Anne Wagner
Richard K. Sherwin *Editors*

Law, Culture and Visual Studies

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Advance Praise for *Law, Culture, and Visual Studies*

This diverse and exhilarating collection of essays explores the many facets both historical and contemporary of visual culture in the law. It opens a window onto the substantive, jurisdictional, disciplinary, and methodological diversity of current research. It is a cornucopia of materials that will enliven legal studies for those new to the field as well as for established scholars. It is a "must read" that will leave you wondering about the validity of the long-held obsession that reduces the law and legal studies to little more than a preoccupation with the word.

Leslie J. **Moran**, Professor of Law, Birkbeck College, University of London

Law, Culture and Visual Studies is a treasure trove of insights on the entwined roles of legality and visuality. From multiple interdisciplinary perspectives by scholars from around the world, these pieces reflect the fullness and complexities of our visual encounters with law and culture. From pictures to places to postage stamps, from forensics to film to folklore, this anthology is an exciting journey through the fertile field of law and visual culture as well as a testament that the field has come of age.

Naomi Mezey, Professor of Law, Georgetown University Law Center, Washington, DC, USA

This highly interdisciplinary reference work brings together diverse fields including cultural studies, communication theory, rhetoric, law and film studies, legal and social history, and visual and legal theory, in order to document the various historical, cultural, representational, and theoretical links that bind together law and the visual. This book offers a breathtaking range of resources from both well-established and newer scholars who together cover the field of law's representation in, interrogation of, and dialogue with forms of visual rhetoric, practice, and discourse. Taken together, this scholarship presents state-of-the-art research into an important and developing dimension of contemporary legal and cultural inquiry. Above all, *Law Culture and Visual Studies* lays the groundwork for rethinking the nature of law in our densely visual culture: How are legal meanings produced, encoded, distributed,

and decoded? What critical and hermeneutic skills, new or old, familiar or unfamiliar, will be needed? Topical, diverse, and enlivening, *Law Culture and Visual Studies* is a vital research tool and an urgent invitation to further critical thinking in the areas so well laid out in this collection.

Desmond Manderson, Future Fellow, ANU College of Law/Research School of Humanities and the Arts, Australian National University, Australia

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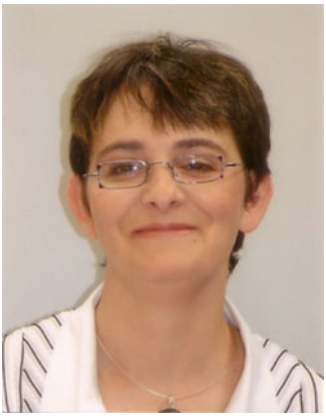

Anne Wagner is an Associate Professor at the Université Lille – Nord de France. She is a research member at the Université Lille – Nord de France (Centre de Recherche Droits et Perspectives du Droit, équipe René Demogue: http://crdp.univ-lille2.fr/le-centre/). She is a Research and Adjunct Professor at China University of Political Science and Law (Beijing). She is a permanent member of the *Instituto Subalpino per l'Analisi e l'Insegnamento del Diritto della Attivita Transanzionali* (ISAIDAT with Prof. Rodolfo Sacco). She is the Editor in Chief of the *International Journal for the Semiotics of Law* (http://www.springer.com/law/journal/11196 – Springer) and the Series Editor of *Law, Language and Communication* (http://www.ashgate.com/default.aspx?page=3916 – Ashgate). She is President of the *International Roundtables for the Semiotics of Law* and Vice President of the *Multicultural Association of Law and Language* (Hong Kong).

She has lectured in Asia, Australia, Europe, and North America. She has extensively published research papers in the area of law and semiotics, law and criminology, legal discourse analyses, law and culture, and legal translation. She is the Editor of *Images in Law* (2006, Ashgate); *Legal Language and the Search for Clarity*

(2006, Peter Lang); *Interpretation, Law and the Construction of Meaning* (2006, Springer); *Obscurity and Clarity in the Law* (2008, Ashgate); *Diversity and Tolerance in Socio-Legal Context* (2009, Ashgate); *Prospects of Legal Semiotics* (2010, Springer); and *Exploring Courtroom Discourse* (2011, Ashgate). She is the author of *La Langue de la Common Law* (2002, L'Harmattan). She also has many editorial appointments as Guest Editor for *Meta – Journal des traducteurs* (2013) and *Semiotica* (2013).

In 2009, Anne Wagner began investigating *Visual Studies* with a close connection to visual semiotics and the way empty spaces, shapes, and garments can either subjugate or disrupt the public sphere and lead to disobedience, incivilities, and crimes: *Nation, Identity and Multiculturalism* (Guest Editor – *International Journal for the Semiotics of Law*, vol.25/2: 2012); *French Urban Space Management – A Visual Semiotic Approach behind Power and Control* (A. Wagner, *International Journal for the Semiotics of Law*, vol.24/2, 2011); and *The Muslim Veil in France: Between Power and Silence, between Visibility and Invisibility* (*Hermes 46*, 2011).

Richard K. Sherwin is Professor of Law and Director of the Visual Persuasion Project at New York Law School. He is the author of *Visualizing Law in the Age of the Digital Baroque*: Arabesques & Entanglements (Routledge: 2011) and *When Law Goes* Pop: *The Vanishing Line between Law and Popular Culture* (University of Chicago Press: 2000 [2002]). He has written numerous chapters and articles on topics ranging from the interrelationship between law and culture, law and rhetoric, discourse theory, political legitimacy, and the emerging field of visual legal studies. Recent publications include "Law's Life on the Screen," in Sara Steinert-Borella and Caroline Wiedmer, eds., *Intersections of Law and Culture* (Palgrave Macmillan: 2012); "Constitutional Purgatory: Shades and Presences Inside the Courtroom," in

Leif Dahlberg, ed., *Visualizing Law and Authority* (Walter de Gruyter: 2012); "Visual Jurisprudence," in the New York Law School Law Review Symposium Issue on "Visualizing Law in the Digital Age" (Fall 2012); "Law's Screen Life," in A. Sarat, ed., *Imagining Legality* (Alabama: 2011); and "Imagining Law as Film: Representation without Reference?" in Austin Sarat, et. al., *Introduction to Law and the Humanities*, (Cambridge University Press: 2010). He edited and also contributed to *Popular Culture and Law* (Ashgate: 2006).

In 2001, Professor Sherwin debuted Visual Persuasion in the Law, the first course of its kind to teach law students about the role and efficacy (as well as the pitfalls) of using visual evidence and visual advocacy in contemporary legal practice. Student films are produced in New York Law School's digital media lab.

In 2005, Professor Sherwin launched the Visual Persuasion Project (http://www.nyls.edu/centers/projects/visual_persuasion). The project seeks to promote a better understanding of the practice, theory, and teaching of law through the cultivation of critical visual intelligence. The web site showcases "best practices" in visual persuasion inside the courtroom through a broad range of visual products, from 2-D and 3-D animations to accident reenactments, day-in-the-life documentaries, settlement brochures, montages, and other innovative visual products.

A frequent public speaker both in the United States and abroad, Professor Sherwin is a regular commentator for television, radio, and print media on the relationship between law, culture, film, and digital media. His appearances include NBC's Today Show, WNET, National Public Radio, RTE Radio 1 (National Public Radio in Ireland), and CKUT (Montreal, Canada).

Biographical Notes on Contributors

Amy Adler is the Emily Kempin Professor of Law at NYU School of Law. She is a specialist in the legal regulation of art, sexuality, and speech. Her scholarship focuses on the intersection of law and culture; her work draws on an array of fields, primarily from the arts and humanities, to explore legal questions. Adler's recent articles have included analyses of nude dancing, obscenity, pornography, child pornography, "sexting," moral rights, and art. She teaches Art Law, First Amendment Law, Feminist Jurisprudence, and Gender Jurisprudence. She is also on the faculty of the Visual Culture department at NYU. Professor Adler has lectured to a wide variety of audiences, ranging from artists to psychoanalysts, to the Federal Bureau of Investigation.

Janet Ainsworth is the John D. Eshelman Professor of Law at Seattle University. Her research interests include comparative legal theory and the intersection of law, language, and meaning. The author of more than 30 book chapters and articles, her work has been published in law reviews such as the Yale Law Journal, the Cornell Law Review, and the Washington University Law Quarterly as well as in linguistics journals such as Gender and Language, Multilingua, and the International Journal of Speech, Language and Law. In addition to scholarly writing and presentations, Professor Ainsworth has been active in a number of other professional endeavors, serving on the Executive Committee of the Criminal Justice Section and as Chair of the Law and Anthropology Section of the American Association of Law Schools and on several committees of the Law and Society Association. Her pro bono activities include membership on the Board of Directors of the Seattle-King County Public Defender, writing amicus curiae briefs to the Washington State Supreme Court and the United States Supreme Court, serving on the Washington State Supreme Court Committee on Pattern Jury Instructions, and acting as consultant to the National Association of Criminal Defense Lawyers, from which she received its Outstanding Service Award in recognition of her contributions. She currently serves on the editorial board of the Oxford University Press series, Law and Language.

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Jason Bainbridge is Senior Lecturer and Head of Media at Swinburne University of Technology in Victoria, Australia. He has published widely on the relationship between law and popular culture and is currently working on a monograph mapping this relationship and how it helps to create a popular understanding of how law functions. Additionally, Jason has written on areas as diverse as risk communication in times of natural disaster, media convergence, comic books, anime, action figures, and chequebook journalism. He is a regular commentator for the Australian media and coauthor of *Media and Journalism: New Approaches to Theory and Practice* (Oxford, 2nd edition, 2011).

Malik Bozzo-Rey is Associate Professor in Economic Ethics and Philosophy of Management at the Ethics Department of Lille Catholic University. He is also a researcher at the Law School of Sciences Po Paris and Honorary Research Associate at the Bentham Project of University College London. Philosopher, his previous and present works focus on Utilitarianism and Jeremy Bentham's thought through the question: could ethical utilitarianism become a political philosophy? This work is articulated with thoughts about new conceptions and forms of democracy and history of liberalism. It also led him to business ethics; more particularly what is at stake is the emergence and relationships between legal, ethical, political, and managerial norms. Internormativity is then at the core of his thought.

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Paul Douglas Callister is Director of the Leon E. Bloch Law Library and Professor of Law at the University of Missouri-Kansas City School of Law. Professor Callister received his BA from Brigham Young University, his JD from Cornell Law School (serving as Editor in Chief of the *International Law Journal*), and his MS in Library and Information Science from the University of Illinois at Urbana-Champaign. Professor Callister previously served as a law librarian at the University of Illinois College of Law and practiced law for 9 years in Southern California. He has served as the Chair of the Copyright Committee of the American Association of Law Libraries, serves on the Advisory Board of the International Journal of the Book, and is President of a small nonprofit, the Institute for Rule of Law, Identity, Stability and Culture, which conducts research on cultural factors affecting rule of law and stable governance. He teaches courses in *Cyberlaw and Information Policy*, *Advanced Legal Research*, and *Digital Copyright and Licensing.* He regularly publishes and speaks on legal history, as influenced by information environments.

Cristina Costantini is a researcher in Comparative Private Law at the University of Bergamo. She is a member of various academic associations: the Selden Society, the Italian Association of Comparative Law (A.I.D.C.), the Italian Association of Law and Literature (A.I.D.E.L.) Scientific Board, the Associazione Italiana di Anglistica (A.I.A.), and the European Society for the Study of English (ESSE). Her main fields of research include comparative law, law and literature, law and culture, legal systemology, and law and geopolitics. Among her numerous publications are *La Legge e il Tempio. Storia comparata della giustizia inglese* (2007); *The Literature of Temple Bar* (2007); *Equity Breaking Out: Politics as Justice* (2008); *Equity's Different Talks* (2008); *The Jews and the Common Law: A Question of Traditions and Jurisdictions. An Analysis through W. Scott's Ivanhoe* (2008); *The Keepers of Traditions. The English Common Lawyers and the Presence of Law* (2010); and *The Iconicity of Space: Comparative Law and the Geopolitics of Jurisdictions* (2012).

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Dennis E. Curtis, who received his BS from the US Naval Academy and his LLB from Yale, is Clinical Professor Emeritus of Law at Yale Law School, where he teaches courses on sentencing and professional responsibility and directs a clinical course in which students work with Connecticut's State Disciplinary Counsel to prosecute lawyers who violate rules of professional conduct. He was one of the pioneers of clinical education in the 1970s, creating a program at Yale in which faculty supervised students working with indigent clients in a variety of contexts so as to gain insights into an area of substantive law in an administrative-regulatory context. Professor Curtis has written extensively on clinical education and the legal profession and on sentencing and post-conviction justice. His most recent book is *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, coauthored with Judith Resnik. In 2012, the American Publishers Association selected the book to receive two PROSE Awards for excellence, one in social sciences and the other in law/legal studies, and the American Society of Legal Writers selected the book to receive the 2012 SCRIBES Award.

Larissa D'Angelo is a Research Fellow at the Department of Comparative Language, Literature and Culture of the University of Bergamo and a Lecturer in English at the Faculty of Educational Studies. She is involved in examination boards, in collaboration with the University Language Centre, and is an active member of the Research Centre on Languages for Specific Purposes (CERLIS) of the University of Bergamo. After graduating in Foreign Languages and Literatures, she specialized in English Language in the USA (Youngstown State University), obtaining an MA, a TESOL Certificate, and a Certificate in Children's and Young Adult Literature. She is currently a PhD candidate in Applied Linguistics at the University of Reading (UK). Her main research interests deal with synchronic/diachronic analyses of gender and cultural identity variation in academic discourse as well as multimedia genres employed in academic discourse. She is a member of AIA (Associazione Italiana di Anglistica), and since 2006, she has been involved in national interacademic Research Projects on academic language and discourse funded by the Italian Ministry of Education and coordinated by Prof. Maurizio Gotti.

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Betty L. Hart teaches ethnic studies and composition at the University of Southern Indiana in Evansville, Indiana. Born in South Charleston, West Virginia, Hart attended Howard University in Washington, DC (1972), for her undergraduate work and finished her Master's (1975) degree in ethnic literature and her Doctoral (1991) degree in composition pedagogy at West Virginia University in Morgantown, WV. Her scholarly investigations include technology and race, composition and computers, ethnic literature, and screenwriting and film. Currently, Hart is researching the life of Harlem Renaissance writer Zora Neale Hurston as background for a biopic film about the author's life.

Mary Hemmings is founding Chief Law Librarian at Canada's newest Law Faculty, Thompson Rivers University, and British Columbia. An academic librarian since 1980, Mary worked at Concordia University and McGill University. At the University of Calgary's Law Library, she was Assistant Director. She is author of a book chapter on the role of women in pulp fiction and is a coauthor of a chapter on libraries and popular culture. She is a prodigious book reviewer and has taught law courses in Fundamental Legal Skills and Advanced Legal Skills. Mary's research interests focus on social and legal controls of popular culture, and legal history, generally.

Paolo Heritier graduated in Law at Turin Law Faculty and in Theology at Milan Theology Faculty. He is an Associate Professor of Philosophy of Law at the Turin University. He teaches Philosophy of Law, Legal and Philosophical Anthropology, and Neurosciences and the Law. Research interests are legal anthropology, legal visual studies, theology and law, theory of liberty, legal epistemology, semiotics of law, network theory, theories of complexity, and neurosciences and the law. He is a member of the Directive Council of Italian Society for Law and Literature (ISLL, Bologna University), Center for Legal Methodology (Trento University, CERMEG), and Center Research on Communication (CIRCE, Turin University). He is Director (with P. Sequeri) of two collections in Anthropology and legal Aesthetics, "Humana" and "Tôb," and Coordinator of the Observatory on Anthropology of Liberty (www.aliresearch.eu). Among his publications are *Ordine spontaneo ed evoluzione nel pensiero di Hayek*, Napoli 1997; *La rete del diritto*, Torino 2001; *L'istituzione*

assente, Torino 2001; *La vitalità del diritto naturale*, Palermo 2008 (eds. with F. Di Blasi); *Le culture di Babele,* Milano 2008 (eds. with E. Di Nuoscio); *Problemi di libertà nel cristianesimo e nella società complessa,* Soveria Mannelli 2008 (ed.); *Società post-hitleriane?*, Torino 2009; *Sulle tracce di Jean Vigo,* Pisa 2010 (ed.); *Estetica giuridica*, Torino 2012; *Good Government, Governance, Human Complexity*, Firenze 2012 (eds., with P. Silvestri); and more than 50 papers in Italian, English, and French.

Pamela Hobbs is a Lecturer in Communication Studies at the University of California, Los Angeles, where she received a PhD in Applied Linguistics, and is also an attorney licensed to practice in Michigan, USA. Her research interests include legal discourse, medical discourse, political discourse, language and gender, and the evolution of communication.

Christopher Mark Hutton is Chair Professor in the School of English at the University of Hong Kong, where he served as Head of School from 2004 to 2007. He holds a BA in Modern languages (1980) and a DPhil in General Linguistics from the University of Oxford (1988); an MA in Linguistics from Columbia University, New York (1985); and an LLB from Manchester Metropolitan University (2008). He was Assistant Professor in the Department of Germanic Languages at the University of Texas at Austin from 1987 to 1989. His research is concerned with the politics of language and linguistics, the history of Western linguistics in its relationship with race theory, and language and law. His publications include *Abstraction and Instance* (Pergamon, 1990); *Linguistics and the Third Reich* (Routledge, 1999); *Race and the Third Reich* (Polity Press, 2005); *Language, Law and Definition* (with R. Harris, Continuum, 2007); and *Language, Meaning and the Law* (Edinburgh, 2009).

Christian Mosbæk Johannessen, MA from the University of Southern Denmark and Industrial PhD from Danfoss A/S and the University of Southern Denmark, currently holds a position at the Institute of Language and Communication, University of Southern Denmark, and conducts research in forensic analysis of graphics and graphetic articulation drawing on theories of multimodal semiotics, ecosocial semiotics, distributed cognition, and ecological psychology.

Orit Kamir is a Professor of law, culture, and gender. She specializes in law and film, honor and dignity cultures, Israeli society and law, feminist analysis of law, and sexual harassment and wrote her dissertation in Law and Culture under the supervision of James Boyd White at the University of Michigan in 1995. Most of her work is in Hebrew. Her books in English are *Every Breath You Take: Stalking Stories and the Law* and *Framed: Women in Law and Film*.

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structure, law and literature, law and visual arts, law in popular culture, and law-relevant emotions. His main methods are phenomenology, semiotics, and discourse analysis. He published in Semiotica, Law and Social Inquiry, Discourse Studies, National Identity, American Journal of Semiotics, Text and Talk, Janus Head, Law and Critique, Comparative Sociology, and other academic journals. He is a coauthor (with Katja Hannken-Iljes and Thomas Scheffer) of "Doing Procedure: Ethnomethodological Explorations of Criminal Defensework in the United Kingdom, Germany, and the United States" (Palgrave Macmillan: London, 2010). Currently, he is working on a book project, "The Liminal Place of Law."

Marett Leiboff is an Associate Professor in the Faculty of Law at the University of Wollongong Australia, where she is a member of the Law and Popular Cultures Group of the Legal Intersections Research Centre. Marett is Vice President of the Law Literature and Humanities Association of Australasia. A lawyer with a diverse background, she has published around legal accounts of visual culture, focussing on the reading and interpretation of the visual as an aesthetic, as an engagement with textually diffuse meanings, and as an exercise in connoisseurship. She has drawn on her background in academic theater studies to engage and develop a theatrical jurisprudence, grounded in the contemporary theories of staging to reclaim the body from law's valorization of the word. The theatrical reminds us that our actions and responses exist in the moment, rather than the narrative account of our conduct that the law prefers. She coedited a 2010 special issue of the journal *Law Text Culture* on "Law's Theatrical Presence" and edited a 2012 special issue of the *Australian Feminist Law Journal* on "Law and Humanities Futures." She can be contacted at marett@uow.edu.au.

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Introduction: Law, Culture, and Visual Studies

Richard K. Sherwin

> *[E]very epoch is defined by its own practices of knowledge and strategies of power, which are composed from regimes of visibility and procedures of expression.*
>
> (Rodowick 2001, xi)

The proliferation of electronic visual media has transformed social and cultural practices around the world. In all walks of life, the life of law included, visual images increasingly compete with words in the meaning-making process. This is no small matter. Visual communication is different from communicating in words alone. Of particular interest in this regard is the peculiar efficacy of visual representation. What explains its power? For one thing, visual representations do not simply resemble reality, they also tend to stimulate the same cognitive and especially emotional responses that are aroused by the reality they depict. Movies, television, and video games, among other image-based media, tend to eclipse words alone. This is largely because visual images effectively engulf the spectator (or, in the case of computer games and immersive virtual environments, the interactive player) in vivid, life-like sensations. Emotion enhances belief. To the extent that visual images amplify emotion beyond the usual efficacy of text, images tend to be more compelling.

Another reason for the peculiar power of visual images is that they often get treated as "windows" opening onto reality, rather than as the visual constructions that they are. As Richard Lanham put it, we tend to look *at* text, but we look *through* the electronic screen (Lanham 1993). Unlike words, which are abstract and obviously constructed, photographs, films, and video images seem to be caused by the external world. With no obvious trace of mediation, visual images seem to lack artifice. That is why visual images make for such highly persuasive evidence for what they purport to depict (Kassin and Dunn 1997). Finally, unlike words, even when images seek to make propositional claims, some of their meaning always remains implicit. Put simply, images cannot be reduced to explicit propositions (Messaris 1997).

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For these reasons, visual images do not simply enhance the meaning of words. The image is transformative, both qualitatively and quantitatively, which is to say, both in terms of the content it displays and the efficacy of emotion and belief that it evokes. Part of its power derives from the way visual images work. For example, unlike the sequential assimilation of verbal or textual messages, the meaning of images often can be grasped all at once. It takes a lot less time and seeming effort to absorb a picture than to read a thousand words. Such rapid and comparatively easy intelligibility allows viewers to assimilate one visual meaning after another in quick succession. The immediacy of visual uptake also serves to enhance believability. We are so busy and often so sensorially gratified taking in rapid flows of visual information that the felt need to second-guess what we see hardly arises. Diminished critical judgment typically invites enhanced visual credulity. The disinclination to object (or to suspend belief) is further advanced by the fact that so much of what we glean from visual images remains unconscious. Visual communication operates largely on the basis of associative logic. In response to what we see on the screen, we unconsciously associate to memories, thoughts, and feelings. Investing images with personal feelings and associations strengthens the viewer's sense of "ownership." It is difficult to argue with something one has already experienced as true. By the same token, familiarity alone, the feeling of having encountered the same sort of visual image before in other works or other genres, benefits from an already authorized sense of shared cultural meaning. The pleasure of such recognition, like the sensory gratification of experiencing the image itself, augments the viewer's feeling of immersion and sense of the "truthfulness" of what appears.

The way we mind the world and others around us changes along with significant changes in our tools of perception and mass communication. Over time, we become the tools we use. The camera is already inside our head, so to speak, along with the stream of digital programs that we commonly use to recognize patterns on the screen before us. Law and culture intertwine. No longer may students of law remain preoccupied exclusively by the texts of the trade – whether judicial opinions, legislative codes, regulations, contracts, constitutions, or treaties. Law awakens from its dogmatic slumber upon contact with the flesh of the world and the skin of the image. Facts have a tendency to carry abstract legal codes into the realm of real human drama. Facts spawn stories. And stories are not easily bred in captivity, much less the lab. They are a part of our everyday lives, and they permeate the popular culture in which we live. In the stories that we hear and tell, popular culture speaks. Our sense of self is distributed by the stories that circulate around and through us (Bruner 1990, 69). Those very stories cross over into law whenever human conflicts crank up the law's machinery of dispute resolution. Law without storytelling is like having rules without human conflict.

Culture constitutes the collective repository and repertoire of legal storytelling. In a visual age such as our own, visual storytelling asserts its own measure of content and craft, along with its own sense of expectation, interpretation, and critique. The world of law, as everywhere else in contemporary society, marches in lockstep with shared visual scripts and digital programs. In the previous century, Heidegger said we dwell in the house of being. But today, new rooms have been added on.

Today, we live increasingly in a digital matrix of synthetic visual representations. It is a little like living in the mirror – a special kind of mirror that has been algorithmically encoded to reflect back other rooms and other faces, some of which may or may not be our own. On this imaginary landscape of flattened signs, we live out much of our private and public lives. The ensuing transformation in the meaning-making process runs the gamut from entertainment to commerce to managing the affairs of state (Noveck 2009).

In short, the days when law could be treated as an autonomous domain, with no need to look beyond the law's own rules and procedures and specialized forms of discourse, are long gone. Today, it is a commonplace that the boundary between law and the culture in which it operates is highly porous (Sherwin 1992, 2000). In the realm of the human sciences, it has long been accepted that interpretations of truth and falsity and judgments of liability and guilt are socially constructed and, to a significant degree, culturally contingent (Ricoeur 1981). Many other disciplines, including the philosophy of science (Latour 1987), the philosophy of language (Bernstein 1985), and linguistics (Sweetser 1990), similarly recognize that meaning depends on context and that truth depends on the ways in which it is represented. Indeed, new studies of the physiology of perception indicate that even our most basic contacts with reality are socially mediated and constructed (Berns et al. 2005). In short, across many disciplines, scholars have sought to explain how knowledge is locally constructed through culturally embedded practices and through diverse techniques of investigation and representation (Geertz 1983; Shweder 1991). So, too, in Anglo-American legal studies, many have recognized that legal meaning is produced by the ways law is practiced (Llewellyn 1962) and that rhetoric in its many guises is constitutive of, not opposed to, truth (Sherwin 1988).

Nevertheless, the cultural shift from an objectivist to a constructivist approach to human knowledge has not been anxiety-free. Many participants in and observers of the legal system in particular continue to experience uneasiness with the semioticians' wisdom that 'it's all signs' (Sebeok 1994). Their fear seems to be that embracing this constructivist insight would undercut confidence in the capacity of legal proceedings (paradigmatically, trials) to yield provable truths about the world (Burns 1999; Nesson 1985). An unbridgeable gap between what legal decision-makers believe they need to know and what, on reflection, they seem able to know is for many a cause for real concern. Within this late modern (or postmodern) mindset, there is a heightened sense of inhabiting a universe of representations that seems to turn the urge for real-world knowledge back upon itself, as if in an endless regression, like some spectacular baroque tapestry or infinite arabesque endlessly folding in upon itself (Sherwin 2011a).

This vertiginous sense of a lack of grounding has intensified in the digital baroque age in which we now live. Digital technologies allow the pictures and words from which meanings are composed to be seamlessly modified and recombined in any fashion whatsoever, while the Internet allows practically anyone, anywhere, to disseminate meanings just about everywhere. The Enlightenment-era insistence upon essentialist foundations (whether exemplified by Locke's empiricism, Kant's rational categories, or other totalizing epistemologies) is being challenged by digital

experience, which has helped to inspire an alternative model of knowledge and reality as a centerless and constantly morphing network of relations (Flusser 1999; Rorty 2004).

No walk of life, no matter how far flung or esoteric, is immune to the influence of contemporary visual culture. From aboriginal rituals (Deger 2006) to neuroscientific studies (Gazzaniga 2005) to courtroom practices around the world (Sherwin et al. 2006), electronic screens increasingly mediate the realities in which we live and from which we seek meaning, understanding, and judgment. Aesthetics, epistemology, ethics, metaphysics, and, yes, jurisprudence are all being interpellated anew by new communication technologies. Everyone everywhere lives more and more of his or her life on the screen. It behooves us, therefore, to cultivate a proper understanding of the visual codes that are operating in the meaning-making process. The stakes involved in undertaking this task are greatest when it comes to law, for that is where power and meaning converge. It is where particular interpretations are backed by the police power of the state. Finding oneself on law's "field of pain and death" (Cover 1986) is hardly the occasion to indulge postmodern irony.

Juxtaposing law, culture, and visual studies has the power of removing the scales from our eyes, so that we may begin to see anew, perhaps as if for the first time, the visual codes which surround us. As the character Cipher put it, staring at the unceasing flow of digital data in the Wachowskis' epochal film, *The Matrix* (1999): "Your brain does the translating. I don't even see the code. All I see is blonde, brunette, and redhead." So do we all, more or less, and to a degree of habituation that may or may not serve our personal, much less the collective good. New visual media, new digital communication technologies, and new social networks together with the diverse codes of visual meaning making that they entail require new forms of critical awareness. We need to retool the mind, the better to attain the visual literacy that is required of us in the digital age, so that we may judge well that which calls out for judgment. This mandate marks the *raison d'être* and overarching objective of this volume.

In our mass-mediated society, information and entertainment, fact and fiction, real events and strategically constructed media events, common law and folk law readily intermingle. The ensuing blend of fantasy and reality is not an isolated phenomenon. Recent studies in cognitive psychology have shown that our world knowledge is often scripted by a mixture of fictional and nonfictional claims (Gilbert 1991). We have seen this, for example, when filmmakers skillfully emulate popular expectations about what reality looks like on the screen. Consider in this regard the credibility of the home video aesthetic. This low-tech style was effectively exploited in popular horror films like *The Blair Witch Project* (1999) and *Cloverfield* (2008). The rough, ill-lit images produced by an unsteady camera, off-center framing, and seemingly unscripted exchanges, all contributed to an enhanced sense of immediacy and visual truthfulness. What began as a distinct cinematic visual style, however, may have serious consequences outside the realm of popular entertainment, particularly when the chief evidence in a law case is a film. The prospect of life imitating art through the genre of *cinema verité* is no idle speculation. It is currently on display in courtrooms around the world (Sherwin 2011b; Sherwin et al. 2006).

The symbols, images, icons, codes, rituals, and gestures that pervade our lives operate on multiple levels of visual meaning. Exposing them to critical analysis is a complex task. It requires a multidisciplinary approach. This volume begins the task of laying the groundwork for a semiotics of visual legal meaning making. To carry out this task requires that we explore a variety of cultural and historical contexts and diverse cognitive as well as philosophical and pragmatic perspectives. New forms of visual rhetoric have created the need for a new kind of visual rhetorical handbook. Such a handbook must bring together multiple codes for making and deconstructing visual meanings across a broad landscape of skills, methods, and practices. The various sites where discrete visual codifications occur – the new rhetorical places or *topoi* that shape and inform the contemporary world – incorporate and project multiple ways of seeing, being, and knowing.

In an effort to map this visual terrain, we begin, in Part I, with a historical perspective, looking back to a time when visual culture played a robust role in the practice and study of law. In this vein, Peter Goodrich tracks the classical Roman "law of images" up through the early modern tradition of legal emblems. Paolo Heritier takes Pierre Legendre's concept of the nomogram as his point of departure in assessing the emblematic legal structure of society and the image. Paul Callister takes us to seventeenth-century England in his examination of the law book's (paradigmatically, Lord Coke's *Institutes* and *Reports*) importance as an authoritative sign. Luccia Morra and Cristina Costantini examine the visibility of sovereignty, including the codes of dress, pageantry, and figural depiction of Kingship. Our focus then shifts to a more contemporary setting commencing with Neal Feigenson's analysis of the cognitive properties of visual perception inside the modern courtroom. We round out this initial survey of the field with Ira Torresi's examination of photographs as evidence in criminal proceedings and other legal contexts and Hanneke van Schooten's semiotic investigation of the relationship between fictitious legal rules and factual behavior.

Part II alerts us to the various ways in which conventional legal topics are often informed and shaped by discrete, frequently implicit or unconsciously held visual codes. Amy Adler begins the inquiry by revealing the remarkable similarity between the reasons why the United States Supreme Court tends to favor text over image and the reasons that motivated iconoclasts throughout the history of their religious and secular struggles over visual images. In what follows, Jessica Silbey takes the analysis of US Supreme Court jurisprudence through a variety of cases from which she derives a semiotics of film in law. David Rolph next focuses our attention on the role of photographs as a form of information in the context of invasion of privacy disputes. Alec McHoul and Tracey Summerfield address the line between art and pornography in an ethno-semiotic analysis of recent cases involving the display of nude photographs of children. Janet Ainsworth next explores how dress codes function in the workplace. Along the way, she demonstrates the extent to which visual representation and the performance of identity converge and conflict. In the following two chapters, Ronald Butters and Christian Johannssen offer their respective takes on visual semiotic interpretations of trademark law. We close out this part with Anne Wagner's and Malik Bozzo-Rey's look at the semiotics of postage stamps as a means

of cultural and legal memory and David Brion's semiotic exploration of the impact of visual protests inside the courtroom in the criminal trial of *Musladin v. Lamarque*.

Part III explores a semiotics of pictorial icons as they appear in diverse legal settings. The studies in this part range from Marett Leiboff's look at a court's struggle to define what constitutes "Australian audiovisual content" to Massimo Leone's semiotic analysis of "the giving of the law," Oliver Watts' exploration of Honore Daumier's politically controversial depictions of the King's body, and Ronnie Lippens' discussion of the role of "prophetic paintings" that, perhaps akin to Shelley's poets as the "unacknowledged legislators of the world," anticipate novel forms of life. In Part IV, the focus shifts to indigenous or folkloric forms of legal culture. The topics in this part range from Renee Cramer's treatment of the creative ways that tribal buildings and signs reflect and resolve the tensions between modern and indigenous cultures and Sarah Marusek's look at the conflicting emblematic value of the bald eagle in American environmental law and in the native American religious tradition. As Marusek shows, from the perspective of the former, the act of shooting an eagle becomes an assault not only on a particular endangered species but also on the emblem of American nationhood itself. From the contrasting perspective of the owner and protector of the Mohawk Trout Hatchery, however, the very same act is understood as one of safeguarding a precious livelihood.

In Part V, we take up the perspective of place as a source of visual legal meaning making. Topics here range from Judith Resnik, Dennis Curtis, and Allison Tait's survey of courtroom architecture as revelatory of the ideology of judging to Pekka Virtanen's sophisticated analysis of the juridical role of sacred sites among the Oromo people living in the Horn of Africa, to Roshan de Silva Wijeyeratne's extraordinary look at the tension between the virtual sovereignty that characterizes Buddhist kingship and the actuality of a decentralized bureaucratic state that derives from Buddhist polities stretching back to the third century BCE. Christopher Hutton next draws our attention to the juridification of modern societies using as his case study the display of public signs in Hong Kong. James Fox rounds out our survey of the role of place in visual legal studies as we join him in his travels across the United States looking at the paintings that adorn local courtrooms. The messages that this visual art conveys about law and the judicial process are diverse, to say the least, verging at times on the bizarre.

In Part VI, the focus shifts to the technology of visual representation and the various ways in which digital visual tools in particular are affecting day-to-day legal practices. Maurizio Gotti begins with an analysis of alternative dispute resolution online. Next, Joseph Pugliese investigates the growing warfare between biometric scientists and technologists who seek to protect confidential information and a covert clan of "fraudsters" who struggle to penetrate those defenses by simulating identity and live presence online. From the assault on confidentiality, we move next to Karen Petroski's look at how legal scholarship is with increasing frequency turning away from conventional text to a diverse array of visual digital displays, including graphical representations, tables, and diagrams. Pamela Hobbs brings this section on the visual technologies of law to a close with her study of the mysterious function of the largely invisible Foreign Intelligence Surveillance Court. Along the

way, she questions the court's use of an online web site to manage the public's perception of the court's covert operations.

Part VII examines the interpenetration of popular and legal visual culture using a variety of case studies to shed light on the two-way traffic that runs between these two domains. Cynthia Lucia kicks things off with her close study of a feature film about, as well as the actual trial of Claus von Bulow, who stood accused of murdering his wife, Sunny, by administering an overdose of insulin. Orit Kamir next takes us on a tour of Hollywood's love affair with the lawyer-hero character, singling out the liminal as well as the "champion of liberty" aspects of this cinematic prototype. Wim Staat guides us through the films *Mr. Deeds* and *Adam's Rib* to illustrate their significance in regard to our understanding of law's morality in the context of cinematic courtroom renditions of private life. In the next contribution, Majid Yar and Nicole Rafter analyze popular crime films to garner insights into popular representations of the learning disabled. Jason Bainbridge follows this with his examination of the popular American lawyer-based television series, *Ally McBeal*, among other pop cultural legal representations, to generate insights into the public perception of the significance of civil litigation. Christina Spiesel next draws our attention to the popular television series *CSI* ("crime scene investigations") as a vehicle for exploring the mass media's impact on the public's perceptions of forensic evidence in real cases and the consequent rise of "scientistic" magical thinking. The latter, in Spiesel's view, invites comparison to the medieval notion of trial by ordeal. Madeira Lynee next offers a phenomenological examination of the way popular culture visualizes executions, while Marco Wan and Janny Leung, in their concluding piece in this part, examine how the popular press in Hong Kong played upon popular prejudices to construct the identity of a criminal defendant as sexually deviant and criminal.

Part VIII ends our survey by suggesting new ways of theorizing law from the standpoint of visual culture. This part gathers insights about visual legal meanings from diverse times and places, ranging from Mary Hemmings' exploration of eighteenth-century images of law in popular culture to Alexander Kozin's analysis of "instant justice" in the contemporary science fiction comic, *Judge Dredd 2000 AD*. In his contribution, David Papke shows how the conventions of popular media tend to preclude meaningful depictions of constitutional deliberation, while Shulamit Almog explores why the Israeli film industry has generally avoided direct treatment of legal issues altogether. Betty Hart explores how popular assumptions regarding legal guidelines for the production of biographical films have helped to shape and inform the perceived truthfulness of what those films depict. Farid Vanegas next takes us to the aftermath of the Spanish civil war, using three films to explore how cinema helped the process of transition to democracy. In their concluding contribution, Peter Robson, Guy Osborn, and Steve Greenfield provide a grand overview of various approaches to the study of law and popular culture and offer important questions for future research.

Thus, do we come full circle? As Eliot wrote in *Little Gidding*, "What we call the beginning is often the end, and to make an end is to make a beginning. The end is where we start from." Such is the way of things when one undertakes to survey a

new field of scholarly inquiry. With this volume, we have begun the process of delineating the new multidisciplinary field of law, culture, and visual studies. Our venture begins and ends with some of the core questions of our era: Who do we become, what are our institutions like, and how does the state police preferred meanings through the legal system using the shared visual tools, codes, and interpretive methods of our time? How do we ritualize or otherwise habituate the world-preserving ("jurisgenerative") and world-destroying ("jurispathic") processes of law (Cover 1982)? For in law, as in semiotic meaning making more generally, to paraphrase Kenneth Burke, every creation is also an act of nihilation. As Eliot says, "every beginning is often the end."

Yet, ultimately, the task before us is not one of exclusion, but rather of cultivating a more robust heterogeneity in the way we conceive and practice the art and science of visual legal meaning making. As Martin Jay writes: "Rather than erect another hierarchy, it may therefore be more useful to acknowledge the plurality of scopic regimes now available to us. Rather than demonize one or another, it may be less dangerous to explore the implications, both positive and negative, of each" (Jay 1988).

Different visual representations operate in different aesthetic, epistemological, and perhaps even metaphysical registers – ranging from the purely gratifying domain of aesthetic delight to the uncanny presence of the aesthetic and ethical sublime (Sherwin 2011a). Assessing the reliability of a given visual image requires an awareness of the virtues and defects of its form of expression. Thus, we ask: What does the image want? What state of being, what mood, affect, beliefs, memories, and values does it invoke, and how does it do this? How do we think and feel through the image? And what kind of self and social world does the image call into being? Today, practitioners, teachers, and scholars of law, culture, and visual studies alike need to enter an apprenticeship with the image makers, including the digital wizards who know the binary codes that regulate the art of digital visual representation on the screen.

Aided by freshly honed tools of critical reflection, buoyed by insights from semiotics, phenomenology, cognitive psychology, and pragmatic philosophy, among other disciplines, contemporary scholars of law, culture, and visuality will be able to renew the perennial aspiration to synthesize experience and knowledge, meaning and power, and ultimately the aesthetic and the ethical. Crucial to this challenge is a shift in emphasis that leads away from ingrained habits of analytical induction and deduction from rules or axiomatic certainties as a point of departure, to a more capacious, heterogeneous attunement to the diverse tools, concepts, embodied experiences, and operative methodologies that are needed to facilitate visual prudence in contemporary legal culture.

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Part I
Introducing Visual Legal Studies

Chapter 1
Devising Law: On the Philosophy of Legal Emblems

Peter Goodrich

Pro lege et pro grege[1]

Abstract Early modern lawyers, civilian and common alike, developed their very own *ars iuris* or art of law. A variety of legal disciplines had always relied in part upon the use of visual representations, upon images and statuary to convey authority and sovereign norm. Military, religious, administrative and legal images found juridical codification and expression in collections of signs of office (*notitia dignitatum*), in heraldic codes, in genealogical devises (*impresa*) and then finally in the juridical invention in the mid-sixteenth century of the legal emblem book. This chapter traces the complex lineage of the emblem book and argues that the visual depiction of authority and norm that it promulgated so successfully laid down an early modern structure and implicit regulation of vision. The *mens emblematica* of the humanist lawyers was also the inauguration of a visiocratic regime that continues in significant part into the present and multiple technologies of vision.

There is a body of early modern legal doctrine, little studied and even less remembered, that deals with the definition and use of images. Inherited from classical Rome, the *ius imaginum* or law of images was most immediately concerned with heraldic arms and the hierarchy of military, social and ecclesiastical precedence as represented visually and verbally in banners, shields, coats of arms, livery, colour, crests and other images and inscriptions, trophies and insignia placed in both public and private spaces. It was, as John Selden puts it, the law that governed

[1] 'For the law and for the people', a motto that is used as an exemplary emblem (Estienne 1650)

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the 'titles of honour' of the nobility (Selden 1614).[2] While this *ius imaginum* may seem rather specific and particular, concerned with archaic details of greater and lesser social dignities, there is also a much more general interest and application to the doctrines governing the composition and interpretation of images and thence the proper context and construction of the legal emblem tradition which is my subject here.

It is sometimes argued that the juristic emblem, associated most prominently with Andreas Alciatus and his *Emblematum liber* of 1531, was an accidental invention, the inspiration of a publisher who whimsically added woodcut illustrations to a book of adages (moralising maxims), but in fact the emblem belongs to a much older and better established tradition of visual representation (Manning 2002).[3] While Alciatus was entitled to 'baptise' his book with the novel name of *Emblemata*, the images that accompanied the epigrams stemmed, as Alciatus elsewhere acknowledges, from a much more diverse tradition of funereal, genealogical, military and esoteric (hieroglyphic) figures. The *ius imaginum*, in its broadest definition, is the study of what Selden terms 'the trophies of virtue', the insignia of nobility, knowledge, honour and law. It governed all aspects of the visual presence of governance and administration, the representation of family and lineage, public office, sovereignty and *oeconomia* (domestic administration) in the terms recently revived by Agamben in his study of the acclamatory apparatuses of power (Agamben 2009).[4] The science of symbols, military and civil, was juristically a systematic lexicon, a collation of the lawful icons of such visibility. Colours, combinations, figures and the relation of images to words were all coded and defined so that the proper order of things seen, the visiocracy, be recognised and noted. The later common law systematiser John Brydall in his treatise of 1675 indeed defines the *ius imaginum* as the study of the names of nobility, 'that is the names of celebrity', whereby virtue is noted and social place represented (Brydall 1675).

The emblem book was a legal invention of the Renaissance, but it belongs within a much lengthier tradition of heraldry, arms and along with them the fame or notoriety that accompanied military heroics and political prominence. As the lawyer John Ferne nicely puts it, the inherited insignia were only as valuable as their current practices: 'ancient statueas, smokie images, autentique coate armors, torne and

[2] Noting that 'Nobility … being rightly … the virtue of his Fathers' and then observing that in ancient Rome, only the *nobiles* could show the images of their ancestors. The *ius imaginum* here meant the right to house the ancestral images and by extension the duty to maintain, which is to say stay true to and keep faith with the image of the forebears (at preface, n.p.).

[3] Chapter 1 presents a version of this genealogy. This view is corrected with great erudition in Pierre Laurens, 'L'invention de l'emblème par André Alciat et le modèle èpigraphique' 2005 149 *Académie des inscriptions et belles-lettres* 883. For a comprehensive study of the classical and humanistic roots of the legal emblem tradition, see Valérie Hayaert, Mens emblematica *et humanisme juridique* (Geneva: Droz, 2008).

[4] It is interesting to note that Nebrija (1612) distinguishes *oeconomus*, referring to domestic administration, from *iconomus*, which concerns governance of the Church and matters ecclesiastical.

rotten guidons, of the valiant and virtuous ancestors' will not of themselves repel the enemy (Ferne 1586). What was displayed had to be internalised, the images must be real, their interpretation so serious a matter as to be a subject of law. The disciplinary rules and lawful representations of what were variously termed *insignia armorum*, *symbola heroica, pictura* and images generally, latterly being translated into imprese, devises, blazons, enigmas and symbols, required strict disposition. It is with this military and administrative context that I will start and then subsequently move to the theatre of legal emblems properly so called.

1.1 Ensigns and Dignities

If war begins where language runs out, then it makes sense that the most basic science of signs must deal in forms of visible communication that can be seen in circumstances where language or, more exactly, diplomatic modes of conversation have become impossible. Heraldry was the science of seeing from a distance. The first logic of heraldry or, as it was also frequently termed, the law of arms was thus an external one, namely, that of indicating the difference between friend and foe, familiar and stranger within the theatre of war. The study and systematisation of insignia involved the classification and ranking of all the visible elements used to demarcate, distinguish and transmit the identity of their bearer (Pastoureau 1998). Some of our early modern authors stressed the religious origins of armorial symbols, stating that 'they go back before the flood to Seth the Son of Adam who took certain signs and marks to distinguish his family from the children of Cain' (Segoing 1650). In other authors, the symbols used were deemed to be 'holy letters', forms of 'hierography' and more generally still were secret missives carried, in war or peace, between the divinity and its subjects (Estienne 1650; Goodrich 2010). Thus, Marc de Vulson, in an intriguingly detailed work on the history of French heraldry, offers as his first definition of 'Kings of Arms' that they were 'messengers of the sacred' who would convey 'to all and indifferently, to friends and enemies with equal certainty, the announcement of peace or the declaration of war, and always under the protection of the law of nations [*droict des gens*]' (de Vulson 1645).

To the extent that, at least from the beginning of the Christian era – *nobilitas Christiana* – religion lay behind majesty and war alike; the military origin of the science of symbols does not preclude a theological derivation and interpretation. Early modern rhetoricians were all 'Christian soldiers', and this was as true of the visual science of arms as of the art of speech.[5] What matters is that the identity of groups and persons needs to be visible – on columns, buildings, shields,

[5] See, for instance, Lamy (1676), translated from the French the year after its original publication: 'If Postures be propeer for defence, in corporal invasions; Figures are as necessary, in spiritual attacks. Words are the Arms of the Mind …' (Part 2, lib. 2, s.2).

machines, vestments, carriages, uniforms, banners and more. Visible signs, and in theological terms visible words, are key elements in the ritual ordering of public and private spheres, the realms of providence and fate alike. The image of the sovereign (*principum vultus*), as Pancirolus records in his commentary on the *notitia dignitatum*, is to be put on pillars in the market and in other public places as well as in private homes. These images are to be honoured and protected, and stringent punishment was meted out to those who defaced them (Pancirolus 1608). Bartolus, in his treatise on insignia, the earliest but far from comprehensive juristic work, defines the sign as a name which is painted on coats of arms, banners, shields and the walls of the city (Cavallar et al. 1994; Goodrich 2009b). It marks legitimacy, rank and subjection. Referring to *Digest* 1.8.8, Bartolus also suggests that these signs are sacred.[6]

The representation of legitimacy must be by means of legitimate signs. While this might seem tautological, it in fact refers to the complex and forgotten details of the transcription of the full panoply of facets of domestic and social identity, the images of honour, virtue, office, rank and local and national affiliation that define the administration of a territory. This is the visible and most basic *lex terrae,* as common lawyers term it, and finds its first expression in the insignia or *notitia* of administrative regions and offices. These, in the surviving Roman sources, take the form of extensive listings of the imperial territories and the administrative offices – the dignities – through which they were ordered and maintained. The empire was represented, in Pancirolus again, though Selden also reproduces this image, as being suspended under the armorial images of divine providence: angels representing military knowledge and virtue hold up the circular icon of the emperor's face above the list, in the form of an array of books that represent authority and felicity (Fig. 1.1). Beyond this, every province has its map (or properly chorography) and insignia of places – of towns, villages, routes and borders. These then are depicted by way of listings of their visible dignities and offices, literally their *viri illustris* and *viri spectabilis*, translating for us as their manifest (we could also transliterate this as illuminated, embellished) and notable, meaning brilliant, remarkable, famous and even spectacular men.

Every office in every territory listed in the *notitia* had its mark, its image and *insignum* by which it was recognised and known. These were military and religious, of course, but also legal, commercial, scriptive and domestic. The *notitia* were the signs of office and celebrity and included elaborate schemata for the Provost of the Sacred Bedchamber, the Master of Missives, Letters and Records, as well as innumerable clerks of *oeconomic* (domestic) duties, from maintenance of linens to stocking of the kitchen. The point is structural. The notes of office (*dignitates*) formed the visual architecture of the social, carefully tabulated and inscribed by lawyers – a beginning was made by Bartolus in the fourteenth century, by Alciatus and Pancirolus in the sixteenth century – and available and visible in the buildings, designs, figures, statuary, ceremonies and vestments of those who

[6] D. 1.8.8 (Marcian). 'Whatever has been defended and secured against human mischief is sacred (*sanctum*)'.

occupied the social and domestic roles that law purveyed. Celebrity emanated from and imitated the sovereign's court and what the herald Thynne terms the *arcana imperii heraldorum*, the secrets of arms, were the rules whereby the insignia of the court and of all the lesser and imitative courts of the nobility were to be composed and interpreted as the manifestation of their lineage and legitimacy, their honour, virtue and felicity.

The rules governing insignia are recognised and indeed deferred to by the common law and explicitly carry not simply the authority of life, death and loss of liberty – *ius incarcerandi* – in their military uses but also bear an important acclamatory function (Hearne 1720).[7] Thus, to take one instance from the ceremony of investiture of honours, honorific preferment, here membership of the Order of the Garter is in recognition of 'acts of the highest order of virtue, meriting the most praiseworthy status and dignity of honor' (Doderidge 1600). It needs, therefore, to be recognised that in addressing images in law, the *ius imaginum* in its various modes and expressions, the subject matter is that of ritual and ceremony, of praise and celebration, of honour and sanctification as inscribed in the architecture of the social and in the figures of administrative and political as well as legal presence. The image is extant in and through the living, through the exemplary ambulant image, but such charismatic personages in their nobility and majesty are but representative, the mere spectacle of the invisible monuments, the unseen causes, that exist ineffably and eternally. Honour and also its attributes, office, rank, lineage and law are greater than the living; they are inheritances; they survive and live on beyond the grave.[8] The law and the *oeconomic* order are founded alike upon the '*Reverence* and *Honour*, *Fidelity* and *Subjection*', the allegiance and obedience that is owed the sovereign and the parents, the heavenly and the temporal father in their impossible unity (Hale 1713).[9] *Dignitas non moritur*, the dignity, which is to say the image, the rite, the acclamation and the honour that inheritance passes on, that time carries as vestige, imprese and relic, does not die. It belongs in the domain of dogma as Legendre interprets it, namely, the dream of the social and the imaginings of law (Legendre 1983, 2009; Kantorowicz 1958).[10]

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[7] *'& c'est bone Justificacione al comen Ley & Ashton & Moyle concesserunt, que commen Ley prendra notice del Ley del Constable & Marshall'* which is worth citing for the law French if nothing else and recognises, by citation to Justice Needham that the jurisdiction over social insignia, precedence and honour is a civil law jurisdiction, expressly derived from 'Bartolus the Lawyer in the Government of Charles the fourth Emperour' who incidentally, we are then told, 'permitted to Gowne-men (or, as the French termeth them, of the longe Robe, for under that name were learned men, Clergie men, and Schollers comprehended) to beare Armoryes'.

[8] Thynne, *Heraulde*, at 236 cites the maxim *quod consuetudo dat, homo tollere non potest*, translating as 'what custom – time immemorial, the invisible cause, the unseen mover – gives, man cannot take away'.

[9] Fortescue (1453) at 3 talks of the proper 'filial fear' of law, though the quotation is from a later and much more secular source, (Hale 1713) at 42 who lists these rights or duties as defining the subject.

[10] Legendre (1983) at 25–34 tracing the etymological link between honour, decorum, dignity and dogma. In his latest book, Legendre, (2009) at 55–59, the theme is elaborated in interesting ways in relation to architecture and Vasari in particular. Kantorowicz (1958) offers important discussion of the concept of dignity.

1.2 Visiocracy

The early modern systematisation of common law, the *mos Britannicus* that I will use as my example, inherited and elaborated a strict order for the composition and construction of visible rule as precedence, hierarchy and acclamatory order.[11] The earliest source, already mentioned, was the late Roman *notitia dignitatum* in its various Renaissance reconstructions, and Bartolus' mid-fourteenth century treatise on signs. Bartolus is the earlier and more schematic work, and his concern throughout is the legitimacy of representations of rank and office. The basic categories of the law of images concern the dignities that the earlier Roman *notitia* had listed. Thus, those of the specified rank could bear the insignia of that rank, be it proconsul, legate, bishop or doctor of law, but 'if someone who is not of that rank bears them he incurs the charge of fraud' (Bartolus 1883). Further rules govern the appropriate signs of subjection to lord and king that the arms should insert. In addition to that, Bartolus notes the rules that governed how insignia should be composed, namely, that they should imitate the order of nature, were to be supplemented by the requirement that representation of social dignities had to observe the hierarchy of the social order: 'nobler things should be prefered and placed in a privileged position', the right and top of the coat of arms being nobler than the bottom and left (Bartolus 1883). Similarly, colours have their proper order and meaning, descending from gold to purple and red, which latter colours were restricted, Bartolus states, to princes (Bartolus 1883).[12]

The basic elements of the heraldic art, the proper order of colours, metals, stones, and animals form a simple lexicon of the visual signs of a highly regulated manifest social, military and ecclesiastical hierarchy. The order of precedence and rank is arranged to reflect what is technically the celebrity of the bearer and is coded and collated to the order of virtues, the honours attained and inherited. It is worth emphasising this foundational moment, this visual schema of law, and observing that in the early systematising works, it is conceived explicitly to be a reflection of the order and hierarchy of angels: 'almightie God is the originall authour of honouringe noblilitie, who, even in the heavens hathe made a discrepance of his heavenly Spirites, givinge them severall names, as Ensignes of honour. And these heavenly Spirites, when they are sent of God, are called, *Angeli*, Angels, which in the Greek tongue signifieth, sent' (Bosewell 1572).[13] Pause for an example, taken from Legh, the earliest of the Inns of Court authors on heraldic law who offers an instructive

[11] On the *mos Britannicus* and the development of the English *ius commune*, see Goodrich, 'Intellection and Indiscipline' 2009a.

[12] The same can be extracted in greater details from later systematic works, such as Bosewell (1572), Legh (1562), and Trevor (1557).

[13] Continuing to note that 'the Lawe of Armes was by the auncient heraultes grounded upon these orders of Angells in heaven, encorowned with the pretious stones, of colours, and vertues diverse'.

Fig. 1.1 Gerard Legh, The Accedens of armory at fol. 135v. (Herald)

image of a herald at the end of the 1572 edition of his *Accedens* (Fig. 1.1). Here we can see what the legal scientist of symbols saw and follow his interpretation of the visual clues that the picture relays.

The image of the angelic herald is not obvious – not immediately visible – to contemporary view. It is emblematic, though not precisely an emblem, as will be discussed later, because it lacks an explanatory verse. It is properly a 'devise' (or impresse) and serves to devise, which is to say to invent and convey a message of

art (Daniell 1585).[14] Initially, the context of the devise or 'holy letter' has to be reinstated. It is a representation, here in image and vernacular motto, of the earthly reflection of the 'heavenly ierarches' and specifically of the system of law which Legh specifies in terms of 'order, cunning and working' (Legh 1562). Order here represents office – dignity and recognised rank, while cunning is reason in the sense of disposition and administration, and working is service, obedience to the hierarchy, 'following the conformitie, and likenes of god'. The nine orders of Angels duly acknowledged, and 'the glorie of his countenance in heaven' properly imagined, amen, then the image can be viewed as the spectacle of the relation between the temporal order and the celestial hierarchy, between government, nature and divinity, seamlessly joined in one image. This is a matter a signs and their laws as boldly presented in the figure of the herald in a white shirt dotted with black spurs (mullets Sable, in the armorial argot).

The herald is the messenger, the master of signs and wears on his shirt an escutcheon or shield representing the arms of England devised by 'holye Edwarde kinge and confessor'. He is thus immediately identified and placed, our herald, the representative and distributor of common law. To this we can add a rod of office in his right hand, pointing to a flag, and in his left hand the tail end of a banner with words of criticism inscribed, effectively stating that in cold weather more clothes are needed. The herald responds, at the foot of the devise by saying that any clothes will do in haste until more can be had. Legh cites Bartolus in support of this proposition, arguing that any clothes will do provided that the symbols that they bear are visible. What matters for the message is not the quantity of clothing but the visibility and legibility of the sign. Put more strongly, the messenger – text, shirt, skin or coat – is subordinate to the missive which attaches properly neither to body nor materiality but to the invisible and celestial source that sent it. It is for this reason, because of the intrinsically chimerical – 'aereall' or vanishing – quality of the visible, that the science of signs is necessary and the place of the herald and latterly hermeneut is significant. The rod of office held in the right hand points to the flag on the standard that is held by the dragon. The two animals, dragon and panther, represent, respectively, ferocity and amiability, war and peace, fear and love. Between the two, centre image, a banner on which is inscribed the motto, familiar in some form to all common lawyers, 'That lawe alloweth must needes be Reason'.[15]

The most striking feature of the devise lies in the conjunction of law, reason and the visible. The herald, the English herald, is the messenger of common law. He is the index and manifest spectacle of the order of reason and the architecture of legality. He is conceived as an image and presented as a devise for transmitting in a didactic and accessible form, the power and the glory of law, its draconian force and

[14] This defines the prose of the art at 6r: 'to shadow suerly their purposes and intents by figures. Thus by a Serpent [they signified] pollicie. By an Olive peace. By a Gote, lust … This was the first foundations of Impresse …'

[15] Plowden is often cited for the maxim *semblable reason semblable ley* – like reason like law; but it is Coke's *Institutes* which offers the best discussion of reason as the spirit of law and distinguishing *ratio vera et legalis* from the merely apparent reason.

its facilitative felicity, its conjunction of authority and reason, threat and allure. It is thus that the periphery of the image refers to clothes, to the question of vestment as a matter of the signification of identity in the visible realm. Law, we are told, allows these vestments; they are reason in the sense of being fit to the office of the herald and subordinate to the task of conveying messages. Then, in the centre of the image, under the rod of office and authority, is the motto, technically the soul of the devise. Here we learn that what law allows is necessarily reasonable. This requires a little reconstruction.

First, as we know, what is reasonable is legal. At an allegorical level, what is reasonable is what is allowed. What is allowed is what is visible in the figure of the devise, the order of places and the hierarchy manifest in the public and domestic spaces, within the providential and *oeconomic* spheres, respectively. What is seen is 'a spectacle of things invisible', an enigmatic mirror, as St Paul has it, onto a world unseen and still to come. The licit order of things, the visible status quo, is the manifestation of a presumed legality, an esoteric and covert order of being. Second, at the level of doctrine, the words convey a rationality that belongs to and refers more or less directly to prior and unseen causes. The image, which is variously termed a figure, a body, nature or event is to be understood as a glass, a lens onto *anima legis*, the soul or truth of law that only the wise can see and then only in part. The devise, as a figure and as an image, thus represents a structural and necessarily absent order. In the case of the Roman imago or funereal mask, the structure represented by the image – the effigy – was that of lineage, of the ancestors and their nobility. For the authors of the devises, the image is similarly a figure, a reason and law that gains a momentary materiality in the visible world. The devise is a prosopopoeia, according to Estienne, a personification of abstract and incorporeal ideas, the dictates of an unwritten law (Estienne 1650). The image thus represents the exteriority of a larger and hidden design. It is the outer shell, the mark, vestige or impression left by the hidden order and structure of being as law.

The English philosopher and lawyer Abraham Fraunce, author of the *Lawier's Logike*, also wrote on the philosophy of symbols. In the fourth book of his treatise on armorial insignia, the opening sentence defines the symbol as 'a representation by which something is concealed' and then proceeds to interpret the symbol thus defined as a species of synecdoche, the rhetorical figure of part for whole (Fraunce 1588). The image, meaning the figure used in the devise, is viewed by Fraunce as a literal mark, an impression left by the structure of being, by nature and law as orders that express a much greater but unfortunately invisible schema of causes. At its strongest, Fraunce defines the image as a legal bond, an obligation and an undertaking that the bearer of the sign will acknowledge and obey the intention of its unseen author, be it God, nature, sovereign, ancestor or parent who devised the image and so left their mark upon the order of things seen and recognised as allowed by law and therefore reasonable.

Returning to Legh's devise of the herald, we can note certain other features. Centre stage, the herald touches the flag with his rod and the figure speaks. This signifies that what law strikes comes to life, is brought to speech, unveils and divulges meaning to its authorised audience. This, as the central banner and words disclose, is allowed by

law and therefore is reasonable. More than that, this image of interpretation and transmission is emblematic of the art of law which brings nature to life and dead letters to speech. The image is of the herald, the messenger of law, bringing nature to expression, ostensively, as a personification, as power and glory, force and love. The visible and inanimate or painted realm, nature as dormant matter, together with the animals and standards, vestments and instruments shown are all symbols that form part of an order of reason and law. The task of the jurist is to contrive the expression of an occluded intention and to interpret the signs of the hidden legislator, be it the Christian *deus absconditus*, Leviathan or *salus populi*, the will of the people in its immemorial and encrypted forms. All nature signifies and law is the pattern of that signification. At the same time all signs are synecdoches, marks of an anterior and interior intention and meaning. That is the nature of learning and the medium of law for the early modern era. As Plowden put it, and as Fraunce reiterates, even the word must be conceived as nothing other than the image of the legal rule, the sign of the legislator's intent or the impression of the speaker's devise and desire.

1.3 Legal Emblems

Writing towards the end of the seventeenth century, the Jesuit scholar and systematiser François Menestrier opens his treatise *The Philosophy of Images* by observing that the art of devises is the single strongest taste of the century (Menestrier 1682). This inspires Menestrier to produce a comprehensive selection of devises according to the twin criteria of justice and spirituality, law and theology. The devise, in this schema, is a liminal image, an envelope, the material exterior and visible moment of a spiritual cause which becomes, once manifest, law for us. The image as sign always in this tradition refers to an anterior structure, to the idea, ideal and idiom that underpin and explain it. Menestrier elsewhere cites Psalm 18: 'he made darkness [*tenebras*] his hiding place and canopy', meaning that there is an element of the esoteric and enigmatic to all signs, for their cause lies in shadow and darkness, in another realm, a theme that is taken up very explicitly in the systematising works (Menestrier 1694). The Cambridge scholar Philipot makes the same point eloquently: 'The *Egyptians* folded up their Learning in the dark contexture of Hieroglyphicks, the *Greeks* wrap'd up theirs in the gloomy Vesture of Emblems, and the *Romans* lodg'd it behind the cloudy Traverse of Allegorical Allusions pourtrai'd in those Mysterious Signatures that adorn'd the Reverse of their Coin …' (Philipot 1672).

The emblem is a subspecies of devise. It has a lengthy prehistory of legal significance, being the term that jurists would use to refer to ornaments or other images inserted into objects. Antonio de Nebrija, in his legal dictionary from the very beginning of the sixteenth century, a quarter century before Aliciatus' little book, defines the emblem as the form of insets painted on vases, mosaic inlays in tiled floors, inserted images in vestments or any other marquetry or ornament put into and absorbed by a foreign surface. It is a term devised, according to Menestrier, by the jurisconsults, for any assembled image, combination of colours that ornament

an object, a surface or structure (Menestrier 1684). It is, by extension, the image of its cause, the meaning and message of the mosaic, habit, monument or building in which it is inserted. Thus Philipot offers the concept of the emblem as *icuncula* or little icon, the legitimate representation of office – in this case that of a priest – that is inserted into their vestments (Philipot 1672). So too the trappings of positive law had their symbols, their legitimate modes of expression, their visible signs of provenance and authority. The legal emblem is most simply the legitimate image of law as a mixed knowledge and practice, as an expression of 'things divine and human', as rule and administration, legislation and *oeconomic* disposition.

If we look to the standard definitions of the distinction between devise and emblem, the devise is particular in that it represents a specific and identifiable person, family, city or nation, while the emblem is general and at its best is 'the art of painting morals, and of putting the operations of nature in images for the instruction of men' (Menestrier 1684). It is this instructional and didactic purpose of emblems that chiefly distinguishes them from devises. Thus, the devise uses a motto and such is expressly to be obscure, ideally in Latin, as a talisman or secret knowledge and key to the noble identity of the bearer. The words are thus to be 'neither too intelligible, nor yet too obscure' and to this we can add, borrowing from Fraunce that where the motto of the devise does not refer to the image and so is enigmatic, in the emblem the words describe and interpret the figure (Manning 1991). Thus, the emblem is designed to be relatively accessible, is more free in its use of images and is constructed to achieve the end of making the foundations of law, its roots in nature, reason and moral use, visible to a populace that was often unable to read, or as Fraunce formulates it: 'letters are intelligible only to few, presumably only the learned, while even children can quite readily understand images (*figuras*)' (Manning 1991). Mignault in his commentary on Alciatus belabours the same point: 'maxims are sometimes rather obscure, and may not be accessible to everyone; but the emblem, either because of the picture which is the subject, or through the explanation given by the poem or through the inscription, has some facility in which the mind can be at ease' (Mignault 1577).

Drawing out the implications of Mignault's commentaries, we can note first and literally that Alciatus' emblems begin with an emblem of dedication and authorisation. These are lawful and hierarchically approved emblems. The first emblem, opening for content, is of the Duke of Milan, and the ensign of the Duchy. The central figure of this emblem is a shield showing a twisting snake from whose mouth a child emerges. The verse below explains the image as representing nobility of pedigree – *gentilitiis nobile stemma tuis*. The verse then proceeds to explain that the figure of the snake indicates he is the progeny of divine seed. This is the lineage and visible majesty of law, its reference back, its place in the hierarchy, such as to allow the sovereign to promulgate by means of their authority, what the Digest terms 'a knowledge of civil law which is a most sacred wisdom (*res sanctissima civis sapientia*)'.[16] The fourth emblem, titled *In Deo laetandum*, one must delight in God, reinforces the message of the divine provenance of these images and their messages

[16] Digest 50.13.5 (Ulpian).

Fig. 1.2 Andreas Alciatus, Emblemata, emblema 4. (Ganymede)

(Fig. 1.2). Taken quite superficially, the figure shows Ganymede being borne through the heavens on the wings of an eagle. The motto, in Greek, stipulates, as already noted, that one must delight in God. Travelling through the clouds, amongst the angels, Ganymede looks forwards and upwards. Below, on earth, a dog barks at the disappearing image.

Mignault prefaces his commentary on this emblem by noting that it is taken from Homer and that it is to be interpreted by reference to classical mythology, which is to say by reference to stories that 'the early lawyers' used so as to acquire and increase their authority (Mignault 1577).[17] That said, the image is followed by a verse explanation which, in most editions, was in the vernacular and helped to explicate the emblem as the means by which the minds of early viewers were 'captured and charmed'. As to the image itself, the key feature is that Ganymede is

[17] Mignault's commentary to the 1577, Plantin edition of Alciatus' Emblemata.

a child, an innocent, carried to the heavens through his love of God, and it is this filial devotion to divinity and law that the figure captures. The subject of law should be such a child, empty and open to being carried away at a literal level by the word of the father, and allegorically by the wings of an eagle, the queen of birds. The child comes to God and in doing so separates soul from body through joy or rejoicing (*gaudium*). To be carried amongst the clouds, symbols of angels, is to join the celestial choir, to sing praise through one's being as such, and to attach to the divine in a spiritual friendship – *animae amicitiam* (Mignault 1577). It was this spiritual friendship, the amity and brotherhood of a law both spiritual and temporal, that constitutes the first precept, maxim or rule of the emblems that ensue.

Another common juristically directed emblem, number 18 in Alciatus, but the opening emblem in the first vernacular emblem book, given pride of place and principal import by the Toulousian humanist Guillaume Perrière, is the figure of Janus (Fig. 1.3). The two-faced God directly represents past and future, backwards and forwards, but equally, and this is explicit in the symbolism of the vernacular figure, the two realms of governance, exterior and interior, secular and spiritual. It is to this end that the representation in Perrière, reprised in the English translation by Thomas Combe, shows Janus holding an image, in classical terms a funerary mask (*imago*), in his right hand – *in patribus visum est*, as Renaissance lawyers liked to say, meaning thus is the father seen. In his left hand, towards which the mask is seemingly turned, he holds the key, the mode of entry to the kingdom, *clavis regni* in the language of the Psalm (De La Perrière 1553; Combe 1593). John Selden explicates this division in terms of the divide between the interior and the exterior realms, the household and the *populus*, but it is also a distinction between providence and fate, rule and administration, legislation and *oeconomic* disposition (Selden 1610).[18] The accompanying verse specifically refers to providence as the source of governance and the key held in Janus' left hand is expressly an image of the mode of entry to the celestial realm of providence itself. Janus marks thus the two regimes of law, the exterior and positive which is in Christian terminology but a shadow or image of the interior, invisible and enigmatic cause.

