of these same reports referred to some of the more controversial aspects of Marsden's behaviour revealed in the trial — his 'promiscuity', admitted drug use, sex with clients and arrest for toilet sex — the notion that he was also a giant-destroying hero seemed an irresistible conceit for most journalists. But only days later, the champion with the winning slingshot was reported to be depressed, suicidal and receiving treatment at a private psychiatric hospital. Sometimes it seemed that Marsden was indefatigable, larger than life, while at other times he seemed to be desperately clinging to one last shred of dignity. Although Justice David Levine's judgment runs to almost 2500 pages,⁶ although Sydney newspapers reported the case on an almost daily basis for the initial part of the trial, although Marsden has been the subject of countless magazine and newspaper profiles, feature articles and television interviews, the man remains somewhat of an enigma. Or at the very least, the man we think we know one day seems utterly different on next encounter.

The public identity of any plaintiff in a defamation case will necessarily come under challenge. The

2 Photocopied statement distributed by Marsden to journalists, 27 June 2001.

3 As reported by *Sydney Morning Herald* (Sydney), 10 October 2003.

4 This quote is from an undated transcript of an ABC *7:30 Report* interview posted on the web: <<http://gaynet.com.au/news/archive/STORY-91.HTM>>. Context would date it to late 2000, towards the conclusion of the second part of the trial.

5 27 June 2001 statement.

6 *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510.

adversarial system necessitates the construction of competing tales of who that person is and how he or she customarily behaves. This process seems to have been exacerbated in Marsden's case by the length, high profile and complexity of the case. But the emergence of a mercurial, many-faced John Marsden is the product of more than a simple process of adversarial narratives competitively running their course on the long marathon towards the prize of objective truth. I will argue that powerful archetypal patterns have shaped the telling of the Marsden story, which takes it well beyond the realm of the controversial and into the realm of the mythical.

Put simply, myths are stories that help remind us who we are collectively and individually. They provide what historian of religion Mircea Eliade calls 'exemplary patterns';⁷ they tell recurring stories, which connect the present to the past or, as he would have it, mundane time with sacred time. As such they are polyvalent forms of communication, which open up living images rather than producing closed narratives. Recent scholarship has explored the mythical function of news reporting.⁸ This work has shown more than just the appearance of the hero on the front page. A diverse set of studies has shown that when news takes mythic shape it can perform both a community building cultural role and/or a boundary setting ideological role. In this article I will look at theories of myth and the way they function in both journalism and law. This mythical understanding contrasts with the widely held views of journalism and law as truth seeking and fact based institutions; thus I will begin with a brief look at the concept of objectivity and its critiques. I will conclude with a more detailed look at the Marsden case and the way mythical images have been deployed in the media coverage of the trial and its aftermath.

The objectivity fallacy

Law and media are integrally linked in classic liberal democratic theory, with the media being conceived as a 'fourth estate' to the three arms of constitutional government: the parliament, the executive and the judiciary.⁹ In this theory both law and media gain much of their power through their apparently neutral or objective status. Objectivity in both cases is traditionally seen as the guarantee of fairness and fairness is seen as a mediator of justice.

However recent theory in both media and jurisprudential studies would see objectivity as a complex and — ironically — a far more ambiguous phenomenon. Richard A Posner has identified three types of objectivity in law.¹⁰ First we have the most common — ontological — understanding: objectivity as producing a direct correspondence to an external reality. Secondly, we have the scientific or experimental view of objectivity, which relies on the evidence of independently, replicable results. The third type of objectivity Posner calls 'conversational objectivity'. Here a court is *persuaded* that something is so. It is objectivity in the sense of 'merely reasonable — that is, as not wilful, not personal, not (narrowly) political, not utterly indeterminate though not determinate in the ontological or scientific sense, but as amenable to and accompanied by persuasive though not necessarily convincing explanation'.¹¹ Posner points out that although the first two forms of objectivity underlie much common thinking about law, the third form is by far the more common in courtrooms. He also notes that the consensus achieved in conversational objectivity is largely dependent on cultural convergence. It is a negotiation around values — shared or otherwise. It is contingent and ideological. As he bluntly puts it:

Legal thought cannot be made objective by being placed in correspondence with the 'real' world. It owes whatever objectivity it has to cultural uniformity rather than to metaphysical reality or methodological rigour.¹²

7 Mircea Eliade, *Myths, Dreams and Mysteries: The Encounter between Contemporary Faiths and Archaic Realities* (1960) 31.

8 For a summary of this work see below, 'Myth in the news'.

9 Julianne Schultz, *Reviewing the Fourth Estate: Democracy, Accountability and the Media* (1998).

10 Richard A Posner, *The Problems of Jurisprudence* (1990) 7.

11 Ibid 7.

12 Ibid 30.

Although journalists would like to lay claim to methodological rigour, on any detailed analysis they too come up short in the objectivity stakes. Just as Posner argues that the law's apparent objectivity is at least in part dependent on persuasive rhetorical tactics and cultural homogeneity, the media's objectivity is no less performative or ideological.

Gaye Tuchman has argued that objectivity is primarily a 'strategic ritual' for journalists.¹³ She highlights the instrumental function of objective practices in the legitimisation of professional identity, rather than any necessarily objective outcomes in journalism texts. In her fieldwork she found that journalists adopted a series of practices such as the attribution of ideas to sources and seemingly even handed attention to both sides of an argument, so that their stories take on a knowing veneer of objective reporting.

Although numerous studies¹⁴ point to the importance of 'objectivity' as a defining characteristic of the 'news paradigm',¹⁵ one striking feature of media studies literature is the impressive array of scholarship across a variety of different disciplinary approaches — historical, sociological, political and cultural — that points to the complex social construction of news.

At one end of the spectrum we have Noam Chomsky's political economy of news 'manufacture' which sees mass media as an integrated part of hegemonic structures which serve the needs of a political elite.¹⁶ At the other end of this spectrum we have cultural approaches such as Jack Lule's, who emphasises that daily news items retell 'eternal stories' through transparently 'mythic structures'.¹⁷

As well as political economy and cultural studies critiques, a series of sociological studies have shown the influence of such factors as routines,¹⁸ professionalisation¹⁹ and organisational and commercial imperatives²⁰ in news formation and production.²¹ Indeed, as Stephen Reese has argued, the notion that journalism can be delivered 'straight' without any interference is intrinsically ideological. Reese maintains that by 'not appearing openly ideological' — through the deployment of standard conventions such as apparent separation of factual reporting from labelled commentary — 'mainstream press reporting becomes all the more ideologically effective'.²² Hackett and Zhao go even further by suggesting that the practical objectivity criteria of balance and of non-distortion are epistemologically incompatible.²³ The notion of accuracy or non-distortion implies a positivist view of truth as accessible through singular 'straight facts', while the idea of balance suggests a relativist Mannheimian view of knowledge discerned through balancing a series of partial truths.

13 Gaye Tuchman, 'Objectivity as Strategic Ritual: An Examination of Newsmen's Notions of Objectivity' (1972) 77 *American Journal of Sociology* 660.

14 For a review, see Michael Schudson, 'The Objectivity Norm in American Journalism' (2001) 2(2) *Journalism: Theory, Practice and Criticism* 149.

15 Stephen D Reese, 'The News Paradigm and the Ideology of Objectivity: A Socialist at the Wall Street Journal' (1990) 7 *Critical Studies in Mass Communication* 390.

16 Edward S Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (1998).

17 Jack Lule, *Daily News, Eternal Stories: The Mythological Role of Journalism* (2001).

18 Gaye Tuchman, 'Making News by Doing Work: Routinizing the Unexpected' in Dan Berkowitz (ed), *Social Meanings of News: A Text-Reader* (1997) 173.

19 J Soloski, 'News Reporting and Professionalism: Some Constraints on Reporting of the News' (1989) 11(2) *Media, Culture and Society* 207-228.

20 D C Hallin, 'Commercialism and Professionalism in the American News Media' in James Curran and Michael Gurevitch (eds), *Mass Media and Society* (2000) 218.

21 Michael Schudson, 'The Sociology of News Production' in Dan Berkowitz (ed), *Social Meanings of News: A Text-Reader* (1997) 7.

