The trial has taken many forms over the course of the history of the common law. The form the trial has taken directly relates to the needs being satisfied by the trial at any given time. This argues against the notion that the trial, much like the broader criminal law, is shaped by general principles that have existed as part of the common law from time immemorial. To the contrary, the determination of the means and processes by which accusations of wrongdoing are heard and determined are largely the product of customary, social and political relations and it is not possible to exclude certain persons, parties, institutions or groups as bearing influence on the form that the trial ought to take. To this end, the trial as the manifestation of the means by which accusations of guilt are heard and determined, are not exclusive to the interests of select parties, but are inclusive of many voices and perspectives relevant to criminal law and justice. These voices are personal as well as institutional, and include victims, defendants, prosecutors, the Crown, the state, statutory authorities and the public at large. While it is not possible to give voice to each of these participants at each point in the process for the determination of criminal liability, we should guard against any attempt to exclude any one ‘voice’ as irrelevant or detrimental to justice. The controversy, rather, is in the balance of these voices and perspectives.

The previous chapters have shown that the criminal trial has not taken a particular or prescribed form since its inception as a customary practice for the resolution of local disputes. Today, several trends present which suggest that the trial is continuing to transform. These trends, informed by various discourses of criminal justice policy, see the adversarial criminal trial become less adversarial and more inquisitorial, and more decentralised, in its organisation and operation. This trend is evidenced through the genesis of the criminal trial as a
transgressive institution of social justice, seen through the rise of new approaches to justice such as therapeutic and problem-solving courts, the integration of human rights discourse, and the inclusion of victims into processes from which they would be otherwise excluded. The decentralised nature of the trial is also evidenced through the proliferation of a range of courts that specialise in particularised justice by meeting the discrete needs of classes of defendants and victims, and is further demonstrated by the move toward expedient modes of justice that dislocate the criminal trial from ‘judge and jury’ trials for local or magistrates’ courts, which also adopt a range of inquisitorial processes that depart from the strict requirements of adversarialism.

This chapter focuses on the identification of the criminal trial as a site of discourse and power. Foucault’s (1969, 1982, 1984, 1994) notion of disciplinary power as constitutive of social relations and the institutions which govern them assist our understanding of the transformative and decentralised nature of the modern criminal trial. This perspective also realises that the ‘adversarial model’, as it may be termed, is but one manifestation of a system of justice. Adversarialism comes with its own normative assumptions and prescriptions. Attached to these assumptions are commonly accepted ways of the ‘conduct of conduct’, to borrow Foucault’s (see Gordon, 1991: 1–51; Dean, 1999: 10) notion. These normative assumptions define the accepted ways of regulating the behaviour of persons, offices, and institutions, each of which come together in an organised way to constitute the very institution of the adversarial criminal trial. The adversarial model, then, identifies who is relevant and who is not; who may speak and who may be silenced. Furthermore, as the dominant model of justice that emerged into the twentieth century, adversarialism comes to assume certain things about justice in such particularised ways that they constitute an ideology that is defendable within a normative framework as based on prescribed ways of ‘conducting conduct’.

Foucault’s (1969, 1982) work is pertinent here as it reminds us that such ideology, and the normative universe that rationalises its form and function, is constituted as an object of power and, most importantly, as ‘truth’. Power, knowledge and truth are related to the extent that they may come together to perpetuate certain forms of knowledge as fact or truth; as unquestionable. Such truths may be constituted and supported by discursive formations that manifest out of the power of the statement and the archive. That the adversarial trial is the best guarantee of a defendant’s right to a fair trial is one such truth that dominates common law systems of justice. Some deem it to be a truth