The authority and lineage of the emblem established, its sacral and mysterious content presupposed and symbolised, the second feature of the emblem as presented by Mignault lies in the juridical character of its content. The emblem emerges out of a tradition of adages, maxims, precepts, formulas and rules – whether the latter be termed brocards, *regulae* or commonplaces. These short and often poetic statements of moral and legal precepts were developed in part as an accessible species of mnemonic device but had their greatest authority and most visible presence as expressions of lawful conduct and of just reasoning (Scheffer 2007). The legal maxim was of the greatest legitimacy and indisputable prestige within common law where the Latin maxims collected by Sir Francis Bacon and relayed by Sir Edward Coke were expressly 'conclusions of reason … aptly called *legum leges*, lawes of lawes' and had both authority and majesty, power and glory, whether 'penn'ed or

[18] Selden uses this image and the following motto: *e quibus haec facies populum spectat, at illa larem*. On the distinction between providence and fate, derived from Boethius, see Agamben, *Règne*, at 190–201 on the *duplex modus* of providence and disposition.

Fig. 1.3 Guillaume de la Perriere, Le Theatre des bons engins, emblem 1. (Janus)

dicted verbatim' (Bacon 1630). The maxims were the principles, the underlying reasons of law and as such deserved emblematic expression. These were the discovered and self-evident grounds of all legality and judgment, and it is these reasons, these precepts for living, these items of dogma and doctrine that the legal emblem takes up and conveys. Estienne in his discussion of the utility of devises also refers to the use of images – 'the contentment of sight' – as a means of conveying doctrine and so promulgating not simply law but the reasons that constitute the law of law (Estienne 1650). This space of pictorial representation of doctrine, this visible enactment of judgment, to borrow from Junius, occurs in a space of public spectacle where judgment is made visible and plain to see (Junius 1565).

The notes of dignity and other armorial colours and signs, shields, crests, banners and the like were visual identifications of place and lineage. The emblems expanded the scope of such visible marks to the project of moral identification and thus the inculcation of the primary norms, the customs and uses, that make up the unwritten and perhaps we would say the unconscious law. The emblems, no doubt ironically,

promulgated and disseminated images of an invisible source, a law of law, which undergirded and authorised the extant books, rolls and reports of legal community. Thus, for Alciatus, 'it is neither the words written on parchment nor those engraved on bronze that constitute the law, but rather it is that which justice dictates, and which equity directs that bears the true name of the law (*verum legis nomen habet*)' (Alciatus 1582).[19] The images and figures of the emblem tradition were didactic and popularising modes of disseminating the moral content of law and the rules of spiritual amity and temporal civility that provided the context of law application and reception.

Viewed juristically, the legal emblem in its most general sense, that of a visual figure addressing topics pertaining to law, should be understood as a rhetorical device. As Hayaert elaborates it, choosing the Senneton brothers magnificently illustrated edition of the *Corpus iuris civilis* published in five volumes between 1548 and 1550, the images were a matter of elegance of style, of subtlety of disputation and force of persuasion. In the case of the Senneton edition, the images were broadly illustrative, representing specific titles – rubrics or principles of law – in carefully coded figures and gestures. This symbolic visual lexicon would please and engage the subject while also fulfilling the important role of making manifest the mythological roots of the legal injunctions. The illustrations were in this sense technically enigmas, meaning references to antique poetic and literary texts that were the sources of the rules of law.[20] The *Digest* title *de postulando* (rights of action) is illustrated by an image of a judge (praetor) whose left hand is held out staying a child and a woman who turn or are turned away (Fig. 1.4). On the judge's right, towards whom his face is turned, are two men appointed to defend the woman and child. The text illustrated spells out the prohibition of actions being brought by those under the age of 17 or by women. As for the latter, the reason is given in terms of a 'modesty in keeping with their sex' and then refers to the classical story of Carfania 'a shameless woman who .. brazenly made applications to the magistrate'.[21]

The image itself is taken fairly directly from Alciatus' *Emblemata* and specifically emblem 109, *In Studiosum captum amore*, a legal scholar (*iuris peritus*) overcome by love (Fig. 1.5). The earlier emblem is if anything more explicit and in a relatively lewd manner portrays the threat of lust and here the lure of the lascivious and feminine undermining law. The enthroned scholar-judge is shown looking towards a naked Venus, his left hand stretched out towards her sex, his right hand pointing towards Eros who stands bow in hand to the right of Venus. On the other side of the scholar, stands Athena with spear and shield to hand, representing justice in its classical definition as an art graced by both arms and laws. The affective symbolic grammar of the emblem, to borrow Hayaert's locution, is one that depicts in visceral and memorable form the separation (and connection) of public and private spaces, *res publica* and *domus*, law and *gynaeceum* that the tradition constantly revises and relays. The emblem presents temptation and affective relation as the left hand of law, the unconscious and oceanic other scene, the realm of administration, of the law of non-law in Agamben's terms, that is kept at a distance, contained yet pressing at the chirological barrier of legality. The lawyer has been ensnared and of this the

[19] Discussed in Valérie Hayaert, Mens emblematica *et humanisme juridique,* at 198–199.

[20] For discussion of the meaning of aenigmata iuris or legal enigmas, see Goodrich (2010).

[21] *Digest* 3.1.5.

Fig. 1.4 Senneton edition of the Corpus iuris civilis (de postulando)

relevant maxim is *non bene convenit* – it leads to no good. This emblematic visual source is then transferred to the legal text, the holy writ of law in its day, to enliven, to figure and give effect to the juristic interdiction upon actions: 'The image has at least a triple status: a cordial or one could say expressive function, a pedagogic and mnemonic role and an affective and symbolic dimension' (Hayaert 1555). Here then, in interlinear or more accurately non-linear form there is a more popular grammar, a guide to and glimpse of the poetic cause, the invention and motive of this institutional reason that captures the subject for law. It is the symbol, as Legendre has lengthily elaborated, that gets under the skin, that has effects or in the Latin maxim, *id efficit, quod figurat* (Legendre 1994).[22]

[22] Translated as, '*Id efficit, quod figurat* (it is the symbol which produces effects): The Social Constitution of Speech and the Development of the Normative Role of Images' (P. Goodrich trans.) (1995) 20 *Legal Studies Forum* 247.

Fig. 1.5 Alciatus, Emblemata, emblem 109

1.4 Conclusion

There is perhaps no better expression of the lure and the doctrinal ruse of the emblem than that to be found in Thomas Combe's edition of *The Theater of Fine Devices*. The question posed in the preface to Combe's work is that of the differential effects of image and word. The written text, the linear and ever so sensible dictates of prose, will all too often pass the reader by and so gain little or no consideration, let alone having any affective impact. Thus, Combe moves to contrast the image to the word, detailing that 'pictures that especially are discerned by the sense, are such helps to the weaknes of cõmon understandings, that they make words as it were deedes, and set forth the whole substance of that which is offered, before the sight and conceipt' of the viewer. The emblem is a mode of performance, not simply a speech act and illocutionary force but more than that, an enactment, a moment in the visible theatre of legal rule. Here and quite vividly the dead letter of legal prose comes to life, takes to the stage, gets up and walks and in doing so becomes law for us, the viewers, the audience, the spectators of an administration of justice that has always been fairly expressly a theatrical mode of implementation

replete with its aura of majesty, spectacle of place, agon of trial and insignia of dissemination.

Returning to the lawyers who devised the emblem tradition, the performative character of law's visual modes of presence and promulgation is very evident. The emblem is explicitly a theatrical device. Perrière's *Thëatre* not only uses theatre as its title but also invokes 'engines', which in this context refers to stage machinery, the engines, scaffolds or props that are used to make actors appear in front of their spectators. The emblem is a dramatic machine that helps devise, if you will, the mode and method of performance. The emblems in Perrière's work are indeed presented as figures on stage, with the title page itself in the form of a theatre (Fig. 1.6).

The lawyer Pierre Coustau takes up this theme in his *Pegma cum narrationibus philosophicis* of 1555 (Costalius 1555). The work consists of a collection and expansive philosophical annotations of emblems. The opening emblem is a portrait of justice – *in simulachrum Iustitiae* – and shows her holding a child to each breast, suckling war on her right nipple and law on her left. Seated on a throne with a curtain behind her, this pedagogic tableau evidently stages an image, a dramatic mask portraying the two orders of rule and governance, of providence and fate as understood by the Renaissance jurists whose tradition of images we inherit. Barthèlemy Aneau, a year earlier, had used a not dissimilar image of *Justitia* in his *Jurisprudentia* a work that presented in visual and textual form the biographical history and portraits of great jurists as an introduction to the institution of law (Aneau 1554). *Iustitia* in Aneau's image is interesting for being placed on a stone pedestal, the book of laws in her left hand, declaiming to an audience of blindfolded subjects. It is here again the staging, the theatrical natural machinery of presence and play that are of significance.

For Coustau, justice is even more explicitly staged, a social performance upon the two scenes, external and internal, military and domestic, that his opening image portrays. In Anglican terminology, law is a nursing father and passes an interior spirit of animation, a living voice, via its spectacles and stages. The concept of *pegma* is very much to the point and highly indicative, its reference being a pedestal, scaffold or other theatrical device whose origin lies in the shelves and cupboards that were used classically to display the *imago* or mask of the ancestors who ruled from the atrium of the house. The image was there the archetype of governance, a visible visage that overlooked domestic space and represented in spectral form the lineage and inheritance, the honour and virtue of the family and the place and genealogical as well as moral qualification of the subject. The law of images was the pattern of inheritance, the order and titles of honour, the symbolic grammar of governance as it inhabited the most proximate and interior domains of the subject. And then, last point, the tradition of legal emblems arrived on the social stage as a novel apparatus for the promulgation and dissemination of the idea of law. The emblem presented what Combe terms the 'whole substance of that which is offered', meaning in contemporary jargon the big picture, the social face of the 'concept' of law. The power of the image lay in its ability to carry and apply the abstract rule, the prosaic letter of governance to a terrain that law in its positive scriptural expression would never reach.

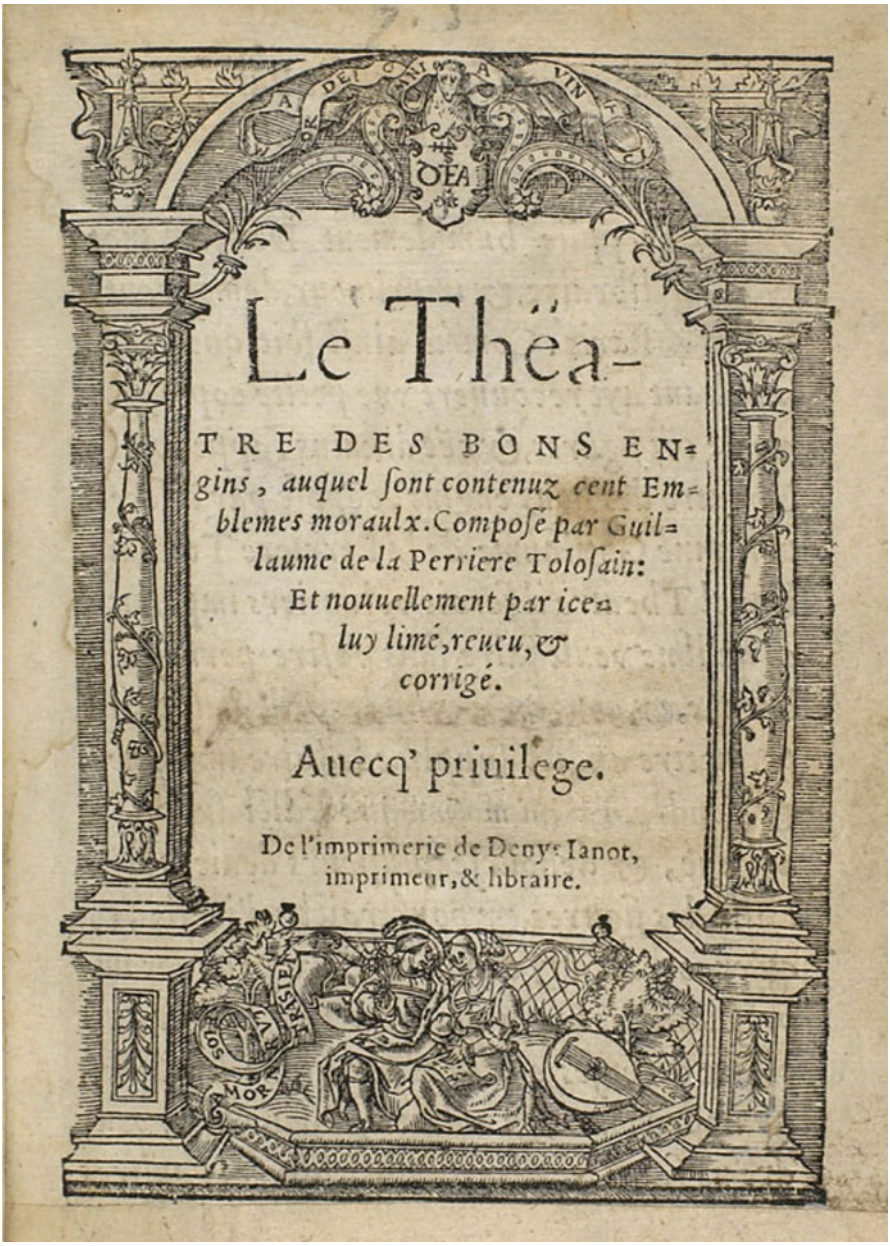

Fig. 1.6 Perriere, Theatre des bons engins, title page

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Chapter 2
Law and Image: Towards a Theory of Nomograms

Paolo Heritier

Abstract Contemporary legal theory cannot be referred solely to the concepts of text and norm, but must take into account the connection between image and law. One of the most interesting contemporary contributions to the study of the relationship between myth, image, history and law is Legendre's analysis of emblem theory. He identifies a single mechanism of legitimation of power – from Roman Empire to globalisation – the dimension of the *Third* (*Tiers*). It is a structural anthropological device on which the Western concept of power and law is founded that brings together different concepts such as God, state, democracy, science and the market and places them in a single *legendary fictional place*, visually perceptible on the aesthetic plane of representation. This chapter analyses the historical and philosophical elements of this conceptual framework, showing both application to the fields of marketing and advertising (the communicative strategies of multinational car companies such as Fiat Chrysler) and also implications for hermeneutics and aesthetics (the analysis of the painting by Piero della Francesca *The Flagellation*). The final aim of this chapter is to begin to develop a theory of legal sources suitable for the contemporary society of the image moving from the idea of nomogram designed as the unifier tool of the written and unwritten forms of the law.

2.1 A Starting Point: Modern Emblems

Contemporary legal theory, in a semiotic perspective, cannot be referred solely to the concepts of text and norm, but must take into account the connection between image and law. A general conception of the sign, starting from the work of de Saussure (Goodrich 1987) and Peirce (2008), must take into account a plurality of

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phenomena (which can be considered as signs) that show a specific juridical importance and are of interest to the philosophy of law.

One of the most interesting contemporary contributions to the study of the relationship between myth, image and history is Legendre's analysis of emblem theory. Taking its departure from the standpoint of normative theory, this chapter will pursue a semiotics of law and the image. More specifically, this research aims to analyse the concept of the nomogram elaborated by Pierre Legendre, historian of law and psychoanalyst, especially in his *Leçons* (Legendre 1983, 1985, 1988a, b, 1989, 1990, 1992, 1994, 1998, 2009) (the seven volumes published so far), and recently analysed by Peter Goodrich (1997; Avitabile 2004; Heritier 2009b; Berni 2008; Lenoble and Ost 1980; Kozicki 1982; Pottage 1994; Schutz 1995) and Alain Supiot (2005).

In his *Leçons*, Pierre Legendre examines various ideas such as the history of canonical and Roman law, aesthetics, emblematics and the study of the arts, the theory of industrial organisation and management, the theory of political communication, Lacan's psychoanalysis and Saussure's linguistics. Always seeking new ways to thematise the question of the legal structure of society, Legendre identifies a single mechanism of legitimation of power characteristic of Western society. In this way, he aims to explain the legal methods of ancient or mediaeval societies, based on the Empire and the divine (like modern-day ones based on the market and on science). Apart from the simplifications of a rationalism convinced that it has, through the advent of scientific thought, overcome the dark centuries of superstition, the Roman Empire and globalisation have in common a structural anthropological device on which the Western concept of power and law is founded, namely, the dimension of the *Third* (*Tiers*).[1]

This is what the notion of *malleability of reference* (Legendre 1994) suggests: it brings together different concepts such as God, state, democracy, science and the market and places them in a single *legendary fictional place*:

[1] The texts of Legendre have drawn upon a vocabulary developed from the history of Roman law, canon law, mediaeval legal texts and contemporary psychoanalysis and semiotics. So, the definition of technical words as *Third* (*Tiers*) will aid the reader: 'Third. …Power is never directly present but is always triangulated, which is to say mediated through the space of the third. In a theoretical sense, the Third is the structural site of the absolute, the empty space, abyss or nothingness upon which both value and power depend. As the founding principle of the social, the logic of the Third is the logic of the distance of lack which makes power possible, it is the inaugural space or theatrical stage of social value and subjective attachment. In theology, the power of God or absolute place of the mythical Third must thus always pass through a mediating figure – that of the Pope, the emperor or the priest – before it becomes an object of subjective attachment. The logic of the Third thus refers to a logic of exchange between the subject and the absolute, which takes place across the space or distance of interpretation. To communicate with, or to love, the enigmatic figure of social authority or of divine power, the subject must address that figure as a lack, as something absent or in Lacan's terms, as the objet of an impossible desire. Thus Legendre variously refers to the Third as the absolute Other, as the Image, Emblem, Mirror or Text. At the level of the Western institutions, the necessary yet empty space of the Third to which desire is addressed is replicated most prominently in the practices of penitence and law…' (*An Abbreviated Glossary* in Goodrich (1997)).

> The Pope is the delegate of the Christian God; no-one can see this God, he is a name. The king or the queen of the United Kingdom is the delegate of the 'United Kingdom'; no one can see it, it is a name; and the crown worn by the monarch is nothing more than the apparent sign of an invisible crown in the hands of God. The president of the French Republic is a delegate of the Republic, no-one can see it, it is a name. All these names are part of the linguistic scaffolding that supports the culture; and the popes, the kings or queens, the presidents, are delegates of these names, *the living Emblems of these names*. (Legendre 2004)

In other words, Legendre identifies a constant structural mechanism that crosses disciplinary fields and historical divisions considered academically and substantively separate. In doing so, he overcomes consolidated distinctions such as those between postmodernity, modernity and the mediaeval or between art, science, religion, law and economics.

The identification of a similar device is possible only when we place ourselves on the *aesthetic* plane of representation, of the image of these names, in their *being presented to the subject* as *references on which to rely.* (Think only of the mechanisms such as *advertising*, *corporate image*, *the mass media* on which today's democracies and markets are based, deeming themselves secular, rational and devoid of 'myths'.) All of these *names* may be founders since they have access to the logic of Third (*Tiers*), whose first name is, in the west, symbolised by the name and figure of the Father (not only the *pater familias* of Roman law or the *God the Father* of Christianity but also the *Father State* of the paternalism of the welfare state, until recently, bore the traces).

In this sense, the Pope, the Dalai Lama, the presidents or the queens can be considered emblems of the mythical foundation. And in terms of corporate brands, we might also mention Coca-Cola or Nutella or the stylised figures of the models or the sports champions (Legendre 1983)[2] which nowadays dogmatically and aesthetically occupy a similar position to that of centuries-old emblems. The paradox and irreverence of these combinations, made possible by the work of Legendre, not only raises the doubt that humanity, on the road to globalisation, has been faced with a serious anthropological problem regarding normativity and the role of the law and its institutions. In addition, it also offers a glimpse of a historical continuity that goes well beyond the historiographical categories once assumed by modernity as 'eternal'.

According to Legendre, secularisation is only one of many observable historical *shifts* in the Third Mythical Foundation of societies. This is how he explains the historical passage from the Empire to the modern state and then to the globalised market and on to the *organisational nomenclature* of an Empire or Church. This historically and aesthetically founded substitutive process is evident when we take into consideration the historical development of the juridical foundation. In this sense, I will limit myself to briefly analysing three twentieth-century theoretical formulations that explain in very different terms the idea of foundation, linked to the names of Schmitt, Legendre and Kelsen. I will then go on to analyse the relationship between image and normativity.

[2] 'Development, the Revolution, God, the Class War, the Republic, the Toyota brand, these are examples of axioms that present the guaranteed truth'.

2.1.1 Historical Analysis: The Juridical Foundation as a Mythical Place in Legendre's Theory

That society organises itself at various times around different dogmatic nuclei is an easily observable phenomenon. Although a controversial figure for his compromise with Nazism, Carl Schmitt remains one of the most distinguished German jurists of the past century. Schmitt described the expedient of substituting the foundation and developing the doctrine of *centres of reference* typical of the time in his pioneering exploration *political theology*, a work with deep roots in the early centuries of Christianity (Schmitt 1963). According to Schmitt, each era had its own hub around which it organised itself. For example, the sixteenth century was organised around the theological; the seventeenth around the metaphysical and scientific; the eighteenth around moral-humanitarian aid; the nineteenth around the economy, to which we then might add the twentieth century, which organised around the technological; and perhaps the twenty-first around the informative-communicative (though, admittedly, it may be difficult today to identify a single centre of reference).

Legendre, while adhering to this Schmittian vision, highlighted the 'reference points' of an era as the criterion for understanding the socio-juridical phenomena in a broader historiographical logic, with reference to the entire second millennium, but dating back to the position of Emperor Justinian at the time of the writing the *Corpus Iuris Civilis*. From his doctoral dissertation (Legendre 1963)[3] onwards, the French legal historian observes how the authority of the *princeps* is placed at the centre of the theory of the sources of Roman law. He finds in reference to the imperial figure its unity, symbolised by the *Corpus Iuris Civilis*, of which Justinian is not only the author (*auctor*) but also, properly speaking, the founder (*conditor*): '[T]he *jus condendi* allows the holder to introduce new rules, making the New Law (*Jus novum*), and to interpret the established law. This dual function belongs to the emperor alone: *Solus princeps habet potestatem condendi leges et interpretandi*' (Legendre 1963).

Here, Legendre identifies a model that already anticipates the position of Schmitt's Leviathan, from the point of view of the sovereign founding function: 'The imperial constitution being then the expression of the human Law, the *princeps* appeared then as the lord of this law. The tenet *Princeps legibus solutus* is thus self-explanatory' (Legendre 1963). This imperial position would then be taken up by Gregory VII as a model, resulting in the complex elaboration of the *Corpus Iuris Canonici*, in which the Romanist doctrine of *Jus condendi et interpretandi* was retrieved to justify papal dominion, and thus the Pope being conceived as analogous to the *princeps*.

The importance of the subsequent process of Romanisation within the Church seemed fundamental. The true heir of the Roman Empire, the historian notes, is the

[3] More generally on the topic of the mediaeval revolution of the interpreter, see variously and from various perspectives, Berman (1983), Nemo (1998), Nerhot (1992), Prodi (2006) and Grossi (2004). Recently, Legendre comes back on the subject (Legendre 2009).

Church of the twelfth and thirteenth centuries, which 'tried in the first place to imitate its organizational power. It made, so to speak, the Pope its emperor' (Legendre 1963).

In the essay *La totémisation de la société: Remarques sur les montages canoniques et la question du sujet* (Legendre 1999), Legendre analyses this legal device, referring to the *Decretum Gratiani*, a collection of disparate texts that was compiled around 1140 in the wake of the Gregorian reform of the eleventh century. Even here he identifies a precise functional symmetry with what was achieved by Tribonian appointed by Justinian at the time of the compilation of the imperial *Corpus*, the *Digesta* or *Pandectae*. He notes how the friar Graziano brings together different sources, identifying canonical texts (to be included in the collection) and texts to be excluded (Apocrypha) – just as Tribonian had done centuries before with the vast material of quotations from Roman jurists of the early centuries.

The first useful step in reconstructing Legendre's theoretical evolution is to consider how in his early lessons, *Leçons II*, *L'empire de la vérité. Introduction aux espaces dogmatiques industriels* (1983), he precisely identifies the historical-juridical mechanism that leads to the development of the model called the 'malleability of reference'. In relation to Roman law (in the final Justinian version), this is considered the first staging (*mise-en-scène*) of 'reference' and a construction technique of the mythical third place – a model later picked up on historically (and therefore capable of taking on increasingly new content in a constant structure) six centuries later by Pope Gregory VII.[4]

For Legendre, the Roman law represents the first instance during which the myth was constructed as the 'trick of historical timelessness' (Legendre 1983). The history of Roman law builds a structure, 'a signifier destined for institutional reproduction' (Legendre 1983), from which it is impossible to escape when analysing the industrial system, for 'to question the concept of history of Roman law is to question the discourse of truth to which industrial order is linked' (Legendre 1983).

The history of the Western resumption of this myth is impressive indeed. It ranges from 'commentators of the two periods (the Middle Ages and Modern Times), *jusnaturalists* of the seventeenth and eighteenth centuries "Pandectaeists" of the nineteenth century and their following of scholars, regardless of the mythological and poetic aspects, amongst whom we also must include the name of Bachofen' (Legendre 1983), to the delusional references of Hitler's Third Reich and the continuity of an imperial tradition.

It is then necessary to fully understand the institutional mechanism assumed by the writings of Justinian in representing the written law or statute, the logic of good and justice. The composition of the *Pandectae* or *Digesta* makes it possible to identify, to some extent, the original mechanism of the space occupied by Roman law in the mythical reference: in these 50 books which gather the historical heritage are 'millions of fragments, grouped under the name of their author and placed under a

[4] Legendre's reconstruction of the normative history of the West is inevitably forced to select some aspects of the normative experiences, inasmuch as it is conditioned by theoretical choices and assumptions.

title' (Legendre 1983). It is the dynamics of the composition that interests us here. On what basis can these texts be considered legally true?

Tribonian, appointed by Justinian, collected the texts by adapting the ancient law: 'He fiddled with the texts', Legendre notes, 'cut them to do away with troublesome or inconvenient passages, mutilated their meaning and transformed their formulations or added words (*tribonianismo*, interpolation)' (Legendre 1983). It is here that we find the change of state, of 'legal truth' of the texts, which due to their inclusion in the collection are, so to speak, mythologised. The Parisian author explains that 'these texts change, while remaining the same. Modified or not by Tribonian, they exist under the name of their original author, becoming something else' (Legendre 1983). Here, the *textual* root of the mechanism of transposition-manipulation of the fragments is created. In doing this, Justinian enacts the *mythical founding place of the origin of the law*: he 'presents something that does not exist, an absolute Authority whose name – the name alone – is proof, also absolute, that the law originates from this author' (Legendre 1983). For instance, we literally find 'Justinian' here a *lieutenant*, a placeholder, in introducing the *Digesta* with the first two words '*Deo auctore*'. God is fictively the author of *Pandectae*, of the *Digesta*; he *theatrically represents a name*, the name of an absence, of a function, the sacred name of a place through which, by dogmatic logic – the same for the laws and for the unconscious – the question of the origin is answered. Thus, the mythological space of the law, in which Roman law first took office, is constructed: a functional assemblage by power that consists 'in a liturgical manoeuvre that presupposes a functional recipient, the *laós*, namely the People, not as a conglomeration of countable individuals, but as a mystical unity to which the absolute Place – a god whatsoever – speaks' (Legendre 1983).

Here it is easy for Legendre to indicate the inaugural and mythical function later assumed by Roman law. For instance, he observes how in this Justinian operation it is possible to see the *consecration of a device* that will maintain its influence over the way of conceiving law, placing it in the Third Empty Place of Reference. Moreover, he considers how this technique represents the continuation of the Greek oracular practices (*ta thesphata*), noting that the Roman Empire produced this institution of the 'sovereign oracular power', which later became 'the juridical strength of the Western Church, a true replication of the Empire' (Legendre 1983). The phenomenon of the centralisation of oracular power testifies to the reference of the absolute interpretation of the sovereign, capable of issuing laws and interpreting them. In fact, the structure of the *Corpus Iuris Civilis*, marked as a collection of laws (*Codex* e *Novellae*), and of fragments such as the *Pandectae*, has a hermeneutical effect: the distinction between *two types of text* that can be traced to *two different legal functions*: 'the assemblage of the emperor-representative of God legislator stipulates a twofold recognition: (a) for the Law as a logical principle of the legal function, (b) of the emperor inasmuch as it is a trick for humanising, that is, enacting this principle' (Legendre 1983). This is the structural point that, according to Legendre, has not been perceived by Romanist scholars careful to expunge the Tribonianisms, the *mythical value of this Reference* and the establishment of a *division of planes* between the mythologised texts and the interpreters, in which the science of interpretation plays the role of mediation between a theoretical absolute and a casuistry.

This is the *principle of division that links*, that holds together the stakes of the reference and of political love, of the sacrifice required of the individual in *liturgically uniting* with power, placing at the heart of the legal discourse the illusory 'truth' of the text bound to the represented absolute. *A principle of division which binds socially and institutes two positions in the enunciation of the law*, Roman law presents itself ideally as the *inaugural law*, which is literally linked to the science of augurs as a discourse that *presumes omniscience*, a *divine reference* communicated in the *liturgical form* as an emblematic imperial position, theological-political mediation between the divine and the human. Thus, the Roman law, according to Legendre, gains access to the plane of the *signifier* in a Lacanian sense,[5] functioning as mythical reference.

On the basis of this analysis of the iconic device underlying Roman law, it is possible to understand the process through which the drafting of the *Decretum Gratiani* was achieved. Many centuries after Tribonian, there was a similar undertaking. The classification of legal texts was undertaken according to a dual causal criterion, testifying to the Pope's claiming of the fundamental position of the Roman Emperor, the *origin* (*origo*) and the *authority* (*auctoritas*), as can be seen from the maxim '*Omnia iura habet in scrinio pectoris sui* – the pontiff guards all the legal texts in his breast'. Here, the pontiff takes the position of the third guarantor, the *living text*, of the incarnate text of the texts: the *origo* is the causal criterion by which the Pope is acting in the position of Christ *in the name of Christ*, as *vicarius Christi*. According to a continuous chain descending from the first *vicarious*, the fact of being *vicarius* still places the pontiff in a position of *Pater Legum* and thus implies the *auctoritas* (being the author) as occupying the position of the foundation that authenticates and *makes the texts real*, guaranteeing their truth (as against the texts that the Pope, or someone in his name, refuses as apocryphal).

As Legendre notes, the superimposition of the figure of the Pope, as well as that of the Emperor, makes the device of occupation of the third place in the legal foundation myth susceptible to being occupied by new figures: even linking, as we shall see, the structure highlighted by Schmitt's 'centres of reference', meaning secularised figures, in the sense explained above, of the foundation.

2.1.2 The Foundation Plane and the Plane of the Interpreter: The Structure of the in the Name of….

The Roman-canonical device described above allows Legendre to identify a way of expressing the power, the *dogmatic communication*, by communicating the position held by the foundation and that of the practices of interpretation referring to it,

[5] On the role of the significant in Lacan, for example (Lacan 1966a, b, 2005). In the field of philosophy of law, I recommend only on Lacan and psychoanalysis and law (Goodrich 1995; Romano 1991) and more recently with mention also of Legendre (Romano 2006).

together holding the fictional third place occupied by the Emperor and the Pope and the concrete place of the legal practices enacted by the jurists. In fact, the French author conceives in structural terms the dogmatic communication as a 'liturgical manoeuvre that presupposes a functional addressee, the *laós,* that is to say the People, not as a countable agglomerate of individuals, but as a mystical unit to which the absolute Place – a god of some kind – speaks' (Legendre 1983). This formulation allows us to better understand not only how the plane of the foundation, and therefore the mythical place, is understood in the legal sphere as a malleable place but also how it becomes undetermined and merely functional, linked to the exercise of power rather than to its specific content.

The relationship between the mythical-sacred foundation and the concrete legal reality implies a specific theory of interpretation as well. According to this logic, a system of interpretations is socially defined as 'organisation on planes of the positions of interpreters' (Legendre 1983). It is precisely this differentiation of planes of interpreters that shows how law identifies a sacredness of its 'priests' as well as its rites in a totally secularised context: the sacred character of the juridical 'rite' or procedure must correspond to the mythical place of the foundation. In order to understand this point, it is necessary to complete the analysis of the model.

Legendre observes that the dynamic underlying the *speaking in the name of* (*of the Roman senate* in relation to the Empire; *of Christ* – in relation to the Church; *of the people* – in relation to the modern democracies), that is to say, recourse to the legitimating *reference*, the enacting of the legal discourse, is still present in the fiction according to which the people of the nation are the author of the texts published in the official Gazette, through its elected representatives. In this sense, there is no clear separation between modernity and premodernity, marked by the French Revolution. Rather, there seem to be surprising elements of structural continuity between historically very different periods. Even the 'Hobbesian' moment of the formation of an absolute state, emblematically symbolised by the Leviathan, cannot escape this structural dynamic of manipulation of the mythical and 'sanctified' third place. To make such a claim would mean removing an incorrect pre-comprehension of the distinction between a juridical 'premodernity' (the Middle Ages) and an enlightened and positivist juridical 'modernity', which finds in the idea of the state the place for the maturity and the definitive consecration of juridical science. On the contrary, even in this rationalistic setting, traces of 'secularised' sacredness of the legal text and its interpreters (the modern jurists) would remain.

Schmitt's doctrine of the 'centres of reference' itself would move within this logic. Not only the height of the positivist construction of the twentieth century, the fundamental Kelsenian norm – a fictive and only imagined norm – would merely fit into this structural logic, becoming a device transcendentally legitimating the state, the *empty* space previously occupied by the Emperor, the Pope and later by the Goddess Reason, under the authority of knowledge of logic. As Amato effectively notes, the empty structure mentioned by Legendre (the dogmatic communication and the position of interpreters who speak in the name of…) appears to indicate not only a 'God as empty as the Kelsenian fundamental norm', which demonstrates how

the institution of a referee intends to save man from the nightmare of nothingness or from the inextricability of the fact, but also a 'God "politically" necessary, like the decisionistic archetype of Schmitt's Creator' (Amato 2002) or even like nostalgia for the divine (which allows the discourse of man on the world a horizon of effectiveness).

In fact, while Schmitt considers the state of exception, a concept that defines the sovereignty and is the basis for decisionism (like the miracle in theology), Kelsen notes not only the logical parallel established between God and state but also a certain real relationship (Kelsen 1962a).[6] Here, he explicitly states that there is a parallel between Christianity and pure juridical doctrine. In fact, Kelsen believes that the theory of self-obligation of the state precisely corresponds to the dogma of the incarnation of God. According to this claim, the meta-juridical state becomes law due to its submission, as a legal subject, to itself, and thus the state limits itself. The difference between God and state lies only in the difference between rational and irrational: in the fact that with respect to this mystery theology can appeal, and explicitly appeals, to the supernatural, while the doctrine of law and of the state, although it states the same mystery, must give the illusion of remaining within the sphere of the rational (Kelsen 1962a, b),[7] precisely through the logical artifice of the fundamental norm.

We can therefore conclude that the twentieth-century founders of two of the principal addresses of twentieth-century legal theory, decisionism and positivism – even if they apparently refer to theology – in fact operate within a mechanism that reads the juridical foundation in the same mythical terms as does Legendre (Legendre 1985).

2.1.3 *Dominium Mundi: The Empire of Management and the Postmodern Nomenclatures*

However, merely considering two fundamental authors of twentieth-century legal theory, like Kelsen (1988) and Schmitt, does not seem sufficient to justify the extent of Legendre's position, which goes beyond the world of law into the analysis of the aesthetic, the psychological and the irrational present in the juridical. In fact, the French historian extends the process of structural transposition of the mythical and sacred foundation well beyond the merely legal sphere, giving it an aesthetic structure capable of justifying the 'mythical-sacred' logic of the functioning of 'centuries-old' lay situations (such as the market and advertising) as well.

In his analysis of the 'political desire of God', Legendre states that the third place of the foundation, in the historical perspective given, cannot be reduced to the

[6] 11th chapter.

[7] 12th chapter.

history of Western political theology, dealt with by such different thinkers as Gaines Post, Carl Schmitt or Jacob Taubes. He explains, 'Having dismissed the western creator and warrior god, the institutional secularization makes it possible to perceive that the place left empty is in fact *a structural place*, where the liberal, or rather the libertarian, hermeneutic is forced to enrol, incapable of revoking the logic that presides over the emergence of the civilisations and over the construction of the subject' (Legendre 1988a).

Many other 'functional subjects' occupy the third place of the foundation. This is the further journey suggested by Legendre's notion of *malleability of the reference*. Placing itself well beyond Schmitt's theory of the centres of reference, it intends to unite, putting them in a single *mythical*, *fictive place*:

> …[I]t can be said that the flags, the brands, the currencies … are Emblems. At another level, the great traditional texts functioned as Emblems: the Bible, the Qur'an… the traditional sovereigns, but also the modern heads of state are living Emblems: the Pope, the King or Queen of England, the President of the French Republic… What have these forms got in common? They are in representation of something that is not here, *in representation of an absence* that… is the *invisible foundation of the Power.* (Legendre 2004)

Here, Legendre identifies a structural *aesthetic* plane of the representation, of the image of these names and, ultimately, of their being *introduced to the subject* as *references to be trusted*.

Precisely from this aesthetic point of view comes a continuity between the emblematic representations of the Pope and the Emperor and contemporary ones. The figures of the foundation nowadays placed in the third and mythical position are, after the state, the new substitutes that 'secularise' the sacredness of the reference to the state, replacing it with the market or communication. As already stated, in the advertising functions of the *corporate logo*, there is now a similar mechanism of psychological identification with the empty place already operating at the times of Justinian, of Gregory VII or the Leviathan. The corporate logo now functions as an empty emblem that carries the foundation reference, the sovereign place (even though it is a 'sovereignty of the consumer' and not of the people). However, it is also possible to identify other icons of communication carrying the new forms of the socially recognised sacred, for example, the role of the models for the fashion industry, gifted with an idealised shape, or the new public role of the effigies of Pope John Paul II in the media.

By taking the standpoint of the legal interpretation and the distinction between the layman and the priests, it is possible for us to identify phenomena of transposition of the same structural role, which thus gives rise to the notion of *nomenclature* of the industrial societies. This notion is similar to the distinction (dating from the period of the pontifical revolution of Gregory VII) between *two kinds if men: the ecclesiastics and the laymen*, the latter being those to whom one speaks through a dogmatic communication in the sense previously described. In fact, the laymen formed the *laós*, the ritual, liturgical people (and not the *demos*, the people in the political-deliberative sense), to whom the ecclesiastics turned 'dogmatically'

according to the scheme taken from the *Decretum Gratiani*, where humanity is divided in *duo genera christianorum* (Legendre 1988a, 2009). For instance, while God occupied the third and mythical place of the founding axiom, the *ecclesiastics* were in hierarchically superior positions to the *laymen*, for they were entirely dedicated to God in a fusional political love (renouncing temporal things). Both categories, however, were formed in relation to the mythical figure of the foundation (in this case the Christian God), one by means of the other, giving rise to two differentiated planes of operating subjects *in the name of* the foundation (the ecclesiastics on a *sacred* plane, the laymen on a *profane* plane).

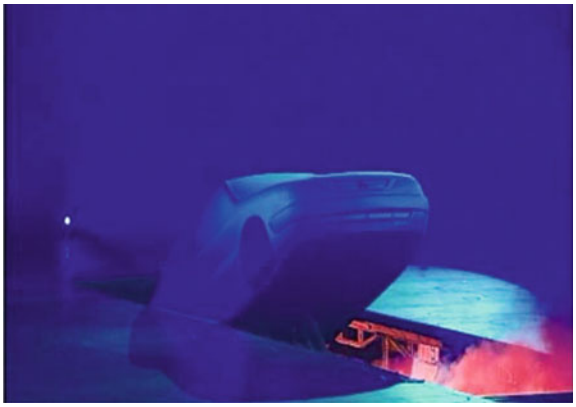
This *structural distinction on two planes* is said to be the origin of the modern question of the *nomenclatures*; having followed the historical events of the malleable reference in the West, it continued to secularise until it became modern-day *management*, which according to Legendre, today, occupies the privileged position of the *ecclesiastics of the past*. The structure of the *two types of men* qualifies *in the name of* jurists, politicians, bureaucrats, scientists, technicians and managers. Even the celebrities of the mass media and television represent the various secularised forms of this *first type of man* whom the historian explicitly refers to as the *nomenclature* (Legendre 2006). This X (referring to 'nomenclature') operates on an aesthetic-legal plane and acquires a differentiated statute with respect to the people (respectively the citizens, the employees, the consumers, the television viewers, etc.).

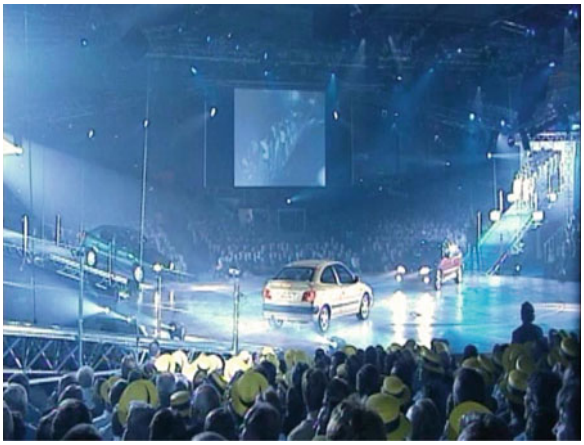
We can find visual support for this theory in the documentary *Dominium mundi, L'empire du Management* (Legendre and Caillat 2007), which was produced for the French-German television company ARTE by Legendre with the director Caillat. In this documentary, annual conventions of multinational companies are shown, in which the *liturgical* (dogmatic-communicative) role of the *managers*, who speak *in the name of the company* to the *laós* of the shareholders and the employees, is evident.

In particular, the theatrical appearance of the motor vehicle in one scenario reflects a fact that is not only related to advertising but is also normative, as Legendre explains while commenting on the filmed sequence:

> The love of the images, the passion for being similar, the art of appearing are irresistible: we are bewitched. In the West as elsewhere, the powers touch on this vulnerable point. The industrial system promoted by the West rivals the great religious dream. It exalts the vast paradisiacal surfaces, the ceremonies of fashion, the beauty of images to be consumed… Management has appropriated the authority of the pomp, of the sensuality of the rituals. It produces the liturgies. The market sells the products-entertainment. The ceremonies of marketing enact a world that knows no masters or slaves, but only planetary fraternity. (Legendre and Caillat 2007)

The images reproduced below (taken from the documentary) refer to the presentation of a French car and clearly show this ritual appropriation. They explain the extension of a theory of *nomograms*, of the multiple forms of writing in the juridical sphere, which (as mentioned earlier) are not limitable to the text, but are extendable to the image and to the 'liturgies' of advertising and of the market that makes use of marketing.





Without wishing to go into too much detail, or extending the nucleus of this interpretative scheme (for to consider the preparation of a model or the presentation of a cosmetic, as Legendre and Caillat do in the documentary, would not be different), I wish to advance, in support of the line of analysis indicated by Legendre, a further observation concerning the presentation of a car, in which the iconic connection between the normative and the marketing appears even more evident. This link is precisely evident in relation to the similarity between the body, which is made up of men of the Leviathan, and the car body, which is made up of men presented in the centre of Torino. We see this on live television demonstrated by the team that organised the opening ceremony of the Winter Olympic Games held in Torino in 2006, during the launch of the new version of the 'historical' vehicle from the Torino-based car manufacturer, 'Fiat 500'. In the narrative 'liturgy' of advertising during the show, this car is even considered to represent the very symbol of Italian economic and civil development, to the point of conceiving the overlaying of the narration of Italian history in the last 50 years and the product being advertised. Finally, the car, in the performance that almost rose from the waves, composed of men, terminated its journey by rising from the ground with a spectacular ascension into the night sky and 'standing' side by side

in a magical atmosphere with the monument on the hills of Torino, overlooking the river and the Church of the Capuchin Friars.[8]

[8] To see the video of the construction of the Fiat 500 'made of men': http://tv.repubblica.it/home_page.php?playmode=player&cont_id=11480&ref=search, Title: 500, la festa di Torino – L'auto umana.

It is interesting to note that the background of the two images is similar: a natural background in which we see the *polis*, the use of men (painted or in flesh and blood, but always considered aesthetic-legal elements) to build the object (the state body of the Leviathan or the 'car made of men').

Although this is a simple example, it seems to clearly and iconically represent what Legendre theoretically indicates by the idea of a malleability of reference: a foundation (the state, the company) is represented and communicated to the people according to aesthetic and fictional modality. This is the same kind of legal fictional modality that we can find in the history of law with regard to the notions of corporation and legal person (Heritier 2009c, 2010).

The message carried by the two images is similar. For instance, we could call it *the entrance of the people* (the citizens, the consumers) *into the represented object* (the state, the automobile) *through a process of iconic and psychological identification* (of an aesthetic-normative nature). Particularly significant in this sense is the overlap on which the show is based (between the history of post-war Italy and the vehicle advertised) and seen as a symbol of that historical period, thus becoming a mythical reference, as can be seen from the article by the journalist of a daily paper reported in the footnote.[9]

2.1.4 The Normative Framework of the Image

In conclusion, it seems even more necessary to indicate how image is normative according to Legendre. We may seek to identify this iconic legal device by means of the specific analysis of a highly controversial painting, undertaken by the French legal historian in his book, *De la societé comme texte. Linéaments d'une anthropologie dogmatique*, with the reproduction of the famous painting by Piero della Francesca, *The Flagellation of Christ* (circa 1463).

[9] That the event was experienced as a 'mythical' moment is evident from the newspaper reports '500 DAY REPORTAGE. The history of Italy becomes a performance for the stands. And a car "takes off" from the Po' (title of an article by Alberto Mattioli in *La Stampa* dated 15 July 2007). 'Who knows, perhaps when the shows in the town square were organized by Leonardo or Bernini the effect was similar. […] So, the 59 minute show organized for the presentation of the new 500 […] ceases to be the most beautiful advertisement ever dedicated to a car and becomes a performance in its own right, a "total" work of art both concrete and visionary, realistic and futuristic, technological and baroque…. It begins with the 500 that was, the car that ferried Italy-past from the Longanesian *strapaese* to a satisfied modernity. And then here it is, amidst extracts from vintage films and songs, the mythical *cinquino* protagonists of the changing country, with Alberto Sordi's traffic warden, the Brambilla family leaving for their first paid-for holiday, Coppi passing the water bottle to Bartali… in a remote *Giro d'Italia* accompanied by a pink 500 like the jersey of the leader, Anita Ekberg diving into the Trevi fountain, and life seems truly sweet … then it's rock and the Beatles are here: modernity is four unique voices singing "I want to hold your hand". The 500 is the history of Italy, the true history, not the list of 'summertime' or institutional governments, but always Christian Democrats, but the people who travelled, loved, hoped in this great little car, in a word, lived.

As Legendre notes, the painting is divided into two scenes: one referring to the past, the scene of The Flagellation of Christ, and the other referring to the present in which the painter portrays three individuals who seem to be questioning or discussing some topic. The problem, then, is the organisation of these two moments. The debate surrounding the painting's dating and, perhaps more importantly, the identity of the three characters in the foreground is interesting because it represents an enigma, a symbolic representation of the *question*, of *human interrogation*. As the historian says:

> Let's consider the painting and its two parts separated by the pillar to the front of the loggia. The scene on the left recalls an episode from the Gospels referring to the passion of Christ: Pilate, the Roman governor of Judea, had Jesus flogged before handing him over for crucifixion. The scene on the right shows a group of three people whose striking presence, made even more enigmatic by the uncertainty that reigns over their possible identity – a mystery not yet resolved by academics (Calvesi 1998; Ginzburg 2000; Bonnefoy 2006) – seems to be offset (in what fate?) against the narration of Jesus tortured before Pilate seated on the praetorium. Why can this canvas be approached as a paradigm, in typically western style, of the dogmatic structure at its most abstract level? (Legendre 2001)

Here we move towards the understanding of an expression specific to a legal aesthetic: the *sovereignty* of the artist (Kantorowicz 1981, 1984, 1995), emblematic of his freedom in representing the world and things. According to the new vision of painting, inspired by the invention of perspective and belonging to Piero della Francesca (and, on another plane, to Pico della Mirandola with regard to the philosophical convergence of all the doctrines), the architectural volumes can no longer be shown in parallel. Rather, they converge towards a rational point, seen as a fugue, and thus create a space projected beyond the painting. Sometimes it is represented as *an eye*. This is the enactment (*mise-en-scène*) of the third dimension, the mythical place of the foundation that is so often mentioned. From here, power ideally descends, as represented in both its aesthetic and its legal dimension at the time, in which a new technique for the representation of three-dimensional objects on a

two-dimensional surface is invented. In other words, *perspective* creates depth, a fictive ideal point of convergence of all the lines in pictorially representing objects.

It is this point at which we find a mechanism paradoxically open to a fictive space of the foundation (the point at which all the perspective lines converge) similar to the Kelsenian space of the *Grundnorm*: the creation of a fictive space on which the reality of the scene (or the system) represented depends. As Legendre notes, the space of fiction here 'insinuates the idea that the aesthetic enunciates something that evades objective understanding, because it depends on the staging (*mise-en-scène*)' (Legendre 2001). Thus, the fictive space of the foundation is identified beyond the distinction between the two scenes into which the picture is divided, to the division between that of the dominant Christ and that of the three characters. This is a difference, as already suggested, instituting a hermeneutic that can, in turn, be referred to the two planes on which the dogmatic, founding and instituting communication of that hermeneutic is organised, proceeding from the asymmetry of the two planes (of the malleable foundation and of the interpreter).

And here lies the secret that the hermeneutic processes guard (including those of law): the relationship between the world of man is not reduced to operations of mere information (Legendre 2001). On the contrary, there is an *anthropological foundation* for human knowledge that, even in its most abstract form, can be traced to the *separation* of the subject from its image. This is what the myth of Narcissus and the mirror dynamic indicate: recognition of self always *speaks of the other and of the world*. In other words, any form of knowledge, including scientific knowledge, is based on a previous *discourse*, by means of which that given knowledge is *instituted and believed* by men as such.[10] There is always a previous legal discourse that *institutes a knowledge* relating to the representation of the foundation: it has precisely the function of *founding* the belief around a certain form of knowledge within a society. A knowledge is not given, at a social level, if it is not 'instituted', 'notified' to mankind or represented theatrically. To use Legendre's effective expression, it must be presented to mankind, if mankind is to *believe in it*. This is the *dogmatic theatrical mechanism*, fictive and constitutive, that he identifies and presents to contemporaneity as a considerable problem. And, as already mentioned, the *knowledge of the discourse that institutes the foundation* is different from the *knowledge deriving from the socially instituted foundation*. The dogmatic anthropology of Legendre considers a possible form of knowledge that turns on the theatrical plane of the empty space, the foundational (referred to the Third) view of every discourse. As we shall see, it crosses and holds together epistemological, historiographical-methodological, religious, legal, aesthetic and hermeneutic concepts. It aims to

[10] 'The reference is a place, and the legitimacy is the recognition of this place which places the figure of the *Third founder* […] in an apodictic position, that is to say incontrovertible…' (Legendre 2001).

reintroduce, following the modern and the postmodern, a theory regarding the attitude of conferring trust on something:

> In other words the Law in each system institutes its own science, a legitimate and magistral knowledge, to ensure communication of the censures also to the subjects and to impose the opinion of the teachers… From the theologist-jurists of antiquity to the manipulators of advertising propaganda, a single and similar dogmatic means has been perfected for the purpose of inveigling the subjects with that infallible method that is at issue here: the belief of love. (Legendre 1974)

If the question of *convincing* has always been the subject of juridical-political capture, it nonetheless qualifies the position of the problem of the *dogmatic* in a general sense. In fact, the sphere of the dogmatic draws justification from the observation according to which all knowledge must be instituted. Not even science, the last to occupy this social role in contemporary society, is exempt from jumping through these hoops. So dogmatic anthropology stands as a theory about the *cultural fixtures* that provide credit to the disciplines that (in a given society) from time to time are placed beyond criticism. These are the disciplines that occupy the third mythical place: Aristotelian philosophy, theology, rationality, law, economy, technology, computer sciences and so on, just to give a few examples.

Piero della Francesca's painting shows us this theatrical 'aesthetic-dogmatic framework' at work, an 'aesthetic envelope of culture' (Legendre 2001), at a very particular moment of the history. According to Legendre, Piero della Francesca is one of the *ferrymen* who ply their way between two eras – like Braque and Magritte in the twentieth century – where we find the enactment of *why*?, the problem of the enigmatisation of the world. In his handling of the enigma, Piero paints here 'a way of seeing man and the world, namely: *the Western institution of the glance*' (Legendre 2001). Consider the logic of the two scenes that the painting (The Flagellation of Christ, with its mysterious group of three characters and their organisation) shows. Without going into great detail concerning the ongoing historical controversy surrounding the painting, which most recently occupied authors such as Clark, Ginzburg and Calvesi, for a legal historian, it shows the constitutive structure of society: the organisation of the figures portrayed, the *iato* between the two scenes represented in the painting emblematically consents 'the infinite opening to interpretation' (Legendre 2001).[11]

This infinite opening to interpretation is possible because the historical reference (Christianity as a founding reference) was under discussion at the time of Piero della Francesca, and it is subject to *criticism* by the three characters, in a today that has *passed* beyond the Middle Ages, and no longer conceives the reference in the same way. We are thus taken back to the topic of malleability of the reference, of the position of the *empty place* that can be manipulated by man in a projective movement dominated by the starting point of contemporaneity, as well as operated by the

[11] Here we see at work, through the *iato*, the same structure identified elsewhere by the author with regard to the relationship meaning/significant: the constitutive separation (of the subject, of the theatrical scene of society, of the sense).

three characters in the picture, who displace the centrality of the first scene (Christ scourged), relating to it as the ideal reference. Through the construction of the *viewpoint* that the painter imposes on those who *pass by* the painting, the movement identified (*the enigma of the iato*) aesthetically traces the construction of the normative structure that supports society.

In this regard, *the institutional systems can be studied by aesthetic means.* For instance, a link is created between aesthetics and law: *just as we study a picture*, *so too do we study a law*, which shares with the former the same *fictively* eternal position and *dogmatic position.* Without forgetting that any exegetical technique presupposes a theatrical foundation on which it is based (even if allegedly positivist), a knowledge that institutes it: this is the *theatrical scenario of law*: the *institutive place of practices of interpretation that recognise an ideal and mythical, institutive, dogmatically founded and fictively historically malleable reference.* These institutions do for society what a painting like that of Piero della Francesca does for its observers: they impose *a window, a framework, a way of seeing. Whether it is a question of a painting or of a text, the dogmatic structure from which it begins is the same.* The problem of the framework (the opinion, the fixing of a glance) is thus posed in its normative and, simultaneously, hermeneutic essence.

The last question that remains to be analysed is the relationship between 'the painter's gaze and the gaze of the viewer' (Legendre 2001) or, transposed in terms of legal hermeneutics, between the eyes of the court creator and the gaze of the citizen to whom the law is communicated: between the gaze of the qualified interpreter and that of all the others. According to Legendre, this is what the *normative mechanism of the framing* means, organised in three moments, in a transposition of glances between he who paints and he who looks, by means of a brokerage of forms:

1. *The painter's viewpoint* (or the functionally equivalent viewpoint of the director or the constructor of pages on a computer). He quotes the work by Leon Battista Alberti, a contemporary of Piero della Francesca and founder of the narrative 'Italian style' of painting *De Pictura*:
   "I trace […] a square of the size I want, made of right angles, and for me it is an open window through which to cross history […]" (Legendre 2001; Alberti 1980)
2. *The gaze of the viewer*:
   We don't see just the forms represented, we compulsorily see them through a certain focus desired by the painter, a binding viewpoint that captures, guides, moulds every gaze to come (Legendre 2001).
3. The *window that frames* (the image as a normative text) is therefore the mediation, placed in an unbiased position, through which the gaze of the viewer *passes* for the vision of the painter who imposed the frame. The viewer's observation in fact comes second, that is to say, it is generated by the viewpoint that created the window. Yet, it does not accede to another's vision (the painter's) which crosses his gaze. Naturally, even perspective (in painting technique) did not represent more than a moment in the western institution of the viewpoint, after which,

according to the logic of the malleability of the reference, other forms of 'framing' followed progressively (up to the present-day forms, the latest of which being the video of a computer connected to the Internet).

According to Ivan Illich, the Italian style of painting, dating from Alberti, became 'narrative'. As a way of telling a story, it translated what was written in a book into something that the eye could contemplate: it 'is a legitimate art, because it represents significant interactions between persons' (Illich 2004). As Wim Wenders notes in his cinema, the image is normative inasmuch as it supplies a frame for reality that selects elements, producing, by means of the image, a psychological identification in the viewer (Wenders 2009; Heritier 2009a). Without exploring this psychological aspect regarding the identification (indeed, extremely relevant in the thinking of Legendre and at the basis of the functioning of advertising), I will draw this chapter to a conclusion by following the juridical exposition of the importance of normativity of the image found in Goodrich. This author refers to the notion coined by Legendre of 'nomograms', 'a neologism formed from the combination of *nomos* (norm) and *gramma* (mark) first defined in Pierre Legendre' (Goodrich 2006).

According to Pierre the French thinker, his wanderings through mediaeval Latin manuscripts, his study of dance, of emblems and of rituality opened up a new area of legal research. He states, 'I came to this conclusion: book, dance, emblem and ritual are variations of a single phenomenon of writing, I designate it with the term nomograms' (Legendre 1992) (cinema would later be added to the list).

Studying the normative phenomenon, seen in an extended perspective and not limited to the specific area of positive law and juridical norms, thus means that 'the phenomenon of writing can no longer be defined only through the historical or ethnological criteria of a lasting support material that preserves traces of it. Rather, it must be explored through the perspective of the institution of signs and the legality of the repetition of the sign, for these manifestations (that we call graphic productions essentially symbolic) depends on the social construction of the Third, a basically normative construction […] So what we are dealing with in every cultural system is a system of nomograms, diversified but dominated by the representation of the third founder, the unifier of the written productions. It is this system of nomograms that research must now circumscribe' (Legendre 1992).

2.1.5 Towards a Theory of Nomograms in the Society of the Image

It is once again an Italian jurist and his book of emblems, the first of its kind (Andrea Alciato, *Emblematum libellus*, 1531, *Little Book of Emblems* (Alciato 2009)), which saw more than 200 editions in the next two centuries, to which Goodrich refers when specifying the notion of the nomogram coined by Legendre. Here, *libellus* does not only mean little book, but, according to Goodrich, it has another meaning as well, one that is useful for understanding a problem regarding

the normativity of the image which, in the context of the twentieth century dominated by legal positivism, may appear to some extent extravagant or simply extralegal. The seventeenth-century emblem, the union of an image and a motto, shows another communicative-normative meaning of Alciato's *libellus*: 'if the emblems are charters or deeds, they are foundational, they institute their object or create the subject to which the emblem will attach. The *Libellus* here signifies a series of obligations, the bonds of norms, the *vinculus* that will hold the subject in place' (Goodrich 2006). In other words, Goodrich wants to insert the seventeenth-century emblem into the area of legal rhetoric as traditionally understood, in a context that is aimed at recognising the methodical value of the rhetorical discourse for the understanding of the legal phenomenon in postmodernity and following the crisis of positivism.[12]

While traditionally epideictic or ceremonial rhetoric was generally considered merely ornamental or merely aesthetic (Heritier 2009b), or at most as having a persuasive purpose, as in Perelman, on the contrary, Goodrich notes that 'Epideictic rhetoric was traditionally the genre of religious practices, of rites and rituals that would bind (*religare*) the subject to the social. The epideictic was the discourse of public office and of social events' (Goodrich 2006). At the time of Alciato, he says, 'The law was a subdivision or branch of the ceremonial. The social presence of law depended upon the theatre of the Court and the rituals attached to an itinerant judiciary or majestic trials' (Goodrich 2006). In fact, while the general function of ritual and the ceremonial, anything but marginal, was to give credence to the law and effect to the rule, in the context in which Alciato operated, and although he uses an ironic register, 'the books of emblems secularized the transmission of law and so greatly expanded its impact as well enlarging the tone or style in which the message of law were delivered' (Goodrich 2006).

Based on these observations, Goodrich can consider Legendre 'the modern Alciato', that is to say, he who turns his attention (with his pioneering studies into the normative role of the image) to a problem that appears central to the modern-day 'society of the image' and of communication. The legal texts, as we have seen, including the codes of modernity and not only the *Corpus Iuris* of classicism, always have an emblematic and institutive value and demand to be communicated by means of figures and images. This element is well known from the rhetoric of the evidence given during a trial, as he notes, 'What was figured would pass before the eyes and so make the point in a manner that the auditor could not refuse. Lawyers did not ignore such an important rhetorical point' (Goodrich 2006). Thus, the central element identified by Goodrich in developing the notion of nomogram seen as the set of normative and semiotic materials (much wider than the mere written law of a given society) is that 'legal text, textures and textualities are not simply prosaic statements of minuscule and technical rules. They attach to life, they go within. More than that, the emblem is the emblematic legal text. It is the clearest possible depiction of the textual function, of what laws are historically supposed to do.

[12] This methodological re-evaluation of rhetorical discourse in Italy is seen in Cavalla (2007) and Velo del Brenta (2007).

They institute life, they pass on the habitus of the human, the institution of the social, they tell, in brief, what to do' (Goodrich 2006).

Here Goodrich explains the notion of nomogram as the key to the way law presents itself in contemporary society (as well as in all societies), beyond the formalisms. In fact, he traces this perspective to the problem present in Carl Schmitt (2003) with regard to the notion of *nomos* meaning 'appropriation that makes law visible'. The problem of making the *nomos* visible in Schmitt's perspective, read against the background of the nomogram in Legendre, 'now takes on a more precise historical meaning in that law is simply a medium of access to the *nomos*' (Goodrich 2006). Legendre's theory, in other words, allows us to understand that, 'the *nomos* is a letter that gets inside, the norm is a message – it gives us our assignments, our name, our place, our role, our understanding of who we are and whence we came' (Goodrich 2006). The well-known statement by McLuhan, 'the medium is the message', which lies behind the society of the image and communication, can here be considered a sort of legal version to be clarified: 'the norm is the message', from which it is possible to derive the idea that 'the *nomos* is a system of nomograms'.

Consequently, the task of a legal semiotic is that of circumscribing the entire widespread system of nomograms operating in the complex contemporary society, which takes us well beyond the pioneering work already carried out by the French historian.[13] In fact, in Goodrich's opinion, it is important to try to move on when investigating 'the telegraphic urgency and libidinal force of the media that bear the message of law' (and I would add, particularly that of the latest media, the Internet, which can be seen as a hypertext that continues and renews the technique of legal writing of the mediaeval glosses) (Heritier 2003). As Goodrich writes, 'the nomogram captures the communicative function of law as a message that renders social structure visible. The nomogram is the system of mail, the relay of social missives by means of which we learn what has been assigned, our assignments, our sense of a place both in genealogical and institutional forms' (Goodrich 2006).

If Goodrich reveals how Legendre's theory, by means of the concept of the nomogram, illustrates the choreography of the social (showing how the legal text is always 'more than simply a text'), other theoretical positions (which would take us beyond the scope of this chapter) approach the configuration of a communicative-normative theory of the legal. In criticising the epistemological formulation of Bobbio and Kelsen from a formulation close to the critical rationalism of Popper, and in particular the fictive tract of the construction of the Kelsenian *Grundnorm*, the Torino-based philosopher of law, Enrico di Robilant, already in 1975 (di Robilant 1976)[14] observed, when analysing what the legal theories do, that a legal theory, in

[13] However, Legendre came back recently to the concept of nomograms in *Leçons IX* (Legendre 2009).

[14] I analysed the position of Robilant in the chapter *Dalla teoria generale all'epistemologia e all'estetica giuridica*, in *Società post-hitleriane*? pp. 3–82. This article is the critical re-elaboration of material sketched out in that text and in other articles on Legendre.

representing the legal system, produces a *figure* of reality susceptible to an aesthetic evaluation:

> The explanation that the legal theories offer […] must not be confused with reality, because it constructs an independent structure that, although seeking correspondence with reality, remains distinct, and, having its own communicativeness and form, it is the carrier of an allusive meaning that goes beyond the information produced. The theories, therefore, contain less than the reality that they propose to explain because they form a figure based on a theoretically conditioned selection, but, on the other hand, they contain more than the reality explained, since they are carriers of an allusive meaning that stems from their form and transcends the reality represented and explained. (di Robilant 1976)

Beginning from this epistemological introduction, Robilant, on the basis of the *General System Theory* of von Bertalanffy, maintains the interest and the fecundity of an aesthetic approach to the legal phenomenon seen as an informative-normative phenomenon. Following the analysis of Legendre's position, it is possible to observe *how the society of the image in which we are immersed cannot be considered merely a place in which information circulates*, *but also as the place in which normative communication circulates in a system of nomograms*. As Ugo Volli states, speaking of Jacobson and of what *passes* through the various systems, 'from advertising to the romantic communication, from fashion to the shop windows, … a strong *exposure* of the issuer and a strong *pressure* on the receiver exist together due to a particularly emphasised contact and a rich formal elaboration of the message' (Volli 1994).

The legal phenomenon that emerges from the analysis of Goodrich and Legendre, as well as of Robilant and Volli, can therefore be configured as a *communicative-normative system.* This system can be further analysed alongside the traditional analysis of the system conducted by the general theory of law. In so doing, we seek to identify the system of nomograms that circulates in the complex society of the image, beginning with the resumption of the classical aesthetic-rhetoric and legal semiotics (of the normativity of the image) of which the theory of the legal historian Pierre Legendre supplies the present point of reference and quite possibly the first step of a renewed theory of legal-semiotic aesthetics.

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Chapter 3
The Book as Authoritative Sign in Seventeenth-Century England: A Review Through the Lens of Holistic Media Theory

Paul Douglas Callister*

Abstract Seventeenth-century England is primarily a textual era for legal authority, but the book also has the capacity to act as sign, and in a few notable instances it does so, providing authority to check both royal prerogative and parliamentary power during the Interregnum. Although its precise meaning is debated, royal prerogative includes the right of the monarch to act as a higher court than common law courts and may encompass the right to legislate. It was the central issue in the seventeenth-century power struggle between English courts, parliament, and the monarchy.

The image of the book has always appeared among icons signifying sovereign authority. However, in seventeenth-century England, the printed law book came to represent a check on government power, especially absolute monarchy and royal prerogative over the interpretation and application of law. To be properly studied within semiotics, signs must be understood holistically, using tools from a variety of disciplines. Holistic media theory, when expanded to include the concepts of cognitive authority and connotative meaning, illuminates the book's evolving signification and function leading up to and including the seventeenth century.

This chapter first sets forth foundational concepts with an explanation of holistic media theory, cognitive authority, and their connections to legal semiotics. It then contrasts the book with another sign of authority—the royal orb—which signifies dominion and prerogative, and finally illustrates specific instances of the emerging

**We have corrected Thy work and have founded it upon miracle, mystery and authority. – The Grand Inquisitor* (Dostoyevsky 1955, 282)

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association of books, particularly Lord Coke's Institutes and Reports and the King James Bible, with authority and conscientious objection.

3.1 Introduction

Seventeenth-century England is primarily a textual era for legal authority, but the book also has the capacity to act as sign, and in a few notable instances, it acts as visual sign, providing authority to check both royal prerogative and unmitigated parliamentary power during the Interregnum.[1] To be properly studied within semiotics, signs must be understood holistically, using tools from a variety of disciplines. Holistic media theory, when expanded to include the concepts of *cognitive authority* and *connotative meaning*, illuminates the book's evolving signification and function leading up to and including the seventeenth century.

This chapter first sets forth foundational concepts with an explanation of holistic media theory, cognitive authority, and their connections to legal semiotics. To better understand the importance of the printed book as sign, the second part of the chapter contrasts the book with another sign of authority—the royal orb—which signifies dominion and prerogative. The third part illustrates specific instances of the emerging association of books, particularly Lord Coke's *Institutes*[2] and *Reports*[3] and the Bible,[4] with authority and *conscientious objection*.

3.2 Methodology: Media Theory, Cognitive Authority, and Semiotics

3.2.1 Media Theory

In the 1950s and 1960s, Marshall McLuhan and Harold Adam Innis conceived of *Media Theory* as an explanation of historical developments, including geopolitics

[1] The meaning of "royal prerogative" is a subject of much controversy as illustrated by the fact that King James, probably as a concession to Parliament, chastised John Cowell for going too far on the subject in his famous law dictionary (Hicks 1921, 37–44). In sum, royal prerogative includes the right of monarch to sit in judgment, as a higher court than common law courts, and may encompass the right to legislate [*compare* Cowell 1607, entry for "Prærogative of the King" (no page or folio references given), *with* Cowell 1964, entry for the same (no page or folio references given)].

[2] Unless otherwise noted, references to the *Institutes* are to Part I (Coke 1633). Coke's third or 1633 edition of the First Part of the *Institutes* is the last edition appearing before his death in 1634 and is so selected for reference.

[3] This work cites the first English edition of the *Reports*, not published until 1728 (Coke 1728).

[4] All references to the Bible are from the King James Version.

and social institutions (Deibert 1997, 6).[5] For instance, *per Innis' theory*, in about 2160 BC, the movement from Egyptian monarchy to feudalism "coincides with a shift in emphasis on stone as a medium of communication… to an emphasis on papyrus" (Innis 1950, 17). However, the initial theory was faulted for being technologically deterministic and *monocausal*, crediting every geopolitical event to new media technology (Deibert 1997, 26–27; Carey 1981, 162, 168). Another prominent, early media theorist is Elizabeth Eisenstein, who has focused on the history of the book, including legal texts (Eisenstein 1979). She is criticized for similar reasons as Innis and McLuhan (Deibert 1997, 17 [citing Hunter 1979]; Rabb 1971, 135).