22 Reese, above n 15, 392.

23 Robert A Hackett and Yuezhi Zhao, *Sustaining Democracy? Journalism and the Politics of Objectivity* (1998) 114-5.

The ideology of objectivity, democracy and community

Michael Schudson links the development of the objectivity paradigm in journalism to the need for a self-articulated narrative of professionalism, which arose as American journalism evolved in the early part of the 20th century. He argues that the adoption of the objective ideal allowed journalists, as a newly emerging professional group, to 'affiliate with the prestige of science, efficiency and progressive reform'.²⁴ This critical link to the ideologies of democracy, progress and science is what continues to give the objectivity paradigm its symbolic and functional power, within the profession and in public discourse, even when much of the literature disputes the possibility of objective practice. However there are other ways to understand both communication and political participation. James Carey has argued for the potency of a ritual/symbolic view of communication over an objective, information transmission model,²⁵ while Benedict Anderson has argued for a notion of modern nations as 'imagined communities' rather than rational public systems.²⁶

Schudson has recently contrasted Habermas' theory of the public sphere and its concentration on the development of a 'free domain of reasoned public discourse'²⁷ with that of Anderson's 'imagined communities' which exist as 'objects of orientation and affiliation'.²⁸ While he credits the Habermasian model with a critical place in media studies, in the end he admits that perhaps Anderson's framework is more productive for future research:

Anderson's work potentially promotes a much more expansive reading of news than Habermas inspires, a recognition that news is not only raw material for rational public discourse but also the public consideration of particular images of self, community and nation. It implies that the study of news should be kin to other studies of the literary or artistic products of human imagination more than to studies in democratic theory.²⁹

Meaning, myth and the social functions of journalism

The idea that journalism is a literary, imaginative production rather than merely an objective account is inherent in the common designation of media reports as news 'stories'. A variety of theoretical models have been developed which posit news as cultural storytelling. Myth,³⁰ narrative strategies,³¹ core plots,³² fairytale,³³ frames³⁴ and ritual³⁵ have all been used as paradigms to discuss both the structures and cultural effects of news. Carolyn Kitch summarises the core tenets of this type of scholarship:

[The social functions of journalism] include unifying readers into communities and nations, articulating and affirming group values and identity, and drawing on and building collective memory. As this body of literature

²⁴ Schudson, above n 14, 162.

²⁵ James W Carey, *Communications as Culture: Essays on Media and Society* (1989) 15.

²⁶ Benedict R Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983).

²⁷ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1989).

²⁸ Michael Schudson, 'News, Public, Nation' (2002) 107(2) *American Historical Review* 481.

²⁹ *Ibid.*, 484.

³⁰ Elizabeth S Bird and Robert W Dardeene, 'Myth, Chronicle and Story: Exploring the Narrative Qualities of News' in James W Carey (ed), *Media, Myths and Narratives: Television and the Press* (1988) 67; Lule, above n 17.

³¹ Barbie Zelizer, 'Achieving Journalistic Authority through Narrative' (1990) *Critical Studies in Mass Communication* 366.

³² F Davis, 'Decade Labeling: the Play of Collective Memory and Narrative Plot' (1984) 7(1) *Symbolic Interaction* 15.

³³ Rosalind Turner, 'Bondi Cinderellas: Storytelling and Gatekeeping in the Press' (November 2000) No 97 *Media International Australia Incorporating Culture and Policy* 105.

³⁴ Todd Gitlin, *The Whole World is Watching: Mass Media in the Making and Unmaking of the New Left* (1980).

³⁵ James W Carey, 'Political Ritual on Television: Episodes in the History of Shame, Degradation and Excommunication' in Tamar Liebes and James Curran (eds) *Media, Ritual and Identity* 43.

contends, journalists accomplish these goals by telling stories and creating characters who stand for something larger than themselves, something that is cultural and historical rather than personal and momentary.³⁶

Many theorists have described such functions as 'mythic'. As Bird and Dardenne argue, 'news stories, like myths, do not "tell it like it is" but rather, "tell it like it means". Thus news is a particular kind of mythological narrative with its own symbolic codes that are recognized by its audience.'³⁷

Jack Lule, who has studied and written about the connections between news and myth for over 15 years,³⁸ recently summarised the two major directions that this type of research has taken over the last four decades:

The work is varied, complex and far ranging. For analytical purposes, however, the research might usefully be organised into two distinct, but sometimes overlapping, traditions. One tradition emphasises social, cultural, and even religious links between news and myth. A second tradition emphasises political and ideological comparisons.³⁹

One of the problems in exploring this 'complex and far ranging' literature is the breadth of its claims, and these problems begin with the definition of myth. Even historians of religion who have devoted a lifetime of study to the matter have difficulty in agreeing upon a definition of myth. Mircea Eliade, one of the foremost modern theoreticians of myth, admits to 'fear and trembling' when approaching the subject:

It is not without fear and trembling that a historian of religion approaches the problem of myth. This is not only because of that preliminary embarrassing question: what is intended by myth? It is also because the answers given depend for the most part on the documents selected.⁴⁰

Classicist G S Kirk, who has also written extensively on myth, says at one point rather dismissively 'myths are a vague and uncertain category, and one man's myth is another man's legend, or folktale, or oral tradition'.⁴¹ Ivan Strenski begins his book, *Four Theories of Myth in Twentieth Century History*, with the assertion that 'there is no such "thing" as myth',⁴² but goes on to describe, in some 200 pages, the critical cultural and political effects of mythical thinking in the first half of the 20th century.

It is perhaps precisely because 'myth' remains such a plastic and elusive concept that it has proven so resilient as a theoretical framework across fields as diverse as theology, linguistics, anthropology, law and media studies.

Towards a theory of myth

Although he admits the problems of definition, Eliade's theory of myth is one of the classic treatments of

36 Carolyn Kitch, "'A Death in the American Family": Myth, Memory and National Values in the Media Mourning of John F Kennedy Jr' (2002) 79(2) *Journalism and Mass Communication Quarterly* 294, 296.

37 Bird and Dardenne, above n 30, 71.

38 Jack Lule, 'Myth Method and International News' (1987) 22(3-4) *International Communication Bulletin* 18; Jack Lule, 'Enduring Image of War: Myth and Ideology in a Newsweek Cover' (1995) 29(1) *Journal of Popular Culture* 199; Lule, above n 17; Jack Lule, 'Myth and Terror on the Editorial Page: The New York Times Responds to September 11, 2001' (2002) 79(2) *Journalism and Mass Communication Quarterly* 275.

39 Lule, 'Myth and Terror on the Editorial Page', *ibid* 278.

40 Mircea Eliade, *The Quest: History and Meaning in Religion* (1969) 72.

41 G S Kirk, *The Nature of Greek Myths* (1974) 21.

42 Ivan Strenski, *Four Theories of Myth in Twentieth Century History: Cassirer, Eliade, Levi-Strauss and Malinowski* (1987) 1.

the subject and has been used by Lule⁴³ and others in their consideration of news and myth. Eliade's work on myth is particularly pertinent because although primarily concerned with myth as a historian of religions, he has also drawn links between the religious/historic use of myth and contemporary mythologies.

In his discussion of Eliade, Brian Rennie argues for the functional character of myth that in effect places it beyond the reaches of any neat typification:

Myth is functional as much when the myth is concealed in the message as when the message is concealed in the myth. The reliance upon pre-reflective, narrative, 'emotive forms of persuasion' will always draw upon mythic sources of power. Thus, for example, it could be said that when a specious statistical argument is utilised, one which strictly speaking is not rational, an appeal is being made to the myth of mathematics, that is to the popular and uncritical association of number and truth.⁴⁴

However for Eliade myth is far more than merely a narrative trick. Whether it is demonstrated in the ritual story of an ancient people or the contemporary myth of Superman, he believes that 'certain aspects and functions of mythic thought are constituents of the human being'.⁴⁵ Elsewhere he writes:

It seems unlikely that any society could completely dispense with myths, for, of what is essential in mythic behaviour—the exemplary pattern, the repetition, the break with profane duration and integration into primordial time—the first two at least are consubstantial with every human condition.⁴⁶

For Eliade mythic stories provide a repeated and exemplary pattern that lays a framework for individual living and social cohesion. A myth is a story form that harnesses sufficient narrative power to assist its audience in breaking through the mundane into the possible. Eliade explains the popularity of Superman in such terms:

This humiliating camouflage of a Hero [Superman as Clark Kent] whose powers are literally unlimited revives a well-known mythical theme. In the final analysis, the myth of Superman satisfies the secret longings of modern man who, though he knows he is a fallen, limited creature, dreams of one day proving himself an 'exceptional person', a 'Hero'.⁴⁷

'Narrative power' and 'exemplary patterns' are two of the clearest and most readily defining elements in Eliade's work on myth. Myth understood in these terms becomes a useful theoretical shorthand to discuss both the cultural and ideological functions of news media. While Eliade is primarily concerned with a cultural/religious view of myth the ideological implications are clear. Although reference to exemplary patterns may most readily lead to thoughts of heroes, as Eliade has pointed out, such patterns have also been used as ritual justification for murder and violence.⁴⁸ In a more contemporary context Lule⁴⁹ has shown the power of the scapegoat myth in the media treatment of American black power leader Huey Newton.

