According to the popular image, in a British criminal trial witnesses give evidence before a robed judge and a jury and they are examined and cross-examined by bewigged counsel for the Crown and for the defence. Inevitably, that image is over-simplified. The vast majority of trials take place before magistrates; the representatives of both sides may be solicitors rather than counsel and, in exceptional cases, in England – but not in Scotland – even trials for serious offences may proceed in the absence of the accused. Where children are involved, in the Crown Court wigs and gowns are discarded and various other steps are taken to make the proceedings less formal. In the Youth Court the proceedings are always relatively informal, being tailored to the requirements of the children who appear there. Historically, also, the popular image does not tell the whole story. For centuries, in England the parties in a criminal trial usually had no professional representation. The prosecutor and his witnesses would put their side of the story and the accused would try to discredit it. In that world, cross-examination and formal rules of evidence were unknown: they are the products of the adversarial form of trial that emerged when, in the course of the eighteenth and early nineteenth centuries, it became common for counsel to be instructed. Since the forms of trial have evolved in this way over the centuries, there is no reason to suppose that today’s norm represents the ultimate state of perfection or that the procedures will not evolve further, as technology advances.

Lord Rodger of Earlsferry, *R v Camberwell Green Youth Court* [2005] 1 All ER 999 at 1004–1005. (emphasis added)

This chapter will argue that the modern criminal trial is less adversarial and increasingly decentralised than is currently realised. The criminal
trial is emerging as an institution of transformative justice. As Lord Rodger of Earlsferry indicates, the criminal trial need not be organised around the principles of adversarialism to the exclusion of other pathways to justice. As demonstrated in Chapter 3, this decentralisation takes effect through a range of criminal justice policies that challenge the notion that the adversarial trial takes a prescribed form. Such policies not only come to affect the scope of the conventional trial by indictment before a ‘judge and jury’, but affect the pre-trial and sentencing processes as well. The need for expediency, the law and order debate, the rise of terrorism, victim’s rights, and the rise of new court procedures to bind persons over to prevent offending, have each challenged the conventional means by which persons are being held to account for their wrongdoing. The liability of the offender is now dealt with through an array of processes, across a number of tribunals, each of which dislocate the trial experience from a nominal adversarial process. A number of common law jurisdictions are therefore modifying the conventional approach to the adversarial criminal trial to connect individuals, such as victims, and groups, such as the community and service organisations, to effect a different, perhaps less centralised criminal process.

This notion of the transformative trial is not based on any normative or prescribed account of what the trial ought to be. It is transgressive to the extent that it seeks to break some of the rules of criminal procedure, while holding onto others. This chapter will further argue that the transformative criminal trial is neither normative nor prescriptive. As such, it is impossible to map the strictures through which this notion of the trial seeks to operate. Rather, the notion of the transformative criminal trial merely reminds us that the criminal trial is not a normative institution that functions according to a prescribed set of rules and principles. It is not that rules and processes of general application constitute particular aspects of the criminal trial. Trial processes and rules of evidence are of application between trials. The point is that the social institution of the criminal trial is not restricted to a set adversarial process before judge and jury. Adversarial processes may vary, or be more inquisitorial, or be modified to include different agents of justice, such as the victim. The adversarial criminal trial as a normative experience is being increasingly sidestepped for alternative means to justice. This, arguably, is consistent with the genealogy of the trial discussed in Chapter 2.

Findlay and Henham (2005: 322–323; also see Findlay and Henham, 2010: 5–9) suggest that such a transition, in the context of integrating