In a later generation of media theorists, Ronald Deibert imposed a less deterministic and, ultimately, Darwinistic model, in what he termed to be a "holistic" approach (Deibert 1997, 37–38). Deibert modified media theory by moving away from technological determinism to emphasize the ecological and holistic nature of information media: "New technologies of communication do not *generate* specific social forces and/or ideas, as technological determinists would have it. Rather, they *facilitate* and *constrain* the extant social forces and ideas of a society" (Id, 36). Much as in Darwin's theory, those institutions best adapted for the media environment are most likely to survive and prosper.

Deibert represents the information environment as a series of concentric rings, with humanity's shared *web* of beliefs (which, per this author's adaption in Fig. 3.1, includes *cognitive authority*) at the center, surrounded by various spheres of influence, with each neighboring ring affecting and being affected by its neighbors (Id, 38, fig. 2). Deibert's model is primarily devoted to explaining changes in a society's web of beliefs and the relative power of social forces that are facilitated or hindered by developments in media technology (Id, 94).

The model is an apt construct for the fields of legal history, legal bibliography, and legal semiotics. For our purposes, Deibert's model is useful for considering the effect and media context of particular legal and authoritative works, such as Lord Coke's *Institutes,* his *Reports*, and the Bible.

3.2.2 Cognitive Authority

In the second to the center ring of the model in Fig. 3.1, Deibert uses *social epistemology* instead of *cognitive authority*, as represented by this author. The two concepts are related. "Social epistemology" has to do with the "web-of-beliefs into which people are acculturated and through which they perceive the world around them" (Deibert 1997, 94). Cognitive authority is a concept derived from

[5] Also see generally Innis (1950, 1951), McLuhan (1962, 1964), McLuhan and Fiore (1967, 1968).

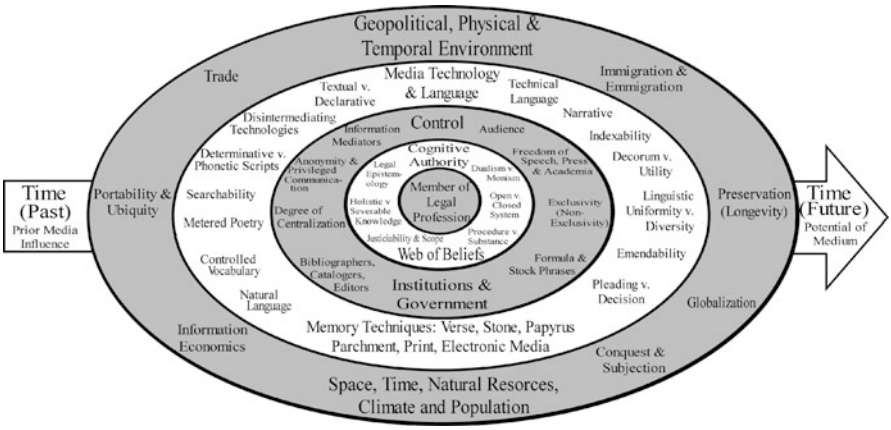

Fig. 3.1 Author's adaption of Deibert's model

social epistemology, which term originally referred "to study of the production, distribution, and utilization of intellectual products…. Any study of these subjects leads quickly to questions of cognitive authority…" (Wilson 1983, vi). As a concept, it initially includes an individual's recognition and trust of particular individuals or institutions as authority (Id, 81, 89). Its original champion, Patrick Wilson, described cognitive authority as the "influence on one's thoughts that one would consciously recognize as proper" (Id, 15). Within the field of library and information science, the concept encompasses an individual's trust and recognition of specific texts as authoritative. Texts are accepted as authority in several ways—if authored by trusted individuals or groups, by publication record of the publisher, and through repeated revision of a reference work (Id, 166–68). *Cognitive authority* has also been extended to Internet sources (Rieh 2002, 145; Fritch and Cromwell 2001, 499). Based upon Wilson's definition, there is no reason that oral traditions, metered verse, insignia, and regalia might not fall within a particular individual's cognitive authority. This author previously made such analysis for law memorialized in oral traditions and metered verse (Callisterp and Paul 2007, 263).

Deriving from *social epistemology* (which is the exact term Deibert used for his center ring of analysis), cognitive authority is not merely applied to the epistemology of the individual, but to social groups and even society as a whole (Deibert 1997, 38, fig. 2). Robert Berring notes that cognitive authority is not only relevant to the legal profession (as a social group) but that "[f]or most of the twentieth century, the legal world ha[s] agreed to confer cognitive authority on a small set of resources" (Berring 2000, 1676). Berring uses cognitive authority to mean "the act by which one confers trust upon a source" (Id, 1676). The field and practice of law share social epistemology and respect cognitive authority based upon a circumspect sphere of trusted authority.

3.2.3 *Conceptual Connections to Semiotics: Connotation, Media Theory, and Cognitive Authority*

As a channel for signal or sign, media is an important consideration for semiotics. Because of this role as a carrier of signs, any inquiry into legal semiotics may properly concern itself with media theory, including cognitive authority. However, there is a more profound reason for semiotics to concern itself with media theory—often, a particular medium itself becomes a sign, sometimes even as a visual expression. This phenomenon can be described by drawing from the well-known distinction between denotative and connotative meanings.

In semiotics, signs are understood to have denotative and connotative meanings. *Denotative* emphasizes a literal and definitional meaning, one commonly recognized, based upon a visual image or an object corresponding to the sign, while *connotative* includes the "socio-cultural and 'personal' associations (ideological, emotional, etc.) of the sign" (Chandler 2007, 137–38; Sonesson 1998, 187–89). *Connotative* meaning is a second-order meaning, where the first order (*denotative*) has had new meaning added to it (Chandler 2007, 139–40). *Connotative* meanings are *context dependent* and have much more to do with the recipient and sign user's background. Furthermore, such meanings are "typically related to the interpreter's class, age, gender, ethnicity and so on" (Id, 138). It is the "sign users," either sender (author) or receiver (interpreter), who may add connotative meaning to the sign, apart from the "perceptual world" (Sonesson 1998, 187). Because the context within which sign users operate is so important to connotative meaning, Deibert's holistic media theory (especially, analysis of cognitive authority) is an appropriate tool for considering the semiotics of the book as sign.

Legal texts and other books act in a denotative role to memorialize arrangements of textual signs. But, in addition, their mere presence is a sign of more signs. By the seventeenth century, however, these books operate on yet another level, one of connotative signification: these books signify authority within the society's accepted realm of cognitive authority. In essence, it is the process of connotative signification that endows law and other books with cognitive authority—in this case, at a level of authority significant enough to challenge royal prerogative and parliamentary authority during the Interregnum.

When Deibert's holistic version of media theory (which includes consideration of temporal, geopolitical, technological, and institutional factors) is applied to books, the theory facilitates an understanding of how the relationship of books to cognitive authority evolves, as books change from manuscript to print forms. As shall be shown in Sect. 3.4.3, printed books have increased acceptance and weight as cognitive authority because of their widespread usage, stability, and capacity for cross citation to other authority.

In summary, cognitive authority is a powerful, fundamental concept and is relevant to several fields. As a social epistemology, it bears a relationship to the intersections of both media theory (as applied to legal history) and the emerging field of law and semiotics.

3.3 Signs of Cognitive Authority: Book Versus Royal Orb

To understand the significance of the law book as sign in the seventeenth century, it is helpful to consider and contrast the historical function the book has played as sign with the role of another sign, the royal orb. The orb plays a similar role, particularly with respect to cognitive authority, since at least the Middle Ages. In general, the printed book is accessible, stable, and widely distributed, while royal orbs are mysterious, unpredictable, and held only by sovereign lords. Nonprinted books function more like the royal orb. All have functions with respect to signifying authority and knowledge.

3.3.1 Nonprinted Book and Authority

On the continent, books have always been associated with authority. For instance, the Throne Room of Terem Palace of Moscow's Kremlin City was redecorated in 1836 by a prominent art historian in the style of the early seventeenth century. It bears an image in the apex of the ceiling of the Lord with open Gospels (manuscript), directly over the throne (Polynna and Rodimtseva 2000, 58, 60–61, 63). A similar relationship between open book (as held by divine hands) and throne can be found in Ambrogio Lorenzetti's fresco, *Allegory of Good Government* (circa 1338–1340). In it, a female figure representing *wisdom* floats, holding a book (perhaps the Gospels), above a female figure on a throne, who represents *justice* (Cohen 1992, 40–41). Furthermore, the motif is repeated in the nineteenth-century throne rooms of Kaiser William I (female deity holds open book above the throne) and Neuschwanstein Castle and on crowns in seventeenth-century Russia and eleventh-century Hungary (Engle 1962, 138; Neuschwanstein Castle; Schramm 1954–56, 1161–62, 1164, tbls. 83–84, 86) and, most notably, the eleventh-century crown of St. Stephen, featuring the enthroned Christ holding the Gospels on the fore plate (Lübke 1904, 373).

Compared to continental Europe, the most notable thing about the representation of books in English regalia is their relatively limited role, at least after the Norman Conquest. In one of the few instances where the book is portrayed as an icon of authority (or at least survives as such), Edward the Confessor, last of the Saxon kings, is depicted in stained glass at Canterbury. Although possibly demonstrating his saintly status rather than making any statement about regal authority, Edward holds a book, probably the four Gospels. See Fig. 3.2. Likewise, Saxon King Athelstan has been illustrated presenting a codex to St. Cuthbert (Deshman 1974, 176, 196, fig. 45). However, this author was unable to find any post-Conquest Norman kings depicted with books until issuance of the printed, great print bibles, starting with Henry VIII (String 1996, 90–112; King 1985, 41, 45, fig. 1). See Fig. 3.3 (*Title Page of Great Bible* 1539). Note Henry VIII's position is as disseminator of the word of God, handing two bibles off to the Archbishop of Canterbury

Fig. 3.2 Edward the Confessor

and the Lord Privy Seal. "There is nothing allegorical about the Great Bible title page illustration… Henry… becomes the obvious link to spiritual authority from God" (String 1996, 1100). He authorizes the Bible and is its conduit, not an inferior to it.

One reason that books do not appear in more iconic representations in England is that the English were influenced less than others by such images. Tatiana String concludes that, in contrast to the German people of Luther's time, "[t]he primary means by which the majority of the English people were 'inculcated' with political

Fig. 3.3 Title Page of Great Bible 1539

and theological propaganda were not pictorial" (String 2000, 141). Supporting her conclusion, String observes, "Unlike the situation in Germany, there is no evidence of a comparable English campaign that used illustrated anti-papal broadsheets or polemical prints" (Id, 138). She queries, "Was literacy in England so high that images were unnecessary? Were those responsible for the clear campaign of persuasion unaware of the value of visual support?" (Sonesson 1998, 33). Perhaps adding some insight into the English stance toward icons is that many such images were removed from public life after Henry VIII ordered dissolution of the monasteries (Id, 85). Such images have functioned in Gregorian fashion (and as adopted by Martin Luther) as "unlearned men's books" (Id, 86). Historian Christopher Hill observes in a work on the English Bible and the seventeenth century, "For Catholics images had been the books of the illiterate" (Hill 1994, 14). With the removal of icons from the information environment, reading becomes essential for accessing information. Per String, the English evolved differently than elsewhere in Europe and were less dependent upon visual icons. Nonetheless, visual signs did occasionally play an important role.

3.3.2 The Ubiquitous Orb

Another reason the book may not play a more central role in the history of English regalia and icons may be the book's image has a functional substitute–one lying deep at the mysteries of kingship throughout Europe. Commencing with the coronation

of King Harold, last of the Saxon kings, and the Bayeux Tapestry, and appearing in regalia of various monarchs until the present day, the orb has occupied a central place in British regalia, as well as in Europe (Coad 2007, 25 [orb in Bayeux Tapestry]; Schramm 1954–56), tafel 113, no. 148 [King Richard II with sphere, 1377–99].[6] At the beginning of the seventeenth century, King James I displays the orb on his Great Seal and on his coinage (Knight 1838–1841, 3, 86, 550, 763). When the monarchy is restored after the revolution, the orb reappears after absence on seals and coinage (Id, 109, 399, 422, 555, 662). Indeed, the actual orb, made of gold and encrusted with jewels, had to be replaced because it had been lost during the Interregnum [45, 225–26, 248], perhaps hinting at its incompatibility with anything but monarchy.

The orb's functions are often described as symbolizing the world, God's power over it and imperial dominion (Ferguson 1954, 313 [entry for "globe"]; Hilliam 2001, 226; Keay and Murphy 2002, 18); however, even a casual survey of literature and art of the Renaissance and Middle Ages suggests more portentous meaning tied to the rites of kingship. By grasping the underlying meaning of the orb, the significance of the printed book to English cognitive authority is easier to comprehend.

In Antwerp in the sixteenth century, a series of gates demarcating a route for procession and honoring various Spanish monarchs were constructed and decorated with statuary from Flemish artists such as Rubens, de Vos, van Thulden, and van den Hoecke (Martin 1972, 23, 30, 142, plate 1). Numerous manifestations of the orb are present in surviving sketches of these gates. The orb is held by the goddess Juno as she consults with Jupiter [plates 17–20], by the goddess Providentia (Id, 69–70, plates 16–18, 21–22, 32), by emperors Maximilian I and II, by Charles V, by Rudolph I and II, by Fredrick IV, by Mathias I, by Ferdinand I [plates 23–24, 26, 38–43], and by various angelic ministers [plates 16–18], but the most telling drawing, by van den Hoecke, depicts Providentia holding the orb. The entire image bears the caption "The Foresight of the King" [plates 76, 79], suggesting the king's role as seer, via the orb. To the Renaissance and medieval mind, the orb, whether held by divine or regal image, represents foresight and providence (through such foresight). It fills a role similar to that of the Mesopotamian *Tablets of Destiny*, part of the secret knowledge of kingship necessary for temporal sovereignty (Callister 2005, 286–87):

> [T]hese tablets are given various names: the Tablets of Destiny, the Tablets of Wisdom, the Law of Earth and Heaven, the Tablets of the Gods, the Bag with the Mystery of Heaven and Earth. All these names reflect various aspects of these mysterious tablets. They decide the destiny of the Universe, they express *the law of the whole world*, they contain supreme wisdom, and they are truly the mystery of heaven and earth. (Widengren 1950, 11 [emphasis added])

[6] Additional illustrations of the orb and regalia include Queen Elizabeth, King James I, Charles II, Mary II, and Edward II (King 1985, 3: 65, fig. 13, 80, fig. 19 [Queen Elizabeth, 1603–4, with sphere]); (Keay 2002, 63 [King James I with orb], 19 [orb of Charles II]; Holmes and Sitwell 1972, 17 [orbs of Charles II and Mary II, in 1689]); (Binski and Panayotova 2005, 136–37 [coronation of Edward II includes sphere]). Henry VIII is depicted with his orb on manuscripts, The Great Seal, and *Black Book of the Garter* (Starkey 1991, 85, fig. V.35, 86, figs. 38–39, 95, fig. VI.5, 141, fig. XI.2). The orb is even present with Charlemagne in a manuscript and mural depicting the "worthies" of Arthurian legend (Loomis and Loomis 1966, illus. 13–14).

Fig. 3.4 Christ holding book on throne [Author will license]

In essence, the orb, like the Mesopotamian Tablets of Destiny, represents everything needed to govern—including wisdom, destiny and law. Also linking the orb to law is Andrea di Buonaiuto's fresco, *Triumph of St Thomas of Aquinas: Allegories of Civil and Canonic Law*, from 1365. It presents seven women seated in thrones above seven men also seated. Each man holds a book, but two of the women hold orbs (Robbins 1990, 156–57).

The question that suggests itself is whether the book is fully interchangeable with orb in terms of its symbolic function as a medium. The instances of persons of the Christian Trinity and of saints in identical poses in religious icons holding orbs and books or scrolls are too numerous to fully cite (Lazarev 1997, 206–07 [note the parallelism of bishops holding scrolls and angels holding transparent spheres]; Id, 316, fig. 115 [Christ child holding scrolls]; Wedgwood 1967, 60 [title frontice piece by Rubens with Pope holding book]; Baudouin 1977, 59 [Christ child with orb], 266, fig. 137 [frontice piece designed by Rubens with Captain holding orb]). As a representative example, from England, consider the following illustrations in the mid-thirteenth-century-illuminated Book of Revelation, known as the *Douce Apocalypse*, held at Oxford's Bodleian Library: (Ms. Douce 180, [Fig. 3.4]; Douce Apocalypse, 187 [Fig. 3.5]). These identical poses of Christ, holding a book in one and the orb in another, appear on the 22 verso and 23 recto of the codex, for pages beginning with Revelation 7:9 and Revelation 8:1, respectively. John the Revelator appears with a book off to the left. In the first passage, the multitudes stand before

Fig. 3.5 Christ holding orb in pose identical to that of previous figure

the throne. In the second, seven angels await opening of the *Seventh Seal*. In either case, the interchangeability of orb and book as signs is apparent.

The importance of these illuminated registers is what they reveal about the mind-set of mid-thirteenth-century English people and how they viewed the relationship of authority, the throne, books, and the orb. In another example from mid-thirteenth-century England, the revelatory or informational aspect of the orb is apparent in a panel of the *Westminster Retable*, an altarpiece constructed for Henry III (Binski 2005, 2nd back panel). In the panel depicting Christ on the throne, the Lord holds a sphere. Unlike those found among English regalia (appearing to be gold or copper), the sphere is transparent, revealing a paradisiacal scene of a world, with birds in the clouds, grazing animals, abundant trees, and a great whale in the ocean (Keay and Murphy 2002, 19; Holmes and Sitwell 1972, 17; Binski 2005, front panel 3). See Fig. 3.6. What Christ holds is a medium, signifying, as in van den Hoecke's depiction of Providentia, the "foresight of the King" (Martin 1972, plates 76, 79).

Illustrating just how culturally embedded the orb had become, the transparent orb is a theme captured by painters, illuminators, and poets of the Renaissance in both England and Europe. In late sixteenth-century and early seventeenth-century works, Rubens portrays the orb as having crystalline and translucent qualities (Baudouin 1977, 58, plate 12, 70, fig. 36, 96, plate 22; Wedgwood 1967, 117, plate

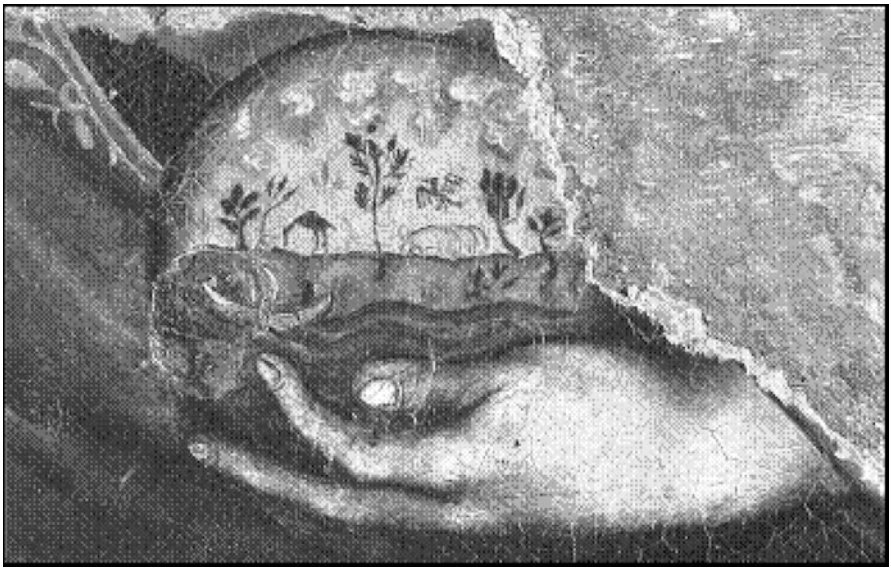

Fig. 3.6 Orb held by Christ as depicted in panel of Westminster Retable (Copied with permission. Copyright: Dean and Chapter of Westminster)

20, 118–19). In addition to Rubens, his contemporaries of the times also gave the globe a crystalline quality (Baudouin 1977, 117, plate 2 [Abel Grimmer and Henrik van Balen's, the "River Scheldt at Antwerp"]). In *Paradise Lost* (first published in 1667), Milton compares Satan's impressions upon escaping to a spot "in the Sun's lucent Orbe." That spot is "beyond expression bright" and described as a multitude of elements—gold, silver, carbuncle, chrysolite, ruby, and topaz—which Milton expressly ties to "Arrons Brest-plate" and the oft-imagined "philosopher's stone" (Milton 1667, bk. 3, ll. 588–601). The stones of Aaron's breastplate are often associated with the biblical Urim and Thummim, media by which knowledge, including prophecy, is obtained (*Oxford English Dictionary Online* 2009, entry for *Urim*).[7] The *philosophers' stone* has typically referred to alchemy and the transmutation of substances, but it also has a function with respect to knowledge. "Even the philosopher's stone or elixir was reinterpreted so that Christ appeared as the perfect matter

[7] The etymology for *Urim* from the Hebrew is "light," or since it is in the plural, "lights" (*Oxford English Dictionary Online* 2009, etymological entry for *Urim*). It is usually referred to with *Thummim* as in *Urim and Thummim*. The etymology of *Thummim* is "perfections" or "*complete* Truth" (Strong 1890, 124 in "Hebrew and Chaldee Dictionary," entry 8550). The Urim and Thummim were not the 12 stones of Aaron's breastplate but were attached to (M'Clintock and Strong 1894, 677). Some have argued that the Urim and Thummim were a system of lots, with "yes" and "no" written on different stones, but M'Clintock and Strong reject this since "[i]n the cases when the Urim was consulted, the answers were always more than a mere negative or affirmative" (Id, 677).

produced by the alchemical process—that is, Christ was the stone of all wisdom and knowledge" (*Encyclopædia Britannica Online* 2009, entry for *Christianity*). Carbuncle is a stone known for resembling burning coal and, among the stones on Aaron's breastplate, signifies divine knowledge (Richardson 1734, 129–30, entry for ll. 596; Dupré de Saint-Maur and Milton 1767, 131, n. [s]), and chrysolite, although similar to *crystal*, is actually a greenish stone and has the property of shining *like gold* (Dupré de Saint-Maur and Milton 1767, 131; *Oxford English Dictionary Online* 2009, entry for *Chrysolite*).

Milton also directly refers to the Urim and Thummim and Aaron's breastplate in *Paradise Regained* and describes them as "oraculous gems" or "tongue of Seers of old" (Milton 1671, bk. 3, ll. 12–16). Elsewhere, Milton, in an earlier, more political piece, refers to the prelate as a "Dunce" and contrasts him with a "learned [secular] Minister" as he "whom God hath gifted with [all] the judgement of Urim more amply oft-times than all the Prelates together" (Milton 1641, 204). It is not only knowledge that the orb confers but judgment and wisdom (necessary endowments for earthly dominion). Milton, as a leading figure of the seventeenth century, is clearly familiar with seeing stones, and his writings, like Rubens' paintings, reflect shared conceptions about authority and knowledge of the early seventeenth century. Both Rubens and Milton provide *portraits* of English and European cognitive authority in the seventeenth century, at least as understood by those belonging to the educated and ruling classes.

Illustrating the ancient roots of the mysteries of kingship, German kings, beginning with Otto I (962 AD), and with whom the English Saxon monarchs shared a common heritage, fashion their crowns in semblance of the biblical breastplate of stones worn by Aaron (Schramm 1954–56, vol. 2, 578, 581, fig. 16, 583–96, table [tafel 68–69]):

> [D]en vier Reihen von Edelsteinen an der Nackenplatte der Krone, die wir weiter unten auf die 12 Stämme Israels (und damit auf die parentes des Königs Salomon wie jedes Köngis) beziehen werden, und…der Widerschein der göttlichen Herrlichkeit, in dem Stirn- und Leitstein der Stirnplatte, dem signum gloriae.
>
> [T]he four rows of precious stones on the neck plate of the crown, which, as we will later discuss, refer to the twelve tribes of Israel (and thus the *parentes* of King Solomon as with every king) and…the reflection of the glory of God in the forehead and guide [also, *lead* or *main*] stone of the plate, the *signum gloriae*. (Id, vol. 2, 580)

The *guidance* or *lead stone* is specifically identified with jasper, which in turn is linked by the same scholar to the white stone in Revelation 2:17, which has also been linked by some to the Urim and Thummim (M'Clintock and Strong 1894, 679):

> Auf ihn ist "ein neuer Name" geschrieben, den niemand kennt….An dem weißen Stein, den Gott spendet, erkennt er also die von ihm Ausgewählten. On it is written "a new name," which no one knows….It is through this stone, given by God, that we recognize those who have been chosen. (Schramm 1954–56, vol. 2, 610)

From the breastplate's stones (signs of the ten tribes) to lead stone, to the white stone in Revelation—in the end, it is the same story, the dependence upon some object, signifying knowledge and foresight for kingly, and not just religious, authority.

The discussion of orbs, Urim and Thummim, oraculous gems, white stones, and so on gives context of what preceded the cognitive authority or shared empiricism

of the seventeenth centuries. When books become signs of authority, the starkness of the break from past is more vivid upon considering how the orb and similar objects serve as mediums for kings and gods to access the knowledge necessary to govern and rule. In keeping with royal prerogative, few can handle the orbs and oracle stones, and even fewer understand their function. By their operation, all of these objects limit knowledge and authority to a relative few. The sphere's connotative meaning is hidden. Consequently, there is little opportunity for connotative evolution of meaning through use of the orb as sign by the populace. Milton and Rubens are privileged exceptions, not the rule. It is because of its restricted, mysterious use that the orb signifies dominion, rather than connoting a wider meaning of access to the knowledge necessary to rule.

In keeping with media theory, the medium of the book is easily co-opted by an ever-increasing literate class in seventeenth-century England. It is as if the *Tablets of Destiny* had, in a sense, been copied and disseminated en masse. This use of the book—as an *accessible* medium—facilitates shared knowledge and governance. This communal authority of books also counters the crown's prerogative of authority, symbolized by the royal orb. As media theory would predict, society's shared cognitive authority shifts in relation to new media technology and institutions. In the age of print, neither knowledge nor legal authority can be confined to the providence of a few.

3.4 Printed Texts as Cognitive Authority: Analysis Through Holistic Media Theory

While printing began in the mid-fifteenth century (and entered into England later in the same century), it is not until the seventeenth century that its full impact is realized (Steinberg 1996, 5–6; Cowley and John 1932, xix [discussion of first English law abridgments]). Per media theory, a number of factors must be considered to understand why the medium of the book comes to represent cognitive authority for English society.

3.4.1 Temporal and Geopolitical Factors: Textuality and the Times

Early seventeenth-century England is, in a word, remarkable. After Queen Elizabeth's reign of judicious tolerance, popular access to the Bible in the vernacular is finally secured with the publication of the *authorized version*, or King James Bible, in 1611 (*Encyclopædia Britannica Online* 2009, entry for *King James Version*). The edition results from seven years of committee work under the direction of Elizabeth's successor, King James I, the *textual* and scholarly monarch of Britain.

James I "was a true bibliophile. He built up a considerable private library in the classics; owned a host of theological works (…which he read in Latin); was especially well read in the French poets…; and of course had many writings in English and Scots" and apparently received an honorary degree from Oxford (Bobrick 2001, 206; Carter and Muir 1983, 68–69; Stephen 2002). "James was not only an active patron, but also a published author, which was a rarity among European monarchs before and since" (Stephen 2002, 12). "With his patronage and repression of works, James believed that he demonstrated that he ruled over the literary realm with the same mediating authority which he wielded in his political and religious ones" (Id, 12). He publishes his own theory of kingship in *The True Law of Monarchies*, arguing that the king is "God's lieutenant" without being bound to "frame his actions according to the law" (Bobrick 2001, 270; James 1996, 72).[8] The *textuality* of James' reign befits the early seventeenth century, which is the era of numerous luminaries in both law and literature, including William Shakespeare (1564–1616). The Bard's *First Folio* is published in 1623, shortly after the authorized version of the Bible (Carter 1983, 73–74; Evans 1974, 59 [facsimile of first folio title page]). These are unprecedented times.

It is during this same prolific period that the legal works of Sir Edward Coke (1552–1634) appear. His works first came into conflict with the crown when, in 1616, King James I ordered Lord Edward Coke "to review all the cases in his previously published eleven volumes of *Reports* in order to eliminate erroneous statements concerning the royal prerogative" (Berman 1994, 1676; Bowen 1957, 376). Notwithstanding the pressure, Coke found only five trivial errors and appears never to have made any changes (Bowen 1957, 381). King James I removed Lord Edward Coke as Chief Justice of the Court of Common Pleas because of his displeasure with Coke's *Reports* (Id, 379–88). However, there is no evidence of any attempt to recall or destroy the *Reports*. The question is: Why not? The answer is that diffusive spread of printing (supplemented with book smuggling) and England's prior history with unsuccessful suppression of the Bible and religious tracts may have made such an effort, if ever proposed (Callister and Paul 2008, 10–15). Furthermore, the geopolitical boundaries of Europe made suppression of the Bible difficult because there was always a safe haven for presses (Id, 11, fig. 2). In the sixteenth century, England's government had vigorously but unsuccessfully attempted to block the smuggling of Bibles in from Europe, and during the seventeenth century, numerous religious and political tracts, including accounts of trials and petitions to Parliament, were published in Holland (Id, 15–22, 44–58). Europe's fragmented geopolitics facilitates the spread of the printed word, even when suppressed, making recall of Lord Coke's reports impracticable.

Lord Coke is numbered among the five masters of English common law: "Glanville, Bracton, Littleton, Coke, Blackstone" (Wambaugh 1903, xi; 43, 96). In effect, Coke may surpass them all by serving as the common thread uniting these

[8] "There were Kings, James stated, before there was law" (Bowen 1957, 228–29).

diverse *masters* by transcending ancient law (Glanville, Bracton, and Littleton) in contemplation of modern law (Blackstone). "If Bracton first began the codification of Common Law, it was Coke who completed it" (Carter and Muir 1983, 75). Besides rounding out and completing a description of the common law, Coke provides continuity with the past. "[H]is writings stand between, and connect the ancient and modern parts of the law, and by showing their mutual relation and dependency" (Butler 1775–78, at an unnumbered page prior to the editor's signature in the preface; Hicks 1921, 96). As a temporal factor, Coke is the important link between legal traditions. That linkage to the past may explain acceptance of Coke's works as authority.

As described above, the temporal factors in Deibert's holistic model illustrates that an information environment should not be considered in isolation, without respect to history. Like Ronald Dworkin's paradigm of law as the unending chain story, where prior events in the chain affect current interpretations of law (Dworkin 1986, 228–38), a fuller understanding of the effect of the information environment upon legal institutions and thinking comes only through a grounding in the past.

3.4.2 Institutional Factors: Coke's Law Books and Revolution

Lord Coke's works operate not only as restatements of law for the profession and arguments for the supremacy of English common law, but for historians they act as sign of English resistance of royal prerogative and absolute power. "With it [the *Institutes*] the lawyers fought the battle of the constitution against the Stewarts; historical research was their defense for national liberties. In the *Institutes*… the tradition of the common law from Bracton and Littleton… made famous, firmly established itself as the basis of the constitution of the realm" (Carter and Muir 1983, 76). The battle is over institutions (constitutional government versus royal prerogatives). It is the lawyers that fought the battle. The development of a literate bar, with the Inns of Court as their fundamental institution, establishes a base of citizenry capable of constitutional debate.

Membership in an Inn implies a progression of fellowships, with a significant role for *readers*: "two years in Clerks' Commons, two in Master's Commons, Utter Barrister in eight years and in sixteen, Reader and Bencher…" (Bowen 1957, 62). Head instructors at the Inns are called readers and were selected from *Utter* or outer barristers by benchers (Barton et al. 1928, 12):

> Many of the Readers of the Inns of Court afterwards attained to high positions at the Bar or on the Bench, and many of their "Readings" were long remembered in the profession for their learning and excellence. Among the most celebrated readings were Sir Thomas Littleton's upon the Statute of Entails, Sir James Dyer's upon Wills, Sir Edward Coke's upon Fines, and Sir Francis Bacon's upon Uses…. (Id, 13)

Obviously, these readings resemble more of a lecture than a simple vocalization of text among a group of law students. Nonetheless the role of tradition in private reading is also evident, at least with respect to Lord Coke, who apparently arose at

3:00 a.m. each morning to read until 8:00 a.m., followed by hearing argued cases and attendance at *readings* (Id, 123). The point is that the bar is a community of readers, and as such the bar in its institutional role is receptive to the *Institutes* and supportive of constitutional reform.

Prior to the *Institutes*, but after publishing his *Reports*, Lord Coke engages in a famous exchange with King James I over the issue of royal prerogative (in this instance, the propriety of King James sitting as a judge to hear a dispute regarding jurisdictions of common law and ecclesiastical courts) (Bowen 1957, 304; Usher 1903, 664, 672–73). According to one source, the exchange ends with Coke on all fours before his sovereign (Bowen 1957, 305). Coke was a constant irritant to the royal institutions such as prerogative to hear cases. It is natural that his books might symbolize that conflict.

The influence of Coke's writing is recognized as such a threat to the monarchy that upon his deathbed in 1634, drafts of his *Institutes* (parts II through IV had not been published yet) are seized by the crown (King Charles, whose throne would soon be lost in Civil War). The manuscripts are not released until 1641 (Hicks 1921, 99–101), at a time when parliamentary power is at its zenith and capable of compelling the crown to produce Coke's seized manuscripts (Bowen 1957, 517).

Coke's struggle with James portends the constitutional conflict to follow his death:

> Intended as a basis for peaceful change, Coke's recourse to history eventually provided a basis for violent overthrow of the existing order. History, Tradition, Precedent, became the slogans of revolution in the seventeenth century sense of the word, and the struggle between Coke and James became a paradigm of the conflict which broke out a generation later in civil war and which ultimately transformed English government, English law, and English Society as a whole. (Berman 1994, 1651, 1689)[9]

As the basis for revolution and reform of English law, government, and society, Coke's writings assumed an unparalleled position of authority. However, only with a bar of readers who embraced Lord Coke's *Institutes* and *Reports* could such books be so effective.

Moving beyond Coke, literature and the populous became important. By the mid-seventeenth century, events had further degenerated into pamphlet wars and actual civil war:

> [L]iterature *was* part of the crisis and the revolution, and was at its epicentre. Never before in English history had written and printed literature played such a predominant role in public affairs, and never before had it been felt by contemporaries to be of such importance: "There had never been anything before to compare with this war of words. It was an information revolution." (Smith 1994, 1)

With this information revolution came concern for the public opinion, which became a basis for modern politics. While the seventeenth century began with a firm

[9] "According to Bacon, if it had not been for Coke's Reports, 'the law by this time had been like a ship without a ballast'" (Mullett 1932, 466). Bacon's praise is noteworthy, considering Bacon and Coke had been lifelong adversaries (Bowen 1957, 30).

commitment to monarchy and "little place for public opinion," it ended with public opinion assuming "a privileged place… in liberal-democratic conception of political order" (Zaret 2000, 7).

3.4.3 *Technological Factors: Lord Coke's Works and Visual Signs*

A primary effect of modern printing, at least after a sufficient time, is the use of indexing and cross-referencing to buttress and organize knowledge. Standardization helped clear up errors and provide access to texts. In particular, innovations brought about by cross-referencing to standardized texts led to the prominence of a new form of treatise, as exemplified by Lord Coke's *Institutes* and the emergence of the common law as primal authority.

Print technology permits Lord Coke's works to operate on at least two levels with respect to visual signs. First, Coke's treatises are visually rendered to emphasize supporting authority through marginal, pinpoint citations to authority. Secondly, they are arranged in such a way as to connect them to glossed manuscripts, constituting authority in prior era. In early seventeenth-century England, Lord Coke finds an information environment favorable to publication and abundant in stabilized texts. Through unprecedented use of marginal cross-referencing to diverse sources (made possible by stabilized texts), Coke creates a web and appearance of authority sufficient to stand on its own, even without royal sanction (Callister 2008, 40–43). See Fig. 3.7. Coke's extensive use of marginalia is unprecedented, at least for English legal texts (Id, 29–35). By its appearance, the *Institutes* establishes a web and weight of authority (Radin 1937, 1124, 1127–28).[10] Second, the layout of Coke's first part of the *Institutes*, the *Commentaries upon Littleton*, visually replicates the glossed manuscript texts of Justinian,[11] which will only serve to reinforce the authority of the *Institutes*. The subject of the work, *Littleton's Land Tenures*, is paralleled with Coke's translation into English (itself a major departure from the past), then surrounded by Coke's extensive annotations, and finally garnished (a distinction from Justinian) with marginal references to other authority, such as Bracton, Britton, and Fleta (see Fig. 3.7). The visual effect is one of weighty scholarship and authority of the same stature as Justinian's works. The technology

[10] Hicks described Coke's Institutes as "a virtual piling of Pelion on Ossa enabling the law student to scale the heights of legal learning" (Hicks 1921, 95; as to the extent of Coke's citations, see generally Gest 1909, 516–32).

[11] To understand the relationship between Coke's *Institutes* and earlier legal codices, examine the layout of Justinian's Digest from the twelfth century in the Shoyan Collection (*Iustinianus: Digestum Novum Cum Glossa* [although the resolution of the image makes study difficult, note the tiny alphabetical enumeration of the marginal gloss, but lacking any indication of cross-referencing, and any visible indication of citation to other sources]).

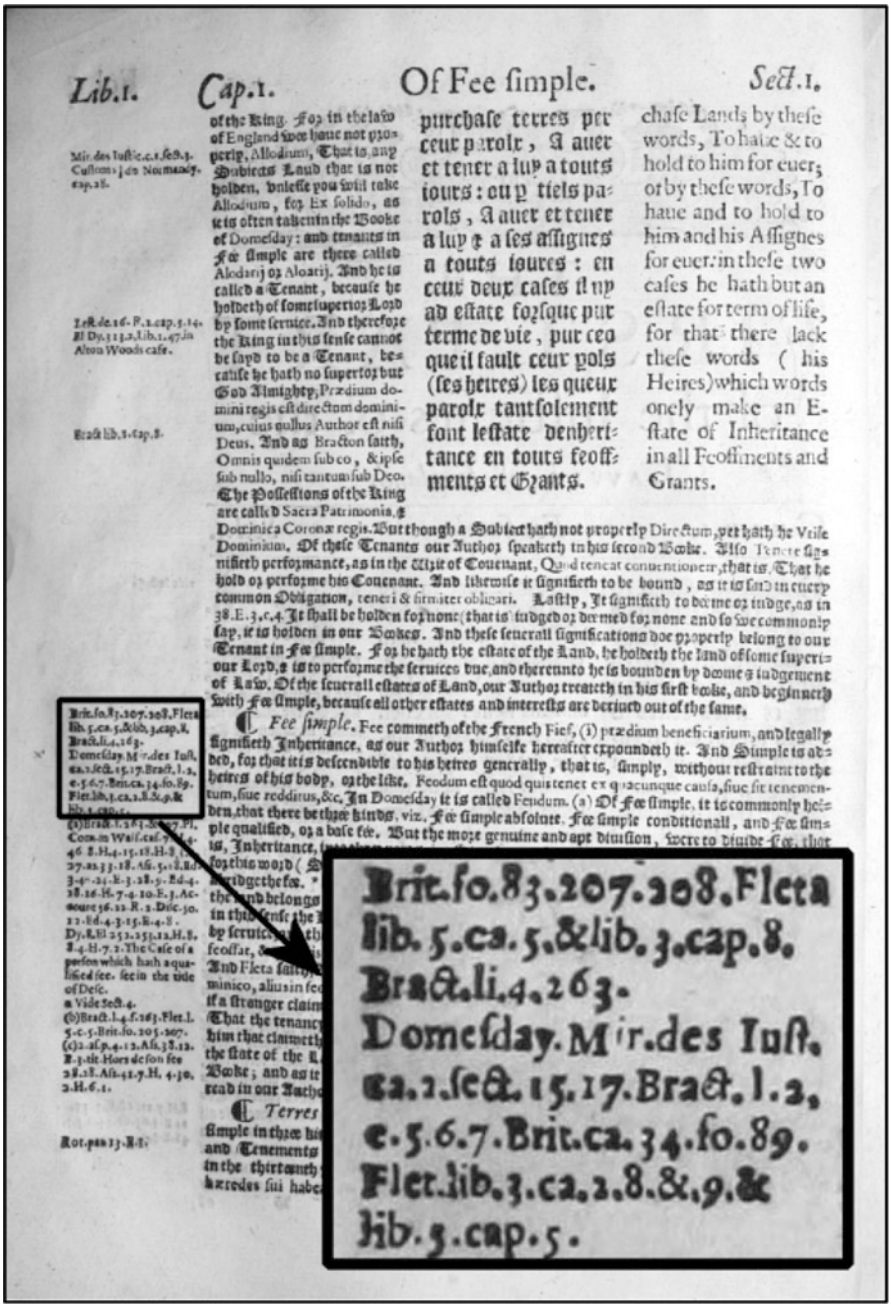

Fig. 3.7 Page from Coke's Institutes (First Part, 3rd ed.) illustrating layout in replication of glossed texts and use of pinpoint citations

of print allows Coke not only to cross-reference with precision but to replicate prior forms of authority.

Coke's objectives and indeed his whole relationship to authority contrasts with other early legal scholars. For instance, the 1607 edition of Cowell's *Interpreter* is dedicated to the Archbishop of Canterbury and pleads for his "gracious protection toward this simple work" (Cowell 1607, *2 [no page numbering]). Cowell, when venturing onto the controversial terrain of whether the monarch can make law, again is obsequious, "whether his power of making lawes be reſtreined…I leaue to the judgements of wiſer men" (Cowell 1607, at entry for *Prærogative of the King* [second recto unnumbered folio from the entry]). Beside Cowell's deference to Prerogative and invocation of royal approval, consider the stance of Britton (who nearest precedes Coke in time among the published authorities on the ancient common law) toward the monarchy. From the introduction of Nichol's 1901 edition of Britton:

> Throughout the whole of the treatise there is a steady endeavor to guard and magnify the royal prerogatives. The laws as they are set forth are to be obeyed because the king wills and commands it. He may take jurisdiction over all manner of actions. Holy Church shall "retain her liberties unimpaired" because the king so wills. If a royal charter is set up, whether it be allowable or false can be judged by the king…. (Baldwin 1901, xv)

With such deference to royal prerogative, approval of the work by the crown must have been much more likely.

In stark contrast to Cowell and Britton, Lord Coke, in the preface to the first part of his *Institutes*, defers to neither monarch nor archbishop but Littleton's *Tenures*, upon which the work was written, and Parliament, for support of introducing a legal treatise into English—"I am jusſtified by the Wiſdome of a Parliament" (Coke 1633, at unnumbered folio iv: a-b [of preface]). In fact, Coke's *Preface* asks that the reader (not monarch or Archbishop) "will not conceiue any opinion againſt any part of this painfull and large Volume, vntill hee ſhall haue aduisedly read ouer the whole, and diligently ſerched out and well conſidered of the ſeuerall Authorities, Proofes, and Reaſons which wee have cited and ſet downe for warrant and confirmation of our opinions thorow out his whole work" (Id, unnumbered fol. v [b]). Coke appeals to the reader to search out cited authority before rendering judgment, rather than implying *protection* or authority from any sovereign figure. Not only does Coke have a different conception of cognitive authority from preceding commentators on the common law, but he is urging his readers to adopt his model of cognitive authority as well, perhaps as defiant an act in legal history as may be found.

Because of marginal *pinpoint* citations (made possible by the stabilization of texts), Coke is able to create a web of authority, including an appearance of overwhelming support for his interpretations of the common law. Because the stabilization of texts—the creation of widely circulated versions in acceptable formats for citation—took significant time after the invention of printing, it is not surprising that the full effect of printing upon legal authority should be delayed until the

seventeenth century. By virtue of its new capacity, the book qualifies to signify authority independent of royal imprimatur.

3.4.4 *Cognitive Authority: John Lilburne's Defense and Coke's Institutes as Visual Sign*

In seventeenth-century England, the law became much more widely accessible through the influence of books. Law books became the *weight of authority* for the profession. John Lilburne, Leveller hero and book smuggler, would appear before Parliament to appeal a judgment of the King's Star Chamber against him "with the Bible in one hand and Coke's Reports in the other," an unprecedented act for the times (Berman 1994, 215; Hill 1994, 200).

In a subsequent trial for high treason during the English Interregnum in 1649, Lilburne engaged in vigorous debate with judges and Lord Commissioner of the Commission of Oyer and Terminer over his right to read the law, specifically Lord Coke's *Institutes*, to the jury (Salmon 1719, 627–28 [Lilburne reads from *Coke upon Littleton*, which constitute the first part of the *Institutes*, and later from the third part of the *Institutes* on treason]). See Fig. 3.8 (Lilburne 1710). A judge objected, "You cannot be suffered to read the Law;…That the Jury are the Judges of the Law, which is enough to destroy all the Law in the Land, there never was such damnable Heresy broached in this Nation Before" (Id, 627). Perhaps because the judges feared the crowd (Pease 1916, 293–94), Lilburne managed to read the First Part of Coke's *Institutes* to support his contention that the jury could consider the law and the *Third Part* (Coke 1644), dealing with treason, to show that proof of treason requires two witnesses (Coke 1728, 627). In the end, the jury acquitted Lilburne (Id, 627). The reasons given by jurors included the "discharge of conscience" and that they indeed "took themselves to be Judges of Matter of Law, as well as Matter of Fact" (Id, 638–39). In subsequent years, Levellers would take up the argument that juries not only had the right to consider the law, but they had a duty to set aside the acts of Parliament at variance with the common law of England (Pease 1916, 326, 342–343). The role of the jury in deciding matters of law was an aberration in England, seen only during the Interregnum, except in the sense that "any general verdict" involves a question of law ("such as no disseisin, or not guilty") that must be decided (Langbein et al. 2009, 441).

About the same time as Lilburne's trial, King Charles I unsuccessfully answered charges against him through the written medium in *The Eikon Basilke* (Charles I and Gauden 1648/49; Smith 1994, 111–12). Note that on the frontispiece to the work (Fig. 3.9), Charles kneels before a book open with the words, "IN TU VERBO SPES MEA" or *in your words my hope*. Apparently, Charles I turns to the book, and thereby public opinion, to defend himself and the institution of monarchy (Smith 1994, 111–12).

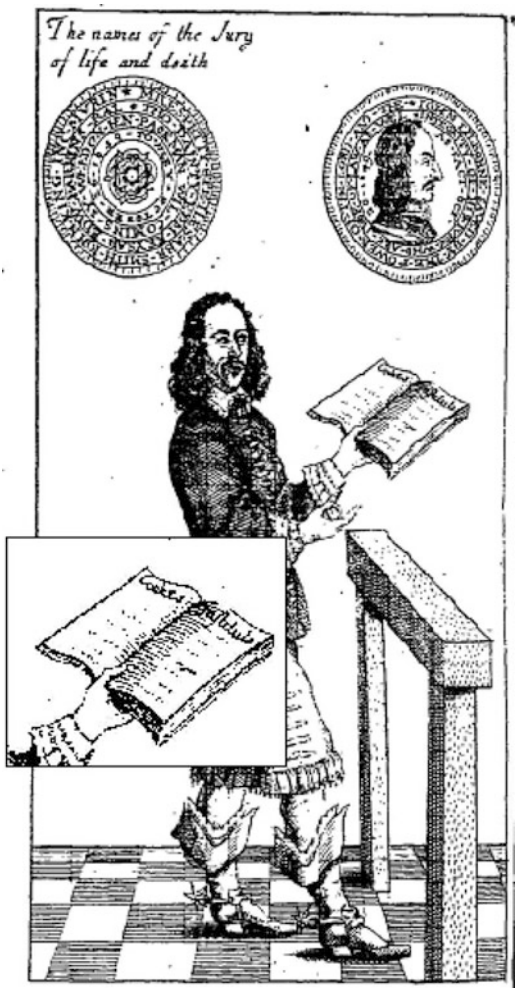

Fig. 3.8 John Lilburne Defends Himself. Note "Cookes Institutes" across *top*

3.4.5 Cognitive Authority: Book as Sign for Social Conscience

Books help define the mental milieu of the seventeenth century, which has been characterized as the "Age of Conscience" (Saunders 1997, 21).[12] Indeed, the English Civil War is described as a "colossal case of conscience," and the political tracts of the time amply testify to conscience's central role in the crisis that lead to revolution (Thomas 1993, 43–44). Conscience was understood as a type of knowledge "made up of two ingredients: the natural law of reason or law of nature,

[12] For support, Saunders quotes Keith Thomas about the importance of conscience in the age: "For much of the century it was generally believed that conscience, not force of habit or self interest, was what held together the social and political order…" (Saunders 1997, 21; Thomas 1993, 29).

Fig. 3.9 King Charles I on front piece of Eikon Basilike (1648/1649)

which was universal to all human beings, and knowledge of the word of God, which required appropriate religious education" (Id, 30). Literacy was a prime tool in both imparting knowledge of the word of God and instruction in the art of natural reason.

Seventeenth-century England is relatively literate, particularly urban areas.[13] The effect of that widespread literacy and the silent reading that accompanies it is individuation of what has previously been a more collective whole in more auditory societies:

> By its very nature, a reading public was not only more dispersed; it was also more atomistic and individualistic than a hearing one…. The notion that society may be regarded as a bundle of discrete units or that the individual is prior to the social group seems to be more compatible with a reading public than with a hearing one. (Eisenstein 1983, 94)

[13] Sir Thomas More estimated that 40% of the English population could not read, implying that 60% could (Cressy 1980, 44). But More's estimate may have been accurate only for London or urban areas. By 1650, the literacy rate (based upon making a mark) was about 30% for men and 15% for women, while in London, as of about 1641, the rate for men was as high as 78% percent (Id, 44, 74, map 1).

The conditions brought about by silent reading among the literate massesfacilitate an uncensored "interior space," which "embolden[s] the reader," a logical prerequisite for individual expressions of conscience (Manguel 1996, 50–51; Saenger 1999, 137). "To hear an address delivered, people have to come together; to read a printed report encourages individuals to draw apart" (Eisenstein 1979, 132). Sharp divisions emerge between public and private spheres (Id, 133). Such change from what had been an auditory culture provides a rich new environment for individual conscience to emerge, flourish, and challenge group norms and authority.

The impact of this new sense of conscience upon the state is significant. The state finds its authority challenged in religious spheres: "Every attempt by the State to prescribe the forms of religious doctrine and worship tested the consciences of those who believed it was their duty to obey the law of the land but were also persuaded of the truth of a rival creed" (Saunders 1997, 21–22; Thomas 1993, 29–30).

Among the foremost influences on public conscience was the Bible. Its impact on "reformation of English politics" is best understood with reference to the schism it often describes between monarchs and prophets (Hill 1994, 20). "[The English] found support for godly kings in the Bible; but they also found a disconcerting black/white, either/or emphasis," which could encourage popular condemnation of rulers (Id, 50). "The old testament at least had no doubts about the treatment which wicked kings deserved" [p. 50]. Rejecting monarchy, the children of Israel had fled pharaonic Egypt for prophets, judges, and the Ten Commandments (Exodus 18:10, 13–26; 20:2–17). King Herod's slaughter of the innocents exhibits the evils of unchecked power. Biblical analogies were easy to draw to contemporary events, for example, between the wicked King Ahab and his wife, Jezebel (1 Kings 16:33; 19:1–2; 21:21–24; 2 Kings 9:27–37), and King Charles and his queen, Roman Catholic Henrietta Maria from France, who plotted a military coup against Parliament.[14] This is not surprising given the many comparisons made between the Pope and the Antichrist of the Book of Revelation (String 2000, 137–39):

> [T]he New Testament is "full of libertarian ideas." The Protestant doctrine of the priesthood of all believers, of the supremacy of the individual conscience, encouraged many to read their destiny in such verses as: "Where the spirit of the Lord is, there is liberty." Through prayer and meditation, they learned to approach God without assistance, and in reading the Word of God to themselves heard it, as it were, not from a priest on high and at a distance, but from deep within their own immortal souls. They turned out tracts proclaiming themselves "free-born," and by the time Laud and his prelates attempted to inculcate passive obedience as a virtue of faith, scriptural notions of their obligation to righteous disobedience had taken hold. (Bobrick 2001, 279–80)

Unmitigated Bible reading was a powerful social force that had to be countered. According to Sir John Coke, the "chief" function of the clergy "is now the defense of our Church and therein our state," which apparently included espionage

[14] Apparently Charles I's Jezabel was his wife Henrietta Maria, who was too openly Catholic in her practices (*Encyclopædia Britannica Online* 2009, entries for *Henrietta Maria* and *Charles I*). Hill enquires, "Was it just possible that Charles himself was so much under the influence of his Jezebel that he was too reprehensible?" (Hill 1994, 50).

(Hill 1994, 16). While Henry VIII had used the printed Bible to assert his authority (see Fig. 3.3), in the end the Bible proved to be a source of popular cognitive authority that challenged the monarchy.

In 1648, a remarkable event occurred, or almost occurred, demonstrating the symbolic association of both law books and the Bible with conscience and adherence to law. David Jenkins, a judge convicted of treason for retaining loyalty to Charles I during the Long Parliament, asked to have Bracton's legal treatise, the Statutes at Large, and the Bible hung about his neck on his execution day (Douthwaite 1886, 212–13). Although the execution never took place, the visual message of such an adornment would have been clear. Books offer the authority necessary to defy government.

3.5 Conclusion

The relationship of the book to monarchy and authority has traveled full circle in this chapter: the monarch is figuratively subject to the Gospels in the medieval crown of St. Stephen of Hungary (Lübke 1904, 373), Lorenzetti's fresco, *Allegory of Good Government* (circa 1338–1340) (Cohen 1992, 40–41), and the throne room of the Terem Palace (Polynina and Rodimtseva 2000, 58, 60–61, 63). Continuing the circle, Henry VIII asserts himself above the printed Bible Fig. 3.3; King James I challenges Lord Coke's *Reports* (Berman 1994, 1676; Bowen 1957, 376), but he publishes his own written defense of royal prerogative (Charles I 1648; Smith 1994, 111–12); King Charles I must look to his own published book for his defense (see Fig. 3.9); and a royalist judge defends his position by conjuring up the image of hanging with books about his neck (Douthwaite 1886, 212–13).

With respect to the masses, nothing so clearly illustrates the book's cognitive authority as John Lilburne. A book smuggler, Leveler hero, and self-represented defendant, Lilburne's image with Coke's *Institutes* (see Fig. 3.8) illustrates the role that the book could play for the populous. It is noteworthy that the image of Lilburne's defense comes forth in a book designed to take Lilburne's ordeal to the masses and that it occurs in the period of the interregnum, suggesting the alignment of books, the populace, and more distributed, if not representative, government.

The relationship of the book to the orb, each as signs of authority, also evolves with the book's transition from codex manuscript to printed form. As codex, the book, like the orb, is mysterious, inaccessible, a medium, and associated with authority. They are both, in the words of the Grand Inquisitor, per the introductory quote, "founded…upon miracle, mystery and authority," or better yet, they "found," as in ground, the miracle, mystery, and power for control over the masses—that is, until printed books and widespread literacy.

The technology of printing plays a role in the evolution of the book's signification in relationship to authority and power but so do other important factors identified in Deibert's holistic media theory, such as temporal and geopolitical factors, institutional developments, and shifts in cognitive authority. The geopolitical fragmentation

of Europe, book smuggling, the failure to control printing and distribution of the Bible, Henry VIII's suppression of icons, the stabilization and cross-referencing, James I's orientation as a *textual* monarch and scholar, jurisdictional disputes between Coke and James I, political pamphleteering, and the ascendancy of individual conscience and public opinion among the shifting notions of cognitive authority are all factors interrelated with printing and the effect on the books ascension to preeminence as a sign of authority. Media theory and cognitive authority provide important tools necessary for semiotic analysis of legal signs.

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Chapter 4
Representing Sovereignty in Renaissance England: Pictorial Metaphors and the Visibility of Law

Cristina Costantini and Lucia Morra

Abstract This chapter investigates some of the multifarious ways used to represent and to communicate what the body of law is and how the law has to be understood. The analysis is based on an interdisciplinary approach, aimed to interpret political concepts and legal practices according to the more recent results of cognitive science. Pictorial metaphors are described as the outcomes of a general mode of thought operating in various spheres of human cognition expressed through pictorial languages. In the background to the recognition theory of depiction and to pragmatic research about contextual factors of evaluation, the cognitive characteristics of pictorial metaphors as well as a sketch of their understanding are given, and their persuasive potential and their role in shaping organizations are hinted at. Examples of pictorial metaphors in the Renaissance England iconography of law are then examined through these analytical tools. In particular, dress of law and allegorical portraits of sovereignty are considered. The purpose of this study is to discover the bulk of symbols and signs used to shape the English Legal Tradition and to justify the inner structure of its proper narrative. The aesthetics of Renaissance Common Law is scrutinized beyond the conventional accounts with the aim to bring to the surface the contending images sustaining antagonistic claims to sovereignty.

This chapter is the product of collaborative research. Sections 4.1, 4.7, and 4.8 are by Cristina Costantini; Sects. 4.2, 4.3, 4.4, 4.5, and 4.6 are by Lucia Morra.

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The research conducted in this chapter seeks to investigate the multifarious ways of representing and communicating what the body of law is and how it is to be understood. The analysis is based on an interdisciplinary approach, aimed at interpreting political concepts and legal practices according to the more recent results of cognitive science. Pictorial metaphors are described as the outcome of a general mode of thought operating in various spheres of human cognition expressed through pictorial languages. Against the backdrop of recognition theory and pragmatics, we explore the cognitive characteristics of pictorial metaphors and sketch their understanding and persuasive potential together with their role in shaping organizations. Using these analytical tools, we then provide examples of pictorial metaphors in the legal iconography of Renaissance England. In particular, we will consider the aesthetic apparel of law along with allegorical portraits of sovereignty. The purpose of this study is to discover the range of symbols and signs used to shape the English Legal Tradition and to justify the inner structure of its proper narrative. The aesthetics of Renaissance Common Law will be scrutinized beyond conventional accounts with the aim of bringing to the surface disparate images that sustain contested claims to sovereignty.

4.1 The Icons of Legal Traditions: A Question of Shades and Appearances

Every system of law is *lived* and *presenced* (Goodrich 1990) through a codified cluster of images, icons, and symbols that depicts and entails its own exclusive and historically bounded aesthetics. An inquiry into legal aesthetics has to address both the ontology of law and the discursive practices used to translate and to assess the bulk of visual signs. The body of law, or the more evocative Latin *corpus iuris*, is shaped by an indissoluble concurrence of *ontological questions, aesthetical responses, and narrative accounts*. On this ground, the intellectual construction of legal traditions should be reinvestigated.

Peter Goodrich has vividly depicted the multifaceted masks of law, casting doubt on the conventional account according to which language is the very medium of transmission and communication of what law is and of what law prescribes, dictates, fixes, and establishes (Goodrich 1990). The crucial issue is how law is represented. This scientific question implies a double perspective: from one side, it deals with the heterogeneous (and, we could say, unfamiliar – if not unsound – to the prevalent explanations) forms used to denote, designate, and portray the law; from another side, it deals with the correlate topic of sovereignty and its legitimate means of expression. On this analysis, law has to be reassessed in relation to the complex and frequently obscure structures of signification of any form of discourse.

In a similar vein, Paul Raffield has analyzed the recondite constitution of English Common Law: “the absence of textual codification necessitates that the legitimacy of the legal institution, and of the constitution that it embodies, is established with

reference to a system of representation and visual signs. This system can be described broadly as the aesthetics of law: the idea that governmentality expresses the 'art' of law" (Raffield 2007). Thus, the conscious selection of visual signs and iconic archetypes, knowingly composed in a learned order of icons and images, becomes a strategic device for reframing constitutional relationships. The multiple forms of appearance and representation of law are structured both to legitimate the arrangement of the present and to scrutinize the past. On this ground, the memory of law is constructed and consigned to an eternally present.[1]

The boundaries of the systems of law are secured by an elaborate discursive plot formed by symbols and emblems codified into an elucidatory narrative. What is a nurtured heritage, a shadowy legacy, where knowledge and customs are mixed together, comes to be perceived as the visual demarcation line that defines self-celebrating identities. Legal traditions overwhelm the histories of law in the same measure as, in literary terms, a plot overshadows a story. This statement is confronted with the two main characteristics of plot: first, whatever form of plot moves from an original ambiguity toward a final (predetermined or unpredictable) solution[2] and, second, in whatever form of plot the emphasis falls on causality (Forster 2005). Both of these structural elements are the inner constituents of the process of constructing or representing legal traditions. The claim for an earliest ambiguity is central when we have to deal with the act of shaping legal identities: the assertion of recognizable and distinctive traits stands for a decision (the juridical equivalent of the common solution) over the early indifference.[3] Moreover, causality governs genealogies and displays the foundational figures of law.[4]

In essence, the *legal plot* is the product of a fascinating design apt to mingle texts and images and words and visual bodies into a purposive form of coherence. In this way, legal traditions solemnize their own idols and memorialize a proper mythology. Within this theoretic framework, we intend to investigate how Renaissance Common Law composed its own imagistic mask, pursuing not only a cultural but also a political strategy. In this strategy, a significant role was performed by pictorial metaphors.

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[1] Goodrich (1996, 96) pointed out that "the memory of law – as a custom and tradition, as precedent and antiquity – is held and 'sealed' in images imprinted through visual depiction of textual figures that bind, work and persist precisely through the power of the image, through a vision."

[2] In this perspective, Lowry (2001, 23) has pointed out that "in whatever type of narrative plot, the event of the story moves from a bind, felt discrepancy an itch born of ambiguity, and moves toward the solution, release from the ambiguous mystery, the scratch that makes it right."

[3] For a skillful and intellectual analysis on ambiguity, see Pier Giuseppe Monateri's thought when he casts doubt on the real possibility of solving ambiguity, which consequently becomes the conclusive (in the sense predicated to this word by Walter Benjamin) incarnation of sovereignty (Monateri 2009).

[4] In this perspective, Pierre Legendre's thought on the *parental function of the States* is a clear and powerful clarification of what it has been assumed in the text (Legendre 1992).

4.2 Metaphorical Thinking Through Pictorial Languages

Nowadays, metaphorical reasoning is recognized as a central cognitive instrument, a general mode of thought operating in various spheres of human cognition (Lakoff and Johnson 1980). Metaphorical expressions are considered to be semiotic phenomena (Eco 1984) not restricted to language but materializing in different representational modalities[5] such as picture, gesture, and sound. Research on gestural metaphors (Cienki and Müller 2008) and pictorial metaphors (Aldrich 1968; Kennedy 1982; Kennedy and Kennedy 1993; Carroll 1994; Forceville 1996, 2002a, b) suggests that they are the outcomes of the same cognitive mechanism that builds verbal metaphors applied through different communicative media with modality-specific characteristics.[6]

Metaphorical reasoning connects two conceptual domains, projecting one of them, the source, onto the other, the target, in order to transfer some of the knowledge characterizing the first domain onto areas of the second. To be metaphorical, the connection attempted must involve domains that not only share some features (some of their elements must implement a similar structure) but are also different in a measure that their combination is perceived as deviating from norms or beliefs about the world (not necessarily as wrong: the domains may be simply settled, as it were, in distant areas of the conceptual net). Interpreting a metaphor means building a conceptual area revolving around selected analogies between the two domains. This is why metaphor is credited with the capacity to structure, transform, and create new knowledge. An expression is produced and interpreted as a metaphor when it occurs in a context that makes the two domains involved and their slotting as source and target identifiable, and that cues to the features of the first domain to be mapped onto the second (Forceville 1996). Pictorial metaphors do this work influenced by the characteristics of the languages through which they are expressed.

Pictorial languages are systems for communication using signs accessed by the visual system. The nature of the signs they use makes their semantics and grammar different from those of verbal languages. While words hold a conventional relation with what they stand for, pictorial signs hold with what they depict an iconic relation that engages the perceiver's visual abilities of recognition (Schier 1986). The latter include dynamic perceptual skills that, working on pattern of visual salience, make perceivers identify objects, scenes, and states of affairs through the recognition of some of their visual characteristics (Lopes 1996).[7] It is on the basis of the aspectual

[5] Lakoff and Johnson's dictum that "metaphor is primarily a matter of thought and action and only derivatively a matter of language" (1980, 153) relies on the cognitivist principle that thought is not a specific form of language; rather, verbal language is a form of thought.

[6] Multimodal metaphors (Forceville and Urios-Aparisi 2009), such as verbo-gestural (Müller 2008) and verbo-pictorial metaphors (Winner 1982; Forceville 2002b), use different modalities of communication conjointly.

[7] Recognition theory of depiction here endorsed states that in interpreting the image of a given thing, interpreters use some of the cognitive capacities used in perceiving the thing in the flesh. For perceptual theories explaining depiction in terms of experienced resemblance, cf. Wollheim (1987), Peacocke (1992), Hopkins (1998); for theories holding that the relation between depictions and what they represent is entirely conventional, cf. Eco (1976), Goodman (1976).

information a picture conveys from the object it depicts that viewers familiar with depiction, and able to recognize the object depicted by its appearance,[8] may visually identify the picture's subject as that object. This is so even when the match between the appearance of the picture and the appearance of the reality it depicts is very rudimentary (cf. also Messaris 1997, 3). Appreciating the visual properties by means of which a picture represents its subject, viewers can detect its content, namely, the properties it represents (or misrepresents). Pictorial recognition is not a conceptual skill. Rather, it enables viewers to think of the object they see in a picture, which is to say, it triggers the entertainment of thoughts about its character and doings that are grounded in the workings of the information system of which the picture is part (Lopes 1996, 102).

The ability to recognize the subject of a picture over pictorial aspects is generative. A first successful pictorial interpretation of an item of an iconic system of representation endows a perceiver with a dynamic ability of recognition. This makes her understand the pictorial content of any novel item of the same system without further tuition, namely, without being privy to additional stipulations, provided only that she can recognize the object or state of affairs the item depicts. *Natural generativity* (Schier 1986, 43–64) is lacking in verbal languages, whose signs hold a conventional relationship with their reference. No speaker understands a sentence composed of words she has never heard before, even if the sentence refers to a state of affairs that she knows. On the contrary, once a pictorial competence in a given system has been achieved, being able to recognize what a picture depicts by its appearance means being able to grasp its pictorial content even if the picture or any of its meaningful parts are seen for the first time. An interpreter may retrieve the pictorial content of an image, provided that she can recognize the object or state of affairs it depicts, without knowing the conventional guidelines along which the picture was produced: neither those of representation for the system to which the picture belongs nor those specific to the cultural background in which the image is set. This retrieval is a necessary step for accessing the information system to which the picture belongs and opens the possibility of interpreting this one as a communicative act. However, it is only a basis for working out the sense of the picture and for inferring the intention of the picture maker (Schier 1986, 58; Lopes 1996, 157–160). This also requires knowledge of the relevant communicative conventions through which a picture is produced and that govern the composition of its parts.

In this understanding, as opposed to verbal metaphors, no necessary guidelines from grammar may be of help, since pictorial languages lack a grammar. Being symbols whose global references are recognized perceptually as well by reference to their parts (Carroll 1994, 189), icons do not call for any set of strict rules to be used for composing them. When the subject of a picture is not fictive, its total meaning can be generated directly on the basis of the ability to recognize the total scene depicted.

[8] Visual information sufficient to enable recognition abilities for an object is given not only by the acquaintance with it *in the flesh* but may be put into circulation by those who are directly acquainted with it and also by pictures (Lopes 1996, 149–157).

When the subject is fictive, the parts of the image being iconic, their combination calls for no necessarily fixed rules other than the commitments settled by the selection of visual aspects through which a picture represents its subject.[9] As opposed to verbal syntax, which clears the direction of the connection proposed by a group of concepts or statements, visual syntax lacks a set of explicit devices for indicating causality, analogy, or any relationships occurring among the objects pictures portray or between pictures other than those of space or time, to indicate which steady conventions have been developed throughout time. Culture-bound conventions about pictorial representation and visual communication on which image-makers do indeed rely (Scott 1994; Goodman 1976) are then functionally different from those holding in verbal languages. They are not fixed and explicitly shared as these, and viewers can ignore, reject, or misinterpret them, but nevertheless have a substantial grasp of what the image stands for (Messaris 1997, 93).

4.3 Understanding Pictorial Metaphors

In the framework of recognition theory, interpretation of a pictorial metaphor follows the detection of the pictorial content of its components. Since the properties a metaphorical picture ascribes to the world are not the properties the world has, the viewer can have no recognition capacity for the whole subject depicted (Nishimura 2004). However, she can understand it once she treats the visual information as if it were denoting (Lopes 1996). With this information, she works out the conditions on which a make-believe source of the subject may be identified. In other words, how may the different parts of the whole picture be seen as similar? Perceptual informational states, into which she is put by the metaphorical picture, are insulated from higher-order cognitive states, so she understands its basic pictorial content whether she knows that its producer meant it to be metaphorical or not. The basic meaning of metaphorical pictures, as that of all pictures, is independent of the producer's belief or intention, but it is the basis for inferring them (Lopes 1996).[10]

[9] A representation is committal with respect to a property F provided that it represents its subject as either F or not F, inexplicitly noncommittal when it does not go into the matter of F-ness, and explicitly noncommittal when it represents its subject as having some property that preclude it from being committal with regard to F. Pictorial content, given by the totality of the picture's commitment and noncommitments, is aspectually structured also because pictures visually present objects and parts of objects as related to each other, so every part of the scene that a picture shows must be represented as standing in certain spatial relations to every other part (Lopes 1996, 118, 125).