The classic statement on ideology and myth is that of Roland Barthes. Although his semiological system of myth cannot be fully explicated here, one of the key points made in his seminal work *Mythologies*⁵⁰ concerns the naturalising power of myth. He writes:

43 Lule, above n 17.

44 Bryan S Rennie, *Reconstructing Eliade: Making Sense of Religion* (1996) 73.

45 Mircea Eliade, *Myth and Reality* (1968) 181-2.

46 Eliade, above n 7, 31-2.

47 Eliade, above n 45, 185.

48 Ibid 144.

49 Lule, above n 17, 60-80.

50 Roland Barthes, *Mythologies* (1972).

Myth hides nothing and flaunts nothing: it distorts; myth is neither a lie nor a confession: it is an inflection ... Entrusted with glossing over an intentional concept, myth encounters nothing but betrayal in language, for language can only obliterate the concept if it hides it, or unmask it if it formulates it ... driven to having either to unveil or to liquidate the concept, it will naturalise it. We reach here the very principle of myth: it transforms history into nature.⁵¹

The contingent flux between history and nature revealed in myth is itself presented in somewhat mythical terms by Barthes. But what is valuable in Barthes' analysis is the clarity with which he shows that myth moves between concealment and revelation and that through this 'naturalising' function it contributes to both social cohesion and exclusion. It builds cohesion but often by mollifying resistance.

As one theorist has recently put it, myth is 'a performative concept that occupies the terrain where the theatrical and the political coincide'.⁵²

Myth in the news

Scholarship on myth and other narrative structures in media has identified particular themes or storylines in news stories, as well as pointed to the general mythic structures or orientation of certain news forms and products.

Richard Campbell uses theories of myth to analyse the development of the US *60 Minutes* and its place in the history of American TV news.⁵³ He argues that the program pioneered a particular style of news storytelling: the TV news-magazine. He analyses numerous *60 Minutes* episodes under the headings of news and *mystery*, news and *therapy*, news and *adventure*, and news and *arbitration*. His central argument is that most *60 Minutes* episodes can be analysed under the rubric of the myth of American individualism. In a striking comparison of two very different episodes he shows how this theme influences both a program about then presidential candidate Ronald Reagan and a program on Joyce Brown, a New York homeless woman. The former actor Reagan is interviewed on his ranch, immediately wedding the candidate's image to the individualist heroes of the American frontier. Brown's story is a complex one but the program represents her not as victim but as one who for various reasons has chosen homelessness.

Jack Lule in his book length study of myth and news identifies journalists as part of a 'long storytelling tradition' which includes minstrels and shamans as well as more contemporary purveyors of information.⁵⁴ Following Eliade, Lule defines myth as 'archetypal stories which play a crucial social role'. He then applies this model to seven case studies drawn from the *New York Times* to demonstrate how seven 'master myths' — the victim, the scapegoat, the hero, the good mother, the trickster, the other world and the flood — shape the production of particular news stories. His examples are impressively diverse, ranging from Mother Teresa as good mother through to Mike Tyson as trickster. His examples extend across sporting celebrities, disaster stories, crime stories and international news.

In a more recent article Lule has analysed the *New York Times* editorial page in the month immediately following September 11.⁵⁵ He argues that the extensive coverage of the attack on the World Trade Centre and its aftermath was driven by 'four crucial myths'. The myths that Lule describes are: the end of innocence (everything has changed); the victims (we might have been); the heroes (amid the horror); and the foreboding future (as horrible as it is to imagine). Lule argues that 'more than editorial "themes" or political "issues" these were myths which invoked archetypal figures and forms at the heart of human storytelling'.

51 Ibid 129.

52 Gourgouris Stathis 'The Concept of the Mythical (Schmitt with Sorel)' *Cardozo Law Review* 21 May 2000, 1487.

53 Richard Campbell, *60 Minutes and the News: A Mythology for Middle America* (1991).

54 Lule, above n 17.

55 Lule, above n 38, 278.

Carolyn Kitch has explored mythic elements in news magazine coverage of the death of John F Kennedy Jr.⁵⁶ She relates the coverage to the ongoing American national interest in the 'myth of Camelot' built up around President Kennedy and his family. Kitch's analysis points to the overlap between notions of 'celebrity' and 'hero' in contemporary culture and the exemplary expectations placed on high profile personalities. She argues that the death of JFK Jr unwrapped hidden wounds in the national psyche still unhealed from the time of President Kennedy's assassination. The son was forever remembered as the child who bravely saluted his father's coffin. On this image, syndicated around the world at the time, rather than on the actual person of John Jr, many personal and cultural hopes and dreams had been painted. For Kitch the rehearsal of the heroic yet tragic stories of both father and son, following JFK Jr's death in a plane crash, both assisted the national grieving process and contributed to a broader ongoing story of national identity.

In an Australian context, Rosalind Turner has analysed the romance and break up of actress Kate Fischer and media heir James Packer and the way the Cinderella story shaped the telling of this event by the media.⁵⁷ For Turner the fairytale format of the unfolding drama provides not just a convenient and familiar structure for a contemporary story, but demonstrates the way a 'dominant morality is idealised and made public in Australian newspapers'. The *tradition* of the fairy story becomes a vehicle for the *traditional* in moral terms.

Interpretive communities

Although each of the authors cited above refer to the ideological and/or the communal ritual elements of journalistic myth-making, there is often a residual or implied intentionality in the notion of journalist as myth-maker. In primarily text based analysis the structural elements of author, reader and interpretive community are often undertheorised.⁵⁸

In their work on the mythic function of television news, which they term 'bardic', Fiske and Hartley note the collective encoding and decoding of mythological messages:

The internal psychological state of the individual is not the prime determinant in the communication of television messages. These are decoded according to individually learned but culturally generated codes and conventions, which of course impose similar constraints of perception on the encoders of the messages. It seems, then, that television functions as a social ritual, overriding individual distinctions, in which our culture engages in order to communicate with its collective self.⁵⁹

While the choice of frame by a TV news producer, or the choice of metaphor by a print journalist, may be either deliberate or routine, the consequent 'map of meaning' produced exceeds any individual intent.

Hall and colleagues have referred to this sense-making process of journalism as a dance between the unexpected and unusual 'newsworthy' event and the consensual cultural 'maps' of our societies:

[News] events cannot be allowed to remain in the limbo of the 'random' — they must be brought within the horizon of the 'meaningful'. This bringing of events within the realm of the 'meaningful' means in essence, referring unusual and unexpected events to the 'maps of meaning' which already form the basis of our cultural knowledge, into which the social world is already 'mapped'.⁶⁰

56 Kitch, above n 36.

57 Turner, above n 33.

58 Stanley Fish, *Doing What Comes Naturally, Change Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989) 141-60.

59 John Fiske and John Hartley, *Reading Television* (1978) 85.

60 Stuart Hall, C Critcher, T Jefferson, J Clarke and B Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (1978) 54.

Hall sees this process producing a 'tendency towards ideological closure'⁶¹ which presents a societal consensus as if there are no major breaks, only institutionally manageable conflicts that can reconcile in the free market place of ideas.

However other theorists such as Stanley Fish present a more dynamic theory of communities, consensus and change.⁶² Fish's theory of interpretive communities, originally developed in the context of literary studies, has been widely applied, including in Blatt's study of statutory interpretation,⁶³ Berkowitz and TerKeurst's study of journalist-source relationship,⁶⁴ and Zelizer's study of journalist identity and practice.⁶⁵ Like Hall, Fish sees reader, writer and text as 'constrained by the possibilities that are built into the conventional system of intelligibility';⁶⁶ the acts of both composition and interpretation are governed by the norms of the communities to which the author or reader belongs. However Fish does not see these communities or their norms as monolithic or impervious to change. Rather he conceives of them as a set of 'nested' beliefs and 'on occasion they may affect and even alter one another and so alter the entire system or network they comprise'.⁶⁷ In this model interpretive communities are not just mechanisms that produce stability and continuity, paradoxically they are also 'engines of change':

It is an engine of change because its assumptions are not a mechanism for shutting out the world but for organising it, for seeing phenomena as already relating to the interests and goals that make the community what it is. The community, in other words, is always involved in doing work, the work of transforming the landscape into material for its own project; but that project is itself transformed by the work it does.⁶⁸

This notion of interpretive community is critical to any developed understanding of the way myths are mobilised in both journalism and law. It allows for a model in which myth is a dynamic force embedded within other cultural and social forces rather than a static model that sees myth as a static, individually crafted, text-based object. This becomes particularly relevant in analysis of a defamation case such as Marsden's because, as a number of scholars⁶⁹ have pointed out, the tort of defamation is as much about the 'legal construction of community'⁷⁰ and the process of moral inclusion and exclusion as it is about the protection and restitution of individual reputation.