[10] For a critic of the role assigned by the recognition theory to communicative aspect of pictures, cf. Hopkins (2005).

Applied to pictorial metaphoric understanding, the recognition theory of depiction seems to mimic the H.P. Grice's hypothesis that the metaphorical interpretation of a verbal expression starts from the retrieval of the literal meaning of its terms, performs a test about its semantic match with what has been already processed, acknowledges its failure, and ends with the final retrieval of an alternative meaning. This idea has been deeply questioned by recent cognitive theories holding that understanding a (verbal) metaphor is a process that starts once a choice about the most salient meaning of its compoments in the given circumstance of interpretation has been made (Ortony 1979; Recanati 1995, 2004). In the bilateral brain language processing model (Jung-Beeman 2005), in which language understanding is simultaneously performed both by a *logical* and a *contextual* stream of analysis (Morra 2010), verbal metaphor interpretation is a fully contextual task, not only because it requires building overlaps between wide areas of the semantic net but also because it is usually triggered by contextual considerations about the most promising meaning to be processed. Grice's description holds when errors of evaluation take place indicating in the literal one the most promising meaning.

The description of pictorial metaphor understanding given by the recognition theory of depiction is compatible with cognitive theories only if the attempt to give a unique account of metaphor understanding that can apply both to verbal and nonverbal contexts is relinquished (Indurkhya 1992; cf. Kaplan 1992). The fact that pictorial interpretation unavoidably starts from the recognition of what the image stands for, balances, as it were, the absence of a fixed set of rules governing how its parts must be composed to form an iconic whole. Possibilities of combination suggested by the conceptual net in which these parts are plunged are automatically limited by the possibility of accessing the net only through the recognition of their pictorial content. By contrast, the relationship between words and what they stand for being conventional, interpretation of a verbal metaphor starts from the recognition of its terms as entries of an acquired lexicon. Then all the meanings associated with the words during this acquisition may be accessed and chosen. The literal one holds no priority and does not necessarily guide the meaning making of the whole expression.

4.4 Pictorial Metaphors and Context

Verbal metaphors are opaque to interpreters not instructed in the meanings of their component words. However, when these are entries in their lexicon, interpreters not only realize the incongruity or distance between the semantic fields elicited and then the opportunity of working out a projection among them but also, given the explicit syntax, they understand their slotting as target and source. The structured way in which words may combine gives interpreters a guide for

working out, on the background of contextual factors, a sense of their combination that, at given conditions, can approximate the mapping intended by its producer.

By contrast, pictorial metaphors, being pictures, are transparent, at least such is their basic content. Since they represent objects as having properties normally perceived visually, what their elements stand for, provided it can be recognized, is also understood by interpreters whose pictorial competence consists only in having already recognized a product of an analogous pictorial system as an icon. But no grammatical rules being fixed for images and no syntactic consideration may be used to select the contextual factors delimiting interpretative choices, not only about the metaphorical mapping pictures propose, but also about the very slotting as source and target of the domains evoked. So, interpretation of a pictorial metaphor has a very low threshold, but lacks a syntactic guide for understanding its metaphorical sense.

Let us provide some examples. A sentence like "Louis XIV thought of himself as the Sun of France" may be understood by those who understand the individual words. Knowing them means (usually) understanding the sentence as metaphorical, and syntax makes it clear which are the target and source of the projection proposed (the king and the sun). An interpreter may then work out the mapping between these ideas considering semantic and contextual factors, although, due to the given knowledge and disposition she has, this mapping may be different from the one intended by the author of the metaphor, and her interpretation may be more or less appropriate. For instance, she may not know that the king thought of himself as Apollo, but, provided that she knows something of the reign of Louis XIV, she can conclude that he thought of his role in France as similar to that of the sun in the universe.

Consider next the left panel of the Wilton Diptych, painted for Richard II of England. Surrounded by Saint John the Baptist, Edward the Confessor, and Edmund the Martyr, the king is portrayed as kneeling – as the other panel hinged to it shows – before the Virgin and Child. The depiction is rich in symbolic nuances (cf. Gordon et al. 1997). For instance, the fabric of the king's outer robe is decorated with white harts, his badge, and sprigs of rosemary, the emblem of his wife Anne of Bohemia, and the three saints, believed to have been venerated by the king, hold the symbolic attribute by which they are recognized in art (respectively, the Lamb of God, a ring, and an arrow). Their depiction in composition similar to the one in which the three Magi were often represented, hints at King Richard's birth on January 6, the feast of the Epiphany.

Notwithstanding its symbolic complexity, a basic pictorial content of the left panel of the diptych may be grasped by whoever has already seen a portrait and understood it as such, at the minimal condition that she can visually recognize human beings. But the metaphorical stance of the portrait can be perceived only by those interpreters that can visually discriminate the figures, namely, recognize one of the men as a king (e.g., since he wears a crown) and the others as saints

(e.g., since their head is surrounded by a halo)[11] and then the anomaly of their being together. Again, their understanding of the metaphorical mapping is a matter of degree. Viewers can know little about conventions relating the iconic parts of the image to the symbols with which they are depicted nor recognize the king as Richard II of England, the saint on the right as John the Baptist, etc. Yet, they may still interpret the composition as an implied comparison between monarchy and sanctity. Of course, nothing in the image necessarily drives the interpretation: to determine the slotting of the domains as source and target (saints thought of as kings or kings thought of as saints?) and which features may be mapped, interpreters must take into account (and then possess) a great deal of contextual information.

Interpreting pictorial metaphors relies, then, on contextual factors of evaluation even more than is the case with verbal metaphors. Understanding a verbal metaphor entails an exploration of the semantic fields elicited, whose actual structure is determined not only by the interpreter's actual encyclopedia (the knowledge stored in it) but also by the degree to which she activates it in the specific circumstance of interpretation (Müller 2008). So, the metaphor may be worked in a conceptual net in which not all the connections suggested by its producer are established or activated, or, alternatively, in a more sophisticated net suggesting unforeseen inferences. Whatever is the case, the connections activated are selected through clusters of criteria: the generality with which they are accepted in the linguistic community and their frequency of activation during conversational exchanges; the status of the metaphor in the given interpretative context (open or closed to interpretation, cf. Morra et al. 2006 – waking or sleeping, Müller 2008); the thematic dimension determined by the subject matter of the dialogue in which the metaphor occurs; the temporal and physical setting of the interaction in which the metaphor is interpreted; nature, function, and register of the text including it; and the relationship its producer and its interpreters share (equality, subordination, etc.). All these factors

[11] Visualizing sanctity through a luminous disk surrounding the head calls on the optical phenomenon of light reflection and refraction observed near strong light sources and mainly around the sun or moon. In ancient religious traditions, a halo variously denoted the sun god, the gods and goddesses, and sometimes, the transcendent nature of people associated with them: in Christianity, it marked Christ as divine from the third century (at first, only when he was represented after his baptism, since it was believed that he had assumed his divine nature during his life: the limitation failed when it was stated that he was born with a fully formed divine nature as well as a human nature). From the fifth century onward, the halo was extended to the Virgin, angels, and saints (after some time, a superior degree of sanctity – such as that of Christ – was then marked by an aureole that encased the whole body or by a halo within which a cross was inscribed). By the eighth century, square halos were used to designate donors, bishops, and popes living at the time the painting was done (the square being inferior to the circle and thus associated with the earth). For individuals who were revered for their sanctity but who had not yet been formally declared saints, it was usual to depict rays of light emanating from their heads, but no actual halo was added until canonization had taken place. Later, it became usual to depict only the circumference of the halo as a circular line (Cf. Collinet-Guérin 1961).

make the activation of less conventional features of the elicited fields inhibited, allowed, or requested. Such constraints are not mandatory, since interpreters may always refuse to conform to them, but then their interpretation, although possible, is not appropriate (Bazzanella and Morra 2007).

Ceteris paribus, these considerations hold even more for pictorial metaphors. Different individuals may interpret the same pictorial metaphor slightly or vastly differently, and slightly or vastly differently from how it was intended by its producer depending on factors similar to those ruling interpretation of a verbal metaphor. Lacking any syntactic way of distinguishing the direction of mapping a metaphorical picture proposes, in order to set it and to select the relevant features to be projected, it is "necessary to take various contextual levels into consideration […] partly text-internal, partly text-external" (Forceville 1996, 65), such as the concrete ways in which domains are rendered, involving specific forms, textures, and colors; an individual's personal knowledge of and attitudes toward these domains; the context in which the metaphorical picture came across as well as the genre of the representation to which it belongs that makes interpreters have certain expectations about what kind of messages they are likely to encounter. Extrapolated intentions of the image maker may guide interpretation when the viewer conceives the metaphorical picture as part of a goal-directed (argumentative, persuasive, instructional) representation and then knows (or thinks she knows) who made the picture and why. When it is so, the number of contextual cues to the source domain provided by the producer of the metaphor indicates to what degree the metaphorical nature of an item was active for her at the moment of its production (Müller 2008).

4.5 Pictorial Metaphors: Structure and Kinds

Noel Carroll described a prototypical pictorial metaphor as characterized both by the fact of being susceptible to reversible interpretations of its target and source and by the fact of portraying in a homogeneous space entities composed of physically *noncompossible* elements (Carroll 1994). He thought of homospatiality as the visual device (analogous to the *is* or *is like* structuring verbal metaphors) used to suggest identity in order to encourage metaphorical insights in viewers. For him, typical visual metaphors are hybrids: namely, visually stable figures in which discernible elements calling to mind different concepts are copresent in the visual array and recognized as such simultaneously in a spatially bounded entity. Visual metaphors intimate categorical identity by presenting non-converging categories as applying to the same entity. The physical noncompossibility of the homospatially fused, but disparate elements in the visual array invites the viewer to comprehend the image not as a representation of a physically possible state of affairs but as an opportunity to regard one of the categories as providing a source for apprehending something about the other category or as an opportunity for regarding each of the categories as mutually informative.

More recently, Charles Forceville described prototypical pictorial metaphors as irreversible thanks to the context in which they are produced[12] that provides sufficient clues for identifying their target and source and the mapping of at least a relevant feature in the situation at hand.[13] This view enlarged Carroll's definition of pictorial metaphors. For Forceville, the only condition for a pictorial representation to be called metaphorical is the necessity that its *literal* or conventional reading "is felt either not to exhaust its meaning potential, or to yield an anomaly which is understood as an intentional violation of the norm rather as an error" (Forceville 1996, 64). He then distinguished four forms a pictorial metaphor can take in a static representation (Forceville 2002a):

Hybrid metaphor: an image consisting of two different parts usually considered as belonging to different domains, but there perceived as parts of an impossible entity in the world within which it occurs, infringing the physical integrity of at least one of the terms involved. Context determines whether the hybrid has to be understood metaphorically or not. In fable contexts, for instance, hybrids between animals and human are considered as possible characters, while in other contexts are more likely to induce the building of a metaphor.

Contextual metaphor: an image in which something is understood as being something else due to the unexpected visual context in which it is depicted that strongly cues something else instead. The target is usually represented in its entirety: the source is only suggested and has to be identified through the visual context.

Pictorial simile: objects belonging to a different category are juxtaposed to the effect that one is understood in terms of the other. Target and source are non-homospatial and both depicted. While similes in language are more explicit than verbal metaphors, visual juxtaposition invites the metaphor's *seeing-A-as-B* in a way that is less explicit than other kinds of pictorial metaphors. It triggers something less than an integration between the activated conceptual systems.

Integrated metaphor: an object is represented as resembling another one. Target and source are perceived in a single gestalt but without noncompossible conflation: the first has been designed in a way that strongly evokes in perceivers the second, but there is no sense of its identity having been violated. Architecture, design, and fashion yield examples of these pictorial metaphors when they produce objects built not just in order to be practical or convenient but also as a source of pleasurable or meaningful experience.

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[12] For Forceville (1996, 2002b), in whatever media they occur, metaphors have clearly distinguishable target and source domains which in a given context cannot be reversed in order to be produced or perceived as metaphors. In pictorial metaphors, the direction of the mapping is set by the context to the effect that there is usually no uncertainty about which of the two possible directions is at stake (situations in which uncertainty about the direction of the mapping is deliberately created are restricted to specific genres of images, such as those considered by Carroll).

[13] Referring to Yus Ramos (1998) and Forceville (2002b) suggests that this condition should be worked out in the frame of relevance theory proposed by Sperber and Wilson (1995).

4.6 Pictorial Metaphors as Vehicles of Persuasion

Like verbal messages, pictures are vehicles for the storage, manipulation, and communication of information. The implicit character of their arguments, which calls for a great cognitive work to make sense of them, and the fact that they speak to individuals at an unconscious level, due to the relationship between vision and emotion[14] (among others, Scott and Batra 2003), make images produce a great attitude change of their interpreters. On their part, relative to their literal counterparts, metaphorical messages have a greater suasory potential, especially when they are novel, stem from the context, are proposed by a highly credible communicator, and the audience is familiar and involved with the target (Sopory and Dillard 2002).[15] It is not by chance then that pictorial metaphors are ubiquitous in persuasion contexts ranging from politics to consumer advertising (cf., for instance, Mio and Katz 1996).

Pictorial metaphors are accessible to a greater audience than verbal metaphors. As opposed to these, detected only by those tutored about their component words, pictorial metaphors have content for anyone who is pictorially competent in the minimal sense required by the recognition theory of depiction. To those who can recognize similarities and differences among the things depicted and then the anomaly of their being together, the bare perception of this anomaly triggers an attempt at metaphorical mapping that they try even when they know little of the pictorial conventions through which the image was produced. Not all the different possibilities of interpretation a pictorial metaphor offers to viewers require consideration of beliefs and intentions of its maker: the more visual clues viewers can decipher as intentionally inserted by her,[16] the closer the mapping they work out can be to the one she meant, but nothing in the editing of the picture allows us to say that one interpretation is more correct than the others. From a suasory point of view, the risk that pictorial metaphors are understood differently from what their creators have intended is balanced by the fact that they are very penetrating due to the essentially implicit character of the arguments they attempt to express (among others, cf. McQuarrie and Phillips 2005). Making sense of them requires the viewer to activate complex affective, motivational, and cognitive processes that, tailoring the message

[14] Thanks to this relationship, images may "elicit reactions stemming from the unique experiences of each individual in addition to the common, shared influence of culture and biology, that might not be as easily accessible through verbal means" (Messaris 1997, 34).

[15] Sopory and Dillard (2002) argued that data most support the explanation of metaphor's persuasive impact given by the theory of superior organization – namely, the idea that, evoking a greater number of semantic associations, a metaphor helps to organize the arguments of a message better than literal language, and a more coherent organization improves the comprehension of message arguments.

[16] This caveat is necessary since when viewers' encyclopedia exceeds the one of the image-maker, they can find more connections between the elements of the image than the image-maker was aware of; cf. Carroll (1994, 210).

to her own predispositions about the matters suggested, enhances stronger and more persistent changes in attitude and belief than would otherwise be the case if the argument were completely explicit. Furthermore, the implicitness of the message they carry has the advantage of not triggering eventual viewer's resistance as much as explicit messages (Messaris 1997; Sbisà 2007).

Metaphorical pictures have, as pictures and metaphors do in general (Morgan 1986), an important role in the making and legitimizing of social organizations. Pictorial metaphors expressed in allegorical portraits, emblems, ceremonies, rituals, theater plays, clothes, etc., facilitating the apprehension of a meaning under construction, are tools for building social identities, for shaping power relations in organizational life of a community, for settling rules and regulations, and for ruling information and management of meaning (Kaplan 1992). In the following section, we will consider some of the pictorial metaphors that shaped the Renaissance Common Law. This takes us to the aesthetic dressing of law and the allegorical portraits of sovereignty.

4.7 Dress Code, Pageantry, and the Renaissance Common Law

If the urgent question is how law can be seen and remembered and how an abstract ideal can be enclosed in real life, our research path has to explore one of the most plastic and, at the same time, detectable signs, that is, the aesthetic dressing of law. By *aesthetic dressing* we refer here to the sociopolitical advertisement exploiting the suasory potential of pictorial metaphors. By publicly linking a category of people with specific visual features that in turn evoke ideal characteristics or symbolic meanings, dressing preferences publicly state how the authority wants people's attire to be perceived or how they themselves wish to be viewed. It is then a shared vehicle for the process of social identity shaping and display. Conceived as such, dressing can be considered as an integrated pictorial metaphor designed to evoke in perceivers a given conceptual domain (e.g., through a sophisticated choice of colors). When the dressing is worn, a metaphor in the form of a pictorial simile takes place, in which the target is the nature and status of who wears it and the source is suggested by the visual characteristics of the attire.

The apparel of the men of law identifies both an inner and secluded body of actors and an inviolable, self-determining space, so as to connect a definite group of individuals to a concrete space and to an ostensible form. The claims for distinctiveness is the background of a conscious contraposition in respect to the other centers of power, and this aspect functions as a powerful lens for inspecting through what can be called the polemical spirit of English Common Law (Costantini 2009). Recently, Bennet Capers has underlined that "clothing is communication: something that can be said, something that can be understood, something that can be read" (Capers 2008).

Contrasting the peaceful appraisal of the history of Common Law, the English Legal Tradition will be here discussed as a manufactured narrative of unity and

timeless custom that hides the antagonistic claims for a higher jurisdiction. In this view, different habits trace a kind of *painted boundaries* among several and concurrent jurisdictions. For these reasons, the inquiry about Tudors sumptuary laws gains a specific, political-juridical significance and reveals a specific feature of English legal history, a useful device for a systematic analysis.

As we know, the main purpose of sumptuary laws, from the Roman period onward, was to adverse social extravagance and consequently to control expenditure.[17] But the appraisal of English Renaissance law allows us to emphasize another function of the same legislation. In brief, sumptuary laws arguably portray and vividly fix a definite constitution. Paul Raffield astutely remarks how the deep justification of sumptuary laws shifted in the historical passage from a medieval legal system to an Anglicized Protestant community so as to reflect a new, emergent constitution (Raffield 2007).

During the reign of Henry VIII, the main subject of the visual representation was the glorified king as the only supreme head of the Church of England. Consequently, the assertion is made of royal supremacy against the Popish illegitimate aggression and usurpation. If this was what the people had to see, then sumptuary laws became the existing device that, deprived of the original meaning and scope, could be perfectly used to support royal strategy. The climax of this political plain is reached in the Act of 1533 (entitled "An Act for Reformacyon of Excesse in Apparayle") marked by an increased stringency in respect to the previous legislation (and especially in reference to the Act of 1509, "An Act against wearing of costly Apparel").[18] A clear evidence of what we are stressing is given by the respective introductions that explain the reasons behind such legislation.

In the first Act of 1509, it is stated:

> For as much as the great and costly array and apparel used within this Realm contrary the good statutes thereof made hath be the occasion of great impoverishing of divers of the King's Subjects and provoked many of them to rob and to extortion and other unlawful deeds to maintain thereby their costly array.

In the following Act of 1533, it is stated:

> Where before this time divers laws ordinances and statutes have been with great deliberation and advice provided established and devised, for the necessary repressing avoiding and expelling of the inordinate excess daily more and more used in the sumptuous and costly

[17] This purpose is inferred from the etymological roots of the expression *sumptuary laws*, from the Latin leges sumptuariae: legislation directed to regulated sumptus, that is, the expense and more specifically the expense on luxury goods. But there are grounded reasons to say that the category of *sumptuary laws* can be a diffuse and vague one (Kovesi Killerby 2002). In fact, critical accounts of the second-century Rome law had variously qualified the goals of this kind of regulation. On the one hand, it is associated to a misogynist rhetoric (Aubert 2004); on the other hand, it seems to express an aristocratic moral belief (Harris 1985); some authors recall a political purpose and especially the reduction of illicit influences in elections or the sociopolitical stability, insofar as *leges sumptuariae* discouraged the competition (Champion 2004).

[18] From the Statutes of the Realm, London HMSO; 1817, vol. III. On Tudor sumptuary laws (Baldwin 1926; Hooper 1915; Sponsler 1992; Cox 2006).

> array and apparel accustomably worn in this Realm, whereof hath ensued and daily do chance such sundry high and notable inconveniences as be to the great manifest and notorious detriment of the common weal, the subversion of good and politic order in knowledge and distinction of people according to their estates pre-eminences dignities and degrees, and to the utter impoverishment and undoing of many inexpert and light persons inclined to pride mother of all vices; which good laws notwithstanding, the outrageous excess therein is rather from time to time increased than diminished, either by the occasion of the perverse and forward manners and usage of people, or for that errors and abuses rooted and taken into long custom be not facile and at once without some moderation for a time relinquished and returned.

Only with the second act is the category of *sumptuary laws* expressly linked to politics. It has become a political device fitted to assured common weal and public order[19] to certify the social status that anyone holds, making clearly perceptible the rank, and the degree, or the estate and dignity every man possesses.[20] The impoverishment, as a matter of concern, that in the previous Act appeared as the one and only goal to reach closes a much more extensive list of legislative aims. Thus, the scope of sumptuary provisions is enlarged in various directions, with clothing being defined as a mark of social and occupational status. The actual rationale for the Act of 1533 is to introduce social texts that narrate a particular view of the political order. In this normative framework, the first provision, modeled on the first statement of the previous Act, takes on a new meaning. It proclaims that:

> No person or persons of whatever estate dignity or degree or condition so ever they be, from the feast of the purification of Our Lady which shall be in the year of our Lord 1534 use or wear in any manner their apparel or upon their Horse Mule or other beast any silk of the colour purple, not any cloth of gold of tissue but only the King, the Queen, the King's mother, the King's children, the King's brethren and sisters and the King's uncles and aunts.

Here is the condensed *image-making operation* which concerns the king and his double-faceted sovereignty. To consolidate the new position of the king as the head of spiritual jurisdiction, to render the new ministerium recognizable to the society at large, even the dislocation and the specific attribution of the dress colors becomes a matter of public interest in need of regulation. In particular, the colors of gold and purple are granted only to the king and to specified close relatives. The political-theological project is ritualized by a regulated liturgy of colors.

Recalling the symbolism of classical icons, Henry VIII's figure is communicated as the new Caesaropapist emperor. In the rule mentioned above, there is a conscious quotation and a deliberate reenactment of Roman codes.

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[19] As M. R. Jaster suggests, "modern scholars identify various objectives behind sumptuary legislation; some motives were, in brief, economic protectionism, the preservation of the social hierarchy, and the government's attempts to curb the luxurious tendencies of its citizens for their own good and the good of the kingdom. At different times in the history of the laws, one or the other of the motives took precedence, but the most frequently rationale for the laws was that a citizen's sartorial desire must be tamed in the interest of the state" (Jaster 2006).

[20] F. A. Youngs depicts this function: "The fundamental principle was that the gradations in society should be reflected in men's cloth so that each rank might wear apparel of slightly less magnificence than those in the next highest order" (Youngs 1976).

The combined use of purple and gold as the colors that signify sovereignty dates from ancient times. Even before the Republic, the Roman kings were represented in the attire of celebrating a triumph, dressed in a purple cloak, wearing a golden wreath on their heads, and carrying a scepter surmounted by the figure of an eagle. This was the visual incarnation of an *Earthly Jupiter*: the dress of the triumphator was simply the emblem of supreme power or status (Gradel 2004; Gruen 1995). The same color association marked imperial iconography, and especially the color of gold was closely related to the cult of Sol Invictus (Janes 1998; Beck 2007; Kantorowicz 1963).

In this regard, it is important to remember that the same color combination celebrates, as a figural label, the first public appearance of the new, uncrowned king during his solemn procession from the Tower to Westminster. According to Wickham Legg, the king's dress on this occasion, as well as the arrangement of his escort, was ruled both by *liber regalis*, introduced in 1307, and by another document known as the *Little Device*, set down at the time of Richard III's coronation. This prescribed that the king should "wear a doublet of Grene, or white clothe of golde and a long gowne of purple veluet furred with Ermyns."[21] During the reign of Elizabeth I, sumptuary laws were supported by a much more intense political purpose, so to mark the entire period as an era of unprecedented activity in the history of restraints on apparel. To represent the perfect unity of the kingdom, the queen imposed a rigid etiquette, a binding code of dress, a *prescribed* conformity.

Another visual expression linked to the social product of sumptuary laws is pageantry: both of them have a political function, representing *power* as the very image of potency that authority projects upon the governed (Anglo 1969). Sumptuary laws and ceremonials fix together an accepted iconographic tradition. In particular, Tudor ceremonial transmitted an unequivocal message about the dynasty and his ambitions (King 1989; Strong 1999; Polito 2005), declared the compelling bound between the Crown and the notables of the Reign, and decided the thresholds existing among different domains, and especially between theological and secular, secret and accessible, and private and public.

Obviously, insofar as the monarch is the exemplary center of a symbolic system (Geertz 1981), coronation was the most spectacular event, which combined the reasons of politics with the arguments of theology[22] and embodied a liturgically constructed drama. It was also the iconic mark of the royal project to control or better manipulate community memory. After the Reformation, the ancient ritual was transformed with the aim to merge or reconcile the emerging political language with the settled meaning. Thus, the representation of royalty, staged throughout

[21] As printed by Wickam Legg in English Coronation Record, pp. 220–139, printing P.R.O., LC 1/424.

[22] Alice Hunt underlines "The purpose and the effect of a coronation became a site of contest between rulers and the Church […] The introduction in the West of the anointing of the new monarch with holy oil enforced this, drawing distinct parallels with the Christian tradition of anointing priests and bishops and the Old Testament precedents of the anointing of David and Salomon" (Hunt 2008).

coronation, was nourished by the shifting strategies of political persuasion (Kléber Monod 2001; Jackson 1984). The ceremony of coronation was complex and articulated. Here we would like to mark the main passages (without going into full details) so as to understand the pivotal role of visual representation in Renaissance England. According to the accounts of Henry VIII's coronation, after the creation of New Knights of the Bath, in a deeply symbolic ritual of cleansing and prayer,[23] it was the moment of the procession from Tower to Westminster, which identified the king's first appearance in the public sphere, followed, the next day, by the route from Whitehall to Westminster Hall, where the king sat in the marble chair known as the King's Bench.[24] Then another procession took place, from Westminster Hall to the Abbey. Here, at the presence of the archbishops of Canterbury and York who brought the regalia,[25] the ceremonial included the act of recognition, the celebration of the mass, the king's oath taking, and the rituals of pardon and anointing. As it has been emphasized, these conclusive constituents of English coronation ceremony imbued the monarch with priest-like qualities (Loach 1994). In particular, the ritual of English king's anointing was declared by Pope Innocent II in 1204 as pertaining to the episcopate alone (Schramm 1937), and it was completed in two phases: first, the king was anointed with oil on the hands, the breast, the back, the shoulders, the elbows, and the hand; then he was anointed again with chrism.

To protect the sacred body of the monarch, to cover the parts of the renewed body after anointing, the ritual prescribed the use both of linen gloves put on the king's hand and of a linen coif on his head. As it has emerged, English kingship was underpinned by a choreography of religious devotion (Adamson 2000). In sum, the coronation made perceptible the encounter of the theological element and the political issue: the ritualized transmission of God's grace represented the theological justification visually invoked to legitimate monarchy and its power.

There is another pivotal theme that has to be discussed in this chapter, namely, the strong nexus between sovereignty and the representational power associated with clothing and images within the community of common lawyers. Concluding one of his works on this subject, Raffield has aptly stated that "without the image, the legitimacy, authority and sovereignty of unwritten law cannot be verified" (Raffield 2002, 148). The compelling sense of belonging to a discrete community postulates a corresponding *dress code*, which is apt to reflect the intimate purposes of the fellowship and the way it has chosen to depict and conform itself (Kuper 1973).

As we have known, the brotherhood of the common lawyers was recognizable even by the means of its habitus: the honorable society of the serjeants-at-law was

[23] The knights were dressed in blue robes with hoods like priests (Thomas and Thornley 1938). This detail is very important for the analysis conducted in the following pages. In fact, there is a very deep and impressive consonance with the act of investing new serjeants-at-law.

[24] According to Jennifer Loach, "by taking possession of this, and taking possession of it in the presence of his nobility, the king hinted at a secular enthronement, a parallel to that which took place in Church at the end of the coronation service" (Loach 1994).

[25] The coronation regalia claimed to belong to Edward the Confessor and consequently were the visual signs of a sacred kingship.

immediately perceived through its specific dress symbols and especially through the connection of the gown, the hood, the tabard, and the coif. The powerful and underlying symbology concerned both the type of dress and its colors, tissue, and texture. The justifying discourse that clarified the profound meaning of the common lawyers' habitus made use of a theological argument. This remark is interesting insofar it allows us to trace a line of continuity from the medieval custom to the prototype after Reformation even if the political constitution and the aims of sumptuary laws had been substantially changed. Both Waterhouse and Dugdale claimed a religious origin that sanctified the dress of the lawyers (Dugdale 1666).

Other theological arguments were used by the Lord Chief Justice in his inaugural discourse during the ceremony of investiture of the new, privileged serjeants-at-law. In this occasion, the religious element has to be found not so much in the genesis of the dress, as in the conscious choice of their colors, so that we can efficaciously speak of an intentional *liturgy of colors*. In this view, the celebrated parti-colored dress in its *blu-murrey* variant was described and explained with these words:

> Tabard and hood is belwe and murrey, rather than of any other colors. I shall tell you mine opinion. The blew dothe represent unto us the elyment, in token that we should lift up our yees to hevine and remember us that we suffer not our selfes so to be drowned in worldlye matters that we forget heaven and heavenlye cogitations. The murrey signifiethe unto us the blode that Christ sched for us all when he suffered his passion, wh ich thinge we that be Christians owght always to have in memorye.[26]

Moreover, the talk of the Lord Chief Justice was clearly devoted to exemplify the function of the various garments. It was at the same time an erudite discussion and a severe advice for the neo-nominated lawyers. The structure of the speech inevitably – if not expressly – combined the theological lecture of the selected colors with a not only secular conception of the serjeants' office.

We find an articulate comment in respect of the coif, whose representational meaning was so strong as to forge the name of the serjeants' guild: more exactly, Order of the Coif. Quoting the inaugural discourse of 1521:

> Your white coife betokeneth the pure life and thein corrupte consciens which is loked for in you, and ought to be in men of your profession. For, as the coif is immaculate, fayre and cleane, purged from all filthe, so ought your life to be without spott or blemishe, so ought your conscience to be purged, that no corruption may entre whereby ye might be allured from the truthe.[27]

The sacred duty of the body of law to set and apply a particular theory of the image was reaffirmed with a new scope after the Reformation. Once again the brilliant analysis of Raffield has pointed out how. Despite the fact that the Inns of Court were free from interference by the crown, and in particular were exempted from the sumptuary legislation enforced in the reign, the legal community adopted its own regulation and imposed upon its members appropriate apparel. In this way, it took upon itself the role of exemplifying the correct use of symbols (Raffield 2002).

[26] BL MS Harley 361, ff. 80v-86 e BL MS Add. 21993, ff. 155-161v.

[27] BL MS Harley 361, ff. 80v-86 e BL MS Add. 21993, ff. 155-161v.

The Protestant Reformation was followed by a corresponding reformation of clothing, in the same way the self-governing body of male jurists comprised a compelling dress code not only to reassert the inherent divinity of common law (Raffield 2002) but also to legitimate the new Constitution. On this ground, the arguments discussed above seem to be deeply interrelated and cast new light on the multifarious elements that shaped, even in a semiotic way, the English constitution and the *Englishness* of English law.

4.8 Royal Iconography

The shifting visibility of sovereignty is also shaped by royal iconography. There is a subtle link among dress code, pageantry, and figural depiction of kingship and law. The issue at stake is one of utmost political importance insofar as it deals with the accepted image of the monarchy that has to be communicated to subjects. Moreover, during the Tudor dynasty even pictorial representations were theologically determined. As J. P. D. Cooper has noted, "visual symbols of the monarchy were certainly becoming an increasingly obvious feature of parish life in the Tudor period and the trend was closely associated with Reformation, if not entirely dependent upon it" (Cooper 2003). The conscious selection of images, symbols, and settings, combined in a propagandistic metaphor, declares both the real nature and the location of sovereign authority (Sharpe 2009). The projection of power passes through (and is manifested by) means of the multifarious activities (production, circulation, and even appropriation) connected to images.

These remarks are useful in the proper perspective of the comparative lawyer. The iconic visualization of sovereign power could be assumed as a systematic device to discuss the deepest relation between politics and law. Roy Strong has pointed out that, during the sixteenth century, "portraiture was one aspect of the massive expression of the Idea of Monarchy; involving the dissemination of a ruler's image in paint, stone, print and metal throughout the realm on a scale unheard of since Classical antiquity" (Strong 1999). Commenting on this notion, Louis Adrian Montrose has written that "the proliferation of images of Habsburg, Valois, and Tudor princes provides compelling visual evidence for the consolidation of the powers of the dynastic state, and for the highly personalized nature of political identity and affiliation" (Montrose 2006).

When one is confronted with the critical understanding of a definite legal framework (how it is shaped, narrated, and transmitted), it is also important to verify how all the visual signs are used to construct a discursive text in support of or in opposition to the pictorial strategies. In our view, this is an interesting topic that should be emphasized in legal analysis. Given that the visual and the verbal are distinctly representative media, with differing resources and limitations, it is possible that their formal differences may be placed in the service of different interests. Most interesting would be the means to verify how these differences – at various levels (both at the level of the typology of the means of communication and at the level of

the nature of interests promoted) – could be reassessed, composed, or better negotiated to substantiate the unity of a legal system or the cultural body encoded in an identifying legal tradition. On this ground, circumscribing the object of the present research, our attention focuses on three pictorial representations of sovereignty that seem to fit better with the arguments made in this chapter. Obviously, Tudor iconography is extremely rich, rendering a purposeful selection unavoidable.

Our preference here is devoted to allegorical portraits (West 2004). This is justified by the characteristic properties they have as persuasive images: iconicity, indexicality, lack of an explicit syntax, and metaphorical potential. Portraits can be considered as direct traces or emanations of the subjects they depict. This is especially the case when these very subjects commissioned them. (In special conditions, portraits can act as substitutes for the individual they represent.) When undertaken with a propagandistic aim, allegorical portraits visually present how the authority that commissioned them wants their subjects to be perceived and thought of. They visually build (new) identities for the subjects they depict. Furthermore, the implicitness of visual syntax makes them state their persuasive arguments in a less obtrusive way than if the same arguments were to be declared verbally. Allegorical portraits may then strongly suggest an argument that avoids the implications entailed by saying it explicitly. Thus, they are particularly useful tools when the assumption or expectation they hint at is one that the audience itself may not want to confront directly. Through their implicitness they lower or *bypass* altogether the viewer's eventual resistance.

Allegorical portraits are contextual metaphors. The subjects they depict are understood as being something else. This is due to the unexpected visual context in which they are depicted, strongly cueing something else instead. Usually, the target of the metaphorical mapping is represented in its entirety, while the source is only suggested and consequently has to be identified through the visual context. (For instance, Holbein's allegorical portraits of Henry VIII, considered hereinafter, have the king as the target and God's direct investiture as a source, suggested by the religious context.) When the maker of an allegorical portrait wants its metaphorical sense to be clear beyond doubt, a verbal context may come into play. Sometimes, the verbal headline only reinforces the message of the image itself, especially when this is already clear in itself (cf. the allegorical portrait discussed at the end of this section). But the headline often anchors the meaning of the pictorial metaphor it is linked to in order to avoid possible misinterpretations.

The allegorical portraits discussed in the following pages are those of Henry VIII, appearing respectively on the front page of the Coverdale Bible of 1535, on the front page of Cromwell's Great Bible of 1539, and in both the 1570 and the 1576 editions of John Foxe's Acts and Monuments. All these images function as pictorial metaphors aimed at shaping and assessing the king's supremacy over the Pope.

The Coverdale Bible was the first complete print translation of the Bible into modern English, commissioned by Thomas Cromwell under the king's auspices, compiled by Myles Coverdale, and published in 1535. Its front page is occupied with an emblematic woodcut designed by Holbein, where King Henry VIII is represented in the act of handing the Bible to the bishops with the theological and political aim of demonstrating his own ultimate authority. The first pictorial assertion

of the *Godly King* states the king's direct line to God. This powerful message is communicated by the means of three images, namely, through the lack of a Pope, through the Tetragrammaton at the top of the page, and, on the right side, through the image of Christ handing the keys not just to St. Peter, as the Catholic Church maintained, but to all the disciples. Roy Strong has noted that "on the Bible frontispiece Holbein creates an image which was to be a definitive one for the Tudor and Stuart Kings. […] a variant iconographically of the classic renaissance emblematic device *Ex utroque Caesar*, the emperor bearing the sword and book, allusions to the duality of his triumphs in peace as well as war" (Strong 1967).

This woodcut has to be compared with the image that clarifies the political-theological purposes surrounding the adoption of the so-called Great Bible, the first authorized and approved version of the Bible, compiled by Myles Coverdale (working under commission of Cromwell). Peter C. Herman, paraphrasing John N. King, emphatically asserts that "the language of universals masks the inculcation of political values through his analysis of the reciprocities between religion and politics." Transferring to Henry VIII images and symbols previously used to describe the Pope, the courtly artist made the first steps toward the planned construction of the monarch as a *cult figure* (Herman 1993, 8).

Given the aims of this chapter, the relevant aspect is that the Great Bible, as it became known due to its large size, was issued to meet a decree that each church should make available in some convenient place the largest copy of the whole Bible where all the parishioners could have access to it and read it at their will.[28] This injunction clearly unveils that the inaugural image representing King Henry VIII was destined to assert the way Renaissance English people should know and conceive their sovereign.

Tatiana String has aptly emphasized that the title page illustration of the Great Bible functioned as a key instrument in conveying a fundamental political message, namely, that papal authority over the church in England had been replaced by Henry VIII's Royal Supremacy (String 1996, 2008). At the top of the image, instead of the enigmatic Tetragrammaton, incumbent in the previous representation of the Coverdale Bible, there is now a kind of meaningful triptych. At the top left, the Church and Cranmer are clearly identified; at the top right Cromwell stands in his blank coat of arms; at the center Henry VIII is depicted with the Word of God in each hand. As King has noted, "the propagandistic title page of the Great Bible contains a sophisticated variation of Holbein's original portrayal of Henry VIII for the Coverdale Bible." It "symbolizes royal supremacy over church and state by depicting a graded hierarchy in which the king replaces the pope as the temporal

[28] Tatiana C. String has elaborated an interesting and exhaustive analysis on the strategic goals and commercial success of the Great Bible, from the junction on September 5, 1538 to the ordinance on 6 May 1541, passing through the license granted from Henry VIII's Privy Council to the merchant Anthony Marler (permitting him to sell *the bibles of the great volume*) and Anthony's Marler petition for a proclamation that every church not yet provided with a Bible shall provide one according to the King's former injunction (String 1996).

intermediary between heaven and earth" (King 1993, 80). Even the transmission of God's word is conceived as an exclusive royal prerogative, and it lays on the ground of the renewal of the Church, a theological justification for the Reformation. In this perspective, recalling the clear association of Henry VIII to the figure of Moses, the image inscribes the underlying political strategy in a much higher, providential plan.[29]

Both of these portraits can be further confronted with the woodcut that pictorially clarifies Foxe's apocalyptic view of English history and English sovereignty. Obviously, this was not a case if the image was inserted just after Foxe's account of the events that justified the adoption of the 1534 Act of Succession. Elizabeth Hageman has suggested that the woodcut "is an important visual representation of a principal theme of Foxe's History, for it presents the reformist belief in the moral power of the true English church over the papal Antichrist" (Hageman 1979, 36). Here, Henry VIII is represented as the king enthroned, holding the sword and the Book in his hands, in the act of stomping Pope Clement VII. All around the king, there are several spectators: Cromwell and Cranmer, a community of confident Protestant, and *the lamentable weeping and howling of all the religious route for the fall of their god the Pope*, as it is clarified by the means of an additional gloss that constitutes a whole with the motto over the picture *The Pope suppressed by King Henry VIII*.

The prominent role assigned to the King and to the Pope brings us to conclude that the woodcut is a clear and strong example of propagandistic imagery used to represent and to persuade, to demonstrate and to establish, and to show and to convince. In this perspective, in accordance with Hageman's remark, we can interpret the same woodcut as a Renaissance modification of the typical medieval presentation scene, where an author or a translator is offering his book to a patron (Hageman 1979).

These examples clearly show that in Renaissance England the perceptible meaning associated with signs and figures was used as a potent device to mark political innovations as well as a legitimizing legal discourse (Woolf 1991). In a wider perspective, they highlight the central role assigned to images and to visual metaphors to shape and inform a clear understanding of an identified legal tradition.

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[29] J. N. King (1993, 82) remarked that "Moses' combined role as both leader of the Chosen People and recipient of the Ten Commandments furnishes a precedent for Henry VIII's reputed deliverance of England out of bondage in papal Egypt and for his authorization of the vernacular Bible."

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Chapter 5
Visual Common Sense

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Abstract Pictures can tell us a lot, but not as much as we tend to think they do. A particular common sense attitude toward pictures, *naïve realism*, tends to make people overconfident in their interpretations of visual evidence and less receptive to alternative viewpoints, as well as to entrench the effects of other, first-order biases. Borrowing from anthropologist Clifford Geertz's classic analysis of common sense, I begin by describing naïve realism about pictures as the exemplar of *visual* common sense, and I offer an example of it in judicial decision making. I then explain its psychological bases and its various implications for legal judgment. First, it is a special instance of naïve realism generally, a fundamental and familiar phenomenon in cognitive and social psychology. Second, the claim that naïve realism about pictures results from inattention to context and subjectivity, yielding a sense of assurance that our understandings are correct and that alternatives needn't be taken as seriously, is congruent with the causes and effects of *overconfidence* generally. Third, the literature on *processing fluency* provides further support for the claim that seeing visual evidence would tend to generate overconfidence in the beliefs and judgments associated with that evidence, especially for naïve realists. I conclude by arguing that even in the age of Photoshop and YouTube, when people ought to be increasingly sophisticated about their visual culture, naïve realism about pictures remains a common and psychologically powerful default, and therefore of great significance for legal decision making.

5.1 Naïve Realism About Pictures as Visual Common Sense

Pictures can tell us a lot – but not as much as we tend to think they do. This pervasive metacognitive error and some of its consequences for legal decision making are my focus in this chapter. I claim that a particular common sense attitude toward

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pictures, *naïve realism*, tends to make people overconfident in their interpretations of visual evidence and less receptive to alternative viewpoints. It can also entrench the effects of other, first-order judgmental biases, as well as create biases of its own. The causes and consequences of this central feature of visual common sense ought, therefore, to be of interest to anyone concerned with the role of visual and multimedia displays in the law.

By "naïve realism" I mean people's tendency to identify a picture that looks like ordinarily observable reality[1] with its contents – to look through the visual representation to the reality it depicts. Naïve realists are inclined to believe that descriptive pictures mean just what they think they see in them. To think about pictures this way, however, is to ignore how pictures and their meanings are *framed*: by the physical borders of the picture or screen, which may exclude things viewers would deem relevant to the judgment task; by the underlying technology, which both creates and constrains what can be seen; by words and other pictures that provide context; and perhaps most importantly, by the prior knowledge and expectations that viewers themselves bring to the viewing (Feigenson and Spiesel 2009).

Because naïve realism tells people that reality is just out there to be seen and known and that pictures give that reality to them, it tends to keep them from recognizing that (most) pictures can plausibly mean different things to different people – that viewers who bring different preconceptions to the viewing may reasonably construe the picture in different ways. So the force of naïve realism, like appeals to common sense generally, tends to be a conversation-stopper. It ends discussion on the ground that the picture "speaks for itself." This approach to visual evidence, however, neither enhances the accuracy of legal judgments nor comports with ideals of how those judgments should be reached.

I begin, borrowing from anthropology, by describing naïve realism about pictures as the exemplar of visual common sense, and I offer an example of it in judicial decision making. I then explain its psychological basis and its various implications for legal judgment. I conclude by explaining why naïve realism about pictures remains a concern for the legal system even in the digital age, when people might be presumed to be less naïve about pictures than they used to be.

To understand what visual common sense might be, it helps to have some idea of what is meant by common sense more generally. For guidance, I turn to anthropologist Clifford Geertz's classic essay, "Common Sense as a Cultural System" (Geertz 1983).

Geertz describes what he terms the "stylistic features" of common sense. It is, first of all, *natural*: Things known to common sense have the aspect of "of-courseness." Common sense is also *thin*: Whatever there is to know is right there on the surface.

[1] Thus, pictures that don't look to laypeople like ordinarily observable reality, such as many sorts of forensic scientific images, are unlikely candidates for naïve realism because they can't be as readily incorporated into a useful internal representation of relevant reality. On the other hand, to the extent that these kinds of "expert images" (Dumit 2004) *do* resemble what laypeople think of as reality, they may appeal to naïve habits of viewing and comprehension, as the example of fMRIs indicates (Feigenson 2009).

Relatedly, common sense is *accessible*: Anyone with a sound mind and open eyes can see and understand. And it is *practical*: Attributing common sense to a judgment or a person reflects a normative evaluation that the judgment or person is wise in an everyday kind of way – pragmatic, but unexceptionally so. Crucially, "it is an inherent characteristic of common-sense thought … to affirm that its tenets are *immediate deliverances of experience*, not deliberated reflections upon it…. Religion rests its case on revelation, science on method, ideology on moral passion; but common sense rests its on the assertion that it is not a case at all, just life in a nutshell. *The world is its authority*" (Geertz 1983, 75) (emphasis added).

All of these features of common sense combine to produce great confidence in the beliefs and judgments it yields. Because common sense beliefs are justified by the way the world is, appeals to common sense tend to cut off debate: "There's nothing more to say." Yet as the diversity of beliefs that different cultures take as common-sensical shows, "[c]ommon sense is not what the mind cleared of cant spontaneously apprehends; it is what the mind filled with presuppositions … concludes" (Id, 84). By locating the source of belief in the world out there, common sense resolutely fails to notice how belief is shaped by individual psychology and shared culture.

Geertz's conception of common sense maps quite nicely onto visual common sense as exemplified by naïve realism. First, for naïve realists, the judgments about reality to be derived from seeing a photo or video come naturally. Believing in the truthfulness of our perceptions is intuitive. Our brains process direct sensory inputs more quickly than they do the kinds of language-mediated thoughts that lead to reflection, critique, and suspicion. At the same time, intuition, as cognitive psychologists Daniel Kahneman and Shane Frederick have observed, is like perception: fast, effortless, and automatic (Kahneman and Frederick 2002). Intuitive judgment just "feels right." And that's how the naïve realist tends to take up the meaning of a picture. Seeing is believing; to engage in further interpretive labor would be superfluous.

Visual knowledge is also thin. The meaning of a picture is just what it obviously depicts. Neither context nor verbal gloss can materially change anything, because the picture "speaks for itself." There is in naïve realism a kind of reflexive movement in which the intuitive understandings prompted by the picture are *projected onto* to the picture; what the picture means seems to come from the picture, so that what one thinks one knows appears as a simple "read-off" from depicted reality, rather than being derived as well from other sources (such as the context or the viewer's prior knowledge and expectations about the depicted reality).[2] And the ease with which viewers seem to get the point makes them less willing to look into things more deeply.

For the naïve realist, visual knowledge is also fully accessible, at least to anyone who can see – and anyone who can, as social psychologists remind us, should see things the same way. Expertise is not required, or even helpful. Finally, it's also

[2] This is an example of the *aboutness principle* (Higgins 1998), discussed below.

eminently practical to rely on visual evidence. If seeing is believing, having something to look at offers a reliable ground for belief, so visual evidence is the best sort of evidence there is.

Geertz's portrait of common sense not only helps us to understand why naïve realism about pictures is a characteristic of visual common sense but also reveals what's most problematic about it: the failure to notice or to pay sufficient attention to the ways in which the framing of pictures, including context and the presuppositions that people bring to the viewing, shape their very perceptions as well as the inferences they draw from those perceptions. Precisely when common sense tells people that they are being the most "bottom-up," relying on visual access to what's out there ("what the mind cleared of cant spontaneously apprehends"), they are actually being significantly "top-down" ("what the mind filled with presuppositions concludes").

5.2 Visual Common Sense: A Case Study[3]

Justice Antonin Scalia's opinion for the majority of the US Supreme Court in *Scott v. Harris* (2007) perfectly illustrates a naïvely realistic approach to visual evidence. In a nutshell, the case is as follows. Late one night in 2001, Victor Harris led Georgia county police on a high speed car chase. The chase ended when one of the pursuing officers intentionally rammed Harris's car off the road. The car careened down an embankment and crashed, leaving Harris a quadriplegic. Harris sued the officers and the county in federal court, alleging that the police had violated his constitutional rights under the Fourth Amendment by using excessive force to end the chase. The legal issue was whether the force that the police used was reasonable under the circumstances; or, to put it another way, whether Harris's driving posed enough of a threat to public safety to justify the officers' use of deadly force.

Whenever a question like the reasonableness of conduct is genuinely disputed, it's up to a jury to decide the case. Both the trial and court of appeals judges agreed that a jury should consider all of the evidence to decide if the police had acted reasonably. But eight of the nine Justices of the Supreme Court disagreed. They ruled that there would be no trial because any reasonable person would have to conclude that Harris's driving posed such a great risk to public safety that the police were justified in using deadly force.

Why did the Supreme Court think that it could decide for itself a question ordinarily left for local jurors? Because they had seen the chase – as recorded by video cameras mounted on the two pursuing police cruisers. It didn't matter that Victor Harris and the police testified to different accounts of the events; the Justices had the tape. As Justice Stephen Breyer asked Harris's lawyer during oral argument: "But suppose I look at the tape and I end up with Chico Marx's old question …: Who do you believe, me or your own eyes?" Justice Breyer believed his own eyes. Indeed, so

[3] This section is adapted from Feigenson and Spiesel (2009).

conclusive did the video evidence seem to the Court that it took the unprecedented step of posting a version of the videos on its own web site. Justice Scalia, responding to dissenting Justice Stevens' different interpretation of the facts, wrote for the majority, "We are happy to allow the videotape to speak for itself."

Does the tape "speak for itself"? In deciding that no reasonable person could draw any different conclusion from watching the tape than the one they themselves reached – that Victor Harris's driving posed such a risk to public safety as to warrant the use of deadly force to end the chase – the majority of the Court reduced the crucial evaluative judgment to a simple perceptual one: what "we see" on the tape. Justice Scalia wrote that "what we see on the video … resembles a Hollywood-style car chase of the most frightening sort" and that "we see [Harris's] vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast" (*Scott v. Harris* 2007, 379–80).

But do "we" really "see" all of this? Whether the cars' speeds are "shocking" depends as much on the viewer as it does on what the video shows. During closing argument, Justice Scalia remarked that Harris "created the scariest chase I ever saw since 'The French Connection.'" This reference is especially telling. There are of course many differences between the Hollywood chase, with its exciting sideswipes and near misses, and the actual visual evidence in the case, which appears to show that Harris, although speeding, drove his car in a very controlled fashion, signaling his turns and neither colliding with anything nor even causing any other vehicle on the highway to swerve to avoid him. And the crosscutting in the movie reminds us that Gene Hackman's character was chasing a criminal member of a heroin ring. How might these cultural frames have influenced what Justice Scalia thought he saw and how he judged it? Justice Stevens, watching the same video but informed by different personal experiences, concluded that it was "hardly the stuff of Hollywood" in terms of the danger Harris posed to the public.

In short, *Scott v. Harris* illustrates the problem of naïve realism in response to visual evidence that looks like ordinarily observable reality. Justice Scalia seemed to believe that his judgment about the dangerousness of Harris' driving was a simple read-off from reality as the videotape depicted it: "The videotape speaks for itself." Conversation closed. Others who watched the same material, however, including four judges in the courts below and Justice Stevens, interpreted the tape differently. The majority's naïvely realist stance, the assumption that the video unproblematically and unequivocally showed "the real," dismissed these alternative interpretations as unreasonable, and therefore, not worth considering.

5.3 The Psychology of Naïve Realism

So far I have relied on one anthropologist's wisdom and one legal case to suggest that naïve realism about pictures hampers good legal thinking because it tends to blind people to the ways in which context and presupposition shape their beliefs about what they see in those pictures and to discourage them from considering

alternative points of view. I would now like to marshal the cognitive and social psychological research that supports this conception of naïve realism about pictures and its consequences.

5.3.1 Naïve Realism in General

Naïve realism describes people's basic tendency to experience subjective representations of the world as objective copies of it. "[T]he represented world 'in here' is experienced phenomenologically as veridically mirroring what is 'out there'" (Gilovich and Griffin 2010, 574). "[T]he act of [mental] representation is transparent to the actor … [; people] tend to look *through* their lenses rather than *at* them" (Id, 573). That is to say, people think that they see things as they really are.

As a consequence, naïve realists "fail to acknowledge, consider, or otherwise take into account their mind's role in the construction of their subjective experience" (Gilbert 1998, 125). The result is "the individual's unshakable conviction that he or she is somehow privy to an invariant, knowable, objective reality – a reality that others will also perceive faithfully, provided that they are reasonable and rational, a reality that others are apt to misperceive only to the extent that they (in contrast to oneself) view the world through a prism of self-interest, ideological bias, or personal perversity" (Robinson et al. 1995, 405).

Naïve realism has been described as a "fundamental and universal" tendency in human thought (Ross et al. 2010, 22). Unsurprisingly, then, it is a familiar concept in many fields, identified as an epistemological stance in philosophy, politics, and education, to name a few. Often it carries a pejorative taint (e.g., as "level zero" in adolescent cognitive development; Boyes and Chandler 1992). Yet, naïve realism expresses a very basic neurobiological response to the existential problem of being in the world. It reflects the fundamental principle of *brain-world consonance* (Wexler 2006): By importing our presuppositions into what we take to be our perceptions and what we recognize as our beliefs, we sustain the comforting sense that our knowledge of the world is in agreement with the world itself.[4] Thus, naïve realism should be understood as a natural and powerful mindset, a deep-seated, biologically based default sense that our knowledge of the world corresponds to the world itself.

[4] Our brains develop through infancy, childhood, and early adulthood to adapt to our interpersonal and cultural environments. Then, as adults with reduced neuroplasticity but greater conceptual and physical abilities, we try to make our worlds adapt to what our brains have come to expect. This is what psychiatrist and neuroscientist Bruce Wexler describes as brain-world consonance in the ontogenetic sense. Neuroscientist Leif Finkel (1992) has eloquently captured the discrepancy between the mind-world agreement that our consciousness seems spontaneously to yield and the underlying neurophysiology of perception: "The world, to a large extent, is a vision of our own creation. We inhabit a mixed realm of sensation and interpretation, and the boundary between them is never openly revealed to us. And amid this tenuous situation, our cortex makes up little stories about the world, and softly hums them to us to keep us from getting scared at night" (404).

5.3.2 *Naïve Realism About Pictures*

Naïve realism about pictures concretizes the lens metaphor (Gilovich and Griffin 2010) to apply to our perceptions of external visual representations (i.e., pictures) and the cognitions we derive from them. People tend to think that what they think they know about the reality a picture depicts derives more or less exclusively from the picture. That is, their understanding is just a read-off from objective reality as shown in the picture. This exemplifies the *aboutness* principle (Higgins 1998): "When people perceive a [cognitive or emotional] response … they represent it as being *about* something, and this thing that the response is about is inferred to be the *source* of the response" (Higgins 1998, 174). The most common way in which aboutness leads to judgmental error is by leading people to think that what a response to the world is about is *the* source of the response, when in fact there are likely to be *multiple* sources. This perfectly characterizes naïve realists' response to pictures – they attribute their understanding of relevant reality solely to the picture and not also to the context of the picture and their viewing of it and to their own presuppositions about the depicted reality.[5]

5.3.3 *Naïve Realism About Pictures and Overconfidence*

The basic model of naïve realism about pictures that I am proposing is congruent with at least some of the causes and effects of *overconfidence*. I summarize the findings and concepts in this area, and in particular, the relationship between overconfidence and *processing fluency*.

5.3.3.1 Confidence in General

Subjective confidence in the correctness of one's memories, beliefs, or judgment is an example of metacognition – that is, it involves second-order thoughts, or thoughts about thoughts or thought processes (Briñol et al. 2010). Confidence is also a feeling (Clore and Parrott 1994; cf. "feeling of knowing" (e.g., Koriat 1993)) that is generally experienced as positive (Lazarus 1991).

Having confidence in one's beliefs and judgments can be adaptive. First, uncertainty (Kagan 1972) and cognitive dissonance (e.g., Festinger 1957) are usually thought to be aversive states, which people would want to reduce or avoid (Blanton et al. 2001; Trout 2002). The feeling of confidence is a somatic marker that uncertainty and self-doubt about the matter at hand have been avoided, and insofar as confidence

[5] Naïve realism about pictures is not about *mistaking* the picture for direct access to reality in the sense of being fooled into thinking that one is really present at the depicted events, as in the mythologized report of early cinema goers hurrying from the theater to avoid the approach of the train on the screen (Gunning 1995). Naïve realism is about believing that one's understanding of reality is objectively correct, to the exclusion of all others, because one's understanding simply copies that reality.

helps to maintain closure around a given mental state, it also helps to ward off further dissonance and uncertainty. Second, since people are generally motivated to hold true beliefs (see, e.g., Petty and Wegener 1999), confidence again functions as both a desired state and a satisfying cue signaling that one's beliefs are correct (whether they are or not). Third, because society generally encourages people to hold and express their beliefs with confidence and to act with confidence (O'Connor 1989), the confident person gains approbation and the positive sense of being and acting in conformity with social norms. Fourth, confidence can motivate people to make decisions and undertake tasks that they otherwise might avoid, increasing the chance of positive outcomes (Baumeister 1998).[6] In the legal context, increased confidence in judgment can help jurors deal with the considerable stress of deciding the fate of another person (Feigenson 2010).

5.3.3.2 Overconfidence

But there can be too much of a good thing. Confidence in one's judgments and beliefs can become overconfidence. Many studies show that people tend to be overconfident about the correctness of their answers to questions testing their memory and general knowledge (for reviews, see Alba and Hutchinson 2000; Hoffrage 2004; O'Connor 1989), and the more difficult or less familiar the question or task, the greater the overconfidence (Alba and Hutchinson 2000; Hoffrage 2004; O'Connor 1989). More specifically, studies show that people tend to overestimate their abilities, among other skills particularly relevant to the law, to detect changes in the visual field (*change blindness blindness*; Scholl et al. 2004), to have predicted past events (*hindsight bias*; Fischhoff 1975) and to determine whether an eyewitness is telling the truth (e.g., Kassin and Fong 1999).

People's overconfidence about their beliefs poses a threat to both the judgmental accuracy and good process ideals of legal decision making. The more firmly that people hold onto inaccurate beliefs (Alba and Hutchinson 2000), the more likely they are to reach incorrect decisions. And the more overconfident they are, the more *closed minded* they become (Kruglanski 2004) – the less willing they are to seek out and properly consider differing points of view.[7]

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[6] The phrase *positive illusions*, for instance, describes people's unrealistic but sometimes beneficial optimism about potential health and other outcomes (Taylor and Brown 1988).

[7] Kruglanski (2004) offers a helpful framework for understanding the relationship between overconfidence and closed mindedness or *cognitive closure*. He explains that people are generally subject to competing cognitive motivations, the *need for closure* and the *need to avoid closure*. Forming beliefs and reaching judgments always involve a trade-off between, on the one hand, keeping an open mind, seeking out additional information, and entertaining other points of view (i.e., avoiding closure) and, on the other, stopping the information search, ceasing to consider alternative viewpoints, and concluding the cognitive task (i.e., seeking closure). Both are essential to knowledge formation; each presents benefits and risks. Being overly confident leads to closed mindedness by reducing the perceived costs of premature closure, which include the possibility of being wrong ("fear of invalidity") and the potential for conflict with relevant decision making norms (such as the standard jury instruction to keep an open mind).

Crucially, the disregard of alternative points of view that characterizes closed mindedness can be both a cause and an effect of overconfidence. Paying insufficient attention to potentially contrary evidence can lead to overconfidence (e.g., Baron 1994; Koriat et al. 1980). "People are often overconfident in their judgments because they focus exclusively on a preferred hypothesis and do not devote enough resources to considering other possibilities that might instead be true" (Koehler 1994, 461). At the same time, "[t]he 'settled' subjective feeling of understanding [an explanation] that is associated with overconfidence … may be the subjective state that prompts … [the] decision that we can stop explaining or considering alternative explanations" (Trout 2002). In sum, the relationship between overconfidence and the discounting or ignoring of competing evidence and argument is reciprocal. "[O]ne reason for inappropriately high confidence is failure to think of reasons why one might be wrong. Such inappropriate confidence could, in turn, cause a person to stop searching for alternative possibilities, leading to insufficient thinking" (Baron 1994, 223). The concept of *groupthink* (Janis 1982) famously describes, in the context of small group decision making, this same reciprocal movement, in which the failure to seek out alternative hypotheses and counterarguments is both a cause and effect of overconfidence.[8]

There are both motivational and cognitive accounts for this effect of (over) confidence on information search and interpretation. Insofar as being confident is a positive affective state, people would want to maintain that feeling and be less inclined to seek out information that might change it (Briñol et al. 2007).[9] Research also shows that people are more confident about making an evaluation or decision the *less* they know about it (see O'Connor 1989). Less knowledgeable decision makers can be insensitive to gaps in information that ought to be relevant to their decisions (Sanbonmatsu et al. 1992). And consumer research studies show that "as confidence increases, a consumer's tendency to take in information declines" (Levin et al. 1988, citing research of Howard and Sheth 1969).

The causes and effects of overconfidence are thus congruent with those of naïve realism, and specifically, naïve realism about pictures. Naïve viewers' inattention to context and subjectivity yields the sense that their understanding of the

[8] The extensive research on *confirmation bias*, the "selective search, recollection, or assimilation of information that lends spurious support to a hypothesis under consideration" (Arkes 1991, 489; see Lord et al. 1979), also supports this reciprocal relationship. Arkes (1991) observes that "a primary reason for unwarranted confidence is that subjects can generate supporting reasons for their decisions much more readily than contradictory ones" (Id, 489, discussing Koriat et al. 1980). So the biased generation of arguments is reasoned to be a cause of overconfidence in a hypothesis. But since the hypothesis is posited to be "under consideration" as part of an ongoing process, it seems that (increasing) confidence in the hypothesis may cause as well as result from bias in the assimilation of further information.

[9] "[C]onfident people engag[e] in less thought than people lacking in confidence. One reason for this is that when people feel confident in their current views, there is little need to seek additional information that might lead to change" (Briñol et al. 2010, 23).

picture as a representation of reality is objectively correct and, therefore, that they needn't seriously consider other points of view – as we have seen in the *Scott* case.

5.3.3.3 Processing Fluency, Naïve Realism, and Overconfidence

Further support for the notion that naïvely realistic viewers of pictures tend to be overconfident in the inferences they draw from what they see comes from research on *processing fluency*. This is the label for a number of related phenomena (for a review, see Oppenheimer 2008) that can be summed up as follows: The easier it is for people to perceive or otherwise mentally process something, the more they tend to like it (Winkielman et al. 2003) – and the more likely they are to believe that it is true (Reber and Schwarz 1999).

Why do people tend to like stimuli that are easier to process? Psychologist Piotr Winkielman and his colleagues propose the *hedonic fluency model*: "[F]luency indicates good progress toward stimulus recognition, coherent cognitive organization, and the availability of knowledge structures to deal with the current situations[, and] such qualities tend to be associated with positive affect" (Winkielman et al. 2003, 82–83). Since people like positive feelings, fluency produces liking. People then unconsciously *misattribute* the positive affect caused by fluent processing to the target of their percept or judgment, producing a more positive evaluation of the target – that is, they like it more. This misattribution occurs "[b]ecause people have only one window on their subjective experiences, [so] they find it difficult to distinguish experiences elicited by incidental variables … from experiences elicited by the focal object of interest[.] In most cases, they assume that their experience is 'about' whatever is in the focus of their attention" (Cho et al. 2008, 272).[10] In short, people use their sense of fluency in perceiving and/or understanding a stimulus as a cue to how much they like it.

Moreover, "statements that are easier to process are experienced as familiar, thus leading participants to feel that they have heard or seen this before, suggesting that it is probably true" (Reber and Schwarz 1999, 342) (cf. the *illusion of truth* effect; e.g., Begg et al. 1992). Other studies have found that the easier it is for people to retrieve items of information from memory in response to a question, the more confident they are that their answers are correct (Kelley and Lindsay 1993; for a review, see Bjork 1999). That is, people mistake the accessibility of information for its truthfulness. Fluency also influences truth judgments through other paths. Novel aphorisms are judged more accurate when they rhyme (e.g., "what sobriety conceals, alcohol reveals") than when they do not ("what sobriety conceals, alcohol unmasks") (McGlone and Tofighbakhsh 2000). Thus, Keats' assertion that "beauty

[10] This, of course, is the *aboutness principle* (Higgins 1998), discussed above.

is truth [and] truth beauty" may well be an expression of processing fluency (Winkielman et al. 2003).

The processing fluency research thus indicates that simply seeing visual evidence, whether naïvely or not, may prompt feelings of ease of processing that get unconsciously misattributed to the judgment target. If people find it easier to understand a pictorial as opposed to a verbal description of relevant reality, they would be more inclined to like the visual depiction and to believe that it truly represents reality. Naïve viewers, though, would be especially likely to hold those beliefs with confidence. "[H]ighly fluent judgments [are] made with more confidence than judgments that are made slowly and with subjective difficulty" (Gill et al. 1998, 1102). And what leads people to make those judgments more fluently, and hence more confidently, is that people form richer internal representations of the judgment target – that is to say, representations that are better integrated and more information-rich (Gill et al. 1998). Visual evidence enables all viewers to form more information-rich ideas of reality. But because naïve realists tend to think that pictures that represent reality simply give them that reality, their internal representation of the depicted event strikes them as the only plausible one (because it simply reflects what's real). Their thoughts about the depicted reality should therefore be better integrated, more coherent; they sense fewer loose ends or inconsistencies because they imagine themselves simply to have "mentally recorded" what really happened, and tend to ignore alternative points of view that might ambiguate their internal representation. Consequently, naïve realists would be more inclined to believe in not just the truth but also the judgmental adequacy of what they derive from visual evidence, and thus to hold their beliefs about the depicted reality with greater confidence.

In sum, naïve realists tend to prefer "epistemic stability, clarity, order, and uniformity" (Jost et al. 2003, 348), which inclines them toward closed mindedness. And this closed mindedness can be derived from the basic fact that naïve realists understand their own interpretation of reality as the simple, objective truth. So naïve realists tend to assume that their own views of things are shared by others (the *false consensus effect*; Ross et al. 1977; see also Ross et al. 2010); accordingly, they tend to denigrate those who don't share their views as biased or abnormal and "fail to give assessments and judgments by [their] peers as much weight as [their] own" (Ross et al. 2010, 23). All of these features of naïve realism apply to naïve realism about pictures.

5.3.4 Naïve Realism About Pictures and Other Visual Biases

The overconfidence to which naïve realism, as a metacognitive or second-order phenomenon, leads would tend to entrench decision makers in whatever distortions of judgment that any first-order biases produce. This would be especially true where the psychological processes behind the first-order biases resemble the one that characterizes naïve realism itself. And while no one has yet experimentally tested naïve

realism about pictures,[11] its underlying logic, or something very much like it, does seem to be present in a number of other visual biases. The common theme in these biases is that seeing pictures tends to reduce the subjective uncertainty that a greater awareness of the limits of one's own knowledge base or interpretive skills ought to yield, prompting overconfidence in one's perceptions and judgments.

The *illusion of explanatory depth* (IOED) describes people's belief that they understand the world in far greater depth and detail than they actually do (Keil et al. 2004; Rozenblit and Keil 2002). When confronted with the task of explaining complex causal phenomena or devices (e.g., how helicopters fly or how a flush toilet works), people claim relatively high levels of understanding, but when subsequently tested on their knowledge, their self-rated understanding diminishes significantly (Keil et al. 2004). Psychologist Frank Keil and his colleagues reason that people get a "flash of insight" about the general, skeletal causal patterns that plausibly govern a class of phenomena, but mistake them for a more detailed, mechanistic understanding of the particular phenomenon in question (Keil et al. 2004, 228–29).

There are several sources of this overconfidence about people's understanding of complex devices, but the strongest predictor of the IOED turns out to be *the proportion of visible to hidden parts* during the normal operation of the device or process. "It appears that having visual access to mechanism information increases the sense of understanding, often falsely" (Keil et al. 2004, 244–45). That is, the more of a device and its operations that people can see, the better they think that they understand how it works – even when they don't actually understand it very well.

The overconfidence reflected in the illusion of explanatory depth parallels the overconfidence prompted by naïve realism. In both instances, people think that visual information tells them more than it actually does – that is to say, they think that seeing enables them to form an internal representation that is more adequate to the task (in IOED studies, giving explanations; in law, evaluating disputed facts and attributing legal responsibility) than they think it is.

The *visual hindsight bias* is people's tendency to incorporate after-acquired information into their judgments of what others, lacking that information, should be able to see in a picture, and thus to overestimate what those others can perceive. In one study, observers who knew the identity of a degraded visual target (e.g., a famous movie actor or politician) overestimated the ability of observers who lacked

[11] The construct that comes closest is *magic window* realism, "the central, but not the sole, component of perceived reality" in the media effects literature (Potter 1988, 27). Magic window "is concerned with the degree to which a viewer believes television content is an unaltered, accurate representation of actual life" (Id, 26). People who score high on the magic window dimension think that television "provides them with a view of how things really are. They believe that television news shows are accurate, complete, unbiased, and objective pictures of 'the way it is'" (Potter 1986, 162). To the extent that media effects researchers employ magic window and other dimensions of perceived reality primarily to measure people's ability to distinguish factual from dramatic or fictional programming, however, their measure does not get at quite the same thing as naïve realism about pictures as presented in this chapter, which concerns the extent to which people think that various factual conclusions and evaluative judgments can be uncontroversially read off from an indisputably factual evidentiary picture.

that knowledge to identify the target under the same degraded conditions (Harley et al. 2004; see also Harley 2007). Like the hindsight bias generally, the visual hindsight bias thus reflects a misjudgment about how uncertain our judgments are: in the case of the hindsight bias, how uncertain our predictions are ("I knew it all along"); in the case of the visual hindsight bias, how uncertain our visual perceptions and judgments are ("He should have seen it all along").

Naïve realists, similarly, tend to think that pictures tell them more than they do. Just as the visual hindsight bias leads people to read into the picture after-acquired knowledge (not available to viewers at an earlier point in time) and not be aware that they are doing so, naïve realism leads people to read into the picture their own prior knowledge (not necessarily shared by other viewers) and not be aware that they are doing so. Thus, just as the visual hindsight bias reflects a misjudgment about how uncertain visual judgments are, naïve realism reflects a misjudgment about how subjective they are.[12]

More specific visual cognitive biases may also reflect a similar underlying dynamic. Consider, for instance, the effect of using images of brain scans to illustrate explanations of neuroscientific research (McCabe and Castel 2008). When an article about neuroscientific research is illustrated by brain images, readers judge it to be better reasoned than when it is accompanied by an informationally equivalent bar graph or no illustration at all. The authors of the study speculated that "[b]rain images may be more persuasive than other representations of brain activity because they provide a tangible physical explanation for cognitive processes that is easily interpreted as such. This physical evidence may appeal to people's intuitive reductionist approach to understanding the mind as an extension of the brain" (Id, 349–50). That is, the brain scan appears to present as a read-off from external reality something intangible and quite obviously the product of human investigative effort and interpretation. Like naïve realism, it converts contestable judgment into effortless perception.[13]

5.3.5 *Judgmental Biases Attributable to Naïve Realism About Pictures*

In addition to engendering overconfidence and entrenching other visual biases, naïve realism about pictures may well create first-order judgmental biases of its own.

[12] Relatedly, psychologist Neal Roese and his colleagues (2006) found that showing mock jurors animations as opposed to diagrams of a vehicular accident case made them twice as susceptible to hindsight bias. The authors speculated: "Our research indicates that the clarity of computer animation can obscure the underlying uncertainty of accident reconstruction, creating a biased feeling of knowing" (308). That is, seeing the animation gave mock jurors a stronger impression that they knew how the accident occurred (as the IOED research would indicate), which made them more likely to believe that, from an *ex ante* perspective, it would occur (hindsight bias).

[13] More recently, however, Nick Schweitzer and colleagues found that showing mock jurors neuroimages did not affect their judgments in criminal cases (Schweitzer et al. 2011).

For instance, consider a multimedia slide show played for the jury in an arson-murder trial, in which a sequence of photos of the firemen at the burning building was synchronized to an audiotape of communications between the firemen and their command center (Feigenson and Spiesel 2009). A critical issue in the case was whether the command's delay in ordering those inside the building to evacuate when it became apparent that the roof was on fire and in danger of collapse contributed to the death of a fireman who was trapped in the building when the roof ultimately collapsed. Visually naïve jurors might think that because the slide show simply presented them with objective reality, anyone else would see and hear that reality the same way – *including the firefighters depicted in the photos*. But no one on the scene saw and heard exactly what the jurors did, because the multimedia show was assembled from photographs taken from different points of view, at particular intervals. And the pictures, even if correctly sequenced, could not possibly have been precisely synchronized to the audiotape because the photographs captured instants in time but remained on the screen for durations of up to half a minute. Therefore, the inference that the slide show invited naïve audiences to draw – that what the firefighters and their commanders were heard saying was said in response to what could be seen in the pictures that appeared when their words were heard – may well have been flawed, as might any judgments of responsibility that followed – for instance, that the commanders should have known that the roof was in danger of collapse from the moment when the fire on the roof was visible in the photos.[14]

It may be worth remarking that the judgmental bias of which visual evidence is generally thought to pose the greatest risk – its capacity to provoke emotional decision making (e.g., Bright and Goodman-Delahunty 2006; Douglas et al. 1997) – is probably only partly due to naïve realism. The emotions prompted by a graphic crime scene or autopsy photo or the dramatic video or animated depiction of a vehicular collision result from the realism of people's responses to pictures more so than their naïveté. People use the emotions prompted by such pictures as a cue to judgment to the extent that they believe that the pictures tell them something judgment-relevant about the real world. And shouldn't we be moved to tears or anger by presumptively accurate, compelling visual representations of, say, horrific injuries, even if we are not naïve about the nature of representation? In short, pictures that purport to depict ordinarily observable reality do, to the extent that they are authentic, depict that reality, and it is to that depicted reality that viewers respond, even if they are also aware that what the picture tells them about reality is shaped and limited by the means of representation.

Yet naïve viewers' inattention to the features of the visual representation, their belief that the picture is giving them reality as it was in itself and not as it is represented, also influences their emotional responses to visual evidence and how they

[14] The same inference may also have been prompted by the visual hindsight bias if jurors, knowing that the roof did soon collapse, reasoned that the commanders on the scene should have realized that it would, based on visual evidence that, viewed without the benefit of hindsight, was highly ambiguous.

use those emotions in deciding cases. According to the aboutness principle (Higgins 1998), naïve realists would tend to attribute *all* of their emotional responses to the reality the picture depicts, and in particular, to the most salient items in the depicted reality – usually, the legal judgment targets (e.g., the defendant or the victim). They would be less likely than more critical viewers to discount their emotional responses as partly attributable to the tools and techniques used to produce the picture or its formal features. Consequently, the emotions that naïve realists feel when they see photographic or video evidence should seem to them to be more relevant to their evaluations of the judgment targets and would therefore influence their judgments more strongly than they would if the decision makers were aware of the true sources of their emotional responses.

5.4 Why Naïve Realism About Pictures (Still) Matters

Despite all this, it might be thought that visual common sense in the form of naïve realism need not be a pressing concern for the law because not that many people today, in the age of Photoshop and YouTube, are still naïve about pictures. People may well be savvier than ever before about the possibilities of digital image construction and manipulation, and perhaps even about the effects of framing and context on pictorial meaning. Yet even in our relatively sophisticated visual culture, naïve realism about pictures remains a common and psychologically powerful default.

Indeed, the increasing mediation of communication and culture through visual representations – the fact that more people spend more time learning about reality through their uptake of digital images – may on the whole make people *more*, not less, susceptible to the pull of naïve realism. As people become more accustomed to seeing any given type of representation of reality, the fact of mediation becomes less and less remarkable, even noticeable, and any resistance to simply looking through the picture to the reality it depicts diminishes. That is, people habituate to popular modes of representation. Moreover, people internalize the meaning-making codes of standard forms of representation – as legal scholar Richard Sherwin puts it, "the camera is inside our heads" (Sherwin et al. 2006, 250) – and then, as discussed above, they attribute those meanings to *what* is depicted rather than to a combination of what and *how* it is depicted.[15] They still think that they're getting reality more or less directly, even as what they're getting and how they're getting it changes dramatically.

[15] Research shows, for instance, that people have assimilated standard film editing conventions to the point that they don't notice cuts (the *illusion of continuity*; Kraft 1986), believing that highly edited Hollywood productions present the depicted reality more or less directly – as long as the structure of the film sufficiently conforms to narrative conventions to allow them to fill in the blanks with their story knowledge (Miller 1990).

That people's prior knowledge of reality itself largely consists of recollections of representations, so that their reality judgments are always already about fitting new cultural products within an existing mental framework of older ones, does not diminish the role of naïve realism. The idea of realism may well be complicated by the fact that there are often no purely unmediated conceptions of reality to which newly encountered mediations can be compared. But this does not lessen the attraction of naïveté in response to newly encountered pictures or the ensuing overconfidence that one's own subjective reading of reality is objectively and therefore exclusively right.[16]

The ease and ubiquity of making and disseminating digital pictures – consider the hundreds of millions of videos on YouTube (Russakovskii 2008) and elsewhere and the over 100 *billion* photographs on Facebook alone (All Facebook 2011) – has also helped to build a popular expectation that there should be visual evidence for every event (cf. Benkler 2006). If there's no visual record, it didn't happen. This skeptical version of "seeing is believing" is, however, readily and even unconsciously converted into a credulous one: Once we've seen the picture, the fact of the matter has been established. That, too, reflects naïve realism.

These same popular habits of making pictures and using them to engage in culture-wide conversations ought to, and do, challenge visual naïveté. As people encounter multiple representations of the same event, and/or realize how easy it is to create variant representations, they should be disabused of the default assumption that their picture-based understandings are objective, sufficient, and not open to reasonable dispute (see Feigenson and Spiesel 2009). But cognitive defaults are difficult to overcome. The sheer number and unceasing variety of pictures available to everyone cumulatively reduces both the time and the attention that people can spare on any given one, leaving them less able and less willing to reflect critically on what they see and reinforcing their default setting of credulity in the face of new information, visual, or otherwise (Gilbert 1991). In addition, the motivations for thinking that one's ideas about reality are correct, and the difficulty of ever getting to the bottom of the often implicit beliefs that shape those ideas, suggest that the hold of naïve realism will in most instances remain tenacious, even among relatively sophisticated and self-conscious decision makers. So while changing media habits in the digital age may foster tension between naïveté and greater sophistication about pictorial meaning, naïveté seems to be alive and well – and, therefore, something that judges, lawyers, and jurors still need to confront.[17]

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[16] Indeed, postmodernist anxiety about the possibility of ever having any kind of access to the "really real" may even impel people toward the sense of security offered by the objectivism of naïve realism (cf. Sherwin et al. 2006).

[17] It might be thought that even if people start out as naïve realists about pictures, their naïveté and any ensuing overconfidence need not be a major concern for the law because that naïveté can be readily corrected. A detailed analysis of the prospects for *debiasing* jurors of naïve realism is beyond the scope of this chapter, so I can merely offer my belief that it appears possible in principle and, to some extent, in practice (see Feigenson and Spiesel 2009).

5.5 Conclusion

As visual and multimedia displays proliferate in law, it becomes increasingly important to appreciate how the audiences for those displays are likely to take them up and use them in presenting evidence, making arguments, and reaching judgments. I have argued that one way in which pictures are taken up is common-sensically – that is to say, naïvely – and that naïve realism about pictures has systematic, and largely negative, implications for legal judgment. This chapter merely introduces the subject; I hope that it will provide a helpful starting point for further inquiry.

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Chapter 6
The Photographic Image: Truth or Sign?

Ira Torresi

Abstract This chapter explores the way in which mechanically or digitally acquired images (photographs and video recordings) are used in the legal, administrative and journalistic practices in the UK, USA, New Zealand, Australia, Canada, Malta and Italy. In the criminal procedure systems analysed here, mechanically or digitally acquired images tend to be accepted as evidence more uncritically than verbal testimony – as something that is harder to manipulate than words and is less prone to bias or distortion since, according to a commonly held misperception, it is generated by a machine rather than a human being. Following the same principle, in the norms and practices involved in issuing personal documents, such images tend to be uncritically taken for granted as proof of identity. A similar presupposition of truth implicitly establishes an identity relation between news reports and the accompanying images, which are shown to present verbal descriptions as incontrovertibly true and accurate. The value of absolute truth implicitly attached to photographic or filmic images, however, contrasts with both semiotic theory and practical considerations. Possible origins and traces left by the stereotype of photographic truth in semiotic theory are discussed, and an argument is made to start considering mechanically or digitally acquired images as signs rather than mere analogue representations of reality.

A value of truth, or a truthful account of facts, persons and objects, is implicitly attached to photographic or filmed images in the legal, administrative and journalistic practices of several countries in the Western world. On the one hand, the use of photographs and video recordings is undoubtedly precious as evidence in legal proceedings, for personal identification procedures and to substantiate news reports. On the other hand, denying pictures and films the status of signs and considering them as mere simulacra of reality risks undermining their very validity and the

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validity of the systems of communication that rely on the stereotype of photographic truth. In the current understanding that one finds outside semiotic scholarly literature (and sometimes even there, see Sect. 6.3), pictures can only be absolutely true or absolutely false; unlike words, they cannot be used to argue. Thus, the risk of dismissing pictures as false without taking into account the messages they convey, or accepting as evidence pictures that may be true, but not relevant to the case in point, is a very real one, as will be shown through real-life examples pertaining to three spheres: criminal procedure, personal identification regulations and practices, and news reports. For the purposes of this chapter, photographs and video recordings will be treated as one category, i.e. mechanically or digitally acquired images.

6.1 Photographs as Evidence in Criminal Proceedings

Photographs and video recordings are admitted as evidence in several Western legal systems, although, perhaps surprisingly, the criteria for their admissibility change slightly from country to country. This is both a confirmation of the geographic reach of the attribution of a truth value to photographs and a first hint that this truth value is not as universal, absolute and immutable as one might be led to think. Due to space constraints, in this section I will limit my discussion to common law in general and, to provide a few specific examples, criminal law in Italy, and two countries where English is one of the official languages.

In common law in general, sketches and other pictorial representations produced by a person involved in a proceeding, as well as oral reports provided in previous proceedings or gestures, are considered to be 'hearsay statements', whose admissibility is subject to particular provisions and must be argued in court. In contrast, photographs and video recordings do not count as statements, but are considered to be 'real evidence':

> Photographs and films are excluded from the definition [of 'a statement'] and continue to be admissible, at common law, as a variety of real evidence, if relevant to the issues, including the important issues of whether an offence was committed and who committed it. (Keane 2008, 273)

Apparently, the common law system does not take into account the efforts of those photographers who have gone to great lengths to have their photographs recognised as (artistic, political, cultural, gender…) statements (e.g. Spence 1988). The status of 'real evidence' assigned to films and photographs seems to attribute greater reliability to mechanical means of production compared to human motor skills (as in the case of deictic gestures) or the recording of past oral evidence, both of which produce 'statements'. One might think that interpretability is the watershed here: gestures are implicit; past oral evidence was given in a different context; therefore, both must be interpreted before being admitted in evidence. Conversely, photographs and video recordings depict reality as it is; therefore, interpretation counts only up to a certain point (once the items have been found to be authentic). However, is this really so?

Biber (2007), for instance, describes the case of an Australian Aboriginal man who was wrongly convicted of robbing a bank on the basis of surveillance images

that, although genuine and not physically manipulated in any way, were misread by the police. The pictures – which were low-quality and low-definition – depicted a hooded young Aborigine. The defendant had been known to the local police, and this apparently led the latter to 'recognise' him promptly in the pictures. By the time the appeal procedure had been completed and the defendant declared innocent, he had already served most of the sentence. It might be argued that in this case the mistake was made at the point of image reading/recognition: what the police (an authoritative reader) saw in the picture was taken to be a *true account* of what was in the picture, and what was in the picture was accepted as a *true account* of reality.

The identity relationship that is commonly held between photographs and reality ('the picture *is* what it depicts') or one's representations of reality ('the picture *is* what I see in the picture') is made explicit in several criminal laws or procedure provisions. By way of illustration, Section 491.2 of Canadian Criminal Code states that (my emphasis):

> (1) Before any property that would otherwise be required to be produced for the purposes of a preliminary inquiry, trial or other proceeding […] is returned […], a peace officer or any person under the direction of a peace officer may take and retain a photograph of the property.
> (2) Every photograph of property taken under subsection (1), accompanied by a certificate […], shall be admissible in evidence and, in the absence of evidence to the contrary, shall have *the same probative force* as the property would have had if it had been proved in the ordinary way [i.e. by producing it in court].

According to the law, then, in order to gain probative status, a photograph must be certified, i.e. accompanied by a certificate stating that the photographer was a peace officer or that the photograph was taken under the direction of a peace officer and that it is a 'true photograph' (Subsection 491.2(3), ibid., 589–590). Such conditions are arguably aimed at ensuring that the photograph is not biased by the photographer's involvement in the trial, and thus acknowledge the importance of the author's gaze in the construction of the photograph's meaning. Provided that such conditions apply, the photograph becomes a piece of evidence *as valid as* the original, which means that all and any modifications introduced by the photographic process vis-à-vis reality, any nonidentity between the signifier and the signified (e.g. reducing the property to a static bidimensional object that can only be experienced visually) may be ignored for the purposes of the legal proceeding.

Similarly, Article 670 of the official English version of the Maltese Criminal Code in English provides that (emphasis in the original)

> (1) Any property which is to be released by the registrar to any person or which is to be destroyed or otherwise disposed of in accordance with the provisions of this Title shall only be released, destroyed or otherwise disposed of following the drawing up of a *procès verbal* containing an accurate description of the property released, the quantity and quality thereof and any photographs, video recordings and computer images of such property as the magistrate or the registrar may deem fit should be taken.
> […]
> (3) […] any process-verbal drawn up in accordance with the provisions of this article including any photographs, video recordings and computer images shall be admissible in evidence in any criminal proceedings as if it were the property itself described in the *procès verbal*.

Although the Maltese Criminal Code, unlike the Canadian text, does not mention certification of photographs, the *procès-verbal* is an official document drawn up by judicial officers and signed by the magistrate or officer who holds the criminal inquest (Art. 549 of the Code), who implicitly take upon themselves the responsibility for the photographs, videos and digital images of the property to be produced as evidence (although the Code does not explicitly state who is entitled to take such images). Interestingly, images obtained mechanically or digitally are once again admitted in evidence *as if they were* the original object.

Another example comes from Italy, whose Italian Code of Criminal Procedure (Section 234, 'prova documentale') states the admissibility in evidence of 'writings or other documents representing facts, persons or things by means of photography, video recording, sound recording or any other means'.[1] A peculiarity of the Italian criminal procedure is that, whereas anonymous written documents are not admissible as evidence in court, anonymous photographs are (Vele 2008, 1783) thus implicitly dismissing authorship and the question of the photographer's gaze as non-issues, at least in the legal sphere. Canadian lawmakers, as well as the feminist tradition stemming from Michel Foucault's (1963) notion of 'le regard' (e.g. Mulvey 1975), would have much to object here.

Differences aside, all the provisions about photographic evidence briefly outlined here have one thing in common: the tacit implication seems to be that once deemed authentic and if acquired following the relevant regulations a photograph or video footage cannot be read, interpreted or argued about in ways that differ from what is supposed to be the truthful account of what it depicts. Thus, the concerns recently raised by several authors about the persuasive use of visual-based presentations of arguments and evidence in court, and their acknowledgement of the fact that the lawyer's semiotic and IT competencies can – and in fact do – influence verdicts, seem to have gone largely unheeded by lawmakers, at least to date (Sherwin 2002; Feigenson 2006; Spiesel 2006; Yelle 2006).

6.2 Photographs as Proofs of Identity

A second case in point is the use of photographs to vouch for a person's identity in official identification documents such as passports and ID cards. The need for a photographic proof of identity in all identification documents is stated in the Italian Code of Criminal Procedure, Title I, Head I, Art. 3, as well as in several legally binding documents in other Western countries. For instance, Part 5.3 (terrorism), Section 100.1 of the Commonwealth Criminal Code Act 1995 valid in Australia, states that '"identification material", in relation to a person, means prints of the person's hands, fingers, feet or toes, recordings of the person's voice, samples of the

[1] 'È consentita l'acquisizione di scritti o di altri documenti che rappresentano fatti, persone o cose mediante la fotografia, la cinematografia, la fonografia o qualsiasi altro mezzo'.

person's handwriting or *photographs (including video recordings*) of the person' (my emphasis). Similarly, Schedule 1, Section 2 (personal information) of the British Identity Cards Act 2006 (which is still in force as I write) states that 'The following may be recorded in an individual's entry in the Register—(a) a photograph of his head and shoulders (showing the features of the face); […]'.

The instructions on how to apply for a passport are particularly illuminating with respect to the inconsistencies of the tenet that the photograph identifies the person it portrays. For instance, when someone applies for a British passport for the first time, one of his or her photographs must be certified in writing by a person older than 18, who has known the applicant for at least 2 years, holds a British or Irish passport and 'work[s] in a recognised profession or otherwise ha[s] good standing in the community'. The certification formula reads: 'I certify that this is a *true* likeness of [Miss, Mr, Mrs, Ms or other title and applicant's full name]' (British passports: first application webpage, my emphasis). Additionally, actual resemblance between the applicant and the photographs is ascertained during an identity interview (Identity and Passport Service 2010, 10). Interestingly, however, certification and interview are no longer necessary for passport renewal (British passport renewal webpage; Identity and Passport Service 2010, 5), since the likeness between the photograph on the old passport and the new ones that will go on the new document becomes proof of the likeness between the new photos and the applicant himself/herself, in a loop of apparent self-referentiality: a person is a photo is a photo is a photo….

Even for renewals, however, certification becomes necessary: 'if your appearance is very different from the photo in your current or last passport' (British passport renewal webpage). Providing for such a case means that the British authorities implicitly accept that people might for any period of time (shorter than the 10 years for which a passport remains valid) use photographs as proof of their identity that have grown to have little resemblance with their actual physical appearance, unless they decide to renew the document of their own free will. Once the new photo is validated as a *true* likeness by the certifying person and accepted as such by the authorities, logic would have it that the old, dissimilar photo is a *false* likeness of the passport holder, even if the holder might have used that very photograph as a means of identification for some time. At the same time, any lesser degree of dissimilarity that does not make one 'very different' from the old photo (but is nonetheless very likely to occur in the 10 years of passport validity) is implicitly ruled out and does not break the self-referentiality chain that may well accompany a passport holder from 18 to very old age, if the passport is regularly renewed at least every 10 years.

Identification document photographs also have another interesting characteristic: they must comply with certain stringent standards which may differ from place to place and from service to service (e.g. for UK, see Identity and Passport Service 2010, 16; see also New Zealand's Department of Internal Affairs – Passport Service 2010; Australian Government's Department of Foreign Affairs and Trade webpage; Passport Canada 2009). In order to help passport and visa applicants comply with its famously strict criteria, the US Department of State's Bureau of Consular Affairs

(2010) has issued a seven-page online brochure including guidelines aimed at professional photographers and visual examples of acceptable high-quality photographs for US travel documents. The Italian police, who are responsible for issuing passports through their provincial offices (*questure*), have issued a similarly detailed 3-page guide (Questure italiane photo guidelines webpage). I have personally seen printouts of the same guide in the registry office (*anagrafe*) of the town where I live as a model for identity card applications and renewals, although of course the municipality and the police are two completely separate and independent authorities that might potentially follow different rules for the documents they issue.

With regard to the standards applying to identity document photographs, Zenon Bańkowski points out the arbitrariness of reducing a person to a few characteristics deemed 'salient' by external, inflexible rules:

> All that is left of me is what is on the card (a photograph, a magnetic strip). […] I've been subsumed into the card which is one created not by me but by the rules, which is all the machine [or the bureaucratic system] applies. (Bańkowski 2001, 205)

The exclusion of gradual variation in physical resemblance, the inflexibility of identification regulations and the arbitrary selection of certain traits instead of others are the prices to pay in exchange for 'certainty and predictability' (ibid.). In denouncing the alienating potential of this system, Bańkowski seems to reject the postulate that lies behind the very use of photographs as official evidence of a person's identity: i.e. there is a purely denotative relationship between the photograph and what it depicts. According to this postulate, photographs do not interpret reality; they represent it as it is. They cannot lie; they are immutable and are therefore perfect evidence. There are, however, at least two levels where the identity relationship between the identification photograph and the person whose identity it allegedly proves can be disrupted or disturbed.

First of all, there may be problems in establishing the correspondence between the real-life person and the person depicted in the photograph. In other words, there may be disturbances at some point in the denotation process. For instance, in cases of close resemblance, the same photograph may fit two separate individuals, who may then choose to exchange documents (and identities). Conversely, someone might look so dissimilar from his/her own photograph that identification becomes difficult, perhaps on account of a sum of minor transitory changes (heavy make-up, glasses, weight loss or gain) or due to technical factors which may have distorted the face in the photograph. We have already seen that the British passport service addresses this problem by reducing all degrees of variation to two positions: either the photograph is less than 'very different' from one's current appearance (more correctly, from one's newer photos), which does not disturb the chain of referentiality that allows the photograph to identify the passport holder through its likeness to his or her older photos, or the photo is very dissimilar from that in the old passport, in which case it can be certified by another person as having a true resemblance to the applicant, however, thereby disqualifying the likeness of the previous photograph that has been used as a means of identification up to the time when the passport is renewed.

The second level at which the photograph ceases to prove the identity of the person holding the document is probably the most obvious one – forgery. In this case, the denotation process is not hindered in any way, and the photograph is in fact a truthful depiction of the user of the document; what is at stake is its status as a guarantee, as proof of what the document is supposed to show (but really does not). Thus, just as Barthes (1977a, 45) points out that in print advertising 'the denoted image naturalizes the symbolic message, it innocents the semantic artifice of connotation', the forged passport-format photograph is used as incontrovertible evidence of what is *said* to be true, but is not. In this respect, the introduction of sophisticated chips containing biometric information such as iris patterns (Daugman 1999) would have the effect of making forgery more difficult to produce but also more difficult to detect. In fact, the denotation process would only be reinforced and made all the more obvious and incontrovertible by a more detailed and accurate description of the person holding the document, even if the problem remains that such incontrovertible denotation would not necessarily be proof of the person's identity.

6.3 On the Semiotics of Photographs

All the legislative and administrative approaches discussed in Sects. 6.1 and 6.2 seem to imply that photographs cannot 'lie': by their very nature, they are objective and truthful. They are to be treated *as if they were* the object or person they represent, and their authorship is to be either neglected (as in the case of Italian criminal proceedings) or attributed to subjects who are supposed to be impartial – an officer in the case of the Canadian criminal law, 'the rules' (Bańkowski 2001, 205) in the case of ID documents.

In other words, criminal laws and administrative bodies do not seem to consider the act of taking a photograph and that of transferring the image onto a film or digital support and from there onto paper or a screen capable of interfering with the identity relation between the represented object and its representation. The signifier, in this logic, does not *stand for* the signified. It *is* the signified. This identity relation (which necessarily implies truth by the standards of classical logic, because in no case can A be other than A itself) seems to imply that in court and administrative practice, photographic images are not considered to be *signs*, which would bring them outside the very realm of semiotics. Interestingly, unlike photographs, words in court are usually recognised as signs (where no automatic identity relationship holds between the signifier and the signified) and therefore do not have a value of truth *per se* attached, while the practice of negotiating their truth value is taken much more for granted than with photographs. This brings us back to the substantial difference that exists in a common sense perception, rather than in sources of law, between the verbal and the visual modes of expression: 'The truth/authenticity potential of photography is tied in with the idea that seeing is believing. Photography draws on an ideology of the visible as evidence' (Kuhn 1985, 27).

Since the potential to be used to lie is the criterion to ascertain whether something can be considered as a sign (Eco 1975, 17), the very issue of including photographs in the realm of legal visual semiotics seems to be at stake here. In fact, the 'inherent truth' approach to photographic images has been long discussed by semioticians. Some of the fathers of semiotics seem to hold an ambiguous position in this respect. For instance, Roland Barthes in his *Le chambre claire* postulates that a photograph is so to speak, trasnparent: what we see is not the photograph itself, but what it depicts, so much so that the referent adheres without further marking or connotation. As a consequence, a photograph cannot be treated as a sign (Barthes 1980, 8). Barthes explicitly professes to be part of those semioticians who maintain that photographs absolutely adhere to reality, and nothing more (ibid., 89). However, he also concedes that society can read photographs in ways that are unpredictable for the person depicted and the photographer (ibid., 16), thus implicitly acknowledging that the interpretation of the photographic image is not universal nor can it be reduced to a true/false exclusive disjunction. And as far back as the 1960s, Barthes wrote that the objectivity and neutrality of photographs is 'mythical (these are the characteristics that common sense attributes to the photograph)' (Barthes 1977a, 19), and that this myth is perpetuated by the mechanical means of production of the image (Barthes 1977b, 44).

In a similarly ambiguous wording, Umberto Eco (1985, 36) tells us that Peirce's indices (including photographs) 'are not mirror images' that do not carry semiosis and do not count as signs 'but one reads them *almost as if* they were' (my translation, emphasis in the original).[2] Jean-Marie Peters tries to solve this conundrum by separating the two supposed natures of photographic and filmic images:

> the *form* as appearance makes the mechanical image a *medium*, an *instrument* with the aid of which one can gain a (better) knowledge of the object reproduced. The form as *vision* instead makes the image a *sign* through which the author of the image or of the sequence of images can formulate a communication. (Peters 1973, 123, my translation, emphasis in the original)[3]

According to Peters, then, photographs by virtue of their being *vision* can convey information and connotations about the referent, but at the same time, photographs are also *appearance*, and as such they only adhere to their referent, so much so that one can know and perceive a referent through the mechanical images depicting it even better than by exploring the referent itself. (It would be interesting to hear what a blind person would have to say about this specific point.)

Such semiotic approaches to photography perpetuate the common sense perception that

[2] 'non sono immagini speculari ma si procede a leggerle *quasi come se* lo fossero'.

[3] 'la *forma* come aspetto rende l'immagine meccanica un *mezzo*, uno *strumento* con l'aiuto del quale si può conoscere (meglio) l'oggetto riprodotto. La forma come *visione* invece fa dell'immagine un *segno* con cui l'autore dell'immagine o della sequenza di immagini può formulare una comunicazione'.

> Photography's plausibility has long rested on the uniqueness of its indexical relation to the world it images, a relation regarded as fundamental to its operation as a system of representation. As a footprint is to a foot, so is a photograph to its referent. It is as if objects have reached out and touched the surface of a photograph, leaving their own traces. (Batchen 1997, 212)

Leaving, for a moment, semiotics for sociology, Bourdieu et al. (1990, 77) also focus on the delusory nature of photographic truth: 'in conferring upon photography a guarantee of realism, society is merely confirming itself in the tautological certainty that an image of the real which is true to its representation of objectivity is really objective'.

Despite the tautological and reassuring stereotype that photographs cannot be less than truthful, there is significant evidence that 'photographs can lie' (as Eco 1984, 223 finally admits), in at least three ways:

(a) Photographs can be manipulated and edited, thus altering their correspondence with their originals (which is quite common in any form of public communication, as Smargiassi 2009 amply shows, but is normally not allowed in court or identity documents).
(b) Photographs can be said to reproduce someone or something that they do not in fact depict, thus altering their correspondence with the fact, person or object they are attributed to (this is most common in identification document forgery and also quite common in the news, as will be shown in the following section).
(c) Even when the correspondence between signifier and signified is preserved, and photographs are lawfully admitted in evidence, they may be misinterpreted by the reader/viewer. The case described in Biber (2007) is an extreme consequence of such a situation. Speaking from a strictly logical point of view, in such cases it is not the photograph that lies, but it is the reader/viewer who uses it to support what he/she thinks is the truth, which does not necessarily correspond to the reality of events. However, this is also proof of the semiotic, non-analogical nature of photographs, as their meaning is clearly constructed through a process in which the receiver plays an active part, rather than being inherently and absolutely true and neutral. Forced interpretations are especially common in legal matters and perhaps constitute the ultimate proof of the fallacy of the 'inherent truth' approach, as they do not presuppose intentional forgery or alteration of the photograph itself but merely the reader's compliance with the stereotype that a photograph *must* tell the truth without retaining anything, so that the first reading is normally supposed to be the correct one.

Outrageous as it may seem, then, it does not appear to be completely out of place to conclude that, at least in the matter of photographic truth, legal and administrative systems might learn something from art photography and accept Joan Fontcuberta's suggestion to 'look out – it's photography, so it's probably false' (Caujolle 2001, 2). Fontcuberta's caveat holds especially well when applied to a third system of communication that heavily relies on photographic validation – the news.

6.4 Photographs as Evidence in the News

Another field where the dogma of photographic truth is easily revealed as a myth that is only valid as long as the encoders choose to abide by it and readers suspend their judgement about it is the news. We expect news to be truthful and assume that the photographs (or videos) that accompany news items are, first of all, genuine and, secondly, really refer to the piece of news they go with. This unwritten, unspoken rule has been violated innumerable times, many of which in turn became news (see Smargiassi 2009 for an account of dozens of historical cases of misleading photographs used as evidence to back legal, scientific and journalistic arguments).[4] However, the rule is still very much in force, as otherwise we would not be able to distinguish news from fiction. The forgery or 'fraudulent' use of visual material seems to surprise public opinion and cheat major media even more than journalists making up verbal-only news.

A case in point is the fake killing of an American citizen by Al-Zarqawi which was 'documented' by a video circulated on the Internet and broadcast by TV channels around the world in August 2004 and aroused substantial public emotion. The alleged victim was found to be alive and well in his American home, while the video turned out to be a home-made spoof whose images were promptly reproduced to support the news of the discovery of the fake (e.g. Farina 2004).

Another example of a forged piece of news whose alleged authenticity was legitimised through mechanically acquired images is the account of the killing of the crook Salvatore Giuliano circulated on the media by the Italian police. The original official version was that Giuliano, at the time one of the most wanted Sicilian criminals, had been found by the police corp of the Italian army (the *Carabinieri*) and killed in the ensuing shoot-out in the early morning of July 5, 1950. The famous photograph that documented the event backed this version: Giuliano's body lay sprawled in a rundown courtyard, face down in his own blood, his rifle and gun scattered around him, with a Carabinieri officer standing over the corpse. A few days later, a magazine article proved that this version (and its photographic documentation) was a fake and revealed how the Carabinieri had set up the scene in order to protect the real killer – one of Giuliano's accomplices, who had shot him while he slept (Besozzi 1950). A newer study of the forensic pictures hypothesises that they do not even refer to Giuliano but to some other body, a further addition to this photographic mystery (Bolzoni 2010).

Not too dissimilarly, a few years ago some Italian media denounced the 'barbarian practice' of rearing kittens in bottles, taking the now infamous webpage allegedly

[4] The same, incidentally, can apply to historical documents as well as news. For instance, in *A film unfinished*, Yael Hersonski (2010) retells the story of a *Das Ghetto*, a Nazi propaganda film depicting the rich Jews of the Warsaw ghetto as cynical and indifferent towards their less fortunate neighbours. The scenes were presented as a document of real life in the ghetto and were taken to be genuine (although strongly biased) documents by historians for over half a century, until new reels revealing that they were purposefully staged were found in 1998.

selling 'bonsai' cats (Bonsai Kitten website) to be a genuine e-commerce site on the grounds of its professional-looking photographs, which were actually the result of digital photoshopping (Maffeo 2001; Sansa 2002). The website was a satirical hoax devised by a MIT student to denounce the barbarian, human-centred attitude with which humans treat pets. Semiotically innocent internet users are apparently still taking the provocation seriously and keep sending chain e-mails to campaign against the practice of bottling kittens or voice their indignation on blogs (Sophos hoax alert website; Gatti bonsai blog). On the grounds that it might have sparked off real-life imitation, the Italian version of the website was shut down by the police following an official investigation that took place well after the contents of the site had been proven and publicly denounced to be a fake. We will never know whether this would have happened had the website not contained authentic-looking photographs. (Irrespective of the police operation, the Italian website was in fact soon back online hosted by a different server, Gatti bonsai website.)

A different case is that of a photograph that depicts a real event, object or person, but is used with a piece of news that has very little or no connection with the contents of the photograph. This might happen because of an editing mistake, which is usually corrected by the newspaper or other media involved as soon as the editorial staff becomes or is made aware of the error. However, the public correction is usually far less prominent than the original (as is the case with errata corrige on newspapers). Alternatively, the 'mistake' might also be the result of a precise choice.

An example of this is a large (11 × 20.5 cm) photograph that accompanied an article in the 20 May 2010 issue of the Italian newspaper *La Stampa* (Ricotta Voza 2010). The picture managed to catch my sleepy eye while I was leafing through the newspaper over my morning coffee because it depicted an event I had witnessed first-hand some 2 years earlier. It was one of the open-air lectures that the teaching staff of my faculty (the SSLMIT of the University of Bologna at Forlì) had delivered back in October 2008 in the local main square, Piazza Saffi, as a form of public demonstration against the Berlusconi government's first reforms of the university sector (see Fabbri 2008 for an account of the event). The photograph featured Francesca Gatta standing in her black professor's gown against the background of the buildings on the square with a few dozen students facing her in the foreground. However, this referential information was not accessible to anyone who had not been there. Readers could only see a woman standing in an official-looking black robe in front of several young people (mostly women, as the SSLMIT has an overwhelmingly female student population) sitting on the pavement and holding sheets of paper. The caption did not make the context any clearer, quite the opposite; it ran, 'Retreating males – The Forlì piazza, named after Aurelio Saffi. Here one gets a visual idea of the pink power in town'.[5] Whatever a group of undergraduate students and their professor caught in the act

[5] '**Maschi in ritirata** La piazza di Forlì dedicata ad Aurelio Saffi Qui si ha un'idea visiva del potere rosa in città' (emphasis and lack of punctuation in the original).

of peacefully demonstrating against the crippling of the university system may have to do with 'pink power', or 'male retreat' for that matter, is still unclear to me. What is clearer is that the editorial staff at *La Stampa* had not found any more fitting (glamorous? good-looking?) photograph to go with an article about Forlì being the Italian municipality with the highest number of women councillors (50%). A much smaller picture (7.3 × 8.9 cm) of the town council was also shown further down the page but without a caption, as if it were a less blatant 'visual idea' of the local empowerment of women – perhaps because it featured the (male) mayor, Mr. Balzani in the foreground, a position which would have hardly fitted the 'retreating male' rhetoric of the article explicit in the caption to the main picture.

To conclude this section, we have seen that even when photographs are employed for their purely denotative qualities, the tenet of photographic objectivity and inevitable truthfulness can be revealed to be an arbitrary convention. In particular, this is the case when we consider not only the relationship between the photograph and the real-life person, object or event it depicts (which might, however, be a case of non-identity, as with the bonsai kittens) but also broaden the scope to include the role of the photograph in the context of a narrative or text that must be proven to be true. In this light, the photograph or video vouches for the reliability of a piece of information which may be deceitful irrespective of the objectivity of the photograph or video itself, because the piece of news has been made up, as in the Al-Zarqawi case, or because it has no relation whatsoever with the image that should substantiate it, as in the *La Stampa* case.

Given that in the journalistic context, as well as in court or identification documents, the photograph or video is used exclusively for its perceived truth value, it can be safely assumed that its only reason of existence is to attach the quality of reliability to something that is potentially unreliable. In this sense, 'photographs can lie' (Eco 1984, 223, already cited here) not only when the *denotation* process is intentionally altered (e.g. spoof photographs) but also when the *connotation* of truthfulness carried by the photograph or video is attached to something which is *not* true or whose relation with the mechanical or digital image itself does not hold. A first direct consequence of this theoretical conclusion is that wherever visuals (even photographs and videos) are employed, they should never be taken at face value, but recognised as important elements of the text as a semiotic whole, also capable of modifying the meaning and value of nonvisual (e.g. verbal) elements. A second consequence of the statement that 'photographs can lie' is another confirmation that photographs and films can be treated as *signs*, as elements of a semiotic *system* or *code*, and as such they can *argue* and be judged beyond the true/false dichotomy. For instance, in the *La Stampa* case, although I would be able to testify as an eyewitness to the authenticity of both the photograph in question and the event it referred to, I would be in far greater difficulty if asked to certify its truthfulness in the context of that particular article. It is not, however, the photograph that is not true; it is the *argument* that it carries – and which is expounded in the caption – that is wrong.

6.5 Conclusion

With reference to the re-enactment of the liberation of the Mauthausen concentration camp with the explicit intention of providing photographic evidence of the event (2 days after the Americans had arrived, soldiers and prisoners arranged the scene and posed in photographs that *de facto* depicted a historical fake), Michele Smargiassi argues:

> acknowledging that such images were constructed does not diminish their importance; quite the opposite, only this second-degree critical awareness can protect them from the unacceptable risk of being brought as evidence of an alleged 'construction of the Shoah myth' by negationists. (Smargiassi 2009, 240, my translation)[6]

Smargiassi maintains that the photographic image is a sign and as such it is in its very nature to lie, but '*it would sincerely confess to this if liars did not coerce it into faking sincerity*' (Smargiassi 2009, 23, my translation, emphasis in the original).[7] In other words, that photographs can lie in many ways has always been there for everybody to see. Ever since the invention of photography, photographers from Bayard to Fontcuberta have played with this tendency to prepossess. Nonetheless, the myth of photographic truth has not faltered: '[photography] can connote, doctor, pose, aestheticize, disconnect its referents, oversyntax the visible, invent new qualities […]; but it is nonetheless always credited with truth' (Didi-Huberman 2003, 60).[8] One might relate this common perception to a kind of statistical generalisation that excludes 'masses of particular exceptions': '"photographic truth" has meaning even where much photography produces the opposite, for the same reason that "surgical precision" has meaning even though some surgery is known to be imprecise' (Maynard 1997, 191).

Arguably, however, there must be a reason why one should willingly accept to rule out *masses* of cases as 'exceptions' to a generalised rule that is supposed to apply unfalteringly in sensitive fields such as criminal proceedings, identity control and, as Maynard suggests in his analogy, surgery. One justification might be that generalised trust in photographic truth is highly functional to various systems or sets of systems, three of which have been taken into account here. First, we have the system of legal procedure, where absolute truth or falsity traditionally has to be

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[6] 'Ammettere la costruzione di queste immagini non è diminuirne l'importanza: al contrario, solo questa consapevolezza critica di secondo grado può proteggerle dal rischio inaccettabile di essere impugnate dai negazionisti come prova della "costruzione del mito" della Shoah'.

[7] '*la fotografia non può che mentire, ma lo ammetterebbe sinceramente se i bugiardi non la costringessero a fingere di essere sincera*'.

[8] It may well be for this very reason that Jean-Martin Charcot established an in-house photographic service at the Salpêtrière hospital to substantiate his 'invention' of hysteria. The pictures produced by the photographer-in-residence, Paul Régnard, became extremely popular under the title *Iconographie photographique de la Salpêtrière* and became the foundation for the classification of hysterical symptoms, several of which were actually induced by the psychiatrists while the patients were under hypnosis (Didi-Huberman 2003).

established for each piece of evidence and witness, in order to come to a verdict of innocent or guilty. Secondly, there are the systems of identification and identity control which rely on photographs to identify infallibly or stand for an individual. Thirdly, the system of journalism is founded on the reader's or viewer's trust: what one reads is implicitly true, and photographs are used to make a piece of news truer than it would be if expressed only verbally.

However, although it may be functional to the *status quo*, the myth of photographic truth and the ensuing true/false dichotomy pose serious threats to those very systems they are intended to support. Article 2712 of the Italian Civil Code, for instance, states that photographs and films can be produced as 'full evidence' only provided that the defendant does not disclaim their conformity to the facts they depict.[9] In practice, it is enough for the defendant to refute a photograph or film produced as evidence against him or her on the grounds of non-correspondence to reality for the photograph or film to be ruled out of the civil proceeding. If it were possible for photographs to *argue* in court rather than just be produced as a substitute for reality that can only be authentic or fake, true or false, then this provision would not make much sense, and photographs might in fact become more relevant as evidence, since it would be understood that they can carry many more meanings and values than just truth or falsity.

In order to restore photographs to their semiotic nature, however, their visual code should be treated similarly to verbal language and not taken at face value as an *analogon* of reality (Marra 2006, 5). After all, the whole discipline of visual studies rests on the principle that all images, including photographs and films, do have a specific code which can actually be described in grammars (Kress and Van Leeuwen 1996/2006). Moreover, neuroscience tells us that

> the areas and centres [of the right hemisphere of the human brain which 'read' and store our visual experience] are structurally identical with those in the left hemisphere which process our experience of words. Furthermore, appearances in their unmediated state – that is to say, before they have been interpreted or perceived – lend themselves to reference systems (so that they may be stored at a certain level in the memory) which are comparable to those used for words. (Berger et al. 1982, 114)

Additionally, one might argue that photographic images are always physically constructed in some way, even if they are constructed by a machine which is ultimately set and/or operated by a human being. Even security cameras, which are usually not directly operated by any human being, can be said to have a gaze or *regard* in the sense that they serve a particular intention rather than being absolutely objective: they have been fixed in that position to fulfil the specific purposes of an organisation that cares for its own security. When using those images for any other purpose (e.g. if a crime was committed nearby the camera but not on the

[9] 'Art. 2712 Riproduzioni meccaniche: Le riproduzioni (Cod. Proc. Civ. 261) fotografiche o cinematografiche, le registrazioni fotografiche e, in genere, ogni altra rappresentazione meccanica di fatti e di cose formano piena prova dei fatti e delle cose rappresentate, se colui contro il quale sono prodotte non ne disconosce la conformità ai fatti o alle cose medesime'.

premises of the organisation owning the camera), one should take the specificity of their gaze into account.

If we acknowledge the inevitability of a particular gaze and intention in any kind of photographic or filmic image, then it is easy to see that photography also has a cultural as well as a semiotic nature and has to be read and interpreted in its own historical context of production and reception which cannot be dismissed as superfluous (D'Autilia 2001, 10). After all, the codes or 'languages' of photographs and film productions differ dramatically across cultures. As Sontag (1992, 146–150) points out, the Chinese do not share the unwritten rule typical of Western photography according to which photographs should appear as uncontrived as possible. In fact, Sontag highlights that despite the presumed identity between photographs and reality, photography is no exception to the ambiguity of the relationship between true *analogon* and artistic representation (ibid., 6). In other words, 'photographs transform their subjects' (Savedoff 2000, 2), although 'we tend to see [them] as objective records of the world, and this tendency has a far-reaching influence on interpretation and evaluation' (ibid., 49).

Thus, there is more than one way in which photographs may be read. Ignoring this multiplicity in favour of a monolithic 'true/false' reading is a reduction of the real, complex status of photography. More importantly, once the stereotype of photographic truth is unveiled as a misleading simplification, it can hardly be said to serve the communication and legal systems that rely on it as a source for their own validation.

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Chapter 7
Visualization Between Fictitious Law and Factual Behaviour: A Pragmatic-Institutional Analysis

Hanneke van Schooten

Abstract The concept of visualization, its function, and role in the relationship between fictitious legal rules and factual behaviour will be the focus of this chapter. Based on the view that legal rules express a message that needs to be *thought* of as real, processes of visualization will be analysed, in particular in the dialogical context of the legal rule as a sequence of linguistic signs, expressing an action-idea, on the one hand, and observable behaviour in accordance with the rule, on the other. The point in question is how we can 'see' and 'know' the rule's content that is not available for direct observation. A legal rule, in the words of Alf Ross, is an indiscernible phenomenon, a 'thought object,' and an 'action-idea', compared to the factual and observable behaviour that is related to the rule. Questions arise whether processes of visualization are dominated by linear causality between rule and behaviour or whether reciprocal elements are involved. Are these processes individually determined or within groups? In the first part of this chapter, the Institutional Theory of Law as well as the Scandinavian Legal Realists and their concept of legal language as imaginary terminology together form the building blocks for the construction of an analytical framework. In the second part of this chapter, a case study will be described, focusing on the rules of war (meanly the 1945 UN Charter), on the one hand, and observable behaviour (actual warfare during 'peacekeeping missions'), on the other. The relationship between the law of war and actual warfare is situated in the aftermath of 9/11. Finally, the framework will be used as an instrument to analyse the case study. Concluding remarks will be made in the last section.

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7.1 Introduction

The concept of visualization, its function, and role in the relationship between fictitious legal rules and factual behaviour will be the focus of this chapter. Based on the view that legal rules express a message that needs to be *thought* of as real, processes of visualization will be analysed, in particular in the dialogical context of the legal rule as a sequence of linguistic signs, expressing an action-idea, on the one hand, and observable behaviour in accordance with the rule, on the other. The point in question is how we can 'see' and 'know' the rule's content that is not available for direct observation. A legal rule, in the words of Alf Ross, is an indiscernible phenomenon, 'thought object' (Ross 1968), and an 'action-idea' (Ross 1968), compared to the factual and observable behaviour that is related to the rule. Questions arise whether processes of visualization are dominated by linear causality between rule and behaviour or whether reciprocal elements are involved. Are these processes individually determined or within groups?

In the first part of this chapter, the Institutional Theory of Law, as well as the Scandinavian Legal Realists and their concept of legal language as imaginary terminology together form the building blocks for the construction of an analytical framework. In the second part of this chapter, a case study will be described, focusing on the rules of war (meanly the 1945 UN Charter), on the one hand, and observable behaviour (actual warfare during 'peacekeeping missions'), on the other. The relationship between the law of war and actual warfare is situated in the aftermath of 9/11. Finally, the framework will be used as an instrument to analyse the case study. Concluding remarks will be made in the last section.

7.2 The Legal Rule as Thought Object

7.2.1 Legal Language

Law is first and foremost a linguistic phenomenon. What has been described as the 'linguistic turn' in science, at the beginning of the twentieth century, has pushed the question of language and communication processes more and more to the centre of theorizing.[1] A dichotomy frequently referred to in this context is the dual character of language, that is, descriptive and prescriptive language. *Descriptive language* purports to represent the facts as they *are* (Searle 1979).[2] Accordingly, the information

[1] Analytical jurisprudence was based on the ideas of Frege, Russell, and the early Wittgenstein. They opened the way to a general programme in which the meaning of propositions would be displayed by a process that revealed hidden logical structure beneath the surface form of statements.

[2] On the basis of Searle's criterion of 'direction of fit', descriptive language represents a direction of fit between word (information) and world (the facts): a 'word-to-world' direction of fit.

is either true or false (Ruiter 1997; Pintore 2000). *Prescriptive language* purports to present the facts as they *ought to be*. Accordingly, the information has to be made true by people (Searle 1979; Ruiter 1997). Thus, with the use of prescriptive language, speech acts can be performed (Searle 1970). A classical example, frequently used, can be found in the Bible, where it is stated that the words of God took effect according to their literal sense: 'Let there be light' (Olivecrona 1971). And the light became into being because He commanded it. Every else on earth, herbs, animals, etc., were created in the same way. In this example, the effects of the imperatives (commands) are physical. However, the effects of legal language are not physical; they bring about 'legal effects': rights, duties, and legal qualities. This brings us to a second characteristic of legal language: the observation that its terminology has no physical counterpart or reference in the world of fact, while terms like 'chair', 'tree', and 'house' do. The terms 'right', 'duty', and 'legal quality' cannot be pointed out as 'facts'. Herbert Hart called this phenomenon 'the anomaly of legal language' (Hart 1983).

In academic literature, the distinction in language between descriptive and prescriptive has also been called *indicative* speech and *directive* speech (Ross 1968). Although the two types of speech differ in function, they have in common that they are formulated in a sentence, expressing a topic, that is, the 'meaning-content' that is 'not only thought of, but thought of as real' (Ross 1968). Legislation is one of the categories of directive speech. Alf Ross states that a legal rule can be regarded as a sequence of linguistic signs, expressing a meaning-content (the 'action-idea'), functioning as a message in a dialogical context (sender-receiver) (Ross 1968). The meaning-content of the legal rule has a directive function, that is, 'to advance it under such circumstances that it is – more or less – probable that it effectively will influence the behavior of the recipient in accordance with the action-idea of the directive' (Ross 1968).

Two elements attract the attention in this approach. First, the meaning-content of a legal rule is an indiscernible phenomenon: an action-*idea*. Legal rules can be considered 'ideal entities, available not to direct observation, but only to the understanding' (MacCormick and Weinberger 1986). Legal rules are not material objects, but *thought* objects, (MacCormick and Weinberger 1986) projecting 'images that exert pressure to be socially realized' (Ruiter 1997).[3] This is where visualization comes in. The rule's action-idea, in order to be communicated, needs to be *thought of as real* (Ross 1968). Second, in contrast to the fictitious rule, a thought construct, the actual existence of behaviour (in accordance with the rule) can be observed as an empirical fact: the actualization of the image the legal rule projects (Olivecrona 1971).[4] Considering these two features of a legal rule, like the two sides of the same coin (MacCormick and Weinberger 1986), it is tentatively concluded that *visualization* – a picture that is internally constructed – forms the pivot between the

[3] Ruiter has based his idea of legal projection upon Wittgenstein's picture theory, in particular Wittgenstein's statements 3.11 and 3.12 (Tractatus Logico-Philosophicus) where he argues that '[t]he propositional sigh is used as a *projection* of a possible situation' (my italics).

[4] In this context, Olivecrona uses the word 'supersensible' for the legal sphere.

meaning-content of a legal rule, a thought object, and behaviour in accordance with the rule, as observable acts.

7.2.2 Institutional Legal Facts

As mentioned above, Ross argues that regarding a legal rule functioning in a dialogical context, three elements can be distinguished: (1) the indiscernible rule – a thought object, involving a meaning-content expressing an action-idea – that (2) needs to be thought of as real: the internally constructed visualization, meant to be (3) materialized (to a certain extent) into actual conduct (Ross 1968). From the viewpoint of institutional legal theory, a fourth element can be added. That is, *prior* to these three elements mentioned, a fourth element can be observed, that is, (4) actual behaviour by which the rule comes into being. To explain this fourth element, the following example can be given (MacCormick and Weinberger 1986).

By getting on a bus and paying a fare to the driver, a *contract* comes into being. The observable pattern of social behaviour (getting on a bus, etc.) is related to an indiscernible rule of contract of carriage (MacCormick and Weinberger 1986). The performance of the act institutes the rule of contract of carriage (institutive rule) that produces a whole set of legal consequences (consequential rules), which form, in turn, the basis for further observable acts and behaviour. If, for instance, there should be a crash and a passenger gets injured, a whole set of consequential rules, resulting from the existence of the contract, is available for the passenger to seek compensation in law (MacCormick and Weinberger 1986), leading to new empirical patterns of conduct. Finally, terminative rules determine the end the contract, for instance, by getting off the bus.

Ruiter states that legal institutions, such as 'contract', 'ownership', and 'corporation', are 'in their origin, *images* that human beings superimpose on reality' (Ruiter 1997). Practices (getting on a bus, etc.) realize a contract insofar as it provides a picture of regular social behaviour corresponding to the 'ideal' image conveyed by the legal rules that together make up a contract (Ruiter 1997).

By adding the fourth element, the following instrument of analysis can be constructed. Actual and observable behaviour (getting on a bus, etc.) institutes an indiscernible rule or rules (rule of contract and its consequential rules), expressing imaginary terminology (the action-idea of the rule of contract and its consequential rules), generating an internally constructed picture, and subsequently actualizing into conduct. Finally, in the event of a conflict about the rule (of contract) and corresponding behaviour – for instance, a bus accident and injured passengers – new observable conduct will entail, that is, a lawsuit for damages before a court. In this approach, on the one hand, the rule is instituted by observable acts, and, on the other hand, the rule entails new observable consequential acts.

Some aspects of the institutional approach are similar to Ross's view laid down in his famous article '*Tû-Tû*' (Ruiter 1997). Although Ross focuses partly on penal law, MacCormick concentrates on civil law, the resemblance between the two

examples is striking.[5] In his article, Ross describes how in the Noît-cif tribe – living on the Noîsulli Islands in the South Pacific, and regarded as one of the more primitive peoples – if certain taboos are breached, a phenomenon called *tû-tû* arises. For instance, the empirical fact of killing a totem animal, the killer – a member of the tribe – has become *tû-tû*. The guilty person must be subjected to a special ceremony of purification, in order to restore the person and his tribe in their regular former states. It is very difficult to explain what is meant by *tû-tû*. Ross states that *tû-tû* is nothing but an illusion, a word without semantic reference (Ross 1957), which is analogous to modern legal terms such as 'rights', 'contracts', or 'ownership'.

To illustrate this, Ross gives the following example (Ross 1957):

> We find the following phrases, for example, in legal language, as used in statutes and the administration of justice:

1. If a loan is granted, there comes into being a claim.
2. If a claim exists, then payment shall be made on the day it falls due.

This is only a roundabout way of saying the following:

3. If a loan is granted, then payment shall be made on the day it falls due.
   The 'claim' mentioned in (1) and (2), but not in (3), is obviously, like *tû-tû,* not a real thing; it is nothing at all, merely a word, an empty word devoid of all semantic reference.

Here, too, observable conditioning facts (Ross 1957), granting a loan or, in MacCormick's example, getting on a bus and paying the fare to the driver, institute a rule – an ideal entity – that, in turn, entails new empirical acts, seeking compensation in law for the deluded loaner or for the injured passenger. It is stated that, between conditioning facts and consequential facts, imaginary terms are inserted, such as the right of ownership or contract (Ross 1957). Like *tû-tû*, 'right' and 'contract' are 'a power of an incorporeal nature, a kind of inner, invisible dominion over the object of the right' (Ross 1957). The legal rule is thus regarded as the indiscernible intermediary between conditioning facts and consequential facts. How is this analysis connected to the visualization of rules? This subject will be scrutinized in the following section.

7.3 Envisaging Law

7.3.1 Word, Image, and Action

First and in general, it is stated that legal discourse favours visual metaphors. Jackson states in his article 'Envisaging Law', 'We frequently consider law itself as a looking: we "observe it"; we evaluate claims "in the eye of the law", high courts "review" the decisions of inferior tribunals', etc.' (Jackson 1994).

[5] In his article, Ross, too, makes the comparison between penal law and civil law.

Second and more specifically, communicating a legal rule as described in Sect. 7.2 means that the recipient has to construct a mental picture of the rule's linguistic meaning-content (Olivecrona 1971). This raises the question of how the process of the internal construction of a picture, stemming from language, takes place and how it is related to external and observable acts. What is the connection between (legal) language, images, and acts?

Asking the question of whether visual images are more powerful determinants of sense construction than language, Jackson comes to the conclusions that (Jackson 1994):

> Generally, visual perception has claims to greater 'originality' than language (…). The visual stimulus produces an iconic image on the retina, unlike the symbolic connections characteristic of linguistic representation. The latter form of representation, characteristic of the human species, may be regarded as a later *development* in evolutionary terms.

In this way, the relationship between acts, images, and language can be seen as an evolutionary development through time from concrete and observable (actions) to more abstract phases (images of actions) and finally into the most abstract form (language). Bruner speaks of 'the successive emergence of action, image, and word as the vehicles of representation' (Bruner 1974). A similar view can be found in the work of the pragmatist George Herbert Mead. Starting with unreflective gestural interactions between two individuals, boxers for instance, Mead explains how a new stage can be attained, in which gestures are no longer unreflective but rest on pre-established ideas and meaning. When a person raises a fist in anger against another person, both know the sign's meaning, without it being necessary that the action expressing the sign leads to an actual fight (Mead 1962). Once it is separated from its original action-context, a gesture as a 'significant symbol' referring to an idea or meaning, like a raised fist as a symbol for anger, can become an independent sign. According to Mead, here we can speak of the beginning of abstract 'language' (Mead 1962). At this point, Mead states, communication starts between individuals, a conversation in gestures as abstract signs that are 'internalized as significant symbols, because they have the same meanings for all individual members of the given society or social group' (Mead 1962).

In this view, too, the origin of language is in the actions underlying the gestures that are separated from the original action-context and have become abstract 'language' signs.[6] Mead points out that although language stems from action and is based upon independent gestures referring to and arousing a meaning or idea in the beholder's mind, the origin of language cannot be compared to or confused with language in its later stages (Mead 1962). The complexity of language has to a great extent been object of research, resulting in many different views, currents, and schools, involving semantic and syntactic approaches, which go beyond the scope of this chapter.

[6] In reverse, this view is similar to Charles Peirce's pragmatic concept of the 'final interpretant': the observable action as a 'living definition.' Peirce states that the description of the action is 'the most perfect account of a concept that words can convey.' C.S. Peirce (1931–1935), (Hartshorne and Weiss 1906) (5.491).

From the above, it can be concluded that language and action are not two totally separate entities, but have in essence the same function: vehicles of representation in different degrees of abstraction. Four levels can be distinguished: (1) the action itself, (2) a symbol of the action, resulting in (3) language that refers to objects in the world of facts, to be distinguished from (4) legal language, since their imaginary terms have no physical counterpart or referent in the world of facts, for instance, the existence of institutional legal facts (right, contract, ownership). The last-mentioned category expresses a *legal state* and represents a power of incorporeal nature, an inner, invisible dominion over the object of a right. A power that, although different, is related to and grounded in the actual exercise of force by which the factual and apparent use and enjoyment of the right is effectuated.

The view of the evolutionary development from actions to words does not clarify how processes of visualization take place: Is it individually determined or determined by groups? The common view that modern society is composed of or divided into different groups – professional, organizational, cultural, territorial, religious, economic, etc. – leads to the question of whether effective communication within group settings is dominated by the group's own ideas and values. Generally, group members depend on the flow of communication to establish their own identity within the group's structure and learn to function in the group's setting. In academic literature, several theories have been developed in order to gain insight into this phenomenon. This subject will be the focus of the next section.

7.3.2 Semiotic Groups, Social Subsystems, and Internal Goods

The view that the rule expresses imaginary terminology that needs to be thought of as real raises the question of how linguistic legal rules are envisaged, individually or in groups. Jackson formulates the beginning of an answer by stating that images – the image projected by the rule – can be analysed by distinguishing three levels regarding the linguistic and visual aspects of the legal system: the cultural level, the causal level, and the psychological level (Jackson 1994). By 'cultural level' is meant 'the attitude expressed within particular cultures (professional, for instance) to particular forms of sense construction' (Jackson 1994). By 'causal level' is meant 'the causal relationship between sensory data inputs and the sense actually constructed (within any particular group)' (Jackson 1994). Finally, 'psychological level' means 'those processes within the brain which are activated in the transformation of sensory inputs (sight, hearing, touch, smell, taste) into perceived senses' (Jackson 1994).

Jackson insists that, as the understanding of language is governed by grammar, 'visual understanding' is 'governed by a mental grammar' (Jackson 1994). He illustrates this with an example of two crossed rectangles, one partly hidden behind the other. We can construct the unseen parts of the underlying rectangle and distinguish two distinct objects. But we can also assume that the picture is composed of three different objects. The interpretation of the image is constructed by 'visual grammar' (Jackendoff 1993).

Piaget, however, denies this assumption, arguing that the same set of structures in the mind operate equally upon different forms of sensory input. Image and language are both dependent on 'cognitive development' – the development of general intelligence – which underlies the growth of language as well as other sense construction mechanisms (Piaget 1971).

The three levels mentioned above are interrelated (Jackson 1994). In particular, the cultural and causal levels intensify each other, resulting in the existence of particular groups, dominated by internal distinctions and codes, generating a meaning distinct from other groups. Applied to legal language, we can see similarities with what Jackson calls 'semiotic groups'. In the broadest of terms, the definition of a 'semiotic group' is 'a group (professional, national, etc.) which makes sense of law in ways sufficiently distinct from other groups' (Jackson 1999). The legal system comprises a series of interacting semiotic groups.

The concept of semiotic groups, although different in some respects, comes close to the idea of 'social subsystems', developed by the German legal scholar and legal sociologist Gunther Teubner, in his book *Law as an Autopoietic System* (Teubner 1993). Functional subsystems, for instance, groups defined by profession or disciplines, are relatively closed in their self-organization, but partly open to information. If legal information 'enters' a subsystem, it will be transformed in the system's own distinctions, codes, and meanings (Teubner 1993). As a result of this phenomenon, different subsystems make sense of legal information distinctly from other subsystems. The degree of autonomy of the interpreting groups correlates with the 'resistance' they offer against different (dissenting) interpretations of other groups as well as with their power to impose their own interpretation on other groups.

At this point, we might compare Teubner's ideas of 'social subsystems' with MacIntyre's understanding of 'practices' (MacIntyre 1985). 'Practices' are defined by MacIntyre as 'any coherent and complex form of socially established cooperative human activity' (MacIntyre 1985) bound together by rules. Every practice creates what MacIntyre calls 'internal goods', that is, immaterial goods that cannot be known or acquired in any way other than by participation in that particular practice (MacIntyre 1985). This means that 'those who lack the relevant experience are incompetent thereby as judges of internal goods' (MacIntyre 1985). In this view, particular practices differ from each other, since practices create their own internal framework for interpretation. Practices originate and develop from within: the practice is self-referential. When faced with a change in its environment, a practice will react in terms that reflect its own internal organization and its own internal self-understanding. Like Teubner's social subsystems and Jackson's semiotic groups, practices will always react to its environments in terms of its own internal organizations and corresponding codes. Outside information or interaction with other groups or practices will be transformed in the system's own distinctions and meanings.

On the basis of these theories, it may be stated that images, projected by rules, differ in distinct groups and cultures. The group's own codes and internal framework determine the visualization of the rule's action-idea. If we accept that legal

language and action are not two separate entities, but two sides of the same coin, that the rule is an indiscernible thought object and an intermediary between observable conditioning facts and observable consequential facts, and that visualization of legal language is connected to and grounded in action, then the act plays a key role in the sense construction of the rule image. The case study, described in the next section, is a classic example of this phenomenon. The Court and the Prosecution Service can be regarded as two distinct semiotic groups, both envisaging the law (here the law of war) in their own distinctions, codes, and meanings, resulting in legal uncertainty and a lack of legal clarity.

7.4 A Case Study: Fictitious Law of War and Factual Warfare

7.4.1 The Legal Rules and the Picture They Project

The laws of war can be divided into (1) the rules that provide acceptable practices while engaged in war (*jus in bello*) and (2) the rules that are consulted before a war is engaged in, in order to determine whether entering into war is justified (*jus ad bellum*). The *jus in bello* – the 1949 Geneva Conventions – is only applicable in the event of a legal 'state of war', which comes into being after a 'declaration of war'. The declaration of war initiates the state of war and, in that way, reflects a clear dividing line between the 'state of peace' and the 'state of war'. This dichotomy appears to have been almost universally accepted. The *jus ad bellum* involves the rules that justify the start of a war. In the Netherlands, for instance, the Constitution requires prior approval of Parliament, before the government can declare war. Since the 1945 UN Charter, the use of force between states has been prohibited (Article 2(4)). No declaration of war has been made since.[7] The exceptions to the prohibition of interstate force can be found in Article 51 (the individual or collective right of self-defence) and in Articles 39–50 (international peace and security). In this chapter, I will focus on the last-mentioned articles.

International security postulates the institutionalization of the lawful use of force. The collective security system is constructed in Chapter VII (Articles 39–50) of the UN Charter. The Security Council determines the existence of any threat to the peace, breach of peace, or acts of aggression and decides what measures must be taken to maintain or restore international peace and security (Article 39 of the Charter).[8]

[7] However, there is one exception. In 1989, Iran formally declared was against Iraq with which it had been engaged in hostilities since 1981.

[8] Article 39: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

The idea of restoring international peace and security suggests that such a breach has already happened. This being the case, the Council has to employ enforcement measures calculated to re-establish international law and order. On the basis of the Charter, the Council has a whole array of powers, enabling it to maintain or restore international peace. Article 41 authorizes the Council to put into operation measures not involving the use of force, such as complete or partial interruption of economic relations, cutting off communication, and severance of diplomatic relations.[9] If the measures provided by Article 41 prove to be inadequate, the Security Council is authorized by Article 42[10] to maintain or restore international peace and security by military force, either on a limited or on a comprehensive scale.

The common denominator of all UN forces created so far is that they are *ad hoc*, as and when required in specific cases, and their dependence on voluntary cooperation by Member States has been absolute (Sommereyns 1982). Subsequently, UN forces have come to be known as 'peacekeeping' forces and may have manifold missions. 'Peacekeeping' is a broad, generic, and often imprecise term to describe the many activities of the UN forces.

Changes have occurred, especially since the end of the Cold War.[11] Not only the number but also the size, functions, and strategies of peacekeeping missions have been altered. The function of peacekeeping missions has moved beyond interposition and ceasefire monitoring to include election supervision, nation building, and a wide range of other functions. Peacekeeping has also adopted more coercive tactics and strategies, making it increasingly less distinct from collective enforcement actions. In essence, peacekeeping forces are not designed for combat. Nevertheless, it has been understood that they are entitled to defend themselves. Moreover, the Security Council has granted some peacekeeping forces permission to use force in circumstances that go beyond self-defence.[12]

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[9] Article 41: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.

[10] Article 42: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations'.

[11] 1989: the fall of the Berlin wall.

[12] Already in Bosnia-Herzegovina, UNPROFOR (United Nations Protection Force) was explicitly authorized in Resolution 836 (1993), 'acting in self-defence, to take the necessary means, including the use of force, in reply to bombardments against the safe areas' (free from hostile acts) established by the Council, as well as to protect freedom of movement and humanity convoys (Security Council Resolution 836, 48 RDSC 13, 14 (1993)). In Resolution 1101 (1997), the multinational protection force in Albania was authorized 'to ensure the security and freedom of movement' of its personnel (Security Council Resolution 1101, 52 RDSC 58 (1997)). Most significantly, ONUB (United Nations Operations in Burundi) was authorized by the Security Council, in Resolution 1545 (2004), 'to use all necessary means' to carry out its extensive mandate (Security Council Resolution 1545, 43 ILM 1453, 1455 (2004)).