61 Ibid 64.

62 Fish, above n 58, 141-60.

63 William S Blatt, 'Interpretive Communities: The Missing Element in Statutory Interpretation' (2001) 95(2) *Northwestern University Law Review* 629.

64 Dan Berkowitz and James TerKeurst, 'Community as Interpretive Community: Rethinking the Journalist-source Relationship' (1999) 49(3) *Journal of Communication* 125.

65 Barbie Zelizer, 'Journalists as Interpretive Communities' in Dan Berkowitz (ed), *Social Meanings of News: A Text-Reader* (1997) 401.

66 Fish, above n 58, 83.

67 Ibid 146.

68 Ibid 150.

69 Lawrence McNamara 'Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame' (2001) 6(4) *MALR* 271-296; Lyrrisa Barnett Lidsky 'Defamation, Reputation and the Myth of Community;' (1996) 71 *Washington Law Review* 1; Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691; Robert N Bellah, 'The Meaning of Reputation in American Society' (1986) 74 *California Law Review* 743.

70 McNamara, above n 69, 274.

Myth and law

Robert Cover argues that narrative plays a key role in any such legal construction of community.⁷¹ He asserts that 'no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning'.⁷² A legal tradition is an integral part of the *nomos* or normative world in which we live and establish community:

The tradition includes not only a *corpus juris*, but also a language and a *mythos* — narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behaviour. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves — a lexicon of normative action — that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be levelled at the justificatory enterprises of law.⁷³

For Cover the 'nomos' or 'normative universe' is held together by the 'force of interpretive commitments — some small and private, others immense and public'.⁷⁴

While Cover is concerned to explicate ways in which myth and other forms of narrative undergird broad notions of legal meaning, other scholars have focused on the way specific myths have been mobilised in the rhetorical performance of trial narratives. In a fascinating and detailed analysis of the closing arguments in a 1991 New York murder trial, Amsterdam and Hertz argue that one of the tactics used by the defence attorney was to cast the jury in the role of the quest hero and himself in the role of the paladin:

In addition to using the stock script of the paladin defensively to guard against a prosecutorial attack, counsel uses it affirmatively. The same story line that enables him to assume the *persona* of the paladin also enables him to cast the jurors in the role of the Quest Hero. Disciplined obedience to duty is the soul of it.⁷⁵

This casting of both juror and lawyer as bound by sacred duty allows a focus on the emotive force of the juror's obligation to hard justice, rather than the emotive force and ugly facts of the murder. The primary story becomes the present of the courtroom rather than the past scene of the crime.

Phillip Meyer builds on Amsterdam and Hertz's model in his analysis of the Silkwood trial.⁷⁶ Meyer argues that attorney Gerry Spence uses both myth and melodrama in his attempt to win damages on behalf of the estate of Karen Silkwood against the operators of the plutonium plant where she worked. He not only rhetorically links his own role — giving voice to the fallen hero — with that of the hero quest journey of the jury, he also creates a heroic character out of Silkwood, whom he sets up as a 'prophet':

You know, history has always at crucial times reached down into the masses and picked ordinary people and gave ordinary people extraordinary power. That is the way it has always been in history and I have no reason to believe

71 Robert M Cover, 'The Supreme Court, 1982 Term: Foreword: *Nomos* and Narrative' (1983) 97(4) *Harvard Law Review* 4.

72 *Ibid* 4.

73 *Ibid* 9.

74 *Ibid* 7.

75 Anthony G Amsterdam and Randy Hertz, 'An Analysis of Closing Arguments to a Jury' (1992) 37 *New York Law School Law Review* 55 at 111.

76 Phillip N Meyer, 'Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in the Estate of Karen Silkwood v Kerr-Mcgee Inc' (2002) 9 *Clinical Law Review* 229.

that it is any different now ...

I think she was a heroine. I think her name will be one of the names that go down in history, along with the great names of women heroines. I think she will be the woman who speaks through you, and may save this industry and this progress and may save, out of that industry, hundreds of thousands of lives.⁷⁷

But as Meyer notes, the mythic dimension to the Silkwood story is played out as melodrama and owes much to contemporary popular expositions of that genre, particularly in film. Silkwood is the woman who knew too much about a monstrous corporation. According to Meyer the narrative power of Spence's argument derives from the effective linking of the mythic and melodramatic, the past and the present:

Only the jury through punitive damages can right the wrong suffered by Silkwood, by the innocent locals who work at the plant now, and by future generations of workers who will suffer as well. Kerr-McGee [the plant operators] has extinguished the voice of the prophet Karen Silkwood, the martyred heroine of the past tense melodrama, who was a 'brave ordinary woman who did care' and whose life ended because she cared. The heroic jury may still give Silkwood's life meaning, may provide narrative redemption, by solving Spence's riddles in their present tense quest for mythic justice at trial.⁷⁸

Lisa Binder also points to the way myth can be used to shift courtroom focus from incident and protagonists to other sites of emotive power. She argues that the prevalence of Beauty and the Beast mythology in the discourse of rape trials belies a 'cultural fixation upon beauty and the morbid':

References to a victim's attractiveness tap into a complex network of cultural mythologies imbuing the beauty of a woman, and even more, the death of a beautiful woman, with emotional force. Beauty and decay are intertwined in a complex dialectic within the narratives of Western culture. The poetics of beautiful women dying by violence can be traced back through centuries of Western and Classical literature and folklore.⁷⁹

However she warns that although constructing judicial narratives of rape around a beautiful victim and a beastly perpetrator may seem to fit the horrible nature of such crimes, and may work to appropriately increase juror's sympathy for the victim, it can also cause problems. In Barthes' terms it 'naturalises' a complex series of constructed events. This is particularly dangerous when the image of 'beast' meets other non-normative social stereotypes based on factors such as race. This can effectively lower the required standard of proof or encourage the meeting out of disproportionate punishment. Binder argues that the ongoing deployment of beauty and the beast imagery, by feeding into traditional understandings of female passivity, may also render 'us less capable of perceiving more subtle types of sexual victimisation'.⁸⁰

These diverse examples show the powerful role that myth can play in the construction and deployment of legal narratives. However they also show that the mythic arises not just in legal stories but is also implied in the very foundations of law and its practices. There is an almost unavoidable rhetorical connection between hero, quest and justice, then to speak of judgement, guilt and innocence places us even more plainly in mythic territory.

Although the employment of mythic rhetoric is seen by these legal theorists as an argumentative tactic — Amsterdam and Hertz even refer to it at one point as a semantic 'trick'⁸¹ — their analysis of the

⁷⁷ Gerry Spence, quoted by Meyer, *ibid* 261-62.

⁷⁸ *Ibid* 262-63.

⁷⁹ Lisa A Binder, 'Law and Literature: "With More than Admiration He Admired": Images of Beauty and Defilement in Judicial Narratives of Rape' (1995) 18 *Harvard Women's Law Journal* 265, 270.

⁸⁰ *Ibid* 286.

⁸¹ Amsterdam and Hertz, *above n* 75, 67.

'microstructural' elements of such rhetoric go way beyond any intentionality that could be ascribed to the attorneys under study. Just as the employment of mythic story telling patterns by journalists is often the product of following professional routines, so too the employment of such rhetoric by trial attorneys arises out of similar practice based routines. Indeed Amsterdam and Hertz note that upon initial inspection the lawyers' closing arguments seem to be textbook examples along 'time-tested patterns'.⁸² However their theoretical analysis attempts to account for the emotive power of the largely predictable arguments.

Myth is mobilised not in a lawyer's decision about the terms of the argument but in the complex interaction between lawyer, jury and other trial participants operating in the sphere Cover terms the 'nomos'.⁸³ For Cover the law is both a visionary and grounding force and thus will always exceed the surface aspects of its application.

The myth of John Marsden

Any extended coverage of a legal case in the media easily lends itself to being written about in mythic terms. When the case achieves the notoriety of the Marsden defamation trial, which was an ongoing Australian media story for nine years, it seems almost inevitable that the mythic themes will be writ large.⁸⁴

As already outlined at the beginning of this article, one of the striking characteristics of the trial and its coverage is the multifaceted — some might say almost schizophrenic — production of images of Marsden. As I noted this is, at least in part, a product of the normal rehearsal of competing narratives of character inherent in a defamation trial; it is also exacerbated by Marsden's genuinely widespread interests and influence.

In assessing damages, Justice Levine considered in his written judgment 18 different spheres of Marsden's life where his reputation might have been damaged.⁸⁵ These 'component fields', as Levine calls them, included Marsden's reputation as a lawyer, a political lobbyist, a member of the Campbelltown community, a fundraiser and philanthropist, a businessperson, an advocate for civil liberties, a role model within the gay community and an organiser of rugby league football. Even from this abbreviated list one can begin to see the emergence of a heroic figure: powerful, altruistic, dynamic, a fighter.