With the evolution of new functions of peacekeeping forces, since the end of the Cold War, scholars have begun to refer to more recent operations as 'new peacekeeping' (Ratner 1995) or 'second-generation' missions (Mackinlay and Chopra 1992). The development from strictly peacekeeping operations to 'enforcement peacekeeping' operations entails the increase of military force towards a full-scale war, which is still denominated under the term peacekeeping. A legitimate peacekeeping enforcement mission is *de facto* indistinguishable from a war, which, in the words of the Charter, is an illegal act of aggression. The fact that war is banished linguistically does not mean that it has vanished empirically.

7.4.2 The Rules Interpreted by the Prosecutor and by the Court

The contradiction between the linguistic ideal of the Charter to ban war and the reality of actual warfare during peacekeeping missions became clear in several cases brought before courts concerning acts during the peacekeeping operation in Iraq, in particular the *Eric O.* case and the *Sleeping marines* case. In both cases, Dutch military personnel participating in the peacekeeping mission in Iraq were prosecuted for actions while fulfilling tasks (*Eric O.*) or neglecting tasks (*Sleeping marines*) during the mission. In both cases, the final question was: Is the peacekeeping mission in Iraq a state of peace (*Eric O.* case) or is it a state of war (*Sleeping Marines* case)? Depending on the answer to this question, the law of peace or the laws of war should be applicable.

Focusing on the *Eric O.* case, the Prosecution Service held to its standpoint that the peacekeeping mission in Iraq was a state of peace and prosecuted Eric O., a commander of the battalion Quick Reaction Force, for manslaughter on the basis of Article 307 of the Dutch Penal Code (*Wetboek van strafrecht*), since O. had fired a warning shot in a threatening situation that killed an Iraqi civilian by accident. Penal law is valid law in times of peace. Eric O. was arrested as a suspect on 31 December 2003. He was directly flown to the Netherlands, where he was imprisoned. Besides manslaughter, O. was accused of deliberately breaching the official instructions (*dienstvoorschriften*) causing danger to someone's life or resulting in someone's death, as stated Article 136 of the Military Penal Code (*Wetboek militair strafrecht*). These official instructions were laid down in the *Aide Memoire for SFIR Commanders* (AM) and the Instructions on the Use of Force (IUF) *(Geweldsinstructies)*.

The District Court, as well as the Court of Appeal, acquitted Eric O. of the charge. Their arguments concentrated on the Rules of Engagement (ROE) which authorized 'the passing of warnings to any person by any means' (Article 151 ROE). The Court of Appeal declared that O.'s conduct could not be regarded as substantially imprudent, negligent, or careless. O.'s behaviour was necessary under the threatening circumstances, sketched by several witnesses (necessity requirement). He could not have acted in any other way, given the lack of military personnel in the threatening

situation (subsidiarity requirement). Nor did he act out of proportion, giving the warning shots in order to remove the threat and the hindrance for the mission (proportionality requirement).

By declaring the ROE, as a part of the Memorandum of Understanding, ratified by the Netherlands before engaging in the Iraq mission, applicable and valid law for the peacekeeping mission in Iraq, both Courts held to their standpoint that this mission was clearly *not* a state of peace, in which soldiers function like police officers, as the prosecutor stated, and have to act in according with the existing 'Instructions for police officers concerning the use of force'. But if it is not a state of peace, what *is* the legal status of this peacekeeping mission? The Court of Appeal declared that several legal states can be distinguished between the ultimate state of war, on the one hand, and the ultimate state of peace, on the other. However, based on the idea of the separation of powers, one of the basic principles of the Dutch *Rechtsstaat*, the judiciary is not allowed to decide upon this matter. It has to be left to the legislature, since the Constitution empowers the legislature with supremacy over the judiciary. However, by ratifying and declaring the ROE applicable law, the Court of Appeal concluded in this case that these rules guarantee military units in Iraq a sufficiently 'robust action'. In fact, *de facto* warfare could be observed in Iraq during the peacekeeping mission. Thus, the judges could not decide what *precisely* the legal status of the peacekeeping mission was. Negatively formulated, the mission was not a regular state of peace but was dominated by the ROE, rules for a situation of 'war', and instituted in particular for this mission. In its judgment, the Court of Appeal criticized the Public Prosecution Service as well as the Minister of Defence. The judges pointed out that the questions about the legal status of the mission had to be answered by the Public Prosecution Service itself, in mutual deliberation and agreement with the military experts of the Ministry of Defence, being part of the legislative power. The answers must function as the basis of a balanced policy for instruction and prosecution. Unfortunately, there had not been such deliberation between the Public Prosecution Service and the Minister of Defence.

Next, the Court of Appeal observed, much to its regret, that in the *Eric O.* case, the Public Prosecution Service had evidently been *insufficiently* prepared for the question of how to react to the described shooting incident. Secondly, the Court of Appeal made the direct and clear statement that, in the comparison with similar rules, such as the instructions for police officers, the fact that a military action during an international mission is *of a totally different order* had been completely ignored. The court observed, however, that further elaboration of ideas had been initiated within the Public Prosecution Service, leading to a different procedure: a soldier who fires will no longer be regarded as a *suspect*. Finally, the Court concluded that, in similar future cases, the Public Prosecution Service's attitude could result in the absence of the necessary legal certainty for soldiers on international missions acting under dangerous circumstances. The Public Prosecution Service was told to work on its 'situational awareness'.

7.5 Applying the Framework to the Case Study

Based on the theoretical notions described in Sects. 7.1, 7.2, and 7.3, an analytical framework can be constructed and applied to the case study. In the classical view, legal rules are directive language involving an action-idea in a dialogical context, in order to influence the behaviour of the recipient in accordance with the rule. On the one hand, we find the indiscernible rule that needs to be thought of as real, that is, the internally constructed visualization, and, on the other hand, observable action that can be regarded as the actualization of the internally created picture. This rather unilateral concept of the relationship between law and conduct can be extended and completed with the aid of institutional legal theory and the concept of law of Ross and Olivecrona.

In institutional legal theory, the fictitious rule and factual behaviour are regarded as two sides of the same coin. Actions express and simultaneously institute rules. This phenomenon is called 'institutional legal fact'. The rule, in turn, entails in new factual conduct of execution and judgment. Ross's exposure on the phenomenon *tû-tû* and its modern version of claims and rights show analogous aspects. Thus, the rule, regarded as an indiscernible action-*idea* that needs to be thought of as real, that is, a visualization in the mind, stands between institutive (or conditional) facts and consequential facts. In this way, the conversion from internal visualization into external acts involves a reconstruction in which reciprocal elements are involved, revealing the rule's meaning-content as a result of action, which Peirce calls 'final interpretant' and 'living definition'.

Eric O.'s shooting incident can be regarded as the conditioning fact that instituted the rule, which resulted in consequential facts, execution and judgment. In this 'fact-rule-fact' sandwich structure, the legal rule forms the indiscernible intermediary between the observable facts. The actual execution and judgment of the prosecutor and the judge determined what (distinct) images were projected by the rule(s). In this respect, the Prosecution Service and the Courts can be seen as two distinct semiotic groups, defined by profession and divided by the principle of the Trias Politica. Members of such groups generate images of the legal rules within the group's own inner framework. Thus, the images, the legal language projects, vary within distinct semiotic groups in society, since they 'transform' the legal information into their own distinctions, meanings, and codes. In the *Eric O*. case, prosecutor and judge each applied their own distinct framework, resulting in a conflict on sense construction of the rule involved. Here, not one rule was central to visualization, but two totally different (sets of) rules. The Prosecution Service insisted upon the law of peace, that is, the Dutch Penal Code, which is valid law in times of peace. The Courts insisted on the law of war, that is, the ROE, which are valid rules in times of war. This discord resulted in legal uncertainty and lack of legal clarity and was in flagrant contradiction with the rule of law. The Courts, as one semiotic group, stuck to their conclusions. However, they could not decide upon creation of legislation, in which the legal status of robust peacekeeping missions needs to be regulated, since this competence is reserved to the legislature.

From the theoretical notions that language is grounded in and developed from action, that legal language forms an abstraction and a representation of the action, that the rule is a fictitious intermediary between actions, and that action is the 'final interpretant and a living definition', we might conclude that acts play an essential role with respect to the imaginary terminology of the legal rule that becomes manifest twice, first, visualized in the conditioning acts of Eric O.'s shooting incident and, second, in the consequential acts of the Prosecution Service and the Courts.

The question of the Court's ascendancy as one semiotic group over the Prosecution Service as another semiotic group remains unanswered. However, following Teubner's concept of law as an 'autopoietic system', it may be concluded that the degree of autonomy of a semiotic group correlates with the 'resistance' it offers against different images of another group as well as with its power to impose its own codes and meanings on other semiotic groups.

7.6 Final Remarks

The *Eric O*. case attracted a great deal of attention and was the subject of debates in politics, constitutional science, and in the media. While the case was pending, a period of several years, the lack of clarity about the legal status of peacekeeping missions that are characterized by warfare was central in discussions in the media and among constitutional lawyers. Since the case had a huge impact on the life of Eric O., a military man, doing his duties in Iraq in a warfare situation that was named 'peacekeeping', investigations were started, resulting in an immense research report[13] in which the legal status of the 'robust' peacekeeping missions was analysed and recommendations were given in order to avoid misunderstandings in the future. Moreover, it resulted in a change in governmental policy. Regular deliberations will take place in the future between the Minister of Defence, as part of the legislature, specialists in the field of war, and the Prosecution Service in order to harmonize the differences in viewpoints and to avoid a lack of legal certainty, which is one of the basic principles in the Dutch *Rechtsstaat*.

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[13] *Rapport Onderzoek NATO Response Force*, Den Haag: Sdu Uitgevers, 2006, Kamerstukken II [Parliamentary Documents] 2005–2006, 30 162, nos. 2–3, *Verslagen van gesprekken* [Reports of Discussions], nos. 4–5.

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Part II
Visualizing Legal Scholarship

Chapter 8
The First Amendment and the Second Commandment

Amy Adler

Abstract We live in an image culture, a world in which images are so ubiquitous as to be unremarkable. It is said that the image has surpassed the word as the dominant mode of communication. It seems preposterous to suggest that in this modern, digital, visual culture, we might still feel the ancient, bewitching pull of images, the instinct that images possess an uncanny power or danger. Surely, this view of images is archaic; it resembles the view that motivated both idolaters and iconoclasts in earlier, supposedly more primitive, cultures. Yet I believe this ancient view of images is alive and well (although we don't acknowledge it) in the modern and supposedly rationalistic world of contemporary First Amendment law. In my view, First Amendment law consistently and unthinkingly favors text over image, and it does so for reasons that bear a remarkable similarity to the reasons that motivated iconoclasts throughout the history of religious and secular struggles over images.

In this chapter, I explore a variety of free speech doctrines to establish that First Amendment offers greater protection for verbal as opposed to visual forms of representation. Curiously, this consistent preference for text over image is buried in the doctrine; assumed and almost never acknowledged, its real-world implications are dramatic. I then show that the First Amendment treatment of images echoes the approach to visual imagery that animated the biblical prohibition on graven images and the historical, religious impulse to destroy images. The view of images that

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motivated iconoclasts, the perception of images as invested with magic powers or indistinguishable from what they represent, persists unrecognized in contemporary First Amendment law and theory.

8.1 Introduction

> *Thou shall not make unto thee any graven image, or any likeness of anything that is in heaven above or that is in the earth beneath or that is in the water under the earth.*
>
> — Exodus 20:4–5

> *The ancient superstitions about images—that they take on lives of their own, that they make people do irrational things, that they are potentially destructive forces that seduce and lead us astray—are not quantifiably less powerful in our time.*
>
> — W.J.T. Mitchell, *What Do Pictures Want?*

We live in an image culture, a world in which images are so ubiquitous as to be unremarkable. It is said that the image has surpassed the word as the dominant mode of communication. It seems preposterous to suggest that in this modern, digital, visual culture, we might still feel the ancient, bewitching pull of images, the instinct that images possess an uncanny power or danger. Surely, this view of images is archaic; it resembles the view that motivated both idolaters and iconoclasts in earlier, supposedly more primitive, cultures. Yet I believe this ancient view of images is alive and well (although we don't acknowledge it) in the modern and supposedly rationalistic world of contemporary First Amendment law. In my view, First Amendment law consistently and unthinkingly favors text over image, and it does so for reasons that bear a remarkable similarity to the reasons that motivated iconoclasts throughout the history of religious and secular struggles over images.

I have two major goals in this chapter. The first is to establish that the First Amendment offers greater protection for verbal as opposed to visual forms of representation. The preference for text over image surfaces in a variety of places in First Amendment thinking. It is, however, a peculiar preference: it is often assumed and almost never acknowledged. Yet, the difference between text and image within the First Amendment has significant real-world implications. It is evident, for example, in the pattern of contemporary obscenity prosecutions, which have focused exclusively on pictorial rather than textual material. The preference for text also arises in child pornography law, which focuses exclusively on pictures. It also turns up as an assumption in a variety of scholarly thinking. For example, Catharine MacKinnon's antipornography writing argues that pictorial pornography, especially photography, is far more harmful to women than is textual pornography. The uncertain status of visual images, in my view, also influences the Court's jurisprudence about the USs flag.

My second goal in this chapter is to trace the ways in which the First Amendment treatment of images echoes the approach to visual imagery that animated the biblical prohibition on graven images and the historical, religious impulse to destroy

images. The view of images that motivated iconoclasts, the perception of images as invested with magic powers or indistinguishable from what they represent, persists unrecognized in contemporary First Amendment law and theory.

Part I offers a very brief introduction to the complex underpinnings of the biblical prohibition on graven images and historical outbreaks of iconoclasm by focusing on one theme that recurs in the literature—the fear that images might somehow merge with their prototypes. Part II then turns to the argument that there is a First Amendment hierarchy that values text over image. Here, I explore four areas of First Amendment law and theory in order to tease out the thematic concerns about images that underlie this unrecognized hierarchy. Ultimately, I argue that the First Amendment preference for verbal over visual representation rests on assumptions about visuality that have biblical roots.

8.2 Iconoclasm and the Fear of Images

In Exodus, Chapter twenty, verse four, the Hebrew Bible commands:

> Thou shall not make unto thee any graven image, or any likeness of anything that is in heaven above or that is in the earth beneath or that is in the water under the earth… (Exod. 20:4–5)

The biblical prohibition on graven images is an extraordinarily complex subject, and I could not begin to do it justice in the confines of this condensed account. In what follows, then, I focus on one central theme in the religious literature that I believe is particularly relevant to First Amendment law and theory: there was a fear that visual images were so powerful that they would provoke viewers to confuse the image with its prototype, leading to a dangerous merger of signifier and signified (Freedberg 1989; Halbertal and Margalit 1992). This theme informed not only the second commandment, it also resurfaced as a prominent justification in numerous outbreaks of iconoclasm.

David Freedberg argues that throughout the history of iconoclastic controversies, across culture and religions, run certain recurrent assumptions about the nature of images. Whether it be the great iconoclastic movements of Byzantium in the eighth or ninth century, of Reformation Europe, of the French Revolution or the Russian Revolution, or even modern day, seemingly isolated attacks on art, one of the most prominent fears expressed by iconoclasts has been that the image will somehow merge (or be seen by others to merge) with what it represents (Freedberg 1989, 378–428).[1] Of course, as the image tempts us to fuse it with what it represents, this becomes the basis of idolatry. One danger of making an image of God is that we might become so entranced with the image that we end up worshipping the thing itself, forgetting that it is only a representation. The image is so beguiling that we

[1] David Morgan has said that in debates on iconoclasm that "difference between representation and the person represented had… become unclear" (2005, 145).

lose all sense. The next step, of course, is iconoclasm. Thus, it is a premise of this piece that idolatry and iconoclasm are two sides of the same coin—both views depend on the attribution of extraordinary power to images.[2]

The Second Commandment's prohibition on graven images was handed down from Moses to the people on tablets in the midst of the "Golden Calf" episode of the Bible (Exod. 32:1–35). Moses went to receive the Word of God, and, in his absence, the Israelites became distracted. They built the Golden Calf, a glittering golden image, and began dancing around it as they lapsed into decadent sensuality and distraction. When Moses returned with the inscribed Word of God, he broke the tablets in anger at what he beheld. This idolatry was no small matter. Moses killed 3,000 men. He burnt the Golden Calf, strewing its dust into the water, and made the people drink it. Only then did Moses give God's commandments once again to the Israelites. This passage marks the elevation of the Word over the image in the Bible. It vividly illustrates the hazardous sensuality of visual representation. The voluptuousness and seductiveness of the image, its power beyond words, and its appeal to the senses and to passion rather than reason paved the way for both worship and condemnation.

Why do images but not words invite such a response? Why does the biblical prohibition apply only to pictorial representation? Indeed, verbal representations of God are not only permitted but encouraged. As Halbertal and Margalit argue, the potential confusion between representation and prototype is unique to pictorial representation.[3] They write: "This blurring of the distinction between symbol and the thing symbolized, which is so common in idolatry, does not occur in language" (1992, 52). The tendency to equate images with what they represent and to invest them with magical powers recurs across a number of contexts—not only in the long-standing worship of images as religious icons or the belief that certain pictures have talismanic properties but also in the widespread fear among native peoples that a picture captures your soul (Frazer 1996, 223–24), or the use of voodoo dolls, or the burning of enemies in effigy. All of these various uses of images depend on a fusion between representation and its subject or its effects.

This interest in the power of images that informs the religious literature also characterizes a great deal of contemporary, secular criticism in the field of visual studies. In recent years, in fact, some say that the field of visual studies has taken an "iconic turn," marking a newfound fascination with the autonomous power of images, their ability to determine their own reception (Moxey 2008; Belting 1994). The use of the term "iconic" in this literature deliberately conjures up the concept of divine presence immanent in religious icons. Of course, there are still many critics

[2] The idolater perceives the image as having power over himself. The iconoclast fears that others perceive the picture as having power over them. The image's power is to be celebrated in the former case and destroyed in the latter. But as David Freedberg puts it, "the love and fear of images… are indeed two sides of one coin" (1989, 405).

[3] Although they do acknowledge a qualification to this rule, citing the potential fetishization of the Torah or occasionally of names (1992, 52).

who resist this turn, and some who resist, in fact, the very assumption that there is a marked distinction between text and image, as did Nelson Goodman and to a lesser extent E.H. Gombrich in an earlier wave of criticism. Nonetheless, for purposes of this chapter, I will assume some difference between pictorial and linguistic representation, at least at the very important level with which I am concerned: the level of cultural and, as I will now explore, legal reception.

What are the First Amendment implications of this tendency I have described to attribute life to images, to imagine them as fusing signifier and signified? I believe it leads to two seemingly paradoxical results: on the one hand, it may lead us to view images as trivial or unimportant in the First Amendment hierarchy. As signifier merges with signified, and the image becomes a thing, we may forget that we are in the presence of representation, of speech, at all. In this view, the First Amendment would not even apply to images. On the other hand, this same merger between signifier and signified can lead to the view that images are anything but trivial. Instead, they possess a magical, uncontrollable autonomy that requires us to restrain them. In this view, images would count as "speech" for First Amendment purposes, but they are such peculiarly dangerous type of speech that the typical First Amendment rules should not apply to them.[4] Below, I will explore how both views of images play themselves out in free speech law and theory.

8.3 The Preference for Text Over Image in First Amendment Law and Theory

Drawing on this analysis, in this part, I explore four areas of First Amendment law and theory in order to trace the ways in which I believe age-old assumptions about visuality assert themselves in the modern First Amendment context.

8.3.1 Obscenity Law

> *[W]hatever images are, ideas are something else.*
>
> — W.J.T. Mitchell (1994), *Iconology: Image, Text, Ideology*

In the 1973 case of *Kaplan v. California*, the Supreme Court offered in dicta its only overt acknowledgement of the preferred status of text over image in First Amendment law. *Kaplan* involved the obscenity prosecution of an adult bookstore owner for selling an "unillustrated" book to an undercover officer (116–17). The Court described the book as "made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous" (116–17).

[4] Perhaps this double vision of images as both trivial and dangerous bears something in common with what W.J.T. Mitchell suggested when he wrote: "We need to account not just for the power of images but their powerlessness, their impotence, their abjection" (2004, 10).

The problem the Supreme Court confronted in *Kaplan* was that the book contained no pictures. Could mere words be considered obscene? The Court's answer was a cautious "yes." Although it held that words alone could indeed be obscene in some cases, the Court also warned that the prosecution of text should give us greater pause than the prosecution of images. Yet, the Court's opinion was maddening in its failure to explain or justify its distinction between words and images. In a remarkably unilluminating passage, Chief Justice Burger offered the following account of the preferred status of text over image in obscenity law:

> Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be. (119)

Why should it be so? Why do words have a different and preferred place in our hierarchy of values? Justice Burger offers "tradition" and emotion in place of analysis. "So it should be" is his ultimate argument. In my view, certain deep but unspoken assumptions about both the meaning of the First Amendment and the distinction between text and image underlie Burger's assertion.

First, Chief Justice Burger's comment assumes a basic, commonplace First Amendment hierarchy in which protected speech is opposed to unprotected conduct. Second, he assumes that the danger of prohibiting speech is that to do so will interfere with "the communication of ideas." This is an unsurprising assumption, given that the predominant rationale for protecting speech under the First Amendment is the fabled metaphor of "the marketplace of ideas."

What is perhaps more surprising is that Burger's statement maps the text/image dichotomy onto the speech/conduct one. His account assumes an association between text and ideas and thus, by virtue of the marketplace of ideas metaphor, an association between text and speech. In contrast, he associates images with conduct and the body. Distinguishing the lofty world of words from "obscene pictures of flagrant human conduct," Burger seems to envision the category of pictures itself as flagrant and debased. They are so closely associated with the conduct they depict that they somehow merge with it, becoming conduct-like rather than speech-like. Indeed, this is a common reaction to images, which are often perceived as if they were unmediated (Goodman 1976).[5] Burger's hierarchical associations recall what W.J.T Mitchell terms "the familiar claim that pictures cannot make statements or communicate precise ideas" (1986, 66). Embedded in Chief Justice Burger's assertion, then, are strains of the long-standing anxieties about images we saw earlier: images are lowly, sensual, and divorced from the realm of reason and ideas; they are so connected with passion, the body, and the senses that pictures become fused with what they represent. They cease to be representation.

Chief Justice Burger wrote of the preferred status of text, "So it should be." And so it was: since *Kaplan*, the preference for text over image in obscenity law has

[5] Goodman, of course, disagrees with this perception.

become the rule in contemporary obscenity prosecutions, which have focused almost exclusively on pictorial rather than textual material (Adler 2000, 210). The influential Attorney General's Commission on Pornography noted and encouraged this prosecutorial trend in 1986. Citing the *Kaplan* Court, the Attorney General's report described the "special prominence of the printed word," as compared to images, in free speech law (1986, 382). The report observed that there is "for all practical purposes, no prosecution of [purely textual] materials now" (382). With two recent notable exceptions (in cases that compensate, as I have argued, for the limits of child pornography law), this trend in obscenity law of prosecuting only visual rather than verbal material has continued unabated (Adler 2007).[6]

8.4 Catharine MacKinnon and the Feminist Critique of Pornography

Photography has something to do with resurrection.

— Roland Barthes (1982), *Camera Lucida*

The image is a kind of threat.

— David Morgan, *The Sacred Gaze*

The image is the sign that pretends not to be a sign, masquerading as (or for the believer, actually achieving) natural immediacy and presence.

— W.J.T. Mitchell, *Iconology: Image, Text, Ideology*

Antipornography feminist Catharine MacKinnon is a scathing critic of almost every facet of the Supreme Court's obscenity jurisprudence. Yet, surprisingly, MacKinnon's approach to sexual materials bears one thing in common with the Supreme Court's: she, too, assumes a hierarchy of text over image. The Court and Mackinnon disfavor images for different reasons, however. Whereas the Court distinguishes text from image in obscenity jurisprudence on the assumption that images are lowly and unimportant, MacKinnon singles out images because she views them as far more dangerous than words.

MacKinnon's basic argument against pornography is as follows: we should censor it not because it is immoral or worthless—reasoning that comes from obscenity law—but because it constructs a world of violence, subjugation, and inequality for women (Dworkin and MacKinnon 1988, 46). Pornographic images are doubly

[6] Adler describes recent trend of using obscenity law to compensate for limits of child pornography law. See also *U.S. v. Whorley*, 550 F.3d 326, 335 (4th Cir. 2008) another case in which obscenity law is applied to text. Here, defendant was convicted of receiving obscene anime cartoons and sending or receiving obscene textual emails about sexual fantasies involving children in violation of 18 U.S.C. 1462. Judge Gregory, concurring in part and dissenting in part, claimed that the text-only emails should be protected as "pure speech." Insisting on the special importance of words as opposed to images in the First Amendment, Judge Gregory cited the special "ability to consider and transmit thoughts and ideas through the medium of the written word."

harmful from MacKinnon's perspective. First, she argues, they are inseparable from the violent action that produced them: the pictures are infected with the "female sexual slavery" that she believes is required to produce them (46). She emphasizes violent acts of abuse that go into making pornography: "[W]omen are gang raped so they can be filmed…. [W]omen are hurt and penetrated, tied and gagged… so sex pictures can be made" (MacKinnon 1993, 15). But MacKinnon believes that all pornography—even that made by women who "voluntarily" pose for it—is a product of pervasive violence and inequality.[7]

The second harm MacKinnon attributes to pornography is that it constructs a world in which all women are victimized. Pornographic images, already the product of violence, harm women beyond those in the pictures: they "institutionaliz[e] a subhuman, victimized, second-class status for women" (MacKinnon 1987, 200–01). She writes: "Social inequality is substantially created and enforced" through pornography (MacKinnon 1993, 13). Arguing that pornography is therefore action, not just speech, she writes that pornography is "a practice of sexual politics, an institution of gender inequality" (MacKinnon 1989, 197). Thus, MacKinnon concludes that pornography is more "actlike than thoughtlike," and that it should no longer merit First Amendment protection (204).

Formally, MacKinnon's work addresses both pictorial and verbal pornography. The model antipornography ordinance she drafted along with feminist theorist Andrea Dworkin specifically defines pornography as "the graphic sexually explicit subordination of women through **pictures and/or words**" (MacKinnon and Dworkin 1988, 36; emphasis added). Yet, despite her formal concern for banning words as well as images, it becomes clear upon closer reading of her work that MacKinnon's main target is pornographic images, not text. As I will suggest below, a special abhorrence for visual pornography emerges in MacKinnon's work.

Why would MacKinnon reserve greater concern for images? I believe that images for her bear a kind of magical power that recalls the power of images in religious, iconoclastic literature. Indeed, the image in MacKinnon's work becomes the site of fusion between the two kinds of harms that she attributes to pornography. As described above, these two harms are temporally distinct. The first type of harm—the violence that it takes to produce pornography—precedes the existence of the picture. The second, social construction harm, occurs after the picture is made; it stems from the effect the image has on its viewers. Yet for MacKinnon these past and future harms are magically compressed in the immortal, timeless space of the photograph. The picture not only is alive with the violent action, the rape, that produced it but also affects its viewers in a way that causes this violence to reproduce itself. Thus, in Mackinnon's work, the picture is inextricable from the harm that produced it and the harm that it conjures up.

[7] She contends that when women consent to posve for pornography, such consent is tainted because "all pornography is made under conditions of inequality based on sex, overwhelmingly by poor, desperate, homeless, pimped women who were sexually abused as children" (Dworkin and MacKinnon 1988, 20).

Consider the vision of images that appears at the opening of MacKinnon's book, *Only Words*. The book begins with a harrowing passage that addresses the reader in the second person, commanding her to imagine herself as being raped and tortured. "You grow up with your father holding you down and covering your mouth so another man can make a horrible searing pain between your legs. When you are older, your husband ties you to the bed and drips hot wax on your nipples and brings in other men to watch…. You cannot tell anyone" (MacKinnon 1993, 3). After this account of sexual violation, MacKinnon then turns to the subject of photography[8]:

> In this thousand years of silence, the camera is invented and pictures are made of you while these things are being done. You hear the camera clicking or whirring as you are being hurt, keeping time to the rhythm of your pain. You always know that the pictures are out there somewhere, sold or traded or shown around or just kept in a drawer. In them, what was done to you is immortal. He has them; someone, anyone, has seen you there, that way. This is unbearable. What he felt as he watched you as he used you is always being done again and lived again and felt again through the pictures. (3–4)

Note what's going on in this passage. Pictures are so powerful it is as if they are alive with the action they document. Indeed, they are "immortal": through them your violation is "done again and lived again and felt again." Pictures are perpetual, potent, and curiously animate. Their promiscuity and permanence are part of their power—they are always "out there somewhere." The camera's click and whir is not just a soundtrack to your pain; the pictures it produces become a site of your eternal re-violation.

Indeed, pictures are so powerful, so alive with the abuse they document, that they have an uncanny, talismanic power to reproduce themselves. In a peculiar passage, MacKinnon writes about the connection between the violence that goes into making pornography and the violence that she believes pornography creates. She writes:

> I have come to think that there is a connection between these conditions of production [the force that goes into producing pornography] and the force that is so often needed to make other women perform the sex that consumers come to want as a result of viewing it. In other words, if it took these forms of force to make a woman do what was needed to make the materials, might it not take the same or other forms of force to get other women to do what is in it? (20–21)

In this passage, MacKinnon invests pictures with talismanic power, as she does at another point when she writes that "[p]ornography brings its conditions of production to the consumer" (25). The picture becomes a totem, supernaturally able to reproduce its violent origins when it is seen by future viewers.

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[8] Many of the questions I discuss here raise issues not only of images in general, but of photography in particular. I have addressed the unusual vulnerability of photography to censorship in prior scholarship. Here, I do not focus on photography as a genre but rather on photography as a subset of images more generally. Like all images, photography often raises assumptions that it is crude, dangerous, powerful, or true. Although photos often present these assumptions more forcefully than do other types of images, for purposes of this chapter, I posit that it is a difference of degree not of kind.

MacKinnon's view of images in these passages is remarkably similar to the view that permeates iconoclastic and iconophilic accounts. For her, a pornographic picture is like an icon in two ways. First, she collapses signifier and signified: the picture is somehow alive, fused with what it represents. But second, the image, like an icon, is able to work magic. As Halbertal and Margalit describe in their definitive account of the biblical prohibition on idolatry, idols typically "become the bearers of the power they represent" (1992, 52). Freedberg describes images as possessing "an effectiveness that proceeds as if the original body were present" (1989, 402). The thing represented—whether violence or a god or a powerful saint—inheres in the representation; the depiction can miraculously conjure up the power of the thing depicted.

It is no wonder that MacKinnon has insisted when writing about pornography that "representation is reality" (29). MacKinnon's definition of pornography begins with her assertion that "pornography **is** … the subordination of women" (Dworkin and MacKinnon 1988, 36) (emphasis supplied). Pornography does not represent the subordination of women—it does not cause it, it **is** it. It "is a form of forced sex" (MacKinnon 1989, 197). When the Seventh Circuit struck down MacKinnon's antipornography ordinance after it had been enacted into law by the city of Indianapolis, the Court seized on and rejected this very point in her reasoning. The Court insisted on the distinction between representation and reality, writing: "[T]he image of pain is not necessarily pain" (American Booksellers Ass'n 1985, 1986, 330). Yet for MacKinnon, the fusion between visual signifier and signified is precisely her point. She writes, for example: "The most elite denial of the harm [of pornography] is the one that holds that pornography is 'representation'" (MacKinnon 1993, 28).

By dwelling on images and not on textual pornography as her paradigm of pornographic harm, MacKinnon draws on an age-old model of visual representation. It is the model of both iconophiles and iconophobes, in which pictures bear a special power by being fused with what they depict.[9]

8.4.1 Child Pornography Law

> *[Images] were perilous in themselves, full of the destructive power of their always-suspect origins.*
>
> — John Phillips (1973), *The Reformation of Images*

The Supreme Court's child pornography jurisprudence is founded on the distinction between text and image. Child pornography law governs only "visual depictions"

[9] Although I do not discuss it here, another result of this fusion is that MacKinnon, like many others, attributes a special truth value to photography. She writes: "[T]he pictures are not so different from the words and drawings that came before, but your use for the camera gives the pictures a special credibility, a deep verisimilitude, an even stronger claim to truth…." (1993, 5).

of child sexual conduct (18 U.S.C. 2256). Words can never be child pornography, no matter how gruesome or sexually explicit they might be.[10] In child pornography law, we once again find an area of First Amendment doctrine permeated by unexplored anxieties and assumptions about visuality.

Federal law defines "child pornography" as "any visual depiction, including any photograph, film, video, picture, or computer … image or picture … of sexually explicit conduct" of a child under 18 (18 U.S.C. 2256 (8)).[11] The law tracks the Supreme Court's approach to child pornography, which it initiated in the 1982 case of *New York v. Ferber.* In *Ferber*, a unanimous Court (extremely rare in First Amendment cases) created a previously unknown exception to the First Amendment, proclaiming that "child pornography" was a new category of speech without constitutional protection. The *Ferber* Court encountered a novel First Amendment problem: whether nonobscene,[12] sexual images of children—speech not falling into any previously defined First Amendment exception—could be constitutionally restricted. The Court's answer was yes.

Although *Ferber* announced five reasons that supported the exclusion of such images from constitutional protection,[13] the primary thrust of these rationales was this: child pornography must be prohibited because of the harm done to children in its *production*. The images lack First Amendment protection because their creation requires a crime, the abuse of an actual child.

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[10] Cf. *U.S. v. Whorley*, 550 F.3d 326 (4th Cir. 2008), where verbal accounts of child sexual conduct were prosecuted as obscenity, not child pornography.

[11] Wholly computer-generated images are not child pornography, since their production does not entail the abuse of a real child. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down provisions of Child Pornography Prevention Act that treated "virtual" child pornography as if it were child pornography). This reasoning, which distinguished between "real" images and "virtual" ones, is based in my view on the faulty but common assumption that certain images, especially photographs, are unquestionably "true."

[12] The materials at issue in Ferber had been found not to be obscene according to a jury. Thus, the issue for the Court was sharply defined.

[13] *Ferber*, 458 U.S. 747, 756 (1982). The five rationales set out in *Ferber* were as follows:

1. The State has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor." *Ibid.,* 756–57.
2. Child pornography is "intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the child's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed" in order to control the production of child pornography. *Ibid.,* 759 (citations omitted). The Court went on to explain that the production of child pornography is a "low-profile clandestine industry" and that the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by punishing its use. *Ibid.*, 760.
3. "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography. *Ibid.*, 761 (citations omitted).
4. The possibility that there would be any material of value that would be prohibited under the category of child pornography is "exceedingly modest, if not *de minimis*." *Ibid.,* 762.
5. Banning full categories of speech is an accepted approach in First Amendment law and is therefore appropriate in this instance. *Ibid.,* 768–69.

Ferber introduced a novel theory into First Amendment law: the theory that a visual representation can be banned because of the underlying illegal act that produced it. This was a remarkable aberration in First Amendment jurisprudence. Indeed, outside of child pornography law, the First Amendment aggressively polices the distinction between a representation and the thing represented. The normal First Amendment rule thus recognizes that a photograph of a criminal act is not the same thing as a crime. If a news photographer captures a picture of a bank robber in the act, for example, we might publish his photograph on the front page of the newspaper, not ban it. As Thomas Emerson wrote: "[T]he basic principles of a system of freedom of expression would require that society deal directly with the [illegal] action and leave the expression alone" (Emerson 1970, 494).

Of course, it is still possible to prosecute the photographer of a crime for any involvement he may have had with the crime itself. The picture does not protect him.[14] Suppose someone took a picture of a murder. Perhaps, if the photographer had merely happened upon the act and had been unable to intervene, we would laud his journalistic coup. If he had participated in the murder, we would prosecute him for murder. In the most extreme case, if he committed the murder in order to photograph it, we might consider it a particularly perverse murder. But in any of these events, the First Amendment would make it exceedingly difficult to criminalize the photograph of the murder.[15] We would prosecute the photographer for the act, not the picture. And although some might hope that notions of journalistic taste would prevent a newspaper from publishing the picture, First Amendment law would almost certainly protect the newspaper's right to do so.

But consider the law of child pornography: it is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the *depiction* of a crime in addition to the crime itself. The Court in *Ferber* recognized that it was already a crime to abuse a child in order to produce child pornography. It observed that producing such materials is "an activity illegal

[14] This is contrary to what MacKinnon intimates in the opening of *Only Words*, where she appears to suggest that taking pictures decriminalizes the underlying crime of rape (MacKinnon 1993, 4). For a statement of the conventional First Amendment rule, see, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

[15] See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) ("[State action to punish the publication of truthful information seldom can satisfy constitutional standards]."); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (upholding the newspaper's right to publish accurate information about confidential judicial proceedings); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (allowing publication of so-called Pentagon Papers despite the fact that the papers had been stolen from the Pentagon); *Food Lion, Inc.*, 194 F.3d 505 (4th Cir. 1999) (holding that torts committed while newsgathering may be actionable, but news that is obtained as a result of those torts is protected expression); *Bartnicki v. Vopper*, 532 U.S. 514, 529–30 (2001) (distinguishing Ferber and noting that outside of child pornography law "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.").

throughout the Nation" (Ferber 1982, 761). But the Court consciously chose to permit criminalization of the pictures too. And in doing so, it introduced into its jurisprudence an entirely new rationale for banning speech.

In my view, *Ferber* made this leap in large part because of the visual nature of speech at issue. Of course, as I have previously argued, the particularly horrifying subject matter of the speech involved—depictions of the molestation of children—explains in part the Court's decision to depart from its normal First Amendment rules. But I believe the Court also made this unusual departure in *Ferber* because the speech involved was visual rather than verbal. When it comes to verbal representations, we insist on the distinction between signifier and signified (Peirce 1958); when it comes to visual representations, we are tempted to overlook the distinction. Child pornography law thus represents yet another place in First Amendment doctrine where we see the persistence of the age-old tendency to elide visual images with what they represent.

Child pornography law conflates act and image on a rhetorical as well as a legal level. First, we ban the pictures because of the criminality of the underlying act, which is already a peculiar move in First Amendment law. Then, the rhetoric of the law replicates this compression. The connection between the underlying child abuse and the picture is so strong that courts and legislators often speak of them as if they were one and the same thing, as if the criminality of the act now resides in the picture itself. Courts and legislatures continually repeat the mantra: "Child pornography is child abuse" (Attorney General's Commission on Pornography 1986, 406). The abuse inheres in the image.

Indeed, as in MacKinnon's work, images in child pornography law take on a peculiarly animate quality. Just as MacKinnon sees the image as "immortal," so the Supreme Court views images of child pornography as bearing the power to "haunt the [the child] in future years" (Ferber 1982, 759*n*10). The photograph's timelessness gives it a kind of life; its harm persists "long after the original misdeed took place" (759*n*10). The photographs possess an uncanny autonomy, as if they were somehow quickened by the abuse they captured.[16]

The image no longer merely depicts an act but becomes itself a powerful actor. When the Supreme Court approvingly quoted an article claiming that images of child sexual abuse were more harmful than the actual abuse itself, it seemed to endorse this view of images. The Court wrote: "[P]ornography poses an even greater threat to the child victim than does sexual abuse" (759*n*10). In this formulation, the image becomes even more powerful than a physical act of violation.[17]

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[16] The visual nature of the speech at issue explains the Court's novel reasoning on two levels, not only the Court's treatment of the image as if it were the crime itself, explained above, but also the assumption that a photograph is indisputably "true." See supra note 9 (describing assumption that images have a deeper connection to truth).

[17] This view of images may explain a puzzling recent discrepancy that critics have observed in sentencing law. Sentences for people who download (but do not produce) child pornography are at times so lengthy that they exceed the sentences given to people who commit physical crimes of molestation against children.

8.5 Flags

The Supreme Court's flag jurisprudence also bears traces of the religious suspicion about images. Yet oddly, in this realm, the Court shows strains of both an iconoclastic and an idolatrous view of the visual.[18] In *West Virginia Board of Education v. Barnette* (1943), the Supreme Court struck down a regulation that required children in public schools to salute the flag. The plaintiffs were parents who brought suit to restrain enforcement of this regulation against their children who were Jehovah's Witnesses. Why didn't the Jehovah's Witnesses want to salute the flag? Fittingly for this discussion, their religious beliefs led them to consider the flag a graven image within the prohibition of the Ten Commandments. Saluting the flag was idolatry, as wrong as fetishizing the Golden Calf. Indeed, the Supreme Court in *Barnette* quoted the Ten Commandments' prohibition on graven images to explain why the Jehovah's Witnesses would not salute the flag.[19]

The issue in *Barnette* was the expressive meaning of saluting the flag, which the Court considered a "form of utterance" (624). Nonetheless, the Court lingered at some length over the meaning of the flag itself as speech. Here, the Court gives us a glimpse of its thinking about the strange power of visual speech. In a curious passage, the Court talks about the nature of visual symbols. Justice Jackson writes for the Court: "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag… is a short cut from mind to mind…." (632). Note what's going on in these lines. Visual images are double edged; they are both "primitive but effective." When Justice Jackson says that an image works as a "short cut from mind to mind," he portrays images as forceful, but crude. They're a cheat, a shortcut.

Furthermore, there is a certain treachery to images. The Court's opinion reveals a nagging uncertainty about how to account for the flag's meaning. Consider what Justice Jackson says next: "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn" (632–33). This passage portrays visual symbols as a potentially hazardous form of communication. If the meaning of a visual symbol rests in the mind of the person who sees it, then a speaker who uses a symbol to convey a message runs a risk that the symbol will mean something other than what he intended. Thus, alongside the great power of the visual symbol as speech—it is a primitive and effective shortcut—runs the possibility of betrayal or treachery. The visual symbol is so powerful it may overpower the speaker. He may not be able to control its meaning.

[18] Of course, as I have claimed, both views share a common vision of images as possessing special power.

[19] See *Barnette*, 319 U.S. 624, 629 (1943) ("Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.'").

This same ambivalence about the power and the danger of visual images resurfaces in the Court's later flag-burning cases. In the 1989 case of *Texas v. Johnson* (1989), the Court considered the conviction of a man who burned a flag at a political protest held outside the 1984 Republican convention in Texas (1989, 399–400). The Court struck down the defendant's conviction under a Texas statute that prohibited "desecration" of the American flag.[20]

On First Amendment grounds, *Texas v. Johnson* should have been an easy case. The statute at issue fell well within precedents prohibiting content discrimination. But emotionally this case was very difficult for the Court. Both the majority and the dissent in *Johnson* seemed struck by the strange force of the flag as a visual symbol.

The majority in *Johnson* focused on the special multivalent quality of the flag as a visual image. Just as the Court in *Barnette* had discussed the way in which the meaning of a visual image would fluctuate dramatically depending on who was viewing it and what his attitude was, to the *Texas v. Johnson* Court, the special quality of the flag was its capacity to convey multiple meanings. In fact, according to the majority, it was this quality of the flag that explained why the statute at issue was unconstitutional. The majority reasoned that the problem with the Texas statute was that it said you can only use the flag in one way, to express patriotism. But to limit the flag in this manner was to cut off precisely what is unique and powerful about the symbol: that numerous meanings inhere within it. The Court held that you can't impoverish the cultural realm by confining the flag to only one meaning when by its nature it is capable of so many different interpretations (1989, 417). Visual images by their nature cannot be confined.[21] In short, you can't capture the flag.

What is the dissent's response to this? Yes the majority is right. Yes the Texas law is an example of content discrimination. Yes it is even viewpoint discrimination. But this is the *flag*. And because it's the flag, content discrimination, even viewpoint discrimination, is acceptable. The flag is so important that it should be an exception to all First Amendment principles.

Why? What is it about the flag that should cause us to ignore clear First Amendment precedent? Isn't the flag after all just a piece of cloth? Not according to Justice Rehnquist. In his dissent, he writes about the "mystical reverence" with which people regard the flag, the "uniquely deep awe and respect" that we hold for it (429, 434). When Justice Rehnquist says the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas" (429), it is as if he is saying that the flag is so powerful, so mystical and awe-inspiring that it is no longer an idea, no longer speech. In fact, Justice Rehnquist attributes a religious

[20] *Ibid.*, 400 (quoting Texas Penal Code Ann. § 42.09 (1989)).

[21] Compare the Court's recent statement in Pleasant Grove v. Summum about the greater variation in meaning produced by visual as opposed to text-based monuments: "[T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable" 129 S. Ct. 1125, 1135 (2009).

quality to the flag. He mocks the majority opinion for telling us that the First Amendment prohibits the government from insisting on one correct meaning for the flag. When he says the government has not "established" our feeling for the flag, that 200 years of history have done that, he puts the word "established" in quotes, conjuring up the religious establishment cases (434).

Remember that the Jehovah's Witnesses in *Barnette* thought about the flag as a graven image. One danger of a graven image of course is that it may inspire idolatry. People may worship the image of God rather than God himself. And speaking of idolatry, there is a strange, wonderfully understandable slippage in Justice Rehnquist's opinion. At the close of his rhetorically stirring argument, he writes that the majority's ruling means that men "must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case" (1989, 435).

Do people really die for the flag? Don't people actually die for what it represents? There is a confusion here between the image and reality. This confusion is of course understandable. To soldiers on a battlefield in the heat of terror and violence, the sight of the flag may become so fused with what it represents—their side; living vs. dying—that they might feel that they are indeed fighting for the flag. It is a rich and powerful symbol. But here and at another point where Rehnquist says the flag "embodies" our nation, I think his slippage between the image and what it stands for reveals something deeper about images. They are so strong, such a plain "shortcut" to our minds, that they tempt us to conflate representation with reality.

There is an irrationality to Justice Rehnquist's opinion, as if he is caught in the grip of the symbol himself, as if the emotional, mystical, and religious power of a visual image has overwhelmed him and made him take an easy case and struggle with it. It is as if the danger of visual images, their primitive force, has manifested itself in this opinion. For a brief moment, Justice Rehnquist has given way to idolatry.

8.6 Conclusion

As I have suggested, our free speech preference for text over image rests on a theory of visual representation that is rooted in the second commandment of the Bible rather than the supposedly rational confines of First Amendment jurisprudence. What are the implications of this argument? I am making a claim not only about visuality and the persistence of historical, magical attitudes toward the visual, I am also making an implicit claim about the nature of First Amendment law more generally.

This chapter continues to build what I call a "cultural theory of the First Amendment" (Adler 2005, 2009). Normally, we presume that First Amendment law is rational and objective, based on a continually evolving, often contested, set of legal principles. When we question these assumptions, we often limit our discussion to whether "politics" is a force that could undermine claims to law's neutrality.

In this chapter, however, I suggest a very different vision of the First Amendment, as a body of law that is surprisingly irrational and contingent. This vision invites us to consider the ways in which legal rules, especially when related to speech, are steeped in cultural anxieties and fantasies. Free speech law governs culture, yet in surprising ways, culture also governs free speech law.

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Chapter 9
The Semiotics of Film in US Supreme Court Cases

Jessica Silbey and Meghan Hayes Slack

Abstract This chapter explores the treatment of film as a cultural object among varied legal subject matter in US Supreme Court jurisprudence. Film is significant as an object or industry well beyond its incarnation as popular media. Its role in law – even the highest level of US appellate law – is similarly varied and goes well beyond the subject of a copyright case (as a moving picture) or as an evidentiary proffer (as a video of a criminal confession). This chapter traces the discussion of film in US Supreme Court cases in order to map the wide-ranging and diverse relations of film to law – a semiotics of film in the high court's jurisprudence – to decouple the notion of film with entertainment or visual truth.

This chapter discerns the many ways in which the court perceives the role of film in legal disputes and social life. It also illuminates how the court imagines and reconstitutes through its decisions the evolving forms and significances of film and film spectatorship as an interactive public for film in society. As such, this project contributes to the work on the legal construction of social life, exploring how court cases constitute social reality through their legal discourse. It also speaks to film enthusiasts and critics who understand that film is much more than entertainment and is, in practice, a conduit of information and a mechanism for lived experience. Enmeshed in the fabric of society, film is political, commercial, expressive, violent, technologically sophisticated, economically valuable, uniquely persuasive, and, as these cases demonstrate, constantly evolving.

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9.1 Introduction

This chapter explores the treatment of film as a cultural object among varied legal subject matter. Film is significant as an object or industry well beyond its incarnation as popular media. Its role in law is also varied and goes well beyond the subject of a copyright case (as a moving picture) or as an evidentiary proffer (as a video of a criminal confession). My interest in tracing the discussion of film in Supreme Court cases is to map the wide-ranging and diverse relations of film to law – a semiotics of film in the highest US court's jurisprudence – to decouple the notion of film with entertainment or visual truth (Silbey 2004).

Usually, the interdisciplinary study of law and film takes one of three paths. One path is a "law-in-film" approach, which is primarily concerned with the ways in which law and legal processes are represented in film (Chase 1996, 2002).[1] The "law-in-film" approach considers film as a jurisprudential text by asking how law should or should not regulate and order our worlds by critiquing the way it does so in the film (Kamir 2006). The second path is a "film-as-law" approach, which asks how films about law constitute a legal culture beyond the film.[2] This approach pays special attention to film's unique qualities as a medium and asks how its particular ways of world-making shape our expectations of law and justice in our world at large (Silbey 2001; Johnson 2000). Writings in the "film-as-law" vein explore the rhetorical power of film to affect popular legal consciousness (Silbey 2001). They also may look closely at film's capacity to persuade us of a particular view of the world, to convince us that certain people are good or bad or guilty or innocent by positioning the film audience as judge or jury (Silbey 2007a, b). This "film-as-law" scholarship explains "how viewers are actively positioned by film to identify with certain points of view; to see some groups of people as trustworthy, dangerous, disgusting, laughable; to experience some kinds of violence as normal; to see some lives as lightly expendable" (Buchanan and Johnson 2008, 33–34; Lucia 2005). In this latter approach, film and law are compared as epistemological systems, formidable social practices that, when combined, are exceptionally effective in defining what we think we know, what we believe we should expect, and what we dare hope for in a society that promises ordered liberty (Silbey 2007a, b).

A third approach to film and law explores the many ways film can be used as a legal tool. Increasingly, film is used to enhance policing and investigations (think surveillance cameras, filmed crime scenes, interrogations, and confessions) (Id). Film is also used as a species of legal advocacy to augment trial tactics (opening and closing statements or evidentiary proffers) (Sherwin 2011), settlement conferences, or administrative hearings (e.g., clemency videos) (Austin 2006). The study of film

[1] Both of these books are most akin to the law-in-literature approach. Jessica Silbey, *What We Do When We Do Law And Popular Culture*, 27 Law & Soc. Inquiry 139, 141–42 (2002) (describing the law and literature movement).

[2] I deliberately reverse the nouns here. Where law-as-literature or law-as-film is a study of law as a rhetoric (be it linguistic or visual rhetoric), film-as-law is a study of filmic practices that are as pervasive and effective as legal ones in the ways in which they influence and inspire social order.

in this area of law connects the understanding of film as a complex visual rhetoric with the practice of law as an authoritative and persuasive adjudicative mechanism.

This chapter begins a new path of law and film study. As a semiotics of film in law, it explores how film (the linguistic term and cultural object) is meaningful among Supreme Court cases. Quite literally, this chapter explores the system of meaning that is produced by a data set of Supreme Court cases that discuss film. Following Saussurean linguistics, the chapter asserts that "film" does not correspond to a preexisting concept or object outside of the legal case. To the contrary, "film" is understood only in terms of its relation to the discussion of the legal matter in the case and other like cases and, importantly, in terms of its difference from other issues and items discussed in this body of law that are "not film."[3] When analyzed this way, these cases help constitute that which is film in Supreme Court jurisprudence.

One cannot understand film, of course, without contemplating its audience. By definition, film is meaningful because of the manner in which it is experienced. Insofar as the following discussion delineates film as relating to multiple practices and objects in social life, the discussion also draws attention to the ways in which that delineation depends more or less on the court's construction of a film audience. Thus, as much as the below analysis discerns the many ways in which the court perceives the role of film in legal disputes and social life, it also illuminates how the court imagines and reconstitutes through its decisions the evolving forms and significances of film spectatorship – an interactive public for film in society.

This project contributes to the work on the legal construction of social life and should be interesting to those who wonder how court cases constitute social reality through their legal discourse.[4] It might also be interesting to those film enthusiasts and critics who understand that film is much more than entertainment and perhaps, as such, may also be a problematic conduit of information. Enmeshed in the fabric of society, film is political, commercial, expressive, violent, technologically sophisticated, economically valuable, uniquely persuasive, and, as these cases demonstrate, constantly evolving.

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[3] For a much more thorough discussion of semiotic analysis and a specific area of law, *see* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. Rev. 621, 629–633 (2004).

> In a given language, all the words which express neighbouring ideas help define one another's meaning. Each of a set of synonyms like *redouter* ("to dread"), *craindre* ("to fear"), *avoir peur* ("to be afraid") has its particular value only because they stand in contrast with one another. If *redouter* did not exist, its content would be shared out among its competitors.… So the value of any given word is determined by what other words there are in that particular area of the vocabulary.… No word has a value that can be identified independently of what else there is in the vicinity.

Beebe, 640 (quoting Ferdinand de Saussure, *Course in General Linguistics*, ed. Charles Bally and Albert Sechehaye in collaboration with Albert Reidlinger, trans. Roy Harris (Peru: Open Court, 1990), 114).

[4] See, for example, Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 Iowa L. Rev. 1253 (2009) (describing how formal law – statutes and cases – constructs and constitutes notions of intimacy).

9.2 Process

The cases for this project were found by searching the Westlaw US Supreme Court database (SCT) for terms that included "film," "video," or "moving picture." This initial search yielded roughly 885 unique results that dated from 1894.[5] In more than half of these cases, the search term occurs solely in the case caption or in a quotation in the case and was not otherwise relevant to the legal issue being adjudicated. These cases were deleted from the data set. Approximately 300 cases remained after this initial filtering process was complete.

After reviewing these hundreds of cases, 153 of them contained a discussion of film in which film is relevant as film (and not as something else).[6] These 153 cases were divided into seven categories. Some cases fit in more than one category. The categories are also porous, overlapping in legal doctrine and citing one another for similar legal principles. The largest two categories concern (1) First Amendment freedoms as they relate to censorship (33 cases) and (2) the interrelation of obscenity law and privacy (44 cases). These two categories contain more than half of the 153 cases. The other categories are (3) search and seizure (14 cases), (4) publicity (6 cases), (5) evidence (11 cases), (6) antitrust (26 cases), and (7) intellectual property (19 cases). Considering these categories as whole, it would be fair to say that film becomes relevant to law and law to film when courts evaluate (1) the contours and importance of First Amendment protections at its margins, (2) the fairness and accuracy of judgments about criminal liability, and (3) the structure of economic relations in terms of an optimal efficiency in market regulation.

The remainder of this chapter will discuss each of these categories in further detail and describe the treatment of film within each category to discern the variations in the significance of film as a cultural object as well as in the resulting constitution of film audiences.

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[5] The data set is on file with the author and is available for review upon request.

[6] Several other categories were created but subsequently removed from the data set because they did not relate sufficiently to the question at issue. For example, a category regarding the Federal Communications Commission (FCC) was created but not considered for this essay because they involved regulation of radio and television programming far more than "film" in any sense of the word. The cases in that category concerned interpreting FCC regulations and the extent of the FCC's power. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *U.S. v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Schreiber*, 381 U.S. 279 (1965). A group of cases focusing on religious freedom mentioned film and film equipment but not to any extent that would illuminate the meaning of film beyond that it is communicative. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Morches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Meek v. Pittenger*, 421 U.S. 349 (1975). Other categories excluded include a miscellaneous criminal category, labor law, civil rights, tax law, jurisdiction, and federal court procedure.

9.3 Categories of Analysis

9.3.1 First Amendment: Freedom of Expression and Censorship

Between 1915 and 1952, film was not protected as speech under the First Amendment. "It seems not to have occurred to anybody … that freedom of opinion was repressed in the exertion of power [via the censorship of films] …. The rights of property were only considered as involved. It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded … we think, as part of the press of the country, or as organs of public opinion" (*Mut. Film Corp. v. Indus. Comm'n of Ohio* 1915, 236 U.S. 230, 244). *Mutual Film Corporation* begins this line of legal analysis in 1915, in which the Supreme Court upholds an Ohio statute that created a board of censors for motion picture films. Recognizing that film is a lucrative and popular business, the court also recognizes that films may be "useful, interesting, amusing, educational and moral" (Id, 241). Indeed, the court acknowledges film's "power of amusement" that might appeal to "a prurient interest" (Id, 242), that film is "[v]ivid, useful, and entertaining, no doubt, but … [also] capable of evil" (Id, 244). The court concludes, therefore, that states are within their police powers to "supervise moving picture exhibitions" when "in the interest of public morals" (Id, 242).

The court does not deny that film is a "medium[] of thought," but it says "so are many things … [like] theater, the circus, and all other shows and spectacles" (Id, 243). The argument comparing the right to exhibit films free from a censor board's approval with right to publish a newspaper article or speak at a political rally "is wrong or strained" the court says (*Mut. Film Corp. v. Indus. Comm'n of Ohio*). The court refuses to "extend[] the guaranties of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities and towns" (Id). Motion pictures and "other spectacle" are not of a "legal similitude to a free press and liberty of opinion" (Id, 243–244).

In the early years of film, it was not unheard of to compare film to the theater or a circus (*Gibson v. Gunn* 1923, 202). Film's unruly and unpredictable effect on its audience worried courts, who were charged with controlling the legal proceedings to ensure fairness and stability and applying the law to achieve the same ends. Attempting to discipline the medium of film through censor boards also made sense, given the inherent conservative nature of courts as the last place where innovative technology and cultural revolution would be embraced (Mnookin 1998).

It is nonetheless surprising to consider that the Supreme Court thought film was not sufficiently expressive – in the way that print media or public speaking could be – such that burdening it with censorship boards would not frustrate the goal of deliberative democracy that the First Amendment was intended to foster. It is fair to say that the Supreme Court, until it changed its mind in 1952 with *Burstyn v. Wilson* (1952, 343), paradoxically thought film pathetically empty in terms of its content and potentially dangerous in terms of its form.

In 1952, the court overrules *Mutual Film* declaring "motions pictures … an organ of public opinion … designed to entertain as well as inform" (Id, 501). The court has not changed its mind on the force or content of film. The Supreme Court acknowledges that "motion pictures [may] possess a greater capacity for evil," but that "the line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine" (Id, 501–502).

What has changed? The court mentions the incorporation of the First Amendment to the states through the Fourteenth Amendment and the advent of sound film in 1926. It does not mention the popular cinematic movements – film noir and classical Hollywood – both well developed and appreciated by 1952. Nor does it mention the newsreel films covering wartime events that were shown before feature films, by that time regular occurrences. Indeed, the court seems to accept without analysis what it rejected in *Mutual Film*: that "motion pictures are a significant medium for the communication of ideas" (Id, 501). The court may be adopting (albeit silently) the anticensorship arguments in lower courts and culture that raged against state censorship prior to *Burstyn*.[7] Certainly, there was a rich debate in the years between *Mutual Film* and *Burstyn* in the First Amendment realm outside the film context, in libel and privacy law, incitement, obscenity, and commercial speech.[8] Indeed, from 1915 to 1952, the Supreme Court decided several major cases in the First Amendment area, changing the doctrine significantly.[9] For example, by midcentury, commercial speech – one seemingly discrediting aspect about film in *Mutual Film* – does not

[7] *See Dennis v. U.S.*, 341 U.S. 494, 579 (1951) (Douglas, J., dissenting) (arguing organizing Communist Party organization protected by First Amendment); *Lederman v. Bd. of Educ. of the City of N.Y.*, 95 N.Y.S. 2d 114 (N.Y. App. Div. 1949) (discussing importance of free speech in schools); *Robert v. City of Norfolk*, 188 Va. 413, 426 (1948) (stating license taxes are form of censorship that infringe on freedom of the press).

[8] *Schenk v. U.S.*, 249 U.S. 47 (1919) (upholding violation of Espionage Act on the basis of distribution of anticonscription flier); *Abrams v. U.S.*, 250 U.S. 616 (1919) (upholding violation of Espionage Act on basis of distribution of perceived pro-Bolshevik pamphlets); *Near v. Minn.*, 283 U.S. 697 (1931) (invalidating state law that restricted freedom of press as applied to circumstances where paper critical of Chief of Police was perceived by state as malicious or scandalous); *Schneider v. State*, 308 U.S. 147 (1939) (invalidating state law that restricted public from distributing handbills in streets and on sidewalks); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (adding commercial speech to list of unprotected expression); *Martins v. City of Struthers*, 319 U.S. 141 (1943) (invalidating anti-leafleting law as applied to Jehovah's Witnesses who were distributing fliers door to door); Saia v. New York, 334 U.S. 558, 562 (1948) (constraints on First Amendment freedoms should be narrowly tailored); Kunz v. New York, 340 U.S. 290, 294 (1951) (licensing systems must have standards; otherwise, they are overbroad and unconstitutional); *Beauharnais v. Ill.*, 343 U.S. 250 (1952) (upholding by 5–4 decision state libel law as applied to hate speech); *Roth v. U.S.*, 354 U.S. 476 (1957) (established obscenity as unprotected speech).

[9] *Kunz v. New York*, 340 U.S. 290, 294 (1951) (declaring licensing systems must have standards or are otherwise unconstitutionally overbroad); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–14 (1931) (explaining different effect of restraints preventing publication versus effect of punishment following publication of illegal or improper statements and the court's preference for the latter); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the Due Process Clause of the 14 Amendment protects freedom of expression against infringement by states).

necessarily deprive it of constitutional protection (Stone et al. 1996, 1226–27).[10] These and other influences can be read into *Burstyn* to explain the overruling of *Mutual Film* and *Burstyn*'s recharacterization of film as unprotected because it is a mere "medium of thought" resembling a circus to protected speech because it is a "significant medium for communication of ideas." This may seem like a too subtle shift in language on which to lay much emphasis, but the transformation in effect cannot be overstated. Where in the first decades of the twentieth century the transformative power of film was cause to censor, that same power in the middle of the century was reason the government could not control film unless exceptional circumstances were present (Stone, 504). What changed appears not to be film's qualities (in both cases film can be trivial and profound, dangerous and useful). The court was broadening the First Amendment's protective reach, discussing its application more frequently in the context of national security, complex commercial relations, and a diversifying cultural milieu. Film benefited from this lively debate. What changed was the perception that judges (or state censor boards) were not always the optimal evaluators of whether or not a film's content (or other expressive speech) is worthy of dissemination. Film being a subcategory of a growing volume of valuable and public speech, what changed was an appreciation for the acumen of (film) audiences and their capacity to judge for themselves.[11]

9.3.2 Obscenity and Privacy Concerns

The obscenity and privacy cases turn this analysis on its head. Obscenity is not protected speech under the First Amendment. This branch of US constitutional law is notoriously vague. Applying the standards for obscenity consistently is challenging and the reasons for the low protection (if any protection) debated. Nonetheless, the cases that evaluate allegedly obscene film – pornographic films – are consistent in the manner they treat and discuss the filmic nature of the speech. Whereas in the above section, film evolves into an expressive medium worthy of First Amendment protection, it can too easily be categorized as obscene to lose protection altogether. This is potentially the case because film's peculiar mechanism – its indexicality and exceptional capacity for verisimilitude – renders obscene films more like actions than speech (and thus outside the ambit of the First Amendment's protection of speech).

At first, reading through the obscenity cases, it seems that most state laws restricting pornographic films are upheld and those restricting other forms of alleged pornography (print media) fair worse under constitutional scrutiny. Digging deeper,

[10] "Despite *Chrestensen* and *Breard*, … [t]he mere presence of a commercial motive, for example, was not deemed dispositive, as evidence by Court's continued protection of books, movies, newspapers, and other forms of expression produced and sold for profit."

[11] I am indebted to Peter DeCherney and Simon Stern for several of the ideas contained in this section. Any errors are my own.

this is not true. But there is something about pornographic films that encourages the court to take a closer look at the state's regulation and assess it in light of the facts. There is a sense from these cases that film does something different than other media. In contrast to allegedly pornographic novels that require elucidation and interpretation (and therefore are less likely to be low-value speech), the court speaks of the films as "the best evidence of what they represent" (*Paris Adult Theater v. Slaton* 1973, 413) such that their value should be obvious upon viewing.[12] Consider Justice Stewart's famous quote: "I know [hard core pornography] when I see it, and the motion picture involved in this case is not that" (*Jacobellis v. Ohio* 1964, 378); or the much ridiculed job for the justices of taking the pornographic films into their chambers for a feature-length viewing. Experiencing the film is necessary to an evaluation, but even then, the evaluation is instinctive. The court goes on to say that expert testimony is usually unnecessary because "hard core pornography … can and does speak for itself" (Id, 197). The court nonetheless seems to think that films do not speak all that much – at least not in the "expressive speech" kind of way. Instead, films; they intrude – especially obscene films. This is the very reason obscenity is left unprotected in the first place. If "'speech' for First Amendment purposes is defined by the idea of cognitive content, of mental effect, of a communication designed to appeal to the intellectual process … [and] hard core pornography is designed to produce a purely physical effect, … a pornographic item is in a real sense a sexual surrogate…. [Thus] hardcore pornography is sex, [not speech]" (Schauer 1979). If film is the most direct transposition of that which it represents, no wonder pornographic films are more highly scrutinized. Courts see themselves as evaluating acts not expression and, therefore, more free to uphold the state restriction.

Indeed, most of the obscene film cases deal with the intrusion of the film in the community: whether if played at a drive in, offended community members could easily avert their eyes (*Erznozik v. City of Jacksonville* 1975, 422), or whether the adult-only theater could be shuttered because of the exogenous effects of the theater on the otherwise non-consenting community (*Paris Adult Theaters v. Slaton* 1973). Much of the debate over pornographic films since the World War I concerned the possible correlation between obscene material and crime. The famous Hill-Link Minority Report of the Commission on Obscenity and Pornography was cited frequently by the court in these cases as a justification for states to regulate commercial obscenity (Id, 58). As early as 1920, there was public concern at the growing number of pornographic films (*U.S. v. Alpers* 1950, 338)[13]:

> It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there…. We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places … with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.

[12] This is precisely what the court says about film evidence that is relevant to the case but not the subject of the case itself. *See* Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*.

[13] Citing to *The Motion Picture Industry*, vol. 254 of *Annals of the American Academy of Political and Social Science* (1947) 7–9, 140, 155, 157.

> Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not. (*Paris Adult Theaters v. Slaton* 1973, 59)[14]

These films intrude only because they are in public – movie houses being places of public accommodation. And of course speech seeking protection is by its very nature public as well. Only when the film is brought into the privacy of one's home do the scales tip in favor of protection because it has become, by nature of the private space, unobtrusive. Even then, however, the film does not magically become protected speech. The private space merely adds a layer of protection from scrutiny because, presumably, it protects the community from any harm.

Privacy is the counterpoint to obscenity. When the issue is the showing of an allegedly obscene film in a movie house or drive-in, or even when it is being transported as an article of commerce (*U.S. v. Orito* 1973, 413), the judges feel free to evaluate the filmic expression as obscene or not. When the film is shown privately, the focus shifts from whether the speech is of the intellect or prurient to whether a state, in controlling this speech (whether or not of value), is intolerably intruding into a person's fundamental privacy. In *Stanley v. Georgia* (1969), the defendant was convicted of possessing obscene films under a state law that prohibited the possession of all obscene matter. In this case, the court famously quotes the origins of the right to privacy in one's home, the right "as against the government … to be let alone," "to protect Americans in their beliefs, their thoughts, their emotions and their sensations" (Id, 564).[15] Whereas Brandeis in this quote from *Olmstead* may or may not have been thinking of the newest visual technology as safeguarding a "man's spiritual nature," the *Stanley* Court must be so thinking as they affirm the defendant's right to possess obscene films that are otherwise illegal to manufacture and distribute. The court does so, however, by elevating the status of the film to "the contents of [a] library" (Id, 565) and by accusing the state of Georgia of attempting "to control the moral content of a person's thoughts." "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (Id). Whereas in public, films are acts – they can intrude on our person, our serenity – in private, they are great books, or, at least, they are enough like great books that while potentially unconventional or objectionable are nonetheless off limits to the court's judgment.[16]

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[14] Quoting Alexander Bickel, *Dissenting and Concurring Opinions*, 22 The Public Interest 25–26 (1971).

[15] Quoting *Olmstead v. U.S.*, 277 US 438, 478 (1928) (Brandeis, J. dissenting).

[16] The court goes on to say that the Constitution's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority.… And in the realm of ideas it protects expression which is eloquent no less than which it is unconvincing. Nor is it relevant that … the particular films before the Court are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Ga.*, 566.

This does not apply to cases of the possession of child pornography where the film is again seen as an "act" rather than "expression" because of what it has done to the child. *U.S. v. Williams*, 553 U.S. 285 (2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Here again, we see a shift from the court as protector of a public by regulating acts to the court recognizing the capacity of the public – here in private – to decide for itself.[17] Necessarily, the court's construction of the film audience evolves. As the century progresses and film (and pornography) becomes disseminated more widely, the court appears to be tolerating more of it by trusting audiences to do the same. The court does so, while still reserving the power to control the most severe form of pornography by declaring those film renditions acts not speech, but not without close scrutiny of the film itself. As we will see later, this correlates to twenty-first century thinking about film as evidence in criminal cases (such as filmed confessions or surveillance film), where the act caught on film is not expressive or subject to interpretation but more like the thing itself. It therefore speaks for itself, unmediated by representational frames.[18]

9.3.3 Search and Seizure

The category of cases concerning the lawful search and seizure of films is an iteration of the above themes but distinguishes film as a cultural object in yet another way. Obscene film is categorically unlike other kinds of contraband – such as narcotics or a weapon – which the court says are "dangerous in themselves" (*Roaden v. Ky,* 1973). This makes sense only, however, if we understand film to have two components: a physical embodiment and an expressive existence.[19] Otherwise, what would distinguish one form of contraband, cocaine, from another kind of contraband, hard-core pornography? Both may be illegal; both may be harmful. But films are expressive in ways that narcotics are not. So we have in these cases a repetition of the notion of film as expressive and, therefore, specially treated by courts because they fall within the First Amendment ambit. But we also have in these cases, as we did in the obscenity cases, a concern about how to properly police the line between legal and illegal (constitutionally protected speech and unprotected *speech acts*) and concerns over who does that policing, how, and when.