⁸² Ibid 57.

⁸³ Cover, above n 71, 4-10.

⁸⁴ The following analysis of the media coverage of the Marsden trial draws on a range of documents and media reports from throughout the various stages of legal proceedings. It focuses on an intense analysis of all reports in the *Sydney Morning Herald* (Sydney), *Daily Telegraph* (Sydney) and *Australian* (Sydney) published between 16 November 1999 and 11 December 1999, which covers the first four weeks of the second part of proceedings until the Christmas recess. The trial resumed in February 2000 and concluded at the end of November 2000. Justice Levine delivered his judgment in June 2001. The first four weeks of the trial saw the most detailed reporting of the case and established patterns that were to continue both in the courtroom and the media for the remainder of the trial. With the commencement of Seven's 'truth' witnesses, in February 2000, the media reporting focused on the credibility or otherwise of the witnesses against Marsden, although it continued to report salaciously the sexual tales recounted by those witnesses. My coverage of this stage of the trial is not as comprehensive although I do draw on several representative reports. In order to situate this coverage of the trial I have also drawn upon two bookend interviews: one Marsden gave to the *Bulletin* (Sydney) in June 1999 prior to the commencement of the second part of the case and one that he gave to the *Sydney Star Observer* (Sydney) after Levine's judgement. This study makes no claim to being an exhaustive study of either the trial or its media coverage. It is one particular reading, although I believe a persuasive one.

⁸⁵ *Marsden v Amalgamated Television Services Pty* [2001] NSWSC 510, 4510-11.

As I have already noted, the case has been widely characterised as a 'David and Goliath battle'. Even though Marsden's power and influence has been a consistent theme in the story — a necessary part of its dramatic tension no less — he has also been portrayed as the heroic loner battling the corporate giant. In this sense Marsden is also sometimes portrayed as martyr or sacrificial king. Lesbian photographer C Moore Hardy has made this theme most explicit when she exhibited a constructed image of Marsden upon a cross with two young acolytes adoringly stationed either side.

But portraits of Marsden are rarely as straightforward or direct. He has been portrayed as *an initiate* of the corridors of power through his friendship with high profile politicians, such as former NSW premiers Nick Greiner and John Fahey. He has also painted as *an initiate* of the seamy underworld of secret gay venues and of the even seamier criminal underworld of Les Murphy, convicted killer of Anita Cobby. Although his status as campaigner for civil liberties, gay community role model and community fundraiser present an altruistic image, that is only one side of a complex picture. The *Witness* segment that defamed him was called 'On The Dark Side' and there is always a haunting shadow to any portrait of Marsden, even the most positive. If the myth of John Marsden is in some way 'exemplary' in the Eliadian sense this is not in any easy or comfortable way. He exemplifies *hero*, *victim* or *villain* depending on the portrayal, the particular stage of evidence in the trial and the journalists or the reader's own perspective or interpretive community. Sometimes these many John Marsdens seem to split into an almost literal schizophrenia. This is particularly obvious in reports of his brokenness: his depression and medication, his thoughts of suicide, his flights of madness.

John Marsden as trickster

Each of the above typologies — David against Goliath, martyr, initiate to secret worlds, hero, victim, villain, madman — could be used to develop a mythological analysis of the trial and its media coverage. However if there is a single mythological pattern that helps us understand the complexity of the image of John Marsden as he has been revealed in both the legal documents of his trial and the media stories about him, it is the figure of the mercurial trickster, or to put it in more indigenous terms: the larrikin.

In his classic description of the trickster figure Carl Jung says:

He is both subhuman and superhuman, a bestial and divine being, whose most alarming characteristic is his unconsciousness. Because of it he is deserted by (his evidently human) companions, which seems to indicate that he has fallen below their level of consciousness. He is so unconscious of himself that his body is not a unity, and his two hands fight each other.⁸⁶

But as Jung also points out, the trickster's chaotic accident prone unconsciousness is not merely destructive, he is also creator and artist, miraculously salvaging order from mess and disaster.

As Helen Lock has noted recently, following the work of Lewis Hyde:

In all this... 'Trickster is the mythic embodiment of ambiguity and ambivalence, doubleness and duplicity, contradiction and paradox' and can thus be seen as the archetypal boundary-crosser, although here Hyde notes that 'there are also cases in which trickster creates a boundary, or brings to the surface a distinction previously hidden from sight'.⁸⁷

This ambiguous duality can be seen in the figure of John Marsden. One of the seminal moments in the media coverage of the case was the June 1999 cover story of the *Bulletin* published just before the commencement of the second part of the trial before Justice Levine. It ran with the cover line 'The Trial

⁸⁶ C G Jung, 'On the Psychology of the Trickster Figure' (1956), reprinted in C G Jung, *Four Archetypes* (1991) 143.

⁸⁷ Helen Lock, 'Transformations of the Trickster' (2002) 18 *Southern Cross Review*, available online at <<http://www.southerncrossreview.org/18/trickster.htm>>.

of an Australian Oscar Wilde'. Wilde was famously tripped up in a defamation case that many think he should never have contested. But the comparison does not merely stop there. Like Wilde, Marsden has been portrayed as a flamboyant, defiant, carnal figure; witty one moment, scurrilous the next.

As John Lyons, the author of the *Bulletin* story, writes:

The wild card in this trial is John Marsden. For his 30 years as a lawyer, and his 30 years as a master networker, he is still unpredictable. Seven's strategy will be to get him into the box and throw whatever they can at him.⁸⁸

Wilde was brought undone under cross-examination with a flippant answer that he hadn't kissed a boy because the youth in question 'was peculiarly plain ... extremely ugly'. Citing this incident Lyon draws an analogy to Marsden's comments in a *Sydney Morning Herald* interview. Looking out the window of his chauffeur driven car, as they drove past a famous venue for male prostitutes, Marsden said to the *SMH* reporter, 'Don't like him ... He's even worse ... Urk he's worse still.'⁸⁹ These comments reportedly cost Marsden the support of former premier John Fahey.

In Australian colloquial terms Marsden is the larrikin. It is perhaps one of the reasons that he has maintained some level of public support; for example, his business in Sydney's western suburbs certainly dissipated but never completely disappeared. Even though he has been accused of what is widely regarded as a most heinous crime — sex with under-age individuals — this ability to make light of himself and his situation can be read as endearingly Australian. The larrikin Marsden, the image of the self-confessed 'pot-smoking poofteer'⁹⁰ is the strange shield that cuts through equally characteristic Australian tendencies to homophobic dismissal.

Marsden is, as Phillip Adams described him in the witness box, a man of 'preposterous candour'.⁹¹ This motif of self-revelation is also characteristic of the trickster figure. He can be as disarmingly honest as he can be mischievously deceptive. But Lock urges us to differentiate the trickster from the fool — the trickster is not just playing:

Not just any rogue or anti-hero can properly be termed a trickster. The true trickster's trickery calls into question fundamental assumptions about the way the world is organized, and reveals the possibility of transforming them (even if often for ignoble ends).⁹²

Lock goes on to talk about a type of Trickster figure that she calls the 'crossblood-trickster', who mediates between cultures and races. This figure's seemingly fanciful mischief confronts what she calls 'terminal creeds' or constricting stereotypes. Marsden's marginality is not race based, but his public gay identity in the straightlaced legal/political world can be read as a similar 'crossblood' identity. Certainly the constant crossover between images of Marsden as powerbroker and pervert create a portrait that is difficult to categorise easily.

The first fortnight of the second half of the trial saw the then-Assistant NSW Police Commissioner Christine Nixon, the President of the Anti Discrimination Board, Chris Puplick and two former presidents of the Law Society under cross-examination offering their definition of 'rough trade'. It heard testimony from Sydney City Councillor and wife of former NSW Premier, Kathryn Griener, and a Catholic priest. Broadcaster Phillip Adams said that Marsden was regarded in some journalistic circles with 'a mixture of respect and wonderment'.⁹³ Most of these witnesses were asked about their attitudes

88 John Lyons, 'The Onus of Proof', *The Bulletin* (Sydney), 15 June 1999, 25.

89 Ibid 24.

90 *Sydney Morning Herald* (Sydney), 7 November 2000.

91 *Sydney Morning Herald* (Sydney), 29 November 1999.

92 Lock, above n 88.

93 *Sydney Morning Herald* (Sydney), 24 November 1999.

to Marsden's 'promiscuity' — all defended him and his right to choice of sexual expression, even though some admitted to personal misgivings about such a lifestyle.

But it's not just the rich and powerful who testified. A former client cried as he admitted he deserted Marsden after the allegations were aired and a dairy farmer demurs when asked if he thinks Marsden's homosexuality is 'revolting'. 'Just wrong,' he replies. When asked if he knew Marsden was promiscuous the burly Australian bloke simply asked what that means.⁹⁴ The definition of 'rough trade', particularly whether it implies a commercial transaction, became so contentious over the first week of the trial that Justice Levine at one point joked that he has failed to take notes on all the definitions.⁹⁵ Following one witness's definition of 'rough trade' as including 'ugly older men', *The Daily Telegraph*⁹⁶ headed their report 'Marsden Liked Ugly Old Men: Supreme Court told'. Whether Marsden liked his men rough and 'toothless' became something of a standing gag throughout the trial.

Several witnesses testified to a distraught Marsden in tears or a suicidal Marsden threatening that he can't go on and is ready to drive off a cliff. A psychologist testified to Marsden's struggles with alcoholism, depression and difficulties in sexual relationships.⁹⁷ He was even designated by one reporter as 'something of a Godfather figure to the Sydney gay community'.⁹⁸

While much of this reporting is plainly voyeuristic, I would contend that it can't simply be dismissed as homophobic. Marsden is clearly mocked in some reports but images of 'flamboyance' are matched with images of 'courage' and 'dedication'. The very fact that it is the Assistant Police Commissioner discussing Marsden's promiscuity or the former president of the Law Society saying promiscuity should not bar anyone from public office tends to undercut what would normally function unreservedly as an ostracising comment.

It could be argued that Seven's council engaged in homophobic tactics and, as Marsden was later to claim, intentionally misused gay terms in a way that was derogatory to himself and the gay community. Indeed this claim was made by one observer in a letter to the gay community newspaper *Sydney Star Observer*.⁹⁹ As reporter David Mills notes in the same issue of the *Star*:

Nicholas [QC for Seven] has also consistently questioned witnesses as to their understanding of the term 'promiscuous', and has invited some witnesses to agree that they found Marsden's sexual behaviour to be 'morally repugnant', or even 'revolting' ... An observer in the case may wonder how much of it is about Marsden, and how much of it is about gay lifestyle and sexual practices.¹⁰⁰

However when these incidents were reported the focus was usually on the witness's denial of Nicholas' proffered terms or explanations. The *Australian's* David Brearley is typical in his playful approach to the subject. He begins: 'Rough trade — it's definitely about sex, it conceivably involves money but, in the case of homosexual Sydney solicitor John Marsden, it does not refer to young men.'¹⁰¹ Even Fr Confeggi, a Catholic priest and friend of Marsden, testifies that his church teaches that homosexuals must be given respect, compassion and must not be discriminated against. He also testifies that Marsden told him that it was only his Catholic faith which kept the lawyer from committing suicide by jumping off the Gap.¹⁰²

94 *Sydney Morning Herald* (Sydney), 25 November 1999.

95 *Telegraph* (Sydney), 23 November 1999.

96 *The Daily Telegraph* (Sydney), 19 November 1999.

97 *Telegraph* (Sydney), 18 November 1999.

98 *Australian* (Sydney), 23 November 1999.

99 *Sydney Star Observer* (Sydney), 25 November 1999.

100 *Sydney Star Observer* (Sydney), 25 November 1999.

101 *Australian* (Sydney), 19 November 1999.

102 *Telegraph* (Sydney), 26 November 1999.

The early reports do tend to emphasise a fragile, victimised Marsden even while narrating competing stories of power. The *Daily Telegraph* reported the case on an almost daily basis with a special series logo titled: 'A question of repute', under a headshot of a determined Marsden against Seven's circular logo. Their headlines over the first fortnight's coverage give an idea of their approach to the evidence: 'Marsden came close to giving up';¹⁰³ 'Marsden had psychiatric problems';¹⁰⁴ 'Marsden liked ugly old men';¹⁰⁵ 'Tears over untrue claims';¹⁰⁶ 'Diners turned backs on lawyer';¹⁰⁷ 'Why Kathryn refused offer';¹⁰⁸ 'Sermon from the witness box';¹⁰⁹ 'Marsden went to Gap';¹¹⁰ 'How Marsden lost his zest'.¹¹¹

Although it certainly could be argued that the juxtaposition of evidence about Marsden's sexuality and evidence about his psychiatric problems and suicidal tendencies plays into stereotypical pathologisation of homosexuality, I believe such a reading is simplistic. In the overall context of the trial coverage Marsden emerges as a fallen hero rather than merely as a passive victim. The images of everyday weakness — tears and depression — constitute Marsden as an everyman rather than as an outcast. Testimony that he was 'close to giving up' but somehow managed to continue helps move him back from victim to hero.

Although the trial was about the allegation that Marsden had sex with underage boys, he refused to be reduced to his sexual behaviour. In fact how much of John Marsden would be admissible became the first legal question of the trial. Seven's lawyers objected within the trial's first 10 minutes to questions about Marsden's reputation in legal circles, suggesting that since the libel only related to Marsden's sexual activities evidence should be restricted to his 'sexual propensities and behaviour'. Having won that point after three hours of legal argument, another objection quickly came at questions on Marsden's mood after the allegations were broadcast. Justice Levine eventually ruled that this line of questioning was also valid.¹¹²

Before and after quickly became the dynamic structure around which witness testimony was collected and reported. The *Sydney Morning Herald's* Kate McClymont shows the complexity of the portrait that emerges from this first fortnight of testimony:

Before Channel 7's broadcasts in March 1995 and May 1996, which accused him of having sex with under-age boys, some of them prostitutes, the picture his witnesses have painted is of an ebullient, flamboyant show off and shameless attention seeker, who was nonetheless a hard worker dedicated to civic causes and Campbelltown, fun to be with, and who made no secret of his homosexuality. So open was he that broadcaster Phillip Adams quipped that Mr Marsden was 'a person of preposterous candour', while the Assistant Commissioner of Police Christine Nixon said she had been surprised by Mr Marsden's frankness about his sexual activities when he once gave a lecture at the Police Academy at Goulburn.

After the Channel 7 broadcasts, the evidence of his friends indicates that Mr Marsden hid at home, didn't look after himself, was frustrated, suicidal, angry and so depressed at one stage a friend found him lying on the floor of his home sobbing.¹¹³

103 *The Daily Telegraph* (Sydney), 17 November 1999.

104 *The Daily Telegraph* (Sydney), 18 November 1999.

105 *The Daily Telegraph* (Sydney), 19 November 1999.

106 *The Daily Telegraph* (Sydney), 23 November 1999.

107 *The Daily Telegraph* (Sydney), 24 November 1999.

108 *The Daily Telegraph* (Sydney), 25 November 1999.

109 *The Daily Telegraph* (Sydney), 26 November 1999.

110 *The Daily Telegraph* (Sydney), 26 November 1999.

111 *The Daily Telegraph* (Sydney), 1 December 1999.

112 *Sydney Morning Herald* (Sydney), 16 November 1999.

113 *Sydney Morning Herald* (Sydney), 29 November 1999.

The trickster is not just a figure of self-revelation; his disclosure reveals something new — and perhaps even horrifying — about us all. A number of the witnesses, including the good Fr Confeggi, admit, much to their own chagrin, that they denied knowing Marsden or avoided him after the allegations were broadcast. Friendship, loyalty, faith, sex and sexuality, politics, depression, suicide and betrayal all feature in these initial narratives of the trial and they each but up against each other in surprising ways. 'More twists than Hamlet' one headline screams.¹¹⁴

The dramatic play of Marsden's colourful life and of the daily parade in the courtroom is savoured by the reporters covering the trial. An article marking the beginning of the trial's second week is headed 'Parade of celebrities join line-up';¹¹⁵ it announces that former Olympics Minister Michael Knight is 'among a galaxy of high profile people' who will be called to testify on Marsden's behalf. The *Herald's* Kate McClymont begins week four: 'Suicide, sex and slander at the Bar table — the opening day of week four of the State's most sensational defamation trial had it all.'¹¹⁶ This sense of the trial as a show with Marsden as either the ebullient or the weeping star constantly reframes what would otherwise be damaging and embarrassing revelations.

By the time the trial broke for Christmas recess, after an intense first four weeks, the trial had already been cast as a David and Goliath battle. In a summary article the *Star Observer's* Mills concludes:

Although the next stage of the trial is likely to be more nasty, the upshot of the first half of the trial has been to confirm Marsden as a larger than life, one in a million public figure. Someone far less timid than the mythical David, but someone who may just as implausibly knock out a gargantuan foe.¹¹⁷

Mills turned out to be right on both counts. It did get nastier: the second phase of evidence wasn't just about sex, it included attacks on Marsden's personal integrity, including accusations of witness tampering and even the bizarre allegation that he was an international drug baron.¹¹⁸ But somehow (to mix my mythical metaphors) the trickster still managed to fire the winning hail of stones.