[17] Where previously film acts were akin to circus entertainment, here pornographic film is akin to sex acts.

[18] As one Supreme Court justice has said recently about the believability of a film of a car chase, "I see with my eyes … what happened…." Transcript of Oral Argument at 45, *Scott v. Harris*, 550 U.S. 372 (2007) (No. 05–1631) [hereinafter Transcript of Oral Argument].

[19] This is the essence of much intellectual property – there is a tangible form (a book) and the intangible aspect (the expression). Law protects the two components differently, the former under real property statutes and the latter under intellectual property statutes. *See* 17 U.S.C. § 109 (2006) (first sale doctrine in copyright law drawing the distinction between selling a copy and thereby losing control over it, but retaining ownership rights over the original expression and preventing others from reproducing it).

The divisibility of film into a physical object and intangible expression is particularly clever in the search and seizure cases (to say nothing about the fact that it is true as a matter of intellectual property).[20] The court draws on national history to remind us that the "use by the government of power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new" (*Walter v. U.S* 1980).[21] In this way, lawful possession of an object (the film reel) must be distinct from the possession of its contents (the images on the reel or the story told by it). Otherwise, the government could use its police powers to control the dissemination of expression with which it disagreed under the auspices of emergency seizure of tangible goods. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression" (*Marcus v. Search Warrant*, 729).

The duality of film (as a tangible object and an intangible expression) manifests in the search and seizure cases in terms of the warrant requirement. "When contents of the package are books or other materials arguably protected by the First amendment and when the basis of the seizure is disapproval of the message contained therein, it is especially important that [the warrant] requirement be scrupulously observed" (*Walter v. U.S* 1980*,* 655). What does this mean? It means more than that a warrant must issue before a search can be effectuated. It means that the warrant must include both the film itself and the reason for viewing it, viewing being an independent search for which probable cause must exist (Id, 655). It means that a warrant must be supported by particular facts setting forth the basis of searching the contents of the film in addition to possessing the film itself (*Lee Art Theater Inc. v. Va.* 1968). Moreover, where the seizure of the film includes both the tangible item and the intangible expression (i.e., a copy of the film and a viewing of it), seizure must be for the basis of preserving evidence for trial and accompanied by an opportunity for prompt post-seizure judicial determination of obscenity (or other basis for illegality).[22] That is to say, the court requires a preliminary assessment of the content of the film – the nature of its expressivity and whether it is likely protected speech or not – before a warrant may issue at all. All of these requirements safeguard the evil of a prior restraint on speech.

Because there is no exigency exception to the Fourth Amendment when seizing allegedly obscene material (in contrast to the case of seizing weapons or narcotics) (*Roaden v. Ky*, 505–06), the method by which the determination that a warrant is necessary is much debated by the court. Here, the above-described aspects of the obscenity cases come to the fore. Except in the case of a large-scale seizure, an

[20] *See supra* note 19 and the discussion *infra* of intellectual property cases in the main text.

[21] Citing *Marcus v. Search Warrant*, 367 U.S. 717, 724.

[22] *Heller v. N.Y.*, 413 U.S. 483 (1973). "Seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particular where … there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film." *Lo-Ji Sales, Inc. v. N.Y.*, 442 U.S. 319, 328 (1979) (citations omitted).

adversary proceeding to determine probable cause for the search and seizure of the film is not necessary (*N.Y v. P.J. Video* 1986). But the determination of probable cause for that search must be made by a neutral, independent, and detached judge (*Heller v. N.Y,* 488). The determination can be based on having viewed the film in a theater before issuing warrant (Id, 488–89, n. 4) or after reviewing particularized factual assertions on the warrant request, which are not conclusory and provide the judge with adequate reasons for finding probable cause to declare the films illegal (*Walter v. U.S,* 656–57). The goal here is to enable the judge "to focus searchingly on the question of obscenity" (*Heller v. N.Y,* 489).

These cases tell us, then, that the viewing of a film is a kind of search. This in itself is an interesting proposition. Viewing a film is both a search of a possession and a search of a mind; at least this must be true if we understand these cases to be about protecting freedom of thought and freedom of one's person (the intangible and the tangible). Viewing becomes a kind of personal intrusion (another interesting proposition) one against which the Constitution protects under certain circumstances.

These cases also tell us that a judge's viewing is not as harmful or intrusive as an FBI or police search because of the focus and independence the judge brings to the task. The court explicitly says that a judge's review of a film for purposes of probable cause is less troubling than an FBI or police viewing of the film, calling the latter inherently harmful (*Walter v. U.S,* 657).[23] It is as if the judge is a doctor viewing the patient's naked body – detached and impersonal – and the police officer is a voyeur or interloper – lewd and unrestrained. Judges, here, are the best kind of critic, necessary and fair.[24] Given the instinctive mode by which judges have been known to interpret expression as obscene or not (behind closed doors, "I know it when I see it") and the fact that judges are unlike the mass of popular audiences in their moving-going ways (Silbey 2008), this aspect of the search and seizure cases distinguishing judges from other kinds of law enforcement officers is puzzling. It nonetheless comports with other lines of cases in which judges are deemed the most appropriate gatekeeper for evaluating the extent of the state's use of force.

As much as these search and seizure cases redefine the nature of film (as an object and an expression) and of search (as a physical and mental intrusion), they are also about the nature of the viewer and searcher (the judge, police, or other state actor). Here again, film audiences are inseparable from the construction of film as a cultural object with political and social significance. Given the narrowed focus of the film audience here – judge or police – as opposed to the more diverse public from previous categories above, these cases affirm judges' conceit in their ability to interpret film astutely. Whether there is an alternative to judges as film critics, "Who else would decide whether the film was lawfully seized?" is a question I have

[23] *See also Wilson v. Lane*, 526 U.S. 603 (1999) (determining that media accompanying a search is unlawful intrusion in suspect's Fourth Amendment rights).

[24] *But see* Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*.

discussed elsewhere (Silbey 2004). Suffice it to say, there are alternatives. The court's default in these cases to preferring themselves over other decision-makers or institutions speaks to their belief in film's exceptionality as well as to their own.[25]

9.3.4 Publicity

Courts are often called to determine whether the press' use of film to titillate rather than to inform violates due process. The cases about restrictions on pretrial publicity conceive of film first as a conduit of information – about the accused, about the crime, about the proceedings that will judge both – and second as a game changer, an ostensible neutral observer that nevertheless effects what is being observed.

The films in these publicity cases start out being made and distributed to expose a problem or solve a crime. In *Wiseman v. Massachusetts* (1970), the documentary filmmaker Frederick Wiseman appealed to the Supreme Court a judgment from the Massachusetts Supreme Judicial Court (SJC) that enjoined the commercial distribution to general audiences of his film *Titicut Follies* about life in the Bridgewater State Hospital for the criminally insane. The Massachusetts SJC enjoined the film's distribution ostensibly to protect the privacy of the inmates, despite the very obvious benefit that would ensue from a public airing of the inhumane conditions at the prison. The Supreme Court denied certiorari, but Justice Harlan dissented from that denial, and, joined by Justice Brennan, wrote that because "the conditions in public institutions are matters which are of great interest to the public generally," "there is the necessity for keeping the public informed as a means of developing responsible suggestions for improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestion or protest" (*Wiseman v. Mass* 1970*,* 961). They argued that the informational quality of the film far outweighed any privacy harm its exposure would cause the inmates. Indeed, neither court doubted the accuracy of the film as a conduit for factual information.

There are other cases that affirm this perception of film as conduit. In *Chandler v. Florida* (1981), the court affirmed a criminal conviction despite the public broadcast of the trial. In this case, the court highlighted the state of Florida's implementing guidelines for film coverage of a judicial proceeding. Film equipment "must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed"

[25] Whether film is in fact exceptional as a representational medium is of course one of the questions this essay and others I have published explore. Film is not uniquely truthful or transparent, despite its treatment as such in law. And it is certainly not necessarily the "best evidence" of what happened. *See* Jessica Silbey, *Cross-Examining Film* (criticizing Justice Scalia's interpretation of the film in *Scott v. Harris*).

(*Chandler v. Fla* 1981, 566). In this case, the film is welcomed *because* it would be a conduit of information and not a distorting influence.

The *Chandler* Court explicitly contrasted the methodical and unobtrusive filming of the criminal trial in its case with the "Roman circus" or "Yankee Stadium" atmosphere admonished in *Estes v. Texas* (1965, 532), where due process was found to have been denied. In *Estes*, a "mass of wires" and "at least 12 camera men with their equipment" and "photographers roaming at will" turned the courtroom into a "forest of equipment" (Id, 553). At one point, the court pointed out that the rebroadcasting of a hearing from the case was in place of the "late movie" (Id, 537). The *Estes* Court accuses the filming as being an "insidious influence" that runs counter to the solemn purpose of the trial which is to ascertain the truth (Id, 540–41). In a case 10 years earlier, *Rideau v. Louisiana*, a filmed jailhouse confession that aired on television three times prior to the trial rendered the subsequent judicial proceeding "a hollow formality" (*Rideau v. LA* 1963, 373). The filmed confession became the de facto trial by which the accused was judged. In both *Estes* and *Rideau*, the filming was transformative – it failed in its role as conduit – and frustrated justice.

Chandler reiterates that filming a trial does not inherently deny due process. Cases before and since *Estes* confirm that the film may render the judicial proceedings an uncontrolled "carnival" (*Murphy v. Fla* 1975, 421) or "spectacle" (*Rideau v. La,* 725) and, as such, the jury may be poisoned against the accused. As with *Wiseman*, where the court was asked to assess the extent of the intrusion by the film into its subject's private lives, in the case of filmed judicial proceedings, the court is charged with assessing the "extent and degree of saturation of the public mind with the TV films" to determine whether pretrial publicity such as filmed interviews with the defendant, victim, attorneys, or politicians rendered the subsequent trial unfair (*Whitney v. Fla* 1967, 389). Additionally, courts must determine based on the orderliness and invisibility of the camera crew whether the filming had an undue influence on witnesses, the defendant, or the jury (*Chandler v. Fla,* 575–76). In *Chandler*, the court discusses studies and amici briefs that discuss the potential adverse psychological impact on trial participants that are associated with filming the proceedings (Id, 576–78). It also praises the safeguards Florida put in place to minimize negative impact and to amplify the public good that flows from broadcasting criminal trials (improving confidence in the judicial system). Concluding that there is no inherent violation of due process in the filming of a criminal trial because film itself is not inherently harmful, courts must nonetheless assess where on the line the particular film at issue falls – mere conduit or injurious meddler.

Of course film is neither, just like language is neither. Film, like language, is constitutive of the social situation. Nonetheless, in these cases on publicity, the court seems to worry mostly about film's physical embodiment – the space it takes up or intrudes upon – and not about its expressive or constitutive force. When it becomes physically more tangled in the proceeding (with wires, lighting, or camera crew) or when it physically dominates the proceeding's representation in the media (with repetitious playbacks of dramatic moments of the case), the court flinches at film's presence. Otherwise, it is like a conveyor belt, neutrally moving information from speaker to listener, broadcaster to audience member.

9.3.5 Evidence

Judges are not necessarily the best judges of film. We know this because of the naïve realism judges inject into their opinions assessing the truth or transparency of film content despite the history of film as an art that counsels otherwise (Silbey 2005). And yet, courts are called to interpret films regularly, most often as either obscene speech or as evidentiary proffers: a criminal confession, an interrogation, a crime scene, a surveillance film, an FMRI, or a filmed deposition (Silbey 2008). The Supreme Court decides cases about this latter kind of evidence less frequently, but it has addressed film evidence enough over the past 100 years to raise alarm bells.[26] How does the court consider film evidence when it has to decide whether it was properly admitted into the trial? This is different from the obscenity cases where the film is the object to be assessed – its relevance undisputed – the determination being whether the film is obscene or not. In the evidence cases, the court assesses the film precisely for its relevance (Is it probative of a fact at issue?) and for its potential prejudice (Does it affect the jurors emotionally and, therefore, degrade their rational deliberation?). The evidence cases are therefore like the publicity cases in which the film has the potential to be a heckler out to spoil the fairness of the game.

But these evidence cases share something with the obscenity cases as well. Recall from the obscenity cases that the court understands film to act on us when it is less expressive (less open to interpretation) and more prurient (arousing). In these instances, it is less protected and can be regulated without violating the First Amendment. With the cases on film evidence, the court also worries that the film will act on us, will trigger emotional responses rather than rational ones, and will therefore cloud our judgment. Unlike the obscenity cases, however, in the cases on film evidence, the court provides a basis for its judgment that film evidence may prejudice the proceeding. Because the film is so much like real life, so traumatizing with its "in your face" quality, the court fears that audiences will see film representations of pain or violence, experience it as if live before their very eyes, and will seek vengeance, whether or not punishment is warranted under the law.[27]

The court holds inconsistent positions on film evidence. At times, the court appears capable of recognizing filmic conventions, its manipulative effect, and its need for interpretation. At other times, the court appears seduced by film's reality effect despite its inherent partiality and ambiguity (Silbey 2005). Most recently, in *Scott v. Harris*, the court fell for a trick that has seduced moviegoers for more than a century: it treated film as a depiction of reality. The court held that a Georgia police officer did not violate a fleeing suspect's Fourth Amendment rights when the

[26] *See* Jessica Silbey, *Cross-Examining Film* (criticizing Justice Scalia's interpretation of the film in the 2007 case *Scott v. Harris*). *See also* Dan M. Kahan et al. (2009).

[27] *Kelly v. Cal.*, 129 S.Ct. 567 (2008) (J. Breyer, dissenting from denial of certiorari). *Yamashita v. Styer*, 327 U.S. 1, 54 n. 20 (1946) (J. Murphy, dissenting partially on grounds of prejudicial documentary film purporting to show the war crimes at issue in the case).

officer intentionally caused a car crash, rendering the suspect a quadriplegic (*Scott v. Harris*, 550 U.S. 372 (2007)). The court's decision relied almost entirely on the film of the high-speed police chase taken from a "dash cam," a video camera mounted on the dashboard of the pursuing police cruiser (Id, 379). Although obviously not the first time the Supreme Court has acted as film critic,[28] *Scott v. Harris* may be the first time the Supreme Court disregards all other evidence and declares the film version of the disputed event *as the unassailable truth* for the purposes of summary judgment. Indeed, the Supreme Court said that, despite the contrary stories told by the opposing parties in the lawsuit, the only story to be believed was the one the video told: "We are happy to allow the videotape to speak for itself" (Id, 393, n. 5). And then, for the first time in history, the Supreme Court linked video evidence to the slip opinion on its website to encourage people to "see" for themselves.[29] In *Scott v. Harris*, the court fell victim to the widespread and dangerous belief – to the degree of enshrining this belief in our national jurisprudence – that film captures reality.[30] As Justice Breyer stated at oral argument, seemingly flabbergasted by the contrary findings below: "I see with my eyes … what happened, what am I supposed to do?"[31]

Here, the worries the court expressed about film's undue influence for other fact finders haunt its own assessment of film. There are other ironies in the court's jurisprudence on film evidence: the perception of film as potentially misleading and prejudicial, on the one hand, and as the conveyor of the most accurate account of the truth, on the other. What happened to film being expressive and creative, like a deep thought (whether despicable or not)? What happened to the film having a dual existence – real and intangible – where form and function intertwine but may be analyzed independently? Is film the epitome of reality and truth or is it so raw that it is for a judge's eyes only? According to these cases on film evidence, it may be both. And yet this is not what we understand about film according to its development as an art form. In these cases where film is assessed as evidence under the more prejudicial than probative standard of Federal Rule of Evidence 403, unlike other evidence such as testimony or business records, film is divorced from its context and history and is either assessed as a street sign that needs no interpretation or as a weapon that is safe only in certain hands. As should be clear by now, however, film

[28] *See supra* discussions in main text, particularly those assessing allegedly obscene films to determine whether they conflict with contemporary community standards. *See also Miller v. Cal.*, 413 U.S. 15, 18–30 (1973) (discussing the evolution of the standards that the court employs when reviewing obscenity cases).

[29] *See Scott v. Harris*, 550 U.S. 372 (2007). The video is available at http://www.supremecourt.gov/media/media.aspx

[30] This was not the first time the court was taken in by film despite other evidence at trial. *See* C*ox v. State of La.*, 379 U.S. 536, 547 (1965).

[31] Transcript of Oral Argument, 45. Justice Stevens was the lone dissenter in the 8–1 decision and the only Justice who recognized that the film was not the whole story. *Scott v. Harris*, 550 U.S. at 389–97 (Stevens, J., dissenting).

is much more than a sign, and it is hardly a lethal weapon. The very meaning of film as a cultural object is contested in the court's *own* jurisprudence. Why the film's message would be so unambiguous in this particular case is therefore perplexing, to say the least.

9.3.6 Antitrust

Even in the cases where film is considered primarily for its commercial element, film's character takes on complex dimensions. Upon first read, the cases in the antitrust category discuss film and the film industry in light of its substantial contributor to the national economy. It is no surprise, then, that film (as a cultural object and practice) is largely considered an "item of commerce" in a large number of Supreme Court cases in this category for the purpose of determining anticompetitive practices. One of the earliest antitrust cases that concerns "motion picture films" equates filmmaking and distribution with the "manufacturing [of a] commodity" (*Binderup v. Pathe Exchange* 1923, 291, 309). At the conclusion of the case, in comparing the film industry to other growing or developed national industries, the court says the "transactions here are essentially the same as those involved in the foregoing cases, substituting the word 'film' for the word 'live stock,' or 'cattle,' or 'meat.' Whatever difference exists is of degree and not in character" (Id, 311). After so many cases in which film is considered a thing apart – exceptional as a medium of communication or cultural object – it is a relief to see the court considers film like so many other kinds of everyday practices.

This characterization of film as an article of commerce does not change, but rather is augmented approximately 20 years later when the courts start to consider the copyrightability of film in their antitrust analyses. More will be said about the relationship between film and intellectual property below, but suffice to say that in the antitrust context, the fact that films are copyrighted – and therefore are monopolies of a sort – can raise the scrutiny (or at least alter the analysis) over the reasonableness of the restraint of trade and the concern for anticompetitive business relationships (*Interstate Circuit v. U.S., Paramount Pictures Distrib.* 1939, 208, 230). In most of these cases, the copyrightability of film only furthers the argument that the film and the film industry are well propertied and commercially and socially valuable. Restraint of trade in the film business, no more so in the livestock business, may run afoul of the Sherman Act. "An agreement [found to be] illegal because it suppresses competition is not any less so because the competitive article is copyrighted" (Id, 230).

But then a kind of film exceptionalism eventually does rear its head, as it did in other categories of cases. In the antitrust cases, film is accorded a special kind of economic status because of the fluctuation in ticket price depending on whether it is a first-run or second-run film. Complicated licensing arrangements attempting to restrict first-run films to specific, noncompeting geographic regions and venues and to restrict the prices of tickets for first-run and second-run shows were met with

disapproval.[32] The combination of the drawing power of a new film (akin to the drawing power of a live prize fight) (*U.S. v. Int'l Boxing Club of N.Y* 1955, 236) combined with its "legal and economic uniqueness" as a copyrighted object made for a distinct analysis under antitrust law (*U.S. v. Loews* 1962, 38, 48). Whether in a theater or on television, the presentation of a film to a live audience garnered "sufficient economic power" that imposing a restraint on the competition in the film product became per se suspect (Id, 48). As one case reads, "forcing a television station that wants 'Gone with the Wind' to take 'Getting Gertie's Garter' as well is taking undue advantage of the fact that to television as well as motion picture viewers there is but one 'Gone with the Wind'" (Id, 48). This per se rule based on the patented or copyrighted nature of the tying product was not abrogated until 2006 (*See Ill. Tool Works v. Indep. Ink* 2006, 28). For nearly all of the twentieth century, film held a special status in antitrust law as a particularly economically powerful product.

This film exceptionalism continues further in the antitrust cases in terms of the Sherman Act's reach over the film industry. When analyzing film as an article of commerce, the court discusses film as both a local and interstate phenomenon. The Sherman Act regulates only interstate commerce. Some film industry players seeking exemption from antitrust regulations therefore argued that film is "a local affair" (*U.S. v. Crescent Amusement Co* 1945, 348).[33] Sometimes the defendants also argued that film is like a sports event or a theatrical attraction, "intangible and evanescent" and, therefore, cannot be regulated under Congress' commerce power (*U.S. v. Shubert*, 227 n. 9). In both situations, the court rejected defendants' arguments concluding that the object of film cannot be divorced from its industry, which is highly complex and nationwide in scope (*U.S. v. Crescent Amusement Co.*, 184–85). In so doing, the court drew an intriguing distinction between the professional baseball industry (which was left unregulated) and vaudeville theater business (which was subject to the Sherman Act). Where the business of baseball was granted immunity despite the interstate travel of players because travel was "a mere incident, not the essential thing" in baseball, for vaudeville, traveling theatrical productions was "more important" to the business (*U.S. v. Shubert*, 228–29). In other words, film was more like vaudeville than baseball. "This court has never held that the theatrical business is not subject to the Sherman Act" and with that held that unlike major league baseball, the film industry would not be categorically exempt from antitrust laws (Id, 230). The film industry's complicated structure and film's unique combination of a mass popular appeal with its reproducible embodiment made it a focal point of antitrust analysis.

[32] See, for example, *U.S. v. Paramount Pictures*, 334 U.S. 131 (1948); *Shine Chain Theaters v. U.S.*, 334 U.S. 110 (1948).

[33] *See also U.S. v. Shubert*, 348 U.S. 222, 227 (1955).

9.3.7 Intellectual Property

Overlap exists between the treatment of film in antitrust cases and in the intellectual property cases. This is because some of the cases are simply the same. But it is also because the commercial aspect of intellectual property directly engages the concern with commercial competition in antitrust law. In many of the intellectual property cases, film is either a stand-alone species of intangible property (as a copyrighted work) or is restricted to being played on a patented machine. Either way, film facilitates a revenue stream, and policy dictates its protection as intangible personal property.[34] In *Dowling v. United States*, the Supreme Court distinguished film as a physical object (which may or may not be owned lawfully) from film as intellectual property (whose legal status is altogether different from that of the physical object) (*Dowling v. U.S.* 1985, 207). In that case, the court had to determine whether the National Stolen Property Act would reach the interstate transportation of infringing copies of Elvis films, among other items. The court held that unauthorized copies (infringing copies) were not "stolen, converted or taken by fraud" as required by the Act, which has heretofore involved only "physical goods, wares or merchandise" (Id, 217). The Copyright Act codifies its own criminal penalties in light of the specific nature of copyright and the particularized harms that flow from infringement. To be sure, the court recognized the physical nature of film as film,[35] but in this category of cases regarding intellectual property, the focus on film's value concerns its copyrighted nature or its tie to a patented machine.

There are several cases in this category in which film is discussed specifically in light of the right to make derivative works under copyright law. Under the Copyright Act, copyright owners enjoy the exclusive right to "recast, transform, or adapt" their work to make a new "derivative" work. Traditionally, derivative works include translations from one language to another or adaptations of the original expression for a new media (e.g., a novel to a film). Cases of this sort span the entire 100 years of cases contained in the current film data set. As early as 1911, when moving pictures were only 16 years old, the Supreme Court decided a case concerning the filmic dramatization of *Ben Hur*:

> The appellant and defendant, the Kalem company, is engaged in the production of moving-picture films, the operation and effect of which are too well known to require description. By means of them anything of general interest from a coronation to a prize fight is presented to the public with almost the illusion of reality …. The defendant employed a man to read

[34] *Eldred v. Ashcroft*, 537 U.S. 186 (2002) (Appendix to Opinion of Breyer, J. at B) (discussing how films account for dominant share of export revenues earned by new copyrighted works of potential lasting commercial value); *Mills Music v. Snyder*, 469 U.S. 153, 176–177 (1985); *Sony Corp of America v. Univ. City Studios*, 464 U.S. 417 (1984); *Teleprompter Corp. v. Columbia Broad. Sys.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968); *Educ. Films Corp. of America v. Ward*, 282 U.S. 379 (1931); *Fox Film Corp. v. Knowles*, 261 U.S. 326 (1923); *Motion Picture Patents Co. v. Universal Film Mfg.*, 243 U.S. 502 (1917).

[35] *See Eldred v. Ashcroft*, 239–40 (Stevens, J. dissenting) (discussing the interest in preserving perishable copies of old copyrighted films).

> *Ben Hur* and to write out such a description or scenario of certain portions that it could be followed in action …. It then caused the described action to be performed, and took negatives for moving pictures of the scenes, from which it produced films suitable for exhibition. These films it expected and intended to sell for use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title "Ben Hur." (*Kalem Co. v. Harper Bros.* 1911, 22)

Holding for copyright owner, the court decided in *Kalem* that the new film *Ben Hur* was an infringing derivative work of the book *Ben Hur*. We see similar discussions in other cases from the same period, one discussing the film version of a poem (*Fox Film Corp. v. Knowles* 1923) and another discussing the film version of a play (*Manners v. Morosco* 1920), and in later cases when film versions of books or short stories become particularly lucrative.[36]

In these cases, analyzing film as a derivative work, the court discusses the derivative film as a distinct expressive form, one that the author of the original work would have wanted to avoid or control. Again, we see the idea of film's exceptionalism structuring the court's analysis. The special features of film – its illusion of reality, its mass produced and mass performed nature – significantly enhance (or change) the underlying work (*Kalem Co v. Harper Bros.* 1911, 60; *Manners v. Morosco*, 327). For these reasons, it made sense to the court that the author of the original work would like the right to control film versions of it. These cases also evidence a suspicion and awe of film as it grows both in mass appeal and as a national industry with its increasing specialization. Combined with the early cases discussing the patented machines on which film was played where the court marveled at the power of "talkies" (*Paramount Publix Corp. v. American Tri-Ergon Corp.* 1935, 464; *Altoona Public Theaters v. American Tri-Ergon Corp.,* 1935, 477), the court's cases in the derivative work area paint a compelling picture of film's emergent cultural and economic dominance as mass entertainment.

Despite film's forceful presence in culture as a medium of expression and national commerce, throughout these cases about intellectual property, film retains its nature as personal property. It is alienable at will and can be exploited only with permission of the owner. Despite its obvious expressive function and the benefit derived from disseminating expression, "any copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work" (*Stewart v. Abend*, 229). This is another way of saying that the property aspect of film dominates over its intellectual aspect. In some instances, the court refuses to limit the monopoly that putative film owners claim over the dissemination of their work despite the personal nature of the property right (*Sony Corp. of America v. Univ. City Studios* 1984, 417). But it has done so only because property lines as drawn by statute are clear and not because of film's expressive value. In the recent case of *Dastar v. Twentieth Century Fox Film Corporation*, the Supreme Court declared that Fox Film, despite making the film at issue, was not entitled to control its subsequent distribution under either copyright

[36] *Steward v. Abend*, 495 U.S. 207 (1990) (evaluating whether the blockbuster Orson Wells film *Rear Window* is an authorized derivative work of the short story "It Had to Be Murder"); *Mills Music v. Snyder*, 469 U.S. 153, 176–177 (1985).

or trademark law because the copyright had fallen into the public domain (*Dastar v. Twentieth Century Fox Film Corp*. 2003, 23, 35). The court recognized that the public owed the existence of an important film to a genealogical line of filmmakers and contributors, but once the copyright in the filmic expression expired, no one had a legal claim to control it. There was nothing left to protect as property, even if the full value of the copyright had not been realized by its originators. The film was relinquished to the public domain for no other reason than its owner was derelict and let the copyright lapse.

These cases on intellectual property and film are interesting inasmuch as they discuss less the intellectual aspect than they do the property aspect of film. Even in the famous case of *Sony Corp of America v. University City Studios*, in which the court was closely divided over whether home recording of television shows and films was fair use under the Copyright Act, the court focused more on the potential harm to the market in television and film as an economic matter than whether it was in the public interest to facilitate building private film libraries (*Sony Corp. of America v. Univ. City Studios* 1984, 417). Ironically enough, in the category of cases in which film could be analyzed most intricately as both intellectual expression and a tangible good, the court's focus is on the latter, leaving the discussion of film's expressivity to other categories of cases.

9.4 Conclusion

This chapter represents a preliminary foray into a semiotics of film and law. It goes without saying that more elaborate analysis can and should be done following this brief exegesis on the assorted treatment of film in US Supreme Court cases. Recently, the Supreme Court decided two new cases in which its discussion manifests many of the varied relationships discussed above between film and commerce, expressive and dangerous speech, truthful evidence and invasive action.[37]

One of those cases is *Citizens United v. Federal Election Commission* (2010, 876). At the center of this controversial case is a film called *Hillary: The Movie*, which described itself as a documentary about then-Senator Hillary Clinton. The film aimed to expose Senator Clinton's flaws and dissuade voters from electing her to the Presidency (*Citizens United v. Fed. Election Comm'n* 2010, 887). One question presented by the case was whether a film such as *Hillary* was "electioneering communication" and "express advocacy or its functional equivalent." Another question presented was whether the kind of speech here – a film made by a political action committee (PAC) and a nonprofit corporation and one that would be shown

[37] *U.S. v. Stevens*, 130 S.Ct. 1577 (2010) (invalidating as overbroad a criminal statute that prohibits the depiction of animal cruelty, which would include films of animal sacrifice, mutilation, and maiming); *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010) (invalidating portions of campaign finance law that banned certain corporate-sponsored speech within several weeks of an election).

shortly before an election – could be regulated as the FEC sought under the Bipartisan Campaign Reform Act of 2002 (as it amended 2 USC §441b).

In deciding that *Hillary* was political speech that deserved the maximum protection under the First Amendment, the court recognized the film's diverse characteristics as "more suggestion and arguments than facts." It also said, however, that "there is little doubt that the thesis of the film is that she [Hillary Clinton] is unfit for the Presidency," and that "there is no reasonable interpretation of [the film] other than as an appeal to vote against Senator Clinton" (Id, 890). The court determined that the film "qualifies as the functional equivalent of express advocacy" and rejected its classification as a documentary (Id). It also said that the film required some interpretation but not in any sophisticated manner; reasonable people could *not* differ as to its message, albeit as argument rather than facts.

Later in the opinion, however, the court considered that some people "might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates" (Id, 918). And so although the film's message may be clear, the import of that message remains up for grabs. This is not very different from the court's reasoning in *Burstyn* half a century earlier. In 2010, as in 1952, the court prefers to trust the public with the film's reception. In 1952, the court said "what is one man's amusement, teaches another's doctrine." In 2010, the court says "[o]ur Nation's speech dynamic is changing…. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-h news cycle" (Id, 912). In both cases, the court accepts the affective quality of film – be it fictional or factual – and then trusts the public to do the work of filtering and processing it on its own. The 2010 court says, "[t]hose choices and assessments … are not for the Government to make" (Id, 917). And then in a remarkable conclusion whereby the court compares *Hillary: A Documentary* to the 1939 Hollywood film *Mr. Smith Goes to Washington*, the court said "it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force" (Id). With this, it seems the court's view on the roles and capacities of film as First Amendment speech over 50 years has not evolved. The court concludes that film, like so much other revered and mythical speech – such as that of "the individual on a soap box and the lonely pamphleteer" (Id, Roberts, J., concurring) – deserves protection for the purposes of deliberative democracy (Id, 915–17).

But so much *has* changed in 50 years. We need only look to the Internet and e-mail, Facebook, YouTube, and the decentralization of video and filmmaking by amateurs who reach a worldwide audience in a short time at low cost.[38] These social

[38] The court mentions these changes but does not discuss whether they merit a new application of First Amendment principles. *See Citizens United v. Fed. Election Comm'n*, 917. Indeed, the court lumps all speech together as undifferentiated. This seems odd given how in other contexts film's exceptionalism sets it apart.

facts make film potentially even more powerful as a medium. It is not necessarily film that has changed, but the world and manner in which the film is made and distributed. The dissent, written by Justice Stevens and joined by three other colleagues, recognizes this. Justice Stevens does not say that the film should be restricted within weeks of an election, only that for it to be shown up to and on the day of an election for maximum impact it need to "abjure business contributions or use of the funds in its PAC" (Id, 944, Stevens, J., dissenting). Stevens goes on to say:

> Let us be clear: [our precedent does not] impl[y] that corporations may be silenced; the FEC is not a 'censor,' and in the years since these cases, corporations have continued to play a major role in national dialogue. Laws such as [those at issue here] target a class of communications that is especially likely to corrupt the political process,… and that may not even reflect the views of those who pay for it. Such laws burden political speech, and that is always a serious matter demanding careful scrutiny. But the majority's incessant talk of a 'ban' aims at a straw man…. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. (Id)

Stevens' dissent recognizes the various degrees of "free" that are part of First Amendment jurisprudence. And he does not differentiate film among them, but instead distinguishes the person or entity who speaks through the film (here a corporation). Calling the majority's application of the First Amendment "wooden" (Id), Stevens recognizes that the First Amendment has come far, expanded in application, and that this is good. But he also cautions that what is at issue here is not the film per se but the wholesale protection of "general treasury electioneering expenditures by corporations" (Id). To him, the film at issue was the output of corporate power and not of individual speech that the majority's First Amendment mythologizes. To Stevens, and the others who signed on to his dissent, the twenty-first century is vastly different from the early to mid-twentieth century precisely because of the magnitude of corporate influence over daily life; corporate entities are not simply aggregates of individual will or ideas. "Films" are not the issue, it is their authors.

Interestingly enough, in this most recent of cases discussing film and speech, the dissent and the majority do not disagree about the film's message or about its forceful way of making meaning. Instead, they disagree because of *who* is speaking through the film. Both sides agree that film may be uniquely powerful as speech, even exceptionally so. But the court remains divided as to the import of the film's authorship. The majority romanticizes the film as the product of a single entity, with a voice worthy of protecting in a democratic society. The dissent sees the film as a product of a corporation composed of diverse actors and thus as impossibly claiming to represent the unified voices of the company's shareholders. In *Citizens United*, film spans the distance between a soapbox speech and a corporate prospectus. The film at issue, *Hillary: A Documentary*, is of course very much like *both* of these things. And perhaps this variable and malleable nature of film as a complex speech act accounts for the irreconcilable positions taken by the justices in the case.

These cases, taken as a whole, are full of contradictions and puzzles such as this one. They describe a Supreme Court that asserts that it (and other courts) is uniquely capable of evaluating film content but also that film is best left to its audience to interpret. These cases demonstrate that the court recognizes film's diverse and strong economic hold on the national economy because of its mass appeal and complex industry, but also that these facts should not disqualify film from First Amendment protection. Finally, these cases describe an exceptionalism whereby film, although like other ubiquitous market goods and other forms of protected speech, should nonetheless be handled with care, as if it is still not entirely understood in terms of its social and cultural influences. This final point recalls the prescient statement of Vladimir Lenin that "of all the arts, for us the cinema is the most important."[39] To be sure, these cases from the US Supreme Court recognize the extraordinary influence of film on politics, culture, and economic life in the United States. It is not mere fringe entertainment, but deeply part of the fabric of our everyday life. It will be interesting to see whether in the next 100 years of cinema the court's special care of film is replaced, and if so, with what.

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[39] This recalls Lenin's prediction that "of all the arts, for us the cinema is the most important." Jay Leyda, *Kino: A History of the Russian and Soviet Film* (Princeton: Princeton University Press, 1973), 161.

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Chapter 10
Looking Again at Photographs and Privacy: Theoretical Perspectives on Law's Treatment of Photographs as Invasions of Privacy

David Rolph

Abstract Courts in the United Kingdom, Australia and New Zealand are increasingly entertaining claims for invasions of privacy. Many of these cases involve the publication of photographs by a media outlet. In the United Kingdom in particular, the means of protecting personal privacy has been the adaptation of the existing, information-based cause of action for breach of confidence. This has entailed treating photographs as a form of information. This chapter analyses the imposition of liability for the publication of intrusive photographs, as it is developing in the United Kingdom. It applies critical insights from leading theorists on photography, such as Barthes, Berger and Sontag, to suggest that the judicial treatment of photography is underdeveloped.

> …the age of Photography corresponds precisely to the explosion of the private into the public, or rather into the creation of a new social value, which is the publicity of the private: the private is consumed as such, publicly. The incessant aggression of the Press against the privacy of stars and the growing difficulties of legislation to govern them testify to this movement.
>
> Roland Barthes, *Camera Lucida*, p. 98

> Still, there is something predatory in the act of taking a picture. To photograph people is to violate them, by seeing them as they never see themselves, by having knowledge of them they can never have; it turns people into objects that can be symbolically possessed.
>
> Susan Sontag, *On Photography*, p. 14

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10.1 Introduction

Photographic technologies have been in existence for over 150 years. In that time, photographs have become a pervasive part of everyday life (Berger 1972, 129; Sontag 1977, 3). Unsurprisingly, the law has readily embraced photographs, particularly because photographs could usefully serve as evidence. However, the law's acceptance of photographs has been largely uncritical. In her book, *Captive Images: Race, Crime, Photography*, Katherine Biber acknowledges this and identifies the need for 'a critical and rigorous jurisprudence of the visual' (Biber 2007, xi). Through a close analysis of the prosecution of Mundarra Smith for bank robbery (*Smith v. R* 2001), Biber explores, in part, the unsatisfactory and unreflective approach of courts to photography and photographs, particularly in their use in evidence in criminal trials. She cogently argues that judges ignore the extensive critical scholarship which has developed around photography and instead treat photographs as unproblematic and capable of straightforward interpretation (Biber 2007, 5).

Biber's concern is with the law's instrumental use of photographs to support a finding of guilt and the imposition of criminal sanctions (Biber 2007, 26). In the criminal law, photographs are items of evidence deployed to prove or disprove the larger issue of the guilt of the accused. The interaction between law and photography considered in this chapter is different. In the cases to be discussed, the photograph itself is the subject matter of the proceedings. It is the source of the dispute and the central focus of the trial. The live issue in each of the cases discussed is whether or not it was acceptable to publish the photograph. The plaintiff complains that the photograph is an invasion of privacy; the media outlet contends that it was not or that there was a countervailing public interest in the publication of the photograph. How judges deal with these competing claims turns upon their approach to the photographs at issue. Therefore, judicial approaches to the photographs and to photography more broadly are vital to the outcome of these cases.

Given the constraints of space and the vastness and diversity of critical theory on photography, it is not possible to undertake a detailed consideration of the interaction between the law on invasion of privacy and photographic theory. Rather, this chapter necessarily has a more limited aim. It seeks to contribute to the development of the 'jurisprudence of the visual' by applying critical insights from leading theorists on photography – Barthes, Berger, Sontag – to recent UK cases involving invasions of privacy committed by the publication of photographs – in order to explore the assumptions underpinning the law of privacy as it developing and to assess their validity in light of photographic theory. It focuses principally on two decisions of the House of Lords – *Douglas v Hello!* and *Campbell v M.G.N. Ltd*. Both cases involve celebrities objecting to the publication of photographs – film stars, Michael Douglas and Catherine Zeta-Jones, in the former case; supermodel, Naomi Campbell, in the latter case. In *Douglas v Hello!*, in one of the judgments which was handed down in this complex, protracted litigation, the English Court of Appeal provided an exegesis on law, photography and privacy. In *Campbell v M.G.N. Ltd*, the House of Lords

decided a case which turned crucially upon what a photograph meant and what information it conveyed. This chapter also refers to other recent UK cases dealing with privacy and photography.

The application of insights from selected writings on photographic theory to the legal treatment of photography in these cases can usefully expose the judicial assumptions underpinning the legal treatment of photography, as it relates to invasion of privacy, as well as, more importantly, the limitations of such an understanding. It highlights the underdevelopment of judicial attitudes towards photography. This chapter contends that Biber's thesis that judges ignore the critical scholarship which has developed around photography and instead approach photographs as unproblematic and straightforward is borne out by recent case law on privacy and photography. It argues that the theoretical literature surrounding photography, particularly semiotic approaches, can enrich legal understandings of photographs as a form of invasion of privacy, in part by providing judges with a discourse and a method to apply to photographs.

10.2 The Protection of Privacy in Anglo-Australian Law

Until recently, Anglo-Australian law refused to recognise a legally enforceable right to privacy (*Victoria Park Racing and Recreation Grounds Pty Ltd v. Taylor* 1937, 496; *Cruise v Southdown Press Pty Ltd.* 1993, 125; *Australian Consolidated Press Ltd v Ettingshausen* 1993, 15; *GS v News Ltd* 1998 64, 913–64, 915). Whilst privacy was widely accepted as an important value, it was not afforded legal protection (*Wainwright v. Home Office* 2004). The most frequently cited reason for this consistent refusal to protect personal privacy directly was the difficulty of defining privacy as a legal interest (*Kaye v. Robertson* 1991; *Australian Broadcasting Corp. v. Lenah Game Meats Pty Ltd.* 2001; Australian Law Reform Commission 2008). One of the corollaries of the non-recognition of a legal right to privacy was that 'as a general rule, what one can see one can photograph without it being actionable' (*Raciti v. Hughes* 1995; *Bernstein v. Skyviews & General Ltd.* 1978; *Bathurst City Council v. Saban* 1985; *Lincoln Hunt Pty Ltd. v. Willesee* 1986). Just as Lord Camden LCJ evocatively stated in *Entick v Carrington*, 'the eye cannot by the laws of England be guilty of a trespass' (*Entick v. Carrington* 1765), so, by extension, the camera could not trespass either. The treatment of the human eye and the camera as equivalent was deeply problematic but remarkably persistent in the Anglo-Australian legal imagination (Rolph 2010).

The historically entrenched position that there is no common law right to privacy has recently begun to shift. In the United Kingdom, the impetus has been the introduction into domestic law of the *European Convention on Human Rights*, which includes a right to respect for private life (Art. 8). In Australia, the impetus has been a growing recognition of the deficiency of the common law's protection of privacy and the developments in other cognate legal systems, such as the United Kingdom

and New Zealand. Over the course of the last decade, a substantial jurisprudence on privacy has developed in the United Kingdom in particular. A significant proportion of these cases involve the publication of photographs which the plaintiffs claim invade their privacy.

One of the notable features of the UK privacy jurisprudence as it has developed is that it has adapted an existing cause of action to protect privacy, rather than creating a new cause of action (*A v. B plc* 2003; *Campbell v. MGN Ltd*. 2004; *OBG Ltd v. Allan* 2008). The cause of action selected is telling – breach of confidence. Breach of confidence is an equitable cause of action which protects against the detrimental disclosure of confidential information. It is an information-based cause of action (*Coco v. A N Clark* 1969; *Attorney-General v. Guardian Newspapers Ltd* 1990). The UK courts have taken the view that the adaptation of this existing cause of action is the most effective means of providing adequate protection of personal privacy, consistent with the obligation imposed under the *European Convention on Human Rights* (*A v. B plc* 2003; *Campbell v. MGN Ltd*. 2004; *Douglas v. Hello! Ltd* 2006; *OBG Ltd v. Allan* 2008) (although there has been some judicial concern expressed that this involves the 'shoehorning' of a claim for privacy into a cause of action for breach of confidence) (*Douglas v. Hello! Ltd* 2006). There is some support in Australia for a similar development of breach of confidence (*Australian Broadcasting Corp. v. Lenah Game Meats Pty Ltd* 2001; *Seven Network (Australia) Operations Ltd. v. Australian Broadcasting Corp*. 2007; *Giller v. Procopets* 2008).

In order for breach of confidence to provide a remedy for invasion of privacy by means of taking and publishing intrusive photographs, UK courts have had to treat photographs as a form of confidential information. This has only been a comparatively recent development, capable of being traced back to the *dicta* of Laws J in *Hellewell v Chief Constable of Derbyshire*, in which his Lordship stated:

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. (*Hellewell v. Chief Constable of Derbyshire* 1995)[1]

The jurisprudence on privacy now developing in the United Kingdom already includes a number of cases arising out of the actual or threatened publication of photographs (*Theakston v. MGN Ltd.* 2002; *John v. Associated Newspapers Ltd*. 2006; *Murray v. Express Newspapers plc* 2009; *Mosley v. News Group Newspapers Ltd*. 2008). The two most significant cases in the United Kingdom, both of which reached the House of Lords, form the principal case studies in this chapter: *Douglas v Hello!* and *Campbell v MGN Ltd*.

[1] See also *Creation Records Ltd v News Group Newspapers Ltd* (1997).

10.3 *Douglas v Hello! Ltd*

In mid-November 2000, film stars, Michael Douglas and Catherine Zeta-Jones, were married at the Plaza Hotel in New York (*OBG Ltd. v. Allan* 2008). The announcement of their engagement led to a bidding war between rival magazines, *OK!* and *Hello!*, for the exclusive rights to publish photographs of the wedding reception. *OK!* prevailed, signing contracts with Douglas and Zeta-Jones worth £500,000 each. Under the terms of their contracts, Douglas and Zeta-Jones had to hire their own photographer to take photographs of the event and then had to use their best efforts to restrict access by third party media outlets and to prevent guests from taking and publishing their own photographs. The invitations sent to guests clearly stated that the taking of photographs was not permitted. Security was hired to prevent unauthorised entry and guests were also sent coded entry cards for the same purpose. However, a *paparazzo*, Rupert Thorpe, managed to gain entry to the reception and surreptitiously took a number of photographs. Through intermediaries, these photographs were ultimately sold to *Hello!* magazine. *OK!*, Douglas and Zeta-Jones became aware that *Hello!* had the photographs and intended to expedite their publication. They obtained an ex parte injunction from Buckley J, restraining *Hello!* from publishing. *Hello!* appealed to the Court of Appeal, which set aside the injunction (*Douglas v. Hello* 2001).

In order to minimise the damage flowing from the loss of exclusivity, *OK!* also had to expedite its publication. *OK!*, Douglas and Zeta-Jones then pursued an award of damages against *Hello!* At the trial as to liability, Lindsay J found, inter alia, that Douglas and Zeta-Jones were entitled to an award of damages and the grant of a perpetual injunction against *Hello!* on the basis that the publication of the unauthorised photographs amounted to a breach of confidence. In a separate judgment on the remedies to be granted, his Lordship awarded the couple £14,600 damages, reflecting the distress caused by the publication of the photographs and the cost and inconvenience caused by having to select authorised photographs hastily for publication in *OK!* (*Douglas v. Hello* 2004). *Hello!* appealed against Lindsay J's judgment to the Court of Appeal.

Giving the judgment of the Court of Appeal, Lord Phillips of Worth Matravers MR first reviewed the development of breach of confidence under English law so as to provide protection for personal privacy. Having doing that, his Lordship proceeded to make some observations about the extension of breach of confidence to invasions of privacy committed by the publication of photographs. Under the heading, '*Photographic information*', he observed:

> This action is about photographs. Special considerations attach to photographs in the field of privacy. They are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances a voyeur would be the more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive.

> This is quite apart from the fact that the camera, and the telephoto lens, can give access to the viewer of the photograph to scenes where those photographed could reasonably expect that their appearances or actions would not be brought to the notice of the public. (*Douglas v. Hello* 2006, 157)

Lord Phillips of Worth Matravers MR then proceeded to review recent authorities dealing with breach of confidence committed by means of the publication of intrusive photographs (*Douglas v. Hello* 2006, 157–159), concluding that a cause of action in breach of confidence could protect Douglas' and Zeta-Jones' interests in this case (*Douglas v. Hello* 2006, 160). His Lordship then considered the effect of their contract with *OK!* magazine, particularly whether, by placing information about the wedding into the public domain, it had deprived that information of the quality of confidence, which is essential for the cause of action being pursued (*Douglas v. Hello* 2006, 161–162). In this context, Lord Phillips of Worth Matravers MR observed that

> Once intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not necessarily be true of photographs. In so far as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it…
>
> Nor is it right to treat a photograph simply as a means of conveying factual information. A photograph can certainly capture every detail of a momentary event in a way which words cannot, but a photograph can do more than that. A personal photograph can portray, not necessarily accurately, the personality and the mood of the subject of the photograph. It is quite wrong to suppose that a person who authorised publication of selected personal photographs taken on a private occasion, will not reasonably feel distress at the publication of unauthorised photographs taken on the same occasion.

His Lordship found that Douglas and Zeta-Jones were not precluded by their contract with *OK!* from obtaining damages for distress for breach of confidence. There was no basis upon which to interfere with the modest award of damages of £3,750 to each claimant under this head (*Douglas v. Hello* 2006, 163). Nor did Lord Phillips of Worth Matravers MR find that there was any basis upon which to interfere the award of £7,000 damages to both claimants for the labour and expense of selecting the photographs for expedited publication (*Douglas v. Hello* 2006, 163–166).

There was a subsequent appeal to the House of Lords by *OK!* magazine in respect of its claim but Douglas and Zeta-Jones did not participate in the appeal (*OBG Ltd. v. Allan* 2008, 46). The issue before the House of Lords was whether the obligation of confidence created by Douglas and Zeta-Jones in respect of the wedding photographs could be imposed for the benefit of *OK!* magazine, such that *OK!* could also sue for breach of confidence. By a bare majority (Lord Hoffmann, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood, Lord Nicholls of Birkenhead and Lord Walker of Gestingthorpe dissenting), the House of Lords found that *OK!* could recover damages for breach of confidence as well as Douglas and Zeta-Jones (*OBG Ltd. v. Allan* 2008, 47–49, 93–94).

10.4 *Campbell v MGN Ltd*

In early February 2001, *The Daily Mirror* newspaper published a front-page story under the headline, 'Naomi: I am a drug addict'. The story, which continued inside the newspaper over several pages, was accompanied by a number of photographs of supermodel Naomi Campbell on a London street (*Campbell v. MGN Ltd*. 2004, 462–463). Lord Nicholls of Birkenhead characterised the tone of the initial publication as 'sympathetic and supportive with, perhaps, the barest undertone of smugness' (*Campbell v. MGN Ltd*. 2004, 463). Campbell immediately commenced proceedings against the newspaper's publisher, MGN Ltd, for breach of confidence and compensation under the *Data Protection Act* 1998 (UK) (*Campbell v. MGN Ltd*. 2004, 463–464, 471, 494). After that, the tone of *The Daily Mirror*'s subsequent publications changed decisively to one of open hostility (*Campbell v. MGN Ltd*. 2004, 463–464).

At first instance, Morland J found in favour of Campbell, awarding her £3,500 damages, including a component of aggravated damages. On appeal, the English Court of Appeal found in favour of MGN Ltd. Campbell appealed to the House of Lords.

Before the House of Lords, Campbell claimed that there were five categories of information impermissibly disclosed by *The Daily Mirror*. Four of these were conveyed in words – the fact of Campbell's drug addiction, the fact of Campbell's treatment, the fact of Campbell's treatment at Narcotics Anonymous and the details of Campbell's treatment at Narcotics Anonymous. The fifth category of information comprised the photographs themselves (*Campbell v. MGN Ltd*. 2004, 467).

During the course of argument, Campbell conceded that, given her repeated public statements that she did not take drugs, the fact of her drug addiction and her treatment for it were no longer capable of being regarded as private information. The issue then resolved itself as to whether the mere fact, as well as the details, of Campbell's treatment at Narcotics Anonymous and the photographs supporting the story constituted confidential or private information.

Significantly, there was a consensus amongst the Law Lords as to the principles to be applied. The division of opinion turned upon the application of those principles to the facts of the case (*Campbell v. MGN Ltd*. 2004, 469–470, 480, 495).

In their respective speeches, the majority, comprised of Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell, held that the facts and details of Campbell's treatment at Narcotics Anonymous, as well as the accompanying photographs, constituted private information (*Campbell v. MGN Ltd*. 2004, 493, 500–502, 505).

Lord Hope of Craighead reasoned that, had *The Daily Mirror* merely published a written account of the private information, the competing interests between Campbell's right to privacy and the newspaper's freedom of expression would have been evenly balanced. For his Lordship, *The Daily Mirror*'s publication of the photographs was the decisive factor in favour of Campbell (*Campbell v. MGN Ltd*.

2004, 492–493). Lord Hope of Craighead characterised the photographs and their impact on his finding of liability thus:

> Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret and with a view to their publication in conjunction with the article. The zoom lens was directed at the doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixelated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded. The argument that the publication of the photograph added credibility to the story has little weight. The photograph was not self-explanatory. The reader only had the editor's word as to the truth of these details. (*Campbell v. MGN Ltd*. 2004, 492)

In her speech, Baroness Hale of Richmond concluded that the photographs in isolation were unobjectionable. However, in context, and particularly having regard to the accompanying text, the publication of the photographs added to the private health information about Campbell being disclosed and the harm being done to her by such revelation. Her Ladyship held that it was unnecessary for *The Daily Mirror* to publish the photographs in order to report the story (*Campbell v. MGN Ltd*. 2004, 501).

In his speech, Lord Carswell agreed with the outcome reached by Lord Hope of Craighead and Baroness Hale of Richmond. In relation to the photographs, Lord Carswell described them as 'a powerful prop to a written article and a much valued part of newspaper reporting, especially in the tabloid or popular press' (*Campbell v. MGN Ltd*. 2004, 504).

In his dissent, Lord Nicholls of Birkenhead reasoned that the information about Campbell's treatment at Narcotics Anonymous was not private because such therapy was 'well known, widely used and much respected' (*Campbell v. MGN Ltd*. 2004, 467). For his Lordship, the proper analogy was as follows:

> Disclosure that Miss Campbell had opted for this form of treatment was not a disclosure of any more significance than saying that a person who fractured a limb has his limb in plaster or that a person suffering from cancer is undergoing a course of chemotherapy. (*Campbell v. MGN Ltd*. 2004, 467)

By extension, Lord Nicholls of Birkenhead found that the accompanying photographs were not a breach of confidence, reasoning thus:

> But the pictorial information in the photographs, illustrating the offending article of 1 February 2001 added nothing of an essentially private nature. They showed nothing untoward. They conveyed no private information beyond that discussed in the article…. There was nothing undignified or distrait about her appearance. (*Campbell v. MGN Ltd*. 2004, 468)

In his dissent, Lord Hoffmann emphasised the public interest in publishing information which would otherwise be considered private, which arose because Campbell herself made her non-use of illegal drugs a public issue and purported to cultivate a false public image of herself as a drug-free supermodel (*Campbell v. MGN Ltd*. 2004, 469–470, 477). This then entitled the media to publish material exposing Campbell's lies and correcting the public record (*Campbell v. MGN Ltd*. 2004, 474). Lord Hoffmann was of the view that *The Daily Mirror* was not limited

to the publication of the bare facts but could include circumstantial details and, importantly, the photographs (*Campbell v. MGN Ltd*. 2004, 474–475) because media outlets ought to be granted some latitude as to how they present their stories (*Campbell v. MGN Ltd*. 2004, 474–476). As his Lordship pithily observed, 'judges are not newspaper editors' (*Campbell v. MGN Ltd*. 2004, 474). In relation to the photographs, Lord Hoffmann characterised them thus:

> In the present case, however, there was nothing embarrassing about the picture, which showed Ms Campbell neatly dressed and smiling among a number of other people. Nor did the taking of the picture involve an intrusion into private space. Hundreds of such 'candid' pictures of Ms Campbell, taken perhaps on more glamorous occasions, must have been published in the past without objection. (*Campbell v. MGN Ltd*. 2004, 478)

10.5 Photographs as Information

The developing law on privacy in the United Kingdom adapts an existing, information-based cause of action – breach of confidence. In order for breach of confidence to provide protection against the unauthorised publication of photographs depicting private matters, courts have had to treat photographs as information. This equivalence first manifests itself in Laws J's *dicta* in *Hellewell v Chief Constable of Derbyshire*. It has been accepted and applied, as is made clear in the judgments in *Douglas v Hello! Ltd* and *Campbell v MGN Ltd*. Although some judicial reservations have been expressed about treating photographs as information (*Douglas v Hello!* 2006, 150), the preponderant view in the UK case law appears readily to accept this approach is unproblematic. In the first Court of Appeal decision in *Douglas v Hello!*, Sedley LJ flatly dismissed the argument made by Hello! that the photographs were not information, asserting that such a submission was 'plainly wrong' (*Douglas v Hello!* 2001, 1005), and Keene LJ characterised it as 'unsustainable' (*Douglas v Hello!* 2001, 1011). In the decision of the House of Lords in the same litigation, Lord Hoffmann posed his own question on this issue and then answered it:

> Is there any conceptual problem about the fact that the obligation of confidence was imposed only in respect of a particular form of information, namely photographic images? I do not see why there should be. (*OBG Ltd. v. Allan* 2008, 48)

(By way of contrast, in *Von Hannover v Germany* – a case concerning the publication of photographs of Princess Caroline of Monaco in tabloid magazines – the European Court of Human Rights suggested some reservations, stating that '[t]he present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual' (*Von Hannover v. Germany* 2005, 29). The quotation marks are telling.) Not only are photographs treated as information, there are assertions that photographs are a superior form of information. For example, in the House of Lords decision in *Douglas v Hello!*, Lord Nicholls of Birkenhead expressed the view that '[i]nformation communicated in other ways, in sketches of descriptive writing or by word of mouth, cannot be so

complete and accurate' as a photograph (*OBG Ltd. v. Allan* 2008, 71). Yet, theorists of photography raise legitimate questions about whether it is possible to treat photographs as information and, if it is, whether photographs are reliable or accurate (Silbey 2010, 1262–1272).

In her essay, 'In Plato's Cave', from her influential collection of essays, *On Photography*, Susan Sontag canvasses, then problematises, the diverse ways in which photographs can be used. Photographs can, *inter alia*, capture experience (Sontag 1977, 3–4), can appropriate the subject being photographed (Sontag 1977, 4), can furnish evidence (Sontag 1977, 5) and can provide information (Sontag 1977, 22). In relation to the latter, Sontag observes that '[p]hotographs are valued because they give information' (Sontag 1977, 22). However, Sontag queries the extent to which one can rely upon the informational value of photographs. Sontag asserts that

> [t]o spies, meteorologists, coroners, archaeologists, and other information professionals, their value is inestimable. But in the situations in which most people use photographs, their value as information is of the same order as fiction. (Sontag 1977, 22)

Sontag takes her analysis further, suggesting that '[a] new sense of the notion of information has been constructed around the photographic image' (Sontag 1977, 22). The photograph captures a specific moment and space in time. What is captured is framed by the photographer. Sontag suggests that that which is captured in a photograph can only ever be 'a thin slice' of space and time and that the way in which it is framed is 'arbitrary' (Sontag 1977, 22). Rather than being continuous with reality, the photograph is in fact marked by its discontinuity with reality (Berger 1971; Berger and Mohr 1982). The framing of a photograph marks out what is included in the photograph and, necessarily, what is excluded from the photograph. Although what is represented in the photograph existed in front of the camera lens, what is photographed and how it is framed are choices made by the photographer. The reality of the photograph and the 'information' it thereby embodies is mediated not only through the lens of the camera but also through the mind of the photographer.

In one of his analyses of the photograph, Roland Barthes draws a profound distinction between the photograph and the written word, observing that

> …the Photograph is pure contingency and can be nothing else (it is always *something* that is represented) – contrary to the text which, by the sudden action of a single word, can shift a sentence from description to reflection. (Barthes 1982, 28)

Rather than stressing the similarity between the photograph and the written word, Barthes emphasises the difference. He suggests that the photograph has a highly specific function and capacity for representation, whereas the written word has broader, more flexible functions and capabilities. Acknowledging that this might be so does not allow the law of privacy's ready acceptance of photographs as another form of information, similar to verbal information.

The judicial treatment of the photograph as a form of information presupposes that the photograph is an object, a passive and neutral embodiment of reality. The photograph then mediates to the viewer, in a pure form, information. According to

this account of the photograph, there is a confluence or an elision between the photograph and its subject, as if the photograph is a close and unproblematic approximation of reality. Yet, Sontag's reflections on the nature of photography invite reconsideration of such views. She problematises the notion that photographs are information in the straightforward manner in which the developing law on privacy has assumed. The judicial treatment of the photograph also presupposes that the capacity of the photograph and the written word to embody and to communicate information is equivalent. For the purposes of imposing legal liability, there is an obvious advantage to stressing the similarities. However, Barthes' observations as to the dissimilarities between photographic and written information suggest that any ready equation of these types of 'information' is problematic. These assumptions, however, are not the only difficulty the law's treatment of photography encounters when subject to the scrutiny of theory.

10.6 Photographs as Information Different from Verbal Information

The law of privacy, as it is evolving in the United Kingdom, not only treats photographs as information but, for certain purposes, treats them as a distinct category of information. It purports to establish a dichotomy between photographic information and verbal information. Not only does it posit this dichotomy, it suggests that photographic information is additional (*Douglas v. Hello! Ltd*. 2001, 1011; *Campbell v. MGN Ltd*. 2004, 468) and more importantly superior to verbal information (*Douglas v. Hello! Ltd*. 2001, 1011; *OBG Ltd. v. Allan* 2008, 71). Photographs provide access to information which is inaccessible by mere words (*Douglas v. Hello! Ltd*. 2001). Recourse is had to the adage that 'a picture is worth a thousand words' (*Campbell v. MGN Ltd*. 2004, 467, 477, 501). The developing law of privacy then proceeds to contend explicitly that photographs as information can be more intrusive upon, and more injurious of, personal privacy than mere verbal description. Thus, the publication of a photographic representation is repeatedly asserted to be more offensive than a verbal description of the same private phenomenon (*Theakston v. MGN Ltd*. 2002, 423–424). It justifies the application of differential remedies, providing a principled basis for a court to restrain the publication of photographs but to allow the publication of a written account of the same matter.

This emerges clearly from the decision of Ouseley J in *Theakston v MGN Ltd*. In this case, the television presenter, Jamie Theakston, sought an injunction to restrain the publication of a story, accompanied by photographs, in the tabloid newspaper, the *Sunday People*. The story concerned Theakston's conduct in a Mayfair brothel. In mid-December 2001, Theakston was drinking with friends in London. In the early hours of the morning, Theakston was taken to what he thought was a strip joint. A woman led him into a private room and 'performed a sex act' on him. More women entered the room and eventually Theakston became aware of the presence of a person taking photographs. Theakston realised he was in a brothel and left shortly thereafter.

In the following days, Theakston received telephone calls, demanding money for the sexual services provided and threatening the disclosure of the photographs to a newspaper if such payment were not made. He refused to pay, so the prostitute approached the *Sunday People* with her story and, importantly, her photographs (*Theakston v. MGN Ltd*. 2002, 402–403). Theakston became aware of the impending publication and sought an injunction. Ouseley J's approach is telling. His Lordship concluded that Theakston was entitled to an injunction to restrain the publication of the photographs of what happened inside the brothel but not the publication of a written account of the evening in question. On the one hand, Ouseley J concluded that a written account of Theakston's presence at the brothel and of the sexual activity he engaged in whilst there could be published. His Lordship reasoned that the information about sexual activity in the context of a transitory, commercial relationship was not confidential; that the brothel was not a private place; that Theakston had placed his private life, particularly his sexual conduct, in the public domain; that, given that Theakston was a television presenter of programmes directed towards children and teenagers, there was a public interest in the publication, even if Theakston could not be considered a role model as such; and that the freedom of expression of the prostitute and the *Sunday People* newspaper had to be respected, notwithstanding the somewhat unsavoury conduct in which they had engaged (*Theakston v. MGN Ltd*. 2002, 417–423). On the other hand, Ouseley J concluded that the photographs could not be published. His Lordship reasoned thus:

> The authorities cited to me showed that the Courts have consistently recognised that photographs can be particularly intrusive and have showed a high degree of willingness to prevent the publication of photographs, taken without the consent of the person photographed but which the photographer or someone else sought to exploit and publish. This protection extended to photographs, taken without their consent, of people who exploited the commercial value of their own image in similar photographs, and to photographs taken with the consent of people but who had not consented to that particular form of commercial exploitation, as well as to photographs taken in public or from a public place of what could be seen if not with a naked eye, then at least with the aid of powerful binoculars. I concluded that this part of the injunction involved no particular extension of the law of confidentiality and that the publication of such photographs would be particularly intrusive into the Claimant's own individual personality. I considered that even though the fact that the Claimant went on to the brothel and the details as to what he did there were not to be restrained from publication, the publication of photographs taken there without his consent could still constitute an intrusion into his private and personal life and would do so in a peculiarly humiliating and damaging way. It did not seem to me remotely inherent in going to a brothel that what was done inside would be photographed, let alone that any photographs would be published. (*Theakston v. MGN Ltd*. 2002, 423–424)

In relation to the photographs, Ouseley J could identify no public interest supporting their publication (*Theakston v. MGN Ltd*. 2002, 424). In terms of the freedom of expression of the unidentified photographer and the *Sunday People*, his Lordship found that such rights had to yield to the superior right of Theakston to his private life (*Theakston v. MGN Ltd*. 2002, 424). The distinction drawn between photographic and written information is therefore important not only in principle but also in practice, leading as it does to differential remedies being granted for different categories of information.

Purporting to draw a distinction between photographic and verbal information and furthermore contending that the former is more intrusive of privacy than the latter presumes that photographs are, or can be, autonomous from the phenomena they represent and the language used to describe them. Yet theorists of photography, in their various ways, challenge precisely these assumptions. Indeed, they contend to the contrary, that an understanding of photographs is dependent upon the words used to describe them.

For instance, Sontag follows her provocative statement to the effect that the informational value of a photograph is 'of the same order as fiction' by linking the importance of photographs as information to the emergence of 'illustrated newspapers'. She observes that '[p]hotographs were seen as a way of giving information to people who do not take easily to reading' (Sontag 1977, 22). She contrasts *The Daily News*, which, at the time when Sontag was writing, promoted itself as 'New York's Picture Newspaper' with *Le Monde*, which eschewed the use of photographs at all, on 'the presumption… that, for such readers [of *Le Monde*], a photograph could only illustrate the analysis contained in an article' (Sontag 1977, 22). Rather than accepting that photographic information is additional or superior to written information, as some recent judges have suggested, photographs might be viewed as superfluous to a written account.

Sontag considers the possibility of the photograph as a source of meaning in isolation from the written text and observes that

> [a]ny photograph has multiple meanings; indeed, to see something in the form of a photograph is to encounter a potential object of fascination. The ultimate wisdom of the photographic image is to say: 'There is the surface. Now think – or rather feel, intuit – what is beyond it, what the reality of it must be if it looks this way'. Photographs, which cannot themselves explain anything, are inexhaustible invitations to deduction, speculation, and fantasy. (Sontag 1977, 23)

Thus, contrary to the law's current position, the notion that a photograph can, independent of the written word, constitute a form of information is problematic. Sontag continues to develop this idea, noting that

> [s]trictly speaking, one never understands anything from a photograph…. Nevertheless, the camera's rendering of reality must always hide more than it discloses…. Only that which narrates can make us understand. (Sontag 1977, 23)

Whereas the emerging law of privacy places photographs in a privileged position as a form of information and, through disclosure, harm, Sontag contemplates the relationship and, by extension, the power structure between the photograph and the written word being inverted. The photograph itself does not convey information and therefore does not intrude upon an individual's privacy; it is only when the photograph is described or interpreted or 'read' that the photograph acquires meaning and has the capacity to harm.

Berger engages with similar issues to Sontag in his writing on visual images. As Berger states at the outset of *Ways of Seeing*, '[s]eeing comes before words' (Berger 1972, 7). He elaborates that

> [i]t is seeing which establishes our place in the surrounding world; we explain that world with words, but words can never undo the fact that we are surrounded by it. (Berger 1972, 7; Berger and Mohr 1982)

Viewed from a different perspective, Price contends that '[i]t is the act of describing that enables the act of seeing' (Price 1994, 6). For Price, the language of description is deeply implicated in the act of looking at photographs (Price 1994, 1). She argues that description entails the interpretation of the photograph, without which the meaning of the photograph is not possible (Price 1994, 5). The process of describing a photograph is important because descriptions 'set limits to expectations, direct attention to subject or context, perhaps name the time and place' (Price 1994, 71). Price explicitly connects the process of describing a photograph with the process of deriving information from the photograph. She argues that

> [t]he crucial and important question is twofold: What does this photograph convey as information, and what does that information mean? To talk about either aspect, it is necessary to describe the photograph, that is, to name what is seen as fully as possible and then to relate that description to the context, effect, and significant of the visual elements. (Price 1994, 76)

The dependence of photographs upon words used to describe them is demonstrated in innumerable ways. A small but telling example is provided by Lord Nicholls of Birkenhead in *Campbell v MGN*. His Lordship records that the article in *The Daily Mirror* was inaccurate because '[t]he street photographs showed [Campbell] leaving a meeting, not arriving, contrary to the caption in the newspaper article' (*Campbell v. MGN Ltd*. 2004, 463). The photographs did not speak for themselves; they did not yield, unaided, their information; they were ambiguous – they could have depicted an arrival or a departure; and they required the captions to disclose their information to the reader. In this instance, the captions misled the reader into placing an incorrect interpretation on the photographs.