The resumption of the trial in 2000 was announced by the *Telegraph* in an article headed 'Circus back in town'.¹¹⁹ It began: 'Expect fireworks next Monday when John Marsden's defamation case against the Seven Network returns to the NSW Supreme Court.' The first few weeks of February 2000 saw Marsden accused of having sex with boys as young as 11, of treating them roughly and of rape. Here the picture is not sympathetic and the incidents are described in some detail. McClymont begins her first report: 'Prominent solicitor Mr John Marsden was yesterday accused of brutally raping an 11 year old boy.'¹²⁰ However, she also rehearses Marsden's status as former president of the Law Society and member of the Police Board against her picture of the witness as 'son of an alcoholic father', a former ward of the state, who at the age of eight had been put in detention as an uncontrollable child. Although allegations like this follow thick and fast for the next few weeks, the credibility of the witnesses is severely weakened on cross-examination and key dates and ages are easily challenged. But this is definitely one of the hardest stages of the trial for Marsden and his survival as a sympathetic figure is at least in part due to his successful negotiation back and forth between the poles of power and vulnerability. In that same article McClymont notes:

114 *The Daily Telegraph* (Sydney), 18 November 1999.

115 *Telegraph* (Sydney), 23 November 1999.

116 *Sydney Morning Herald* (Sydney), 7 November 1999.

117 *Sydney Star Observer* (Sydney), 23 November 1999.

118 *Sydney Morning Herald* (Sydney), 12 December 1999.

119 *Telegraph* (Sydney), 26 January 2000.

120 *Sydney Morning Herald* (Sydney), 2 February 2000.

During the course of evidence, at times very graphic, Mr Marsden sat back in his chair, expressionless, his arms folded across his chest.¹²¹

This is an intriguing image of defiance and passivity. Although at different points in the trial there are outbursts of an emotional or angry Marsden, there is a pervasive sense throughout of stoic endurance.

Under cross-examination himself, Marsden's testimony is entertaining and his choice of metaphors quaint, and although there are moments when anger arises he is never less than direct. Marsden's 'preposterous candour' is used playfully as a defensive ploy. At one point he is asked by Robert Stitt QC, Seven's counsel, whether the inhalant amyl nitrite was used to assist orgasm, Marsden replied:

No, I describe it like this. When you like ice cream really well it's the same as liking sex really well. If you want to add something to it you might add strawberries to it. Using amyl is like adding strawberries to the ice cream.¹²²

At another point having been led through a long session about all sorts of sexual practices and preferences, which included questions about threesomes and nipple torture, Stitt asks him whether he likes being struck:

'Can you imagine a top being passive in those situations?' the witness replied incredulously. 'Tops are top. I'm not a passive partner.'¹²³

He turns his admission about smoking marijuana into a speech about civil disobedience: 'I am proud to have taken on a law which persecutes disadvantaged minority groups.'¹²⁴ He blithely dismisses the contention that having sex with a client is unethical, citing the absence of any such prohibition in the Law Society rules.¹²⁵

It is clear to everyone that Marsden is a teller of stories, some humorous, some instructional and others that seem to toy with the facts. Stitt dismisses part of Marsden's evidence, at one point saying, 'It was just one of your stories.'¹²⁶ Marsden reacts angrily to this as an imputation on his seriousness. For Marsden the performance of truth is important not just from a legal point of view. The trial is an adjudication of more than mere truth-telling; it is about justification and integrity. At one point when Stitt asks rhetorically whether Marsden has something to hide, Marsden responds firmly that he does not. Then he adds plaintively, 'That's why I have opened my whole soul to the world.'¹²⁷ His pathos and suffering is also obvious under cross-examination. He paints a bleak picture of living a lonely gay life in the 1950s and 1960s. Gay people 'were treated like dirt, treated like second class citizens, trod on and spat on,' he says at one point.¹²⁸

But his narratives of suffering and hardship are complimented with invitations to struggle and justice. He ends his closing arguments with a gay riff on Martin Luther King's famous 'I have a dream' speech — even though he admits that it is now a severely disillusioned dream.¹²⁹ Marsden's personality particularly asserts itself in the final weeks of the trial when he takes over his own legal representation after claiming

121 *Sydney Morning Herald* (Sydney), 2 February 2000.

122 *Telegraph* (Sydney), 10 November 2000.

123 *Australian* (Sydney), 14 June 2000.

124 *Telegraph* (Sydney), 8 June 2000.

125 *Sydney Morning Herald* (Sydney), 17 June 2000.

126 *Telegraph* (Sydney), 15 June 2000.

127 *Sydney Morning Herald* (Sydney), 9 June 2000.

128 *Sydney Morning Herald* (Sydney), 14 June 2000.

129 *Australian* (Sydney), 21 November 2000.

he can no longer afford a barrister. But even in full flight Marsden retains a gritty realism:

'Does that mean that every gay man that does beats has a lower reputation? Does that mean that because I am a pot smoking pooker that I am entitled to less damages?' he asks in his closing statement.¹³⁰

In this he is the typical larrikin: a down to earth, but cheeky teller of yarns, fighter and survivor. Characteristically the Australian larrikin figure is an outsider who rejects easy notions of social conformity, yet one whose wily ways ensure a certain degree of ease in his own lifestyle. He is never as pleased as when altruism and self-interest coincide.

This down to earth non-conformist Australian larrikin readily intersects with the traditional trickster. In his cross-cultural study of the trickster, Lewis Hyde makes the point that 'trickster stories are radically anti-idealistic; they are made in and for a world of imperfections ... In fact, it may be exactly because these stories do not wish away or deny what seems low, dirty and imperfect that their hero otherwise enjoys such playful freedom.'¹³¹

By the end of the trial the quest hero has completed his transforming journey but the ambiguity of the trickster is still present, albeit in softer focus. In a post victory interview with Marsden, David Mills captures this ongoing complexity:

'A person of preposterous candour.' That was Phillip Adams's memorable description of his mate John Marsden, spoken in the witness box when Adams was called as a character witness in the longest-running defamation case in Australian legal history.

It was true then; it is true today. Speaking to me on a windy Tuesday afternoon in Hyde Park, John Marsden remains a man driven to reveal, to explain, to confess.

But he is much changed. This man speaking to me is not Manic Marsden, the Marsden of the court case and the *60 Minutes* interview, given to bursts of flyaway anger and occasionally incoherent passions. This, dare I say it, is a kinder, gentler Marsden.¹³²

The narrative here contrasts the many John Marsdens — in our terms the trickster — with the growth of a singular, true self: an image of the constitution of the hero through the slaying of beasts.

Mills continues a little later:

The past few months have changed Marsden. As he says, he has lost a bit of his old arrogance and ego, and he has an appreciation for depressive illness that he never had before. There's something about him that is almost humble. When I ask him what motivated him to pursue Channel Seven for damages in the defamation suit, he says he was only part motivated by altruism to the gay community. He doesn't want to play the part of a gay crusader. 'Don't overplay that,' he tells me. 'That would be wrong.'¹³³

Here again, even in humble guise, we have the performative, duelling trickster. On the one hand there is the birth of the stronger self; on the other softness, humility. On the one hand we have an altruistic martyr for a cause; on the other hand he admits this is not the complete story.

But the most remarkable aspect of Mill's story is the introduction of Marsden in love:

¹³⁰ *Sydney Morning Herald* (Sydney), 7 November 2000.

¹³¹ Lewis Hyde, *Trickster Makes this World: Mischief, Myth and Art* (1998) 91.

¹³² David Mills, 'Preposterous Candour', *Sydney Star Observer* (Sydney) 2001, No 568.

¹³³ *Ibid.*

'In the gay community you meet some amazing people, but this man is the most amazing human being I've ever met,' Marsden says of his new boyfriend Glen. 'He's intelligent, he's witty, he's caring, he's sharing, he's beautiful. Adjectives can't describe him. I've been celibate since 5 May, when he went to America. It's the longest time since I left the priesthood,' he says with that trademark candour and a half embarrassed smile.

Marsden emphasises that his commitment to Glen supersedes any commitment to public life. He says that he 'stuffed up' two previous relationships by committing too much time to community involvements, this time his partner is going to come 'first, second and third and if there's any left over, he'll get that too'. Celibacy in Glen's absence is marked as extraordinary and contrasted with normal patterns of behaviour but it is also mapped to the even more distant and religious past of Marsden's time in the priesthood. In this sense it is a return to origins, just as the commitment to the domestic over the public is a return to 'self'.