For the purpose of deriving information from, and ascribing meaning to, a photograph, not only is there an interdependence between the photograph itself and the language used to describe it, there is also a complex interrelationship between the photograph, the photographer and the viewer. This is a point made by Sontag, when she suggests, on the one hand, that photographing a phenomenon places the photographer 'in a certain relation to the world' (Sontag 1977, 4), whilst, on the other hand, the photograph invites the viewer to deduce or to speculate or even to fantasise about its meaning (Sontag 1977, 23). According to Price, a photograph is created by the mind of the photographer (Price 1994, 75–76) but '[e]very image is also subject to the second mind, that of the viewer' (Price 1994, 77). Berger also considers this in his writings on photography. Not only is there a relationship between seeing and recording what one sees by means of a photograph, there is also a relationship between the photographer, the viewer, the photograph and the photographed which is essential to the construction of a photograph's meaning. Berger emphasises '[t]he reciprocal nature of vision':

> We never look at just one thing; we are always looking at the relation between things and ourselves. Our vision is continually active, continually moving, continually holding things in a circle around itself, constituting what is present to us as we are. (Berger 1972, 9)

Berger suggests that 'all images are man-made' (Berger 1972, 9). He does not limit the making of images to the physical process of creation. Self-evidently, the photographer is responsible for the taking of the photograph. However, Berger argues that the photographer is also involved in the creation of meaning in relation to a photograph. For Berger, a photograph embodies and reflects the photographer's 'way of seeing' (Berger 1972, 10). He explains that

> [e]very image embodies a way of seeing. Even a photograph. For photographs are not, as is often assumed, a mechanical record. Every time we look at a photograph, we are aware, however slightly, of the photographer selecting that sight from an infinity of other possible sights. (Berger 1972, 10)

Berger proceeds to suggest that it is not only the photographer's 'way of seeing' that is relevant to the derivation of meaning from a photograph but also that the viewer's 'way of seeing' informs his or her perception or appreciation of the photograph, thereby influencing the meaning he or she attributes to the photograph (Berger 1972, 10). In turn, each person's 'way of seeing' is informed by what he or she knows or believes (Berger 1972, 8). Consequently, there is no fixed meaning to be attached to a photograph. In Berger's words, '[t]he relation between what we see and what we know is never settled' (Berger 1972, 7). The interaction is dynamic, but not unstable. As Price observes,

> a photograph does not have an inherent, self-evident fixed meaning. But neither does it have a wholly arbitrary meaning. The limits of interpretation are determined by what can be seen in a photograph. (Price 1994, 7)

What emerges clearly from a consideration of these theoretical perspectives is that treating a photograph as a form of information and imposing liability of the basis of the 'information' disclosed by the publication implicitly involves a complex semiotic exercise. Perhaps the most developed account of the semiotics of the photograph is provided by Barthes, particularly through his essay, 'The Photographic Message', and his book, *Camera Lucida*. In the latter work, Barthes considers the nature of the photograph and observes that

> [a] specific photograph, in effect, is never distinguished from its referent (from what it represents), or at least it is not *immediately* or *generally* distinguished from its referent (as is the case for every other image, encumbered – from the start, and because of its status – by the way in which the object is simulated): it is not impossible to perceive the photographic signifier…, but it requires a secondary action of knowledge or reflection. It is as if the Photograph always carries its referent with itself. (Barthes 1982, 5)

Barthes' approach to the photograph denies the ready acceptance of the photograph as a form of information because, as he points out, there is a conceptual distinction to be drawn between the photograph and that which it represents. When looking at a photograph, this distinction can be, and often is, readily forgotten (Barthes 1982, 6).

In his account of the semiotics of the photograph in *Camera Lucida*, Barthes suggests:

> that a photograph can be the objects of three practices (or of three emotions, or of three intentions): to do, to undergo, to look. The *Operator* is the Photographer. The *Spectator* is

> ourselves, all of us who glance through collections of photographs – in magazines and newspapers, in books, in albums, archives… And the person or thing photographed is the target, the referent, a kind of little simulacrum, any *eidolon* emitted by the object, which I should like to call the *Spectrum* of the Photograph…. (Barthes 1982, 9)

Barthes explored his ideas of the semiotics of the photograph, explicitly in the context of the 'press photograph', in his essay, 'The Photographic Message'. He argues that the press photograph is a message which results from the interaction of 'a source of emission, a channel of transmission and a point of reception' (Barthes 1977a, 15). By 'a source of emission', he means 'the staff of a newspaper, the group of technicians certain of whom take the photo, some of whom choose, compose and treat it, while others, finally give it a title, a caption and a commentary' and by 'a point of reception', he means the reading public of a newspaper (Barthes 1977a, 15). The most difficult aspect of the semiotics of a press photograph is the 'channel transmission', which Barthes defines as the newspaper itself. However, the newspaper in turn is itself a complex semiotic structure – 'a complex of concurrent messages with the photograph as the centre and surrounds constituted by the text, the title, the caption, the lay-out and, in a more abstract and no less "informative" way, by the very name of the paper…' (Barthes 1977a). According to Barthes, the photograph poses a methodological problem because 'the photograph is not simply a product or a channel but also an object endowed with a structural autonomy' (Barthes 1977a). Although autonomous, the structure of the photograph is not isolated. It necessarily communicates with another structure: the text accompanying the photograph – the title, caption or article. Thus, according to Barthes, '[t]he totality of the information is thus carried by two different structures (one of which is linguistic)' (Barthes 1977a). The structures are co-operative, but, because one is comprised of words and the other is comprised of 'lines, surfaces [and] shades', they are necessarily separate, qualitatively and spatially. Barthes suggests that the two structures need to be analysed separately before their interaction can be understood. He further suggests that the linguistic structure is well developed, whereas 'almost nothing is known about the other, that of the photograph' (Barthes 1977a). This acknowledgement of the nascent state of understanding the meaning of photographs contrasts with the ease and certainty of the law's current approach.

Barthes proceeds to grapple with the nature of the photograph and the ascertainment of its meaning or meanings. He recognises that, on one level, a photograph is an analogue of its object. In one sense, therefore, the photograph is 'a message without a code' (Barthes 1977a). However, this is only one part of the 'message' of a photograph. Barthes distinguishes between the denoted and the connoted messages of a photograph. The denoted is the analogue of the object, whereas the connoted concerns the communication of the societal reaction to the image and its analogue (Barthes 1977a, b, 17, 37). Barthes suggests that there is a risk that, in describing a photograph in words, one will add a connotation. The act of describing a photograph is problematic because 'to describe is thus not simply to be imprecise or incomplete, it is to change structure, to signify something different to what is

shown' (Barthes 1977a, 18–19). Barthes also considers the role of text accompanying photographs, describing a change in function thus:

> Formerly, the image illustrated the text (made it clearer); today, the text loads the image, burdening it within a culture, a moral, an imagination. Formerly, there was reduction from text to image; today, there is amplification from the one to the other. (Barthes 1977a, 26)

Barthes then considers the multiple senses of connotation – perceptive connotation, cognitive connotation, ethical connotation and political connotation (Barthes 1977a, 28–30; Eco 1982, 35–38) – but all codes of connotation are always, he stresses, historical or cultural (Barthes 1977a, b, 27).

Assessing the effect of Barthes' semiotic analysis of the photograph, Victor Burgin concludes that

> [w]ork in semiotics showed that there is no 'language' of photography, no single signifying system (as opposed to technical apparatus) upon which all photographs depend (in the sense in which all texts in English ultimately depend upon the English language); there is, rather, a heterogeneous complex of codes upon which photography may draw…. Further, importantly, it was shown that the putatively autonomous 'language of photography' is never free from the determination of language itself. (Burgin 1982, 143–144)

These two key insights clearly emerge from an engagement with photographic theory, particularly semiotic approaches to photography, yet they have not been recognised by the law's treatment of photographs in the developing area of privacy. The implications of these insights for the 'reading' of photographs are profound.

Photographic theory does not allow for a ready acceptance of a rigid demarcation between photographic and written information. In different ways, theorists of photography suggest that there is an interaction, even an interdependence, between photographs and written text. In the context of a 'press photograph', this interaction involves not only the photographs and the written text themselves but also those participating in their production and those receiving them. It also entails the codes, connotations and conventions associated with interpreting photographs. According to photographic theory, the process of constructing meaning out of a 'press photograph' is a complex semiotic undertaking. By contrast, the task of 'reading' photographs, contemplated by the developing law of privacy, is assumed to be straightforward and unproblematic. The nuanced and sophisticated approach to the 'reading' of a photograph suggested by theorists, such as Barthes, contrasts markedly to the law's simplistic and unreflective approach. However, as Derrick Price and Liz Wells have suggested, '[t]he issue is not whether theory is in play but, rather, whether theory is acknowledged' (Price and Wells 2004, 24).

10.7 Conclusion

At the outset of *On Photography*, Sontag refers to the need to be educated about how to understand photographs. She suggests that there is a need to be taught 'a new visual code' (Sontag 1977; Berger 1971; Clarke 1997). Just as one needs to be

taught to read the written word, so one needs to be taught to read the photographic image. Both are acquired, not 'natural', skills. It is important to recognise that they are also not the same set of skills. As Diplock LJ evocatively observed in *Slim v Daily Telegraph Ltd*, '[w]ords are the tools of [the lawyer's] trade' (*Slim v. Daily Telegraph Ltd*. 1968). Simply because judges are trained to read and interpret written texts does not mean that they are automatically and necessarily equipped to read and interpret visual images. A sophisticated canon of textual construction has developed over several centuries to allow judges in the common law tradition to read and interpret the written texts they routinely encounter – constitutions, statutes, cases and treaties. An equally sophisticated but distinct approach to the 'reading' of photographs has yet to emerge.

In developing such an approach, the law can benefit from an engagement with photographic theory. Photographic theory considers questions implicitly asked and answered by law. Whereas courts do not explicitly ask these questions and assert the answers as if they are straightforward, photographic theory reveals how problematic the answers and indeed the questions themselves might be. In addition, photographic theory poses questions which the law does not even consider implicitly but questions which are nonetheless worth asking and addressing. For instance, Barthes, on a number of occasions, poses questions about photographs and then proceeds to consider their implications. In his essay, 'The Photographic Message', he asks:

> 'What is the content of the photographic message? What does this photograph transmit?' (Barthes 1977a, 16–17)

Later in the same essay, Barthes poses the questions:

> 'How do we read a photograph? What do we perceive? In what order, according to what progression?' (Barthes 1977a, 28)

In his essay, 'The Rhetoric of the Image', he asks:

> 'How does meaning get into the image? Where does it end? And if it ends, what is there *beyond*?' (Barthes 1977b, 32)

Although these questions do not allow, or require, a definitive answer, they are legitimate and stimulating and the law's treatment of photographs as a form of invasion of privacy would be more nuanced by an engagement with them. Theoretical writings on photographs and photography can at least provide the law with a consciousness of those issues involved with 'reading' photographs and attaching meaning to them, as well as the possibility of a discourse for analysing and interpreting photographs (Sherwin et al. 2006, 227). Currently, glib assumptions are made – about photographs being information; about photographic information being distinct from written information; about photographs being more invasive of privacy than written information; about the ease with which photographs can be 'read', without regard to the complex relationships of meaning by which meanings can be generated and negotiated – which are problematic and warrant explication and scrutiny.

There is a rich and diverse theoretical literature on photographs and photography. Not all of it will be directly relevant to the task confronted by judges in determining whether the publication of a photograph constitutes an invasion of privacy, but there is nevertheless much to be learned from photographic theory. Although the law has only recently engaged with the issue of interpreting or ascribing meaning to or 'reading' photographs, the critical literature considering similar issues has developed for over a century. The law's underdeveloped approach to photographs and photography could enrich its principled approach to this issue by reference to photographic theory.

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Chapter 11
Drawing Attention: Art, Pornography, Ethnosemiotics and Law

Alec McHoul and Tracey Summerfield

Abstract We compare here the everyday and legal readings of two controversial cases from mid-2008 in Australia in which the legal status of a number of photographs came into contestation. The first case turned on an exhibition of photographs by the well-known artist, Bill Henson; the second, a cover from *Art Monthly* magazine. Both cases involved young persons and nudity.

Our first approach to the cases is to look in detail at 'child pornography' law in Australia, by reference to the three jurisdictions in which the photographs were tested. We want to tease out the actual legal situation regarding the demarcation between licit and unlawful images (in terms of their pornographic status), especially where minors may be concerned.

Our second approach is ethnosemiotic. Here we investigate how non-specialist or ordinary members of the society treated the controversies. As an example, we turn to a web discussion site and describe the ethnosemiotic resources that the contributors brought into play in an effort to comprehend these matters.

Finally, we speculate on the gaps and overlaps between 'ordinary' and 'formal' modes of legal reasoning based on these two approaches.

11.1 Introduction

In mid-2008, two events that may be related in more than just their temporality conspired to bring to both general-public and legal attention the question:

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What is an unlawful image? This chapter looks at these two events—and their aftermaths—and compares the everyday and the legal readings of them.

In May and June 2008, Australian Federal and NSW State police raided a number of commercial and public art galleries and seized photographic images amidst public allegations that they were pornographic depictions of children. The raids followed the distribution of 3,500 invitations to the opening of the 2008 exhibition of the photographic works of artist Bill Henson. The invitation featured one of the works, *Untitled (#30)*. The image was a photograph of a naked 12-year-old girl.[1]

There were further tremors in July 2008 when *Art Monthly* provocatively featured on its cover a photograph of a naked 6-year-old child, sitting against a backdrop painted by her father (Robert Nelson), attracting similar public attention. The photograph in this case was by Polixeni Papapetrou and entitled *Olympia as Lewis Carroll's Beatrice Hatch before White Cliffs (detail), 2003*.[2] The Olympia in question is Papapetrou's daughter and, despite the fact that Olympia Nelson has publicly defended her mother's work,[3] an upshot of this controversy (in combination with the Henson event) has been no less than a Prime-Ministerial injunction to the Australia Council that artists in receipt of its grants must follow explicit protocols regarding the protection of the innocence of children.

Our aim in this chapter is twofold. Firstly, we want to tease out the actual legal situation in Australia regarding the demarcation between licit and unlawful images (in terms of their pornographic status), especially where minors may be concerned.

Our second aim is 'ethnosemiotic', where this term refers to the understanding and description of the kinds of interpretations and analyses that non-specialist (general-public) members of the society make vis-à-vis the signs they encounter in everyday life. Following the Henson and Papapetrou cases (particularly the former), the new civic domain, the internet, abounded with readings, interpretations and analyses of the images in question. We take a particular site as our case study. This site is a talk forum for computer enthusiasts and was chosen because its contributors are by-and-large specialists in neither legal nor aesthetic fields (though some who posted to the debate do claim amateur and professional interests in photography).[4] The range of 'laic' readings and the ethnosemiotic methods available for them on this site are discussed.

Finally, using the Henson/Papapetrou events as just one instance or case in point, we ask: What are the differences and similarities between legal and ethnosemiotic judgments[5] concerning graphic signs and their fitness (or otherwise) for public

[1] The image can nevertheless be viewed at Web pages hosting public debate. See, for example, http://www.sauer-thompson.com/junkforcode/archives/2008/05/bill-henson-6-u.html and: http://kaganof.com/kagablog/2008/06/01/bill-henson-the-nude-that-caused-all-the-trouble/.

[2] http://polixenipapapetrou.net/works.php?cat=Dreamchild_2003.

[3] http://www.abc.net.au/news/stories/2008/07/07/2296347.htm.

[4] http://forums.mactalk.com.au/8/45454-bill-henson-art-monthly-nude-child-disgusted-rudd-debate.html.

[5] We refer here to the judgements contained in statutes as well as the judgements of the courts.

display as 'art'? We hope this single case will go some way to drawing attention to the more general relations between legal and ethnosemiotic methods of reasoning about visual signs.

11.2 The Unfolding of the Henson/Papapetrou Child Pornography Allegations

The invitation to Henson's exhibition first caught the attention of journalists at New South Wales' *Sydney Morning Herald* and was reported in an opinion piece by Miranda Devine on 22 May 2008. Here she expressed concern at the naturalisation of images of children in 'sexual contexts' by various groups including 'artists, perverts, academics, libertarians, the media and advertising industries, respectable corporations and the porn industry'.[6] The story came to the attention of tabloid radio journalists ('shock jocks') who advertised the website displaying the image, attracting comment from the general public.

The media offensive that followed attracted official comment. Barry O'Farrell, leader of the New South Wales (NSW) Opposition, commented that '[I]t is definitely not OK for naked children to have their privacy and their childhood stolen in the name of art' (quoted in Marr 2008, 11). The following day, NSW Premier Morris Iemma was reported in the *Daily Telegraph* newspaper as saying '… I find it offensive and disgusting.… I'm all for free speech, but never at the expense of a child's safety and innocence'.[7] Finally, after viewing a number of the photographs, the (then) Australian Prime Minister announced on television that he thought the images 'absolutely revolting', appealing for 'kids to be [allowed to] be kids', whatever the images' artistic merit (which he thought them to be devoid of).[8]

A representation of Henson's work remains available online, including at the website of the exhibition space that was the subject of initial raids.[9] It is reported that the artist chose *Untitled (#30)* for the invitation as he thought it to be the most alive of the exhibited images (Marr 2008, 5). Asked previously why he worked with models so young, Henson is reported as answering:

> It's the most effective vehicle for expressing ideas about humanity and vulnerability and our sense of ourselves living inside our bodies; the breath-taking moment to moment existence as you're walking down a street and feel a cool change come through, feel the weather on our bodies and the way we feel about being in the world. All of this is focused more effectively through this age group, so it's the age group I work with (Marr 2008, 7).

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[6] *Sydney Morning Herald* 22 May 2008, 13.

[7] *Daily Telegraph* 23 May 2008, 4.

[8] *Today* Channel 9, 23 May 2008.

[9] Notably, the image which triggered the raids, *Untitled (#30)*, is absent from the Web page, having been withdrawn at the peak of the controversy. See http://www.roslynoxley9.com.au/artists/18/Bill_Henson/1098/. Accessed 12 January 2009. The image can nevertheless be viewed on a host of other Web pages hosting public debate. See, for example,

http://www.sauer-thompson.com/junkforcode/archives/2008/05/bill-henson-6-u.html

http://kaganof.com/kagablog/2008/06/01/bill-henson-the-nude-that-caused-all-the-trouble/.

The 127 cm by 180 cm unframed print was one of 14 pictures of the subject. She was naked in all of the images, her nipples visible in nine images, and her crotch just visible in one image. The exhibition included other images of young people,[10] as had past exhibitions, but also almost an equal number of images that did not focus on youth or nudity (Marr 2008, 6).

Despite the public controversy and the best efforts of police to find that the relevant images offended Australian child pornography criminal laws, eventually no charges were laid. Online images contained in media websites (which did not include *Untitled (#30)*) were also referred to the Classification Board by the Australian Communications and Media Authority (ACMA) which investigates complaints regarding online content. The panel of five classifiers comprising the Classification Board found on 29th May 2008 that the images warranted a G classification; that is, they were deemed suitable for viewing by all ages. Interestingly, the black bars placed on some of the images contained in a News Limited slideshow, no doubt to preserve the 'decency' of the children, were considered by some of the panel to render the images dirty and more confronting (Marr 2008, 116–117). *Untitled (#30)* was referred to the Board by the ACMA. The Board found that the image was not pornographic and warranted a PG classification; that is, it was suitable for viewing by children, with parental guidance (Marr 2008, 116–117).

The publication of the July 2008 edition of *Art Monthly Australia* put the issue back into gear. The edition had a cover story on the Henson controversy and included articles from various commentators as well as photographs by photographer Polixeni Papapetrou of her then 6-year-old daughter, Olympia. The cover image was considered by the editor to be 'a safe image on lots of levels', having been exhibited on many other occasions without attention, reproduced in many art publications and even featured on a bank's greeting card (Marr 2008, 138). In response to the renewed interest, Robert Nelson, Olympia's father and the producer of the painted backdrop of the photograph, held a press conference, where Olympia (then 11 years of age) offered her view of the image, placing the image into the combined contexts of art and family photo:

> I think that the picture my mum took of me has nothing to do with being abused. I think that nudity can be part of art. I have thought that for a long, long time. …It [the photo] is one of my favourite — if not my favourite photo my mum has ever taken of me (Marr 2008, 140; ABC 2008).

Police did not act against *Art Monthly Australia,* and the Classification Board cleared it for unrestricted sale, the publication warranting an M classification, that is, not recommended for readers under 15 years (Marr 2008, 141). It is then that the Australian Government announced new protocols would be developed for the use of images of children in the arts.

[10] For example, see *Untitled #7*, 2005/06. http://www.roslynoxley9.com.au/artists/18/Bill_Henson/458/38776/. Accessed 12 January 2009.

11.3 Australian 'Child Pornography' Law

As a federation, there is a distinction in Australia between the legislative powers of the Commonwealth and the individual States and Territories. Generally, criminal matters fall under the jurisdiction of the States, aside from areas which are constitutionally under the power of the Commonwealth, such as telecommunications. The Commonwealth criminal laws apply, amongst other things, to telecommunications services and therefore in regard to the postage of invitations and the postings of the Henson image on the gallery website. The outline of laws provided here are those in place at the time of the controversies, although significant changes are noted.

In Australia, it is an offence in most jurisdictions to possess, produce or distribute child pornography.[11] The penalties vary between jurisdictions, with possession attracting a maximum penalty of between 5 and 21 years imprisonment, production between 4 and 21 years and distribution between 5 and 21 years. This compares to penalties of between 5 and 10 years in comparable Commonwealth legal systems, Canada, New Zealand and the United Kingdom (Attorney-General's Department 2009, 72).

The age threshold for these offences is between 16 and 18 years of age.[12] It is said that this is higher than the age of consent for other sexual offences in some jurisdictions because child pornography involves the exploitation of children, usually for commercial purposes (Attorney-General's Department 2009, 3). The Henson images were tested under the classification and criminal laws of three jurisdictions—the Australian Commonwealth, NSW and the Australian Capital Territory, the Papapetrou image under the classification laws only.

Australian Commonwealth criminal law defines 'child pornography material' as material that depicts or represents a person who is or appears to be under 18 years of age in a sexual pose or activity in a way that would reasonably be considered offensive or which depicts for sexual purposes a sexual organ, anal region or breasts of a person who appears to be under 18 years of age, in a way that would reasonably be considered offensive.[13] The matters to be taken into account in deciding what would be reasonably offensive include the 'standards or morality, decency and propriety generally accepted by reasonable adults'; the material's literary, artistic or educational merits; and the general character of the material, including its medical, legal or scientific character.[14]

At the time of the controversies, in NSW, it was an offence to use a child (defined as under 18 years of age) for pornographic purposes[15] or to produce, possess or

[11] *Crimes Act 1900* (NSW), *Crimes Act 1958* (Vic), *Criminal Code* (Qld), *Classification (Publications, Films & Computer Games) Enforcement Act 1996* (WA), *Criminal Code* (WA), *Criminal Law Consolidation Act 1935* (SA), *Criminal Code Act 1924* (Tas.), *Crime Act 1900* (ACT), *Criminal Code Act* (NT) *Criminal Code Act 1995* (Cth).

[12] Though in some jurisdictions there is a distinction between the actual age of the child and the purported age of the representation.

[13] Section 473.1 *Criminal Code 1995* (Cth).

[14] Section 473.4 *Criminal Code 1995* (Cth).

[15] Section 91G *Crimes Act 1900* (NSW).

disseminate child pornography.[16] Child pornography was defined as material which depicts, in a manner that in all the circumstances would be offensive to a reasonable person, a child engaged in sexual conduct, in a sexual context or as a victim of abuse generally.[17] A defence lay in the material being reasonably produced for a genuine artistic purpose or other public benefit and the defendant's conduct being reasonable for that purpose.[18] The term 'offensive' was not defined in the Act. Subsequent amendments have removed the artistic purpose defence and have created a public benefit defence, the definition of which does not include artistic merit.[19]

In the Australian Capital Territory (ACT), it is an offence to produce or disseminate child pornography, which is defined as anything that represents the sexual parts of a child or a child engaged in sexual activity, substantially for the sexual arousal of another.[20] Unlike NSW (and some other Australian States), there is no specific artistic or public benefit defence, but the requirement for prosecutors to show that the object of the images is to sexually gratify limits the provision's application in regard to artistic works and places the burden of proof on the Crown.

Generally, then, in Australia, the assessment of materials as pornographic or otherwise was, and continues to be in most jurisdictions, by reference to the content of the materials, the standards of reasonable persons and the artistic (and other) merit of the work. In Australia, in addition to these criminal provisions, there are reciprocal Commonwealth and State laws regarding the classification of publications, films and computer games.[21] An Australian Classification Board has been established to determine the rating to be given to materials. The matters to be considered by the Board include the 'standards of morality, decency and propriety generally accepted by reasonable adults'; the artistic merit and general character of the work; and the intended audience.[22] It must reflect contemporary community standards and apply criteria provided by the Australian National Classification Code. The general principles are that:

(a) adults should be able to read, hear and see what they want;
(b) minors should be protected from material likely to harm or disturb them;
(c) everyone should be protected from exposure to unsolicited material that they find offensive;
(d) the need to take account of community concerns about:
    (i) depictions that condone or incite violence, particularly sexual violence; and
    (ii) the portrayal of persons in a demeaning manner.[23]

[16] Section 91H *Crimes Act 1900* (NSW).

[17] Section 91H *Crimes Act 1900* (NSW).

[18] Section 91H(4) *Crimes Act 1900* (NSW).

[19] New section 91HA *Crimes Act 1900* (NSW).

[20] Sections 64(5) and 65 *Crimes Act 1900* (ACT).

[21] It was announced in December 2010 that the Australian Law Reform Commission is to conduct a review of the classification system: Australian Government.

[22] Section 11 *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

[23] National Classification Code, paragraph 1.

The definition of 'child pornography materials' under the Commonwealth *Criminal Code 1995* has been judicially considered. In 2009, the Supreme Court of the ACT pointed to the lack of authorities on the topic of distinguishing child pornography from other images of children and noted the Australian community's tolerance, often in a commercial context, of the sexualisation of young children. It found that the meaning of offensiveness requires:

> a recognition of what appear to be general community standards of what can be tolerated in the community at large in art, literature and particularly the mass media (including what is tolerated by people who would not necessarily regard particular standards as acceptable in their own lives), including … community tolerance of various approaches to children and sexuality.[24]

The Federal Court of Australia has held that deciding if something is 'likely to cause offence to a reasonable adult' (for the purposes of classification) involves a 'judgment about the reaction of a reasonable adult in a diverse Australian society'.[25] The Court found that the question is not to be determined by reference to a majority view of society but must accommodate the standards of 'various subgroups within a multi-racial, secular society which nonetheless includes persons of different ages, political, religious and social views'.[26]

In that case, three researchers had given evidence to the Classification Review Board on the findings of research (McKee et al. 2008), to assist the Board to determine reasonable standards. They submitted that the majority of Australian adults have a 'liberal' view of sexually explicit material and are not offended by depictions of actual sexual activity where there is no coercion or violence, although views vary widely according to political, religious or other affiliations.[27] Both the criminal law and classification systems, then, generally require that the image be read by reference to the sensibilities of the reasonable person, the 'reasonable person' not needing to be represented by the majority along with the intended viewing context.

11.4 Regulation Following the Controversy

As noted above, the cases triggered the development by the Australian Government of new 'Protocols for Working with Children in Art' (2008) which are to apply in addition to criminal laws. These provide a distinction in the creation, exhibition and distribution of art involving fully or partly naked children. In the case of creation,

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[24] *R v Silva* (2009) ACTSC 108 (4 September 2009) at [20, 26, 33] per Penfold J.

[25] *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) FCA 1871 at [170] upheld by the Full Court in *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) FCAFC 79.

[26] *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) FCA 1871 at [171] per Jacobson J.

[27] Evidence provided by Professor Catharine Lumby, Ms Katherine Albury and Professor McKee: *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) FCA 1871.

evidence of parental consent is required, including a statement that the parents understand the nature and intended outcome of the work; that they commit to direct supervision of the child while the child is naked; and that they agree that the context is not 'sexual, exploitative or abusive' (Australian Council for the Arts 2008). In the case of exhibitors, a written statement is required from the artist declaring that there has been conformity with the protocols and relevant laws. If the work is to be distributed by publication, in promotional material or through digital material, images of children 1 year and older should be referred to the Classification Board.

Since the Henson and Papapetrou incidents, there has also been further review of the child pornography laws, including an extension of regulation to more broadly defined child abuse and child exploitation materials. These have not been ostensibly as a consequence of the Henson and Papapetrou cases, though they may reflect the growing moral panic surrounding paedophilia and the common view of the relationship between image and child abuse. However, the proposals do not significantly change the fundamental tests.

11.5 The Ethnosemiotic Dimension

This section of our chapter looks, as noted, at a website, begun on 8th July 2008, hot on the heels of Prime Minister Rudd's public remarks about the Papapetrou case. Again, the participants—with a few noted and statistically expectable exceptions—had no professional interest (either legal or artistic) in the matter but, rather, wrote as members of the 'general public'. In this respect, what they have to say may afford some insight into the ethnosemiotic dimension of the controversy.

Ethnosemiotics is a fairly recent area of investigation which seeks to *describe* how non-specialists (as opposed to card-carrying semioticians) work with signs, as users and interpreters thereof. In this sense, it is not a discipline as such (a *resource* for investigation) but rather a domain of *topics* of investigation where those topics are comprised of the *resources* (e.g., endogenous theories and methods) ordinary members themselves use to handle semiosis. To date, ethnosemiotic work has mostly been confined to work by Western anthropologists at non-Western sites (MacCannell 1979—but see also Hoppál 1993) and equally confined to studies of such intercultural matters as travel (e.g., Berger 2008, 2010) and plant names and taxonomies where it effectively conjoins ethnobotany (e.g., Herman and Moss 2007). Its impact on legal studies has been negligible, as has its general application to Western ethnosemiosis.

But is it not interesting to ask what ordinary members of the (in this case, Australian) society make of potential legal controversies such as the Henson/*Art Monthly* examples? Presumably, such folk have *some* knowledge of the law involved, if not at a professional level, and an interest in the legality (or otherwise) of signs such as 'artistic' photographs of naked children and whether they may or may not constitute the crime of child pornography. Indeed the law itself requires ordinary members to have some knowledge of it, the law, via inter alia the oft-held view that

ignorance is no defence. So how did the contributors to the open and off-topic forum formulate their responses? What ethnosemiotic resources, in particular, did they bring to bear on the matters in hand?

Let us begin by noting that the debate was extensive and highly varied in content, running from the view that Henson should be shot (and offering to do so) to the view that all art should be exempt from legal scrutiny. Our transcript of the site runs to some 80 pages of small-font text, the equivalent of 13 long web 'pages' of exchange. It was initiated by Special Hell with the following set of questions[28]:

> Here is one for ya:
>
> 1. when does art push the limits?
> 2. isn't art suppose to push the limits?
> 3. is it a case of nude child = abomination or just conservatives going overboard?
> 4. has fear taken over our thinking?
> 5. is there still innocence left?
> 6. what is the big issue here? the nude child, the childs consent, or the context of the art?
>
> thoughts?

Already we can see that the concerns are primarily moral-ethical ones rather than being aimed at questions of legality as such. But still, such moral-ethical matters overlap, from the outset, knowingly or not, with the legal questions of offensiveness, consent and artistic merit. The implicit resource here lies in the title of the forum: 'Bill Henson/Art Monthly/nude child/disgusted Rudd debate': the two cases are clear and, by this time, it's well known that legal action has been considered. So implicit in the talk on this site is a seen-but-unnoticed background of actual legal controversy. Effectively what we are seeing here is an underlying question: Are the images legal by virtue of having the moral-ethical virtues of artistic merit and the parties' consent? If they are, then, as an implied question: What is actually 'behind' the legal controversy (where the primary candidate is a 'conservative' moral-ethical overreaction attempting to hijack the law for its own ends)?

A fairly typical 'liberal' response to the initial questions runs as follows:

> 1. all the time, that's part of the definition of art.
> 2. absolutely
> 3. conservatives going o/board. nudity is not sexualisation.
> 4. in many cases.
> 5. was there ever? innocence of what?
> 6. there is no big issue for me - unless its fundamentalist christians trying to dictate the agenda and impose their personal moral values on others.

The reasoning is reasonably clear: the images have artistic merit because they 'push the limits' and that is 'part of the definition of art'. While there's a public controversy raging, for this poster, Galumay, 'there is no big issue', and the whole incident

[28] We keep the avatar names of the posters since they are already anonymised, and we reproduce their postings 'as is', with typos and other errors unedited except where clarity demands.

is a question of fundamentalists imposing their moral values—values which are, again for this poster, far from appropriate or majority ones.

Another resource that contributors bring to bear is an ethnosemiotic variant on precedent. The rule-of-thumb here seems to be as follows: in cases of moral-ethical controversy, see if a parallel case can be found and learn from its outcomes with a view to judgment. Hence:

> When I was living in Melbourne, there was the whole ANDRES SERRANO "piss christ" debacle.
>
> The efforts by some to insure less people see something often make the news and the whole of society gets to see it.
>
> They fail to achieve any results in minimizing the exposure, if anything the effort to ban or censor something in a society like Australia is the wrong way to get less people to see it.
>
> If there was never a complaint not many would know of these controversial pieces.

From this point of view and in light of the *Piss Christ* controversy, the 'fundamentalist' or 'conservative' position is shown to be not so much morally wrong as counter-effective.[29] By a neat turn of reasoning, the contention brought about by the moral Right defeats its own purpose: opening the viewing of art works to a general public that would normally take no interest in such matters. Or in the succinct words of another voice on the forum, 'the big issue is that this has been made such a big issue'.

Yet another resource is to turn to the 'conservatives' themselves and to the popular (as opposed to arcane and recondite, the 'artistic') media—as the instigators of the issue—and to see a space in the debate for various kinds of hypocrisy:

> How about a debate on nudity v pornography?? There is a difference but I'm not sure our hypocritical politicians understand that when they all jump up and down according to what the populist media roll-calls on any given day! K Rudd was the willing participant in a NY strip club - someone's daughters I'm assuming.... Yeah that may be beside the point but we have no perspective on this cause we've had so much tawdry imagery, advertising, TV shows, radio etc thrown at us that we're trying to put a block on total innocence. And a nude 2 or 6 year old is an innocent thing and NOT titillating. I mean - ask yourself the question in all honesty - do you find 6 year olds sexually attractive?? If not, as the MAJORITY don't, what are we protecting the kids from? The so-called dirty old men who are preying on children in awful, awful places are they buying this art? Or are they still getting their kicks from K-mart and Myer catalogues and from watching Ocean Girl???

The clear implication here is some equivalent to the maxim about throwing stones in glass houses; the throwing of them by those without sin. Or, in more formal logical terms, the *tu quoque* argument. Apparently it's legal for adult males to enter strip clubs—even if they happen to be Christians and Prime Ministers[30]—and equally

[29] http://en.wikipedia.org/wiki/Piss_Christ.

[30] The membership status of Kevin Rudd in this debate is interesting but cannot be detailed here. A full membership categorisation analysis (Eglin and Hester 1997) could, however, prove illuminating on another occasion.

legal for department stores to issue underwear catalogues and for TV stations to broadcast pictures of scantily clad teens. Ergo, if such things are legal, so is the viewing of certain artistic works. If one condemns one of these lawful things as morally problematic, then one ought to condemn the others.

As a brief rider, the above poster, Blinder, adds a further point which shows another common resource mobilised by the forum's contributors: the invocation of a warrant for speaking. He adds:

> I personally don't see this as art pushing the limits but conservatives sullying beautiful things. And I'm saying this as a Christian and a photographer.

Such warrants are conspicuous in such places as letters to the editor of daily newspapers (cf Heap 1978). They occur especially when one wants to either dispel a position of bias (it's a Christian speaking, hence not one automatically opposed to religious values) or to claim expertise (it's a photographer speaking, hence one with some authority on the topic).

A further resource, not to be overlooked in such cases, is humour used satirically. The following is an interesting example:

> Henson huh???

A fairly straightforward pun on one of the controversial artists' names brings up a well-known figure of the same name (Jim Henson), creator of the Muppets and other innocent characters for children's entertainment. Turning one of his most popular characters into a putative object of pornographic interest completes the point—a point taken by the follow-up poster: '…that is precisely perfect! Things with black bars look so much grubbier and filthier don't they!'[31]

We should also add that the law itself, in a rather loose way to be sure, also gets invoked as a resource in the debate. One contributor maintains her right to take photographs in public as, for her, a clearly legal right that is now jeopardised by moral outrage:

> what concerns me the most about this whole debate is the fact that our society has reached levels of absurdity and people will instantly raise their fists and scream bloody murder at anything they find contradictory to their own views. for f*cks sake you cant even bring a camera and take photos of your kids playing school sports in some schools/clubs.

This is backed by the subsequent poster:

> The anti-photography movement of anybody in public is frightening (I've had it happen once so far and told the guy to call the police if he thought I was doing something wrong in public!). No debate is needed on this surely? I want the law to protect my right to photograph innocently without fear of victimisation (I am 6ft 4 so I don't get intimidated easily!)

On the other side of the debate, there's an argument that runs to the effect that just because a claim is made for an image or event as 'art', this doesn't justify any practice whatsoever as acceptable by virtue of that classification:

> I'm not against nudity as art, far from it, but one thing that artists and the self-proclaimed cultural elite tend to forget is that not everybody has, or should be forced to have, their view on what is acceptable. If you want to appreciate the image of a naked child, then go ahead, you can't ask everybody else to look at the image in the same way.
>
> Personally, I think posed images of naked children should be left in the home and not put on public display.

And interestingly, there's a sub-resource involved in this claim: the public/private distinction. Law, the implication runs, applies in the public domain. Practices that may be acceptable in private clearly, for this writer, may not be so if allowed into broader circulation.

A number of contributors to the forum read the idea of an art gallery space as, effectively, private—more like the home than the media-sphere, for example. They pointed out that had it not been for the media's 'hyping' of the cases in point, only a select few would have even seen the images. And perhaps this is the crux of the issue—that while images remain on gallery walls, they are 'protected' images, understood as artistic and intended for a limited, appreciative audience (after all, who else

[31] Note that this 'lay' comment reflects that of the some members of the Classification Board. See above, in the paragraph following footnote 10.

would see them?), but that in the new world of mass commercialisation and distribution of images, the potential audience shifts and what were narrowly viewed artistic images become part of mass consumption. As Marr argues, it was the 'deliberately commercial purpose' of the Henson image's circulation on the exhibition invitation that was unsettling (Marr 2008, 5), and it was eventually this 'outing' that led to a take-up by the mass media. Perhaps this is what the public reaction was about—a disquiet about the mass circulation of images that would once be almost private, an expansion of the audience, whether or not by intention, from the narrow field of art purveyors, within the public walls of a public gallery, to a mainstream that could involve consumers of child pornography in their own protected private space.

A rather extremist reply to the idea of artistic 'immunity' runs:

> A man walks into an office building with a machine gun and starts shooting everyone he sees. When he walks out there is a barricade of police cars and SWAT teams pointing guns at him, and people screaming at him to drop his weapons. Instead the man says, 'no you don't understand, it was my performance art'
>
> Everyone says, 'oohh…' and they let him go free.

The counter to this runs as follows, again directly referring to the strictly legal situation:

> The issue here is... has any criminal activity occurred? clearly not. have people been offended? clearly yes... and each person to their own opinion. fa[i]r enough who is forcing who to view what? if we hide everything from public view that offends another person where does it stop? The photo of the girl on the cover offends people, so it shouldnt be on the cover. the cross you where on your necklace offends me, so you shouldnt be allowed to where it in public.
>
> The photo of the girl isnt illegal, like the wearing of a cross isnt, so why should one be hidden from public view and the other not?

On the one hand, nothing illegal has taken place. On the other, moral-ethical offence has been taken by a specific ('conservative', 'fundamentalist') sector of the society. (Hence, the neat appeal to the potential offence caused by cross wearing.) This resource (the splitting of the letter of the law from the domain of personal morality) is a significant one. For we have already seen its inverse being mobilised in the debate: the position that the law should reflect some approximation to the moral-ethical values of the *majority* of the society. The debate then hinges on just what those values happen to be. It infects both the pro- and anti- camps, as well as those in the grey areas between—noting again the warrant invocation:

> As a father of two, with another on the way, I can't see how allowing your child to be photographed nude then permitting the images to be made public is even within your right. If you want to pose nude for art, go for it, but your little ones can't adequately make that decision so don't make it on their behalf.
>
> On the issue of photographing kids' sport etc, I have to agree that it's a bit nuts. My little girl in kindy had a musical the other week and I wasn't allowed to take photos or video which was pretty disappointing.

11.6 Some Conclusions

Ordinary, non-specialist—or occasionally semi-specialist—members of the society are able to mobilise a whole range of moral-ethical and even quasi-legal resources in their handlings of culturally controversial signs. These include, but are not limited to:

1. A reliance on at least two matters that overlap with the strictly legal reading: artistic merit and consent.
2. An understanding of a variant of the concept of precedent: finding previous and parallel cases of controversial exhibition and basing judgments on them.
3. A dependence on the *tu quoque* defence: the discovery of the same offence being committed by the accusers.
4. An invocation of warrants for speaking; either to eliminate accusations of bias or to assert specialist knowledge.
5. A capacity to return the argument by recourse to satirical humour.
6. A loose knowledge of the law itself.
7. An appeal to the separation of the public and private realms.
8. A separation or conflation of the domains of the legal and the moral-ethical as required by the specifics of an argument.

These resources are certainly amongst those mobilised in our materials. But what are they mobilised for; to produce precisely what? At one level, the answer must be a debate. But a debate about what? By now it should be evident that what is in contention here is no more and no less than the meaning of the word 'reasonable' in, for example, the legal phrase 'standards of morality, decency and propriety generally accepted by *reasonable* adults'.[32] In effect, then, what we are witnessing here is something akin to what might be called ethnojurisprudence.

What we find particularly interesting is that this ethnojurisprudence does not look substantially different from traditional jurisprudence on determining a matter of moral or nonlegal content, aside from the methodological and rhetorical approaches adopted. There are parallels in the issues raised in each field, namely:

- The question of whether offensiveness is to be measured against a majority view;
- The drawing of comparisons—the sexualisation of children is commonplace in commercial circles without controversy yet artistic depictions draw attack;
- A distinction between those depictions that are offensive at a moral-ethical level, but not at a legal level;
- The importance of context in determining offensiveness.

[32] Section 11 *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

Further, our ethnosemiotic description reveals an understanding of the meta-themes of the common-law tradition (that is, the protection of fundamental rights) in the invocation of the private/public distinction and the need to find a balance between individual freedoms (of expression and of public debate) and the protection of vulnerable groups (children). The distinction between formal legal procedure and rationale and their everyday equivalents, then, is not so great, when normative concepts are embedded in the law and are therefore to be determined, in some form, by reference to ethnosemiotic resources. An elegant summation of the case by the initiator of our web forum confirms this conclusion:

> we have laws and a parent can not consent to a child [being shown in] sexually explicit photos, because it is illegal… but the argument that parents can not consent on the childs behalf in partaking in a photo session with henson is ridiculous. and it has been determined that hensons photos are not exploitative.
>
> as long as the activity is not illegal, that parent is the only and most logical choice in giving consent… you can not take away the right of a parent to decide onbehalf of a young child.
>
> now the right to place said photos on the cover of a magazine… well that ladies and gentlemen… yes is a matter of free speech, and right now it tells us we can do it and yes we have people that are offended by said photos, and they demand that said photos arent to be placed in public view…
>
> I say to these people: think about this clearly… if we took everything on public view that offended someone and hid it away?

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Chapter 12
What's Wrong with Pink Pearls and Cornrow Braids? Employee Dress Codes and the Semiotic Performance of Race and Gender in the Workplace

Janet Ainsworth

Abstract American employers frequently impose dress and grooming restrictions on their employees, and courts routinely uphold their decisions to discipline and even fire workers for violating these dress codes. Workplace dress codes thus serve as a focus for contestation over the visual representation and performance of personal identity. The representation and performance of race and gender—two of the core social identities in contemporary American culture—is achieved in part through elaborate semiotic style codes in dress and grooming. The cases discussed in this chapter demonstrate worker resistance to dress codes that force them to perform core identity attributes in ways that contradict their individual sense of identity. By insisting that the performance on the job of identities such as race and gender by their workers is a matter for the employer to determine, courts are asserting the primacy for the workers of their identity as "employees" over their individualized racial and gender identities. Far from being about trivial matters of personal taste or style, conflict between employers and employees over dress codes serves both as an arena for worker resistance to employer assertions of control over the construction and performance of their "true selves" and as a prime site for cultural contests over the meaning and instantiation of race and gender identities more generally in the modern world.

12.1 Introduction

American employers frequently impose dress and grooming restrictions on their employees, and courts routinely uphold their decisions to discipline and even fire workers for violating these dress codes (Levi 2008, 353). This practice has in recent years spread to Europe, where British and German workers have likewise been subject

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to discipline for dress code violations and, like their American counterparts, have been unsuccessful in their legal challenges (Skidmore 1999, 521–524). At first glance, the frequency of these cases is perplexing. Why would so many workers risk their jobs for something so insignificant as their appearance, and, for that matter, why would employers so tenaciously enforce rules regarding employee dress even at the cost of valued employees? In this chapter, I will suggest that workplace dress codes serve as a site for contests over the visual representation and performance of personal identity. Umberto Eco once said, "I speak through my clothes" (quoted in Hebdige 1979, 100). But what exactly is being said by appearance in employee dress code challenges? I will argue that it is through practices such as the enforcement of and resistance to enforcement of dress codes that the meaning of racial and gender identity in the construction of the self is made manifest in the workplace.

12.2 The Construction of Authentic Selfhood in the Modern Social Order

In contemporary culture, selfhood is experienced as the intersection of a multiplicity of social identities and roles of shifting salience depending on context, including gender, race, sexual orientation, occupation, family role, age, nationality, religion, and political persuasion, in almost infinite scope and variety. It is in the unique intersection of these attributed statuses and roles that the self comes to be realized as one's authentic identity. This "authentic self" is to contemporary culture what the soul was to the medieval world—the purest conception of what constitutes an individual human being.

From a psychoanalytic perspective, the process through which individuals develop and express a sense of personal selfhood is key to understanding human development and flourishing. Erik H. Erikson (1946) first addressed that process in a germinal article that led to a focus in psychology on the acquisition of a sense of self. Later on, other psychologists elaborated on the process of the integrated development of a sense of the authentic self, stressing the importance of congruence between external role identity performance and internal private commitments to the salience of aspects of identity (Callero 1985; Havens 1986). It was recognized that people have multiple aspects of personal identity, with some more central to a sense of authentic self than others and some more salient than others depending on social context (Callero 1985).

Social theorists have also explored the nature of personal identity and the development of a sense of unique selfhood. Anthony Giddens (1991) asserts that modernity is marked by the primacy of the internally referential self, as individuals construct coherent senses of identity and life history. Giddens pointed to authenticity as the primary touchstone valued by individuals in the course of this process. Likewise, Robert Bellah and his coauthors (1985, 334) saw modern American culture as marked by what they called "expressive individualism," in which "the individual has a primary reality whereas society is a second-order, derived, artificial

construct." Some scholars have blended both methodological approaches, uniting the social approach that focuses on the social development of personal identities with the psychoanalytic approach that looks at the development of the psychologically mediated sense of self (Weigert et al. 1986). Identities are both uniquely personal—no one else has the same set of attributes, experiences, and emotional reactions—and, at the same time, inevitably social in nature, because what kind of attributes, experiences, and emotional reactions will count as potentially constitutive of identity is a matter of contingent social systems of meaning.

Whether one takes a psychological perspective or a sociological perspective, an individual's authentic self has to be seen as more than a mere internal and private psychological state. For its complete realization, the interior self must be expressed congruently in its outward manifestations through a complex set of social semiotic codes. The more central an aspect of identity is to the individual's sense of authentic self, the greater the need to instantiate that identity through the public performance of the codes that represent the realization of that identity (Bell 2008, 147–198). Judith Butler, in her influential work on gender identity, called attention to the performative aspects of gender as an example of the way in which gender identity should be thought of as what one *does* rather than what one *is* (Butler 1990, 175–180). More generally, Baudrillard (1979, 19) expressed it this way, "It is no longer a question of 'being' oneself but of 'producing' oneself."

Not all identity performances by individuals serve to instantiate their subjectively understood authentic selves, however. Sometimes social actors will consciously downplay identity attributes, especially when those aspects of their identity are devalued or stigmatized within society. Kenji Yoshino (2002, 772–773) refers to this as "covering" or the intentional nonperformance or underperformance of a core aspect of one's identity. Yoshino borrows this term from Erving Goffman (1963, 102–104), who contrasted "covering," or downplaying key aspects of one's identity, from "passing," that is, mimicking an identity that one does not have in order to persuade others that the passing identity is one's actual identity. Covering as an interactional strategy is not always a freely chosen one by the social actor. Often, there are implied or even overt demands by others that actors cover some aspect of their identity. Racial minorities, for example, may be strongly encouraged to adopt typically white speech patterns or clothing choices to cover their racial identity. Sometimes the external demand on the social actor is not to cover identity, but rather to reverse cover and accentuate their identity markers. Women, for example, may feel pressure to dress and groom themselves in ostentatiously feminine ways to reassure others that they accept traditional gender norms (Yoshino 2002, 909–911). Identity covering thus makes difference invisible, whereas reverse covering makes difference manifest. What both covering and reverse covering have in common is that in both practices, the actor's identity performance is at odds with the individual's sense of authentic self.

Both psychologists and sociologists have studied the consequences for individuals when their external actions are inconsistent with their internal identity commitments. Callero (1985, 204–205) observed that a lack of congruence between role identity performance and internal identity commitments results in a loss of self-esteem.

A mismatch between the individual's privately felt authentic self and its public performance is experienced as alienating and even humiliating. Sociologist Bellah (1985) and his coauthors likewise saw alienation as the result when individuals had to conform to social norms instead of being able to express their authentic selves. One reason why individuals find lack of congruence between their internal commitments and their external actions so alienating may be found in research done on what people infer from the actions of others. Johnson et al.'s research (2004) determined that people conceptualize the authentic self as a relatively private, personal entity, but at the same time, they believe that they can accurately infer the nature of other people's authentic selves on the basis of their externally observable actions. In other words, since we are fairly confident that we can draw conclusions about other people's authentic selves simply by watching how they act, we may reasonably worry that our own actions that are inconsistent with our authentic selves may cause others to make false assumptions about who we really are.

12.3 The Semiotics of Dress and Appearance

Semiotics focuses on the creation and operation of systems of symbolic meaning within an overall framework of socially shared interpretive codes and practices. Scholars working within a semiotic tradition have long appreciated the potential for semiotic analysis of conventions of dress and grooming (Hollander 1978; Barthes 1983; Davis 1988; Cerny 1993; Damhorst 1999; Barnard 2002). Terrence Turner (1980, 14) called dress a "social skin through which we communicate our social status, attitudes, desires, beliefs, and ideals (in short our identities) to others." Dress as a coded symbolic system both locates an individual within a social matrix and serves as an expressive device to communicate to others the wearer's sense of personal identity (Cerny 1993, 78–80). Because individuals experience their identity as comprising multiple aspects whose salience varies contextually, so too their use of dress to signal and instantiate their identity likewise varies according to context (Roach-Higgin and Eicher 1993, 33–37). While an individual experiences the authentic self as intrinsically private and personal, since that self is configured through a unique intersection of a multitude of social roles and experiences, the relationship between dress and the expression of the authentic self is social in nature, since the codes through which identity is communicated must be created and mediated through shared cultural conventions of meaning (Roach-Higgin and Eicher 1993, 34–35; Hamilton 1993, 48–56; Cerny 1993, 72). Without shared social conventions as to what particular aspects of dress and grooming might signify, an individual's choices cannot communicate identity.

Adopted personal appearance—dress, jewelry, and grooming—provides an ever-present resource for the nonverbal communication of identity and social position. Even a person who claims complete disinterest in the clothing he wears is nonetheless signaling a particular kind of "I don't care about fashion" identity. Dress is never neutral and meaningless but is inextricably culturally coded. When a coded

signal of identity is displayed through dress and appearance, observers react based on what they infer about that person on the basis of their appearance. If others react to someone's presentation of self in the way in which the individual expects, this "co-incidence of meaning" creates a "validation of the self that leads to satisfactory social interaction" (Roach-Higgin and Eicher 1993, 34). On the other hand, a mismatch between how others "read" a person through that person's appearance and how the person would want others to perceive his authentic self potentially creates both interpersonal misunderstandings and a sense of alienation in the individual whose authentic self is misperceived (Stone 1970, 216–245).

12.4 Employer Dress Codes as Sites of Contest Over the Visual Representation and Performance of Identity: Three Case Studies

Racial and gender identities are two of the most central social identities in contemporary American culture, and not surprisingly, their representation and performance is achieved in part through elaborate semiotic codes of dress and grooming. While it is certainly true that, even absent overt employer dress codes, worker dress and appearance would be impacted by and regulated by cultural norms and perceived employer preferences (Bartlett 1994, 2549–2556), the imposition by employers of explicit dress and grooming codes greatly increases both the extent and degree of such regulation. The stringency of this regulation can result in legal contests over employee appearance. I will discuss three cases in which employees attempted to legally challenge dress codes on the job in which the employees unsuccessfully argued that their appearance ought to have been a legally protected expression of the racial and gender identity.

12.4.1 Rogers v. American Airlines

Renée Rogers was an African American employee of American Airlines who worked as an airport operations agent. She had been employed by the airline for 11 years, and the airline did not claim that her work was unsatisfactory in any way. However, the airline threatened to discipline her for wearing her hair in cornrow braids, in violation of an airline grooming policy forbidding the wearing of all-braided hairstyles by its employees. American Airlines gave her the option of either changing her hairstyle or covering it completely with a hairpiece while at work. Rogers initially did attempt to comply by covering her hair with a hairpiece, but she found that wearing the hairpiece caused her severe headaches.

Rogers sued the airline to block enforcement of the policy against braided hairstyles, arguing that it constituted unlawful race and sex discrimination for infringing on what she saw as an expression of her racial and gender identity. Her hairstyle, she

asserted, was "historically a fashion and style adopted by Black American women, reflective of the cultural, historical essence of the Black woman in American society" (*Rogers v. American Airlines* 1981, 232). American Airlines should no more ban this cultural symbol of Black female identity, she argued, than it should ban Afro hairstyles.

The response of the district court was first to contest the connection between appearance and her racial and gender identity, asserting that the policy was both race and gender neutral on its face because it equally prohibited all employees, whatever their race and gender, from wearing braided hair. Further, the court insisted that Rogers failed to establish that her all-braided hairstyle was associated exclusively or even predominately with Black women, so that the policy, even as applied, did not amount to unlawful racial discrimination. In drawing this conclusion, the court ignored Rogers' affidavit setting out the historical linkage between Black female identity and cornrow braided hair, instead speculating along with her employer that her adoption of the hairstyle might be linked to its appearance on a white actress in a recent movie. The court admitted that perhaps banning Afro hairstyles might be impermissibly discriminatory because it saw Afro hairstyles as a natural racial characteristic, contrasting what it called the "artifice" of a braided hairdo (*Rogers v. American Airlines* 1981, 232). Amazingly, the court seemed completely unaware that Afro hairstyles require extensive grooming and are in no sense a "natural" or an "immutable characteristic" of persons of African ancestry. Because the court considered Rogers' braided hairstyle a matter of choice rather than an immutable characteristic, it found that the airline was free to impose on Rogers its preferred choice of hairstyle. It accepted American Airlines' assertion that its policy was adopted to "help American project a conservative and business-like image"—an image that a Black-identified hairstyle apparently contradicted (*Rogers v. American Airlines* 1981, 233). Despite Rogers' charge that white women employed at American Airlines were permitted to wear a variety of nonconservative hairstyles, including pony tails and shag cuts, the court dismissed her complaint that the grooming policy was applied in a racially discriminatory way against her as a Black woman.

As the court conceded, it would have been unlawful for the employer to have expressly penalized Rogers for being Black, so that any immutable biological racial characteristics could not be the subject of discipline. However, in the court's view, her employer had the right to demand that Rogers efface the semiotic signals of racial identity—the adoption of a hairstyle that she insisted represented her authentic Black female self.

12.4.1.1 The Semiotics of Braided Hair and the Performance of Racial Identity

Hair and its styling have long served as a key semiotic marker of image and identity. As Susan Brownmiller (1984, 57) observed, this is due to hair's amenability to being manipulated—it can be "cut, plucked, shaved, curled, straightened, braided,

greased, bleached, tinted, dyed, and decorated with precious ornaments and totemic fancies." There are, in fact, no neutral, "message-less" hairstyles; whatever is done or not done to hair has social meaning. Barbara Miller (1998, 277) noted "There is no way to avoid the message power of hair. Even if you cover it with a hat or scarf, it still talks."

In the case of African American women, hair has long been invested with heightened symbolic meaning. The characteristic texture of the hair of many persons of African ancestry has historically served racist ideology as a marker for the "otherness" and inferiority of Black women. Sometimes it quite literally served to exclude Black women, as when nineteenth-century churches and clubs would forbid entrance to anyone whose hair could not pass through a fine-toothed comb without snagging (Bordo 1998, 48). Other times its exclusionary message was more indirect, as culturally promulgated ideal images of feminine beauty incorporated only hair types phenotypically associated with whites (Craig 2002; Caldwell 1991). Those whose hair texture and thickness differed from those of most white women were left with two choices: straighten their hair to approximate the images of "ideal" white beauty or resist the hegemonic messages of white standards of appearance and instead adopt hairstyles well suited to the characteristics of their own hair and embrace them as beautiful (Caldwell 1991).

Straightening one's hair can be problematic. It is expensive to maintain and can only be achieved by using strong chemicals that can sometimes cause hair breakage and skin lesions. In addition, some Black women see hair straightening as an act of conforming to white expectations of what all hair should be like. For them, wearing their hair in ways that do not require it to be chemically straightened is an act of claiming a specifically Black identity—one that refuses to disguise the racial characteristics of their hair but instead celebrates Black hair and its unique possibilities for beauty (Rosette and Dumas 2007). For that reason, Angela Onwuachi-Willig (2010) has argued that banning braided hairstyles ought to be unlawful because it discriminates against African American women on racial phenotypical grounds as well as on cultural grounds.

It is within in this historical and cultural context that Renée Rogers chose to wear her hair in cornrow braids, a style that took affirmative advantage of the texture and thickness of her hair rather than adopt a style that would hide or minimize its characteristic typicality with the hair of many other Black women. In a workplace such as American Airlines which turned characteristically white appearance into so-called professional appearance (Carbado and Gulati 2000), Rogers' braided hairstyle symbolized the concrete embodiment of a self-aware and self-assured Black female identity. Although American Airlines was undoubtedly aware that they could not legally discriminate against her as a Black woman, they felt within their rights to insist that their Black employees perform their identity in a way that effaced that identity to the maximum extent possible.

Camille Gear Rich (2004, 1173–1186) has pointed out the ways in which workplace identity performance deploys socially agreed-upon codes of racial and gender identity and notes that employees are not punished unless the employer recognizes the meaning of the identity performance and sees that meaning as threatening.

At the same time, she suggests, although identity performance in the workplace is arduous work for the employee, it is worthwhile because it gives the worker a sense of agency and control in a workplace environment in which employees generally have little control in other aspects of their work lives. For Renée Rogers, her hairstyle allowed her to express a connection to the historic experiences and practices of generations of Black women and at the same time to affirm the centrality of her Blackness to her own personal identity. In fact, it is entirely possible that American Airlines' act of banning her cornrow braided hairstyle invested it with heightened significance as a marker of her authentic self (Tirosh 2007, 86–87).

12.4.2 Jespersen v. Harrah's Operating Company

Darlene Jespersen had worked for more than 20 years as an employee of Harrah's casino. By all accounts, her work as a bartender at the casino was exemplary. In 2000, Harrah's implemented a policy called the Personal Best program which required employees to maintain certain gender-specific appearance standards. Female employees were photographed after being given makeup and hairstyling "makeovers" and thereafter were required to maintain their appearance in accordance with these photos given to their supervisors. Daily records were kept by supervisors of whether employees measured up to their photographs on that day. Specifically, women employees were ordered to wear full face makeup, including foundation, powder, blush, mascara, and lipstick, as well as styled, curled, and teased hair, colored nail polish, and nylon stockings. Men, in turn, were forbidden to wear makeup, nylon hosiery, and colored nail polish.

Jespersen testified that the Personal Best appearance policy was so inconsistent with her personal identity that she was unable to follow it. Although she did try to wear makeup for a time on the job, she later testified that it made her feel "sick, degraded, exposed, and violated." Being required to adopt this hyperfeminine appearance "forced her to be … 'dolled up' like a sexual object, and … took away her credibility as an individual and as a person" (*Jespersen v. Harrah's Operating Company* 2006, 1108). She also asserted that having to adopt a hyperfeminine appearance undercut her ability to do her job well by undermining her projected authority to set boundaries over potentially unruly or intoxicated patrons.

The Ninth Circuit acknowledged that the Harrah's dress code treated male and female employees differently, which should have established a prima facie case of sex discrimination. Instead, however, the court determined that, in the context of dress codes, the plaintiff needed to show more than that she was treated differently because of her sex. She needed in addition to show that the burden that the Personal Best dress code placed on female employees was a more significant burden than that placed on similarly situated male employees. Since every requirement of the dress code for women—to wear full makeup, nail polish, stockings, and curled and styled hair—was concomitantly forbidden to men, who were *not* permitted to wear makeup, nail polish, stockings, or curled and styled hair, the Ninth Circuit found the burdens

to be equivalent (*Jespersen v. Harrah's Operating Company* 2006, 1108–1111). Moreover, the Ninth Circuit majority opinion refused to credit Darlene Jespersen's testimony that the grooming requirements were a serious burden to her sense of self. Instead they opined that these requirements would fail to present a substantial burden to most of the women employed at Harrah's.

The court also rejected Jespersen's argument that the Personal Best dress and appearance code constituted the imposition of a workplace regime based on sex stereotyping, which should also constitute unlawful sex-based discrimination. The Ninth Circuit did so by limiting actionable sex stereotyping harm to those workplace conditions that would be deleterious to women as a group in performing the job in question. Since they felt that most women bartenders would have no problem adhering to the program, the court turned a blind eye to the sex stereotypical aspects of Harrah's appearance regulations and dismissed Jespersen's claim without trial (*Jespersen v. Harrah's Operating Company* 2006, 1111–1112). Her assertion that being forced to present a hyperfeminine, sexualized appearance undercut her effectiveness in managing bar clientele was ignored entirely. The Ninth Circuit majority accepted the casino's asserted right to insist that its female employees perform their gender in a manner of the casino's choosing—a hyperfeminine, sexualized version of gender.

In dissent, Judge Kozinski—known as a conservative libertarian judge—took the majority to task for failing to acknowledge that having to adopt the external markers of hyperfemininity indeed imposes a substantially greater burden than merely being banned from doing so. The time, effort, and expense involved in applying extensive makeup, nail polish, and hairstyling represent an express and significant burden, as Kozinski saw it—a burden that only women employees suffered. Kozinski also questioned the majority's cavalier dismissal of Jespersen's assertion that she found having to comply with the appearance code degrading and intrusive. He would have remanded Jespersen's case for a jury trial on the question of whether Harrah's grooming code constituted impermissible sex discrimination (*Jespersen v. Harrah's Operating Company* 2006, 1117–1118).

12.4.2.1 The Semiotics of Makeup and the Performance of Gender Identity

Gender, gender identity, and gender ideology are frequently signaled by the dress and appearance of individuals (Kaiser et al. 1993; Workman and Johnson 1993). Fred Davis (1992, 25–28) suggests that gender-differentiated clothing and grooming practices are salient identity markers in Western societies precisely because gender, sexuality, and social hierarchy have such a fluid range of meanings depending on social context. In fact, even attitudes toward the general domain of dress and grooming practices itself are gendered, with males expected to show minimal interest in what they wear or how they look and females expected to be highly attentive to a multiplicity of details of dress and appearance (Workman and Johnson 1993, 98). Harrah's workplace appearance code is consistent with this norm—female

employees were given many detailed and specific dress and grooming requirements to adhere to, whereas male employees were mainly ordered not to engage in these specific "feminine" practices.

Of all the gender-coded appearance resources, facial makeup is undoubtedly the most strictly gender-linked. Males are not supposed to wear makeup of any kind under any circumstances, even the most subtle types. Women are the sole subjects permitted to, encouraged to, and in some instances required to wear makeup. Attitudes toward the appropriate use of makeup by women have changed over time (Peiss 1990). Before the 1920s, wearing makeup was seen as a sure sign of sexual immorality, but by the 1960s, not wearing makeup was considered a signal of the rejection of conventional, "appropriate" femininity (Merskin 2007, 592). Not only has the semiotic meaning of the wearing or nonwearing of makeup changed over time, but it has also varied according to class-linked norms and social context. In many contexts, wearing makeup represents the visible sign that women are and ought to be the decorated sexual objects of desire for men (Beausoleil 1994).

In the contemporary workplace, female workers are acutely conscious of the importance of their choices of whether to wear makeup and of what kind of makeup to wear. They worry that wearing the "wrong" amount and style of makeup will cause them to be seen as incompetent at their jobs. Not wearing makeup risks their being considered inappropriately unfeminine, and these workers understand well that being thought to be unfeminine—or even possibly lesbian—puts their job security and career advancement at risk (Dellinger and Williams 1997, 159). Employees who understand both the implicit and the sometimes overt requirement to wear "appropriate" makeup on the job nevertheless often engage in resistance to those pressures (Dellinger and Williams 1997, 170–172). The contemporary semiotic linkage between wearing makeup and the wearer's presumed endorsement of conservative, conventional female gender roles makes the compulsory wearing of makeup particularly problematic for women whose personal sense of gender identity rejects those roles. Darlene Jespersen's reported sense of "violation" by being "dolled up … like a sexual object" reflects her appreciation that the hyperfeminine sexualized image that Harrah's insisted upon would project a false portrayal of her authentic self to others—a portrayal that actively contradicted her values and beliefs about her gender identity.

Darlene Jespersen objected to having to comply with Harrah's hyperfeminine appearance rules in part because she felt they undermined her credibility as a person. She feared that her "dolled up" appearance would cause other people—her customers and coworkers, for example—to treat her differently on the basis of their reaction to how she looked. Studies by sociologists and psychologists suggest that she had legitimate cause to be concerned, because the dress and appearance of a person have been demonstrated to impact how other people react to them and to affect the judgments they make about the character, personality, values, and traits of that person (Damhorst 1990; Kaiser 1993, 1997; Nagasawa et al. 1993; Brannon 1993). Specifically, characteristically "feminine" clothing and grooming choices do, in fact, cause other people to react to those signals. Not only do others draw conclusions about an individual's biological sex from gender-linked appearance

cues, but they also draw conclusions about that person's sexuality and attitudes toward conventional gender roles based on their clothing and grooming practices. When individuals wear stereotypically "masculine" or "feminine" attire, people observing them attribute gender-linked stereotypical traits and behaviors to them because of their appearance. Gender-linked dress and grooming also encourages others to infer traditional gender-role compliance by the wearer. This in turn causes people to interact differently with the wearer on the basis of those inferences (Workman and Johnson 1993, 98–105). In addition, "masculine" clothing signifies that the wearer is powerful, whereas "feminine" clothing is coded as weak and powerless (Owyong 2009). Thus, Jespersen was also right to fear that adopting a hyperfeminine appearance would cause her customers to see her as powerless and would undercut the authority she needed to project in her job.

12.4.3 Doe v. Boeing Corporation

Plaintiff Doe, born a biological male, was hired by Boeing in 1978 as an aircraft design engineer. Seven years later, Doe notified supervisory staff and coworkers that she was transgendered and was beginning the transitioning process which would culminate in having male-to-female sex reassignment surgery. In order to qualify for the surgery, her counselor recommended that she follow the accepted protocols of the Benjamin standards, under which she would need to publicly present herself as a woman on a full-time basis for a year prior to surgery, including wearing women's clothing. The response of Doe's supervisors was ambivalent at best; she was instructed to wear either masculine or unisex attire and specifically warned against wearing "obviously feminine clothing such as dresses, skirts, or frilly blouses" (Doe v. Boeing Corporation 1993, 534). She was also forbidden to use the women's bathroom until after the completion of the sex reassignment surgery.

After receiving an anonymous report that Doe was using the women's bathroom and dressing in a feminine manner, Boeing issued a written warning to Doe reminding her to use only the men's bathroom and to refrain from wearing excessively feminine apparel. Further, she was ordered to report to a supervisor daily before beginning work who would inspect her clothing to ensure that it was acceptably androgynous. Boeing's definition of acceptable dress was attire that would be unlikely to cause a complaint if seen in the men's restroom. Two weeks later, Doe arrived for work wearing a pantsuit accessorized with a strand of pink pearls. Boeing fired her for violating its dress policy, specifically noting that the pink pearls constituted an excessively feminine aspect of her attire (Doe v. Boeing Corporation 1993, 534).

Boeing conceded that Doe's work as an engineer was entirely satisfactory throughout her employment and that there was no indication that her work group suffered any diminution in productivity or other disruption after she announced her transgendered status. In fact, her coworkers circulated a petition signed by the engineers in her group asking Boeing not to fire her. Boeing also had to admit

that Doe had always been professionally dressed on the job; had she been born biologically female, her attire would have been unremarkable and appropriate to her job. Nevertheless, Boeing terminated her for violation of their policy on gender-appropriate dress, and ultimately the Washington State Supreme Court upheld the firing. The Washington Supreme Court rejected Doe's claims that her expression of gender identity through her dress ought to have been legally protected, and that failure to do so constituted impermissible discrimination. The court instead held that Boeing had the right to determine what kind of performance of female identity by its workers was acceptable on the job. Just as Harrah's casino could insist that its female employees adopt a hyperfeminine appearance, even if that