And so we come back to our original description of the trickster, the mercurial figure of self-revelation; a paradoxical figure whose performance of truth-telling can be marked by duplicity and contradiction. A figure who crosses boundaries from one sphere to another, a playful figure, who challenges stereotypes, a figure, who through suffering, and accident, reveals, challenges and changes. The public and the private, the personal and the political, the past and the present, love and lust, courage and shame, life and death, the outcast and the hero all butt up against each other in the incredible story of John Marsden. Throughout the proceedings it is unclear whether it is Marsden himself, the Seven network, homosexual lifestyles, hetero-normativity, the media, the police, politicians or the legal system that is on trial: all come under challenge. Through the web of accusation and counter-accusation Marsden doesn't exactly escape unscathed but he certainly emerges, trickster-like, vibrantly and chaotically alive.

Reinscribing communal boundaries

The inscription of Marsden as Trickster is partly a self-created public relations exercise; partly a product of his prodigious and multifaceted life; partly a result of the argumentative tactics of the trial; partly due to journalist's readiness, both consciously and unconsciously, to follow a mythic theme; partly the accidental convergence of any number of these elements; and, of course, partly the product of this particular reading and play of interpretive communities. Ultimately what is abundantly clear is that the Marsden case and its reporting in the media is something much more than an objective consideration of evidence about damage to one man's reputation.

As I have already noted, the tort of defamation is as much about the 'legal construction of community'¹³⁴ and the process of moral inclusion and exclusion, as it is about the protection of individual reputation. Personal reputation and the cultural constitution of community are of course necessarily linked. As Bellah puts it:

We all know that reputation is something shared and reflected. Something that reflects on the reputation of a parent, child, spouse, or friend reflects to some degree on us; we are protective of those reputations. To a considerable degree the reputation of a community is reflected in the reputation of its representative figures. Indeed, it is the founders and heroes of a community that to a considerable extent give it its identity, and it is the memory of the sufferings and achievements of exemplary figures that constitutes a community as a community of memory and keeps that community alive.¹³⁵

In this discussion of reputation and community Bellah mirrors much of the scholarship on myth, community and news. His delineation of the function of representative/exemplary figures and heroes in the formation of a 'community of memory' is consistent with an Eliadian view of myth and echoes

¹³⁴ McNamara, above n 69, 274.

¹³⁵ Bellah, above n 69, 745.

Kitch's discussion of the social functions of journalism in 'drawing on and building collective memory'¹³⁶ that I have noted above. It is also consistent with Anderson's notion of mass mediated communication as a product of ritually constituted 'imagined communities'.¹³⁷

As indicated by Justice Levine's reference to the 18 diverse 'component fields' that Marsden acted in, the controversial solicitor was a representative figure across a number of different communities. Each of these interpretive communities¹³⁸ will constitute and reconstitute the myth of John Marsden in their own way. Similarly Marsden as trickster will be read in different ways. In the politico-legal community Marsden the trickster may be read primarily as an adroit negotiator of the public sphere, perhaps even as a bastardised form of Machiavellian statesmanship. In the local community of Marsden's Campbelltown, the larrikin, street-smart fighter image may register most readily. The ritual of repair will occur differently in each of these communities and in each case a new story will be constructed that integrates the narrative of the trial within the pre-existing maps of meaning available to that community.

Various models of community are reiterated or brought under dispute in the courtroom dialogue and the media reportage of the drama. Models of oppression and liberation in gay community are rehearsed. Models of inclusion and exclusion in the legal and political community are also dramatised. At a micro level, particular friendship communities are put under the microscope. In this sense the trickster's performance — the powerful juxtaposition of his different selves and different worlds — momentarily calls into question established boundaries, which in turn opens up the possibility of social as well as personal redefinition.

Just as the trickster is a shape shifter who constantly re-draws his own identity he also re-draws the boundaries of the communities in which he performs. As Lewis Hyde writes:

Trickster is the great shape-shifter, which I take to mean not so much that he shifts the shape of his own body, but that given the materials of this world, he demonstrates the degree to which the way we have shaped them may be altered. He makes the world and then he plays with the materials. There is the given of death, the given of waterfalls and sunlight of sleep and impulse, but there is also an intelligence able to form the givens into a remarkable number of designs. There is no healing for death but it does not follow that human beings must live 'witless'.¹³⁹

This shaping of community can be both divisive as well as recuperative. Marsden is brought back into the sphere of respectability on the backs of the many witnesses who are excluded by virtue of their histories of criminality, prostitution and drug use. However Marsden's own drug use is re-drawn not as addiction but as a radically subversive act.

Technically defamation is an act of degradation or shaming and the trial judgment a reparative act. But in practice, as can be seen from the Marsden case, even where the plaintiff wins the trial evidence can exploit the degradation rather than assuage it. As we have seen, Marsden's 'preposterous candour' assisted him in confronting that shame head on. The trickster's relationship to shame is a complex one. Hyde maintains that it is not right to simply call tricksters 'shameless' because they 'struggle deeply with shame'.¹⁴⁰ But it is in their refusal to stop struggling that they seek to change the face of shame.

Perhaps it would be better, then, to say that those who work the edge between what can and can't be said do not escape from shame but turn toward it and engage with it. They wrestle with it; they try to change its face; they kill it in one form so as to resurrect it in another.¹⁴¹

136 Kitch, above n 36, 296.

137 Anderson, above n 26.

138 Fish, above n 58.

139 Hyde, above n 131, 91.

140 Ibid 165.

141 Ibid 165.

One of Hyde's examples of a contemporary trickster who confronts his shame is the gay poet Allen Ginsburg, who had to confront his shame about both his own homosexuality and the madness of his mother. Hyde maintains that one thing that separates Ginsburg from other confessional poets is that the things Ginsburg confesses are 'not things that he wishes to distance himself from but things he longs to honor. Therefore, he not only wrestles with shame, he remakes its territory, sanctifying what others have called profane.'¹⁴² Hyde then goes on to note:

[Ginsburg's experience] I take to be the general case with those who seek to change the face of shame. Refusing their elders' sense of where speech and silence belong, they do not so much erase the categories as redraw the lines. They lift the old shame thresholds and place them in new doorways. They promulgate an altered sense of dignity to replace the constraining dignity that the village urged on them.¹⁴³

Similarly it is in Marsden's refusal to be constrained by rules of what can and can't be said that he engages in a transforming struggle with the communal boundaries of shame and shamelessness.

In the earlier sections of this article I have dealt with mythic narratives in both journalism and in legal discourse. In the reportage of a legal case we have the coming together of these two mythological structures. One of the elements of a trial is the cumulative evolution of the narrative in the back and forth of evidence, counter evidence and cross-examination. There is a flow and a natural, if sometimes unpredictable, dramatic arc, which is an essential part of that narrative. This cumulative flow of evidence is mapped in a particular way by the media. In the coverage of a long running trial, such as the Marsden case, one of the techniques employed by journalists is a mix of short daily reportage backed up by longer summary analysis at critical points in the trial's evolution. These longer pieces, produced at strategic intervals, such as the conclusion of different stages of evidence, allow for the protagonists to be re-drawn as the story evolves. One of the effects of this technique, in a case like the Marsden defamation trial, is to reinforce the transformative trickster character of Marsden as he morphs from tearful potential suicide, to accused sexual predator, to cantankerous witness, to little man fighting the corporate giants for justice.

The twin impulses that we have seen operating in both journalism and law, a type of strategic objectivity and a deliberative sense-making narrative, are both in evidence here. The telescoped reports of daily evidence and counter evidence play the objectivity game even as they provide incident and anecdote for the mythic play of the story. The intermittent features tend towards contextualisation and broader storytelling and allow for the opening-up of the mythic dimensions. Just as Amsterdam and Hertz argue that an appeal to the quest hero myth shifts the focus of the trial to the present tense of the court-room, rather than the gruesome past of the events under consideration,¹⁴⁴ the stylistic conventions of journalism reiterate the present tense of past events.

The reader of daily newspaper reports of the Marsden trial was constantly reintroduced to the trial as quest by the formulaic recapping of the essential story: 'Marsden is suing the Seven network ...' or 'Marsden is fighting to clear his name ...'. Readers are also constantly reminded that this is a current drama by designation of time frames: 'Yesterday in court ...' or 'Expected in court today ...'. The series title and logo adopted for reports by the *Daily Telegraph*, 'A question of repute', might readily be reframed in Amsterdam and Hertz terms as the 'riddle' of the quest hero; the question is at the nub of the quest.

A figure like Marsden, in a case such as his defamation trial, cannot be contained by the evidence. Technically the legal restoration of personal reputation and the inherent repair of community

¹⁴² Ibid 167.

¹⁴³ Ibid 167.

¹⁴⁴ Amsterdam and Hertz, above n 75.

boundaries occur through the judgement and award of damages. But the collective memory is also reconstituted through the deployment of mythic images. In this process Marsden has undergone a death and resurrection and strangely emerged as a kind of marginal culture hero.

The trickster is always actor rather than passive victim. Even faced with the accidental or disastrous, the trickster emerges, if not unscathed, at least reconstituted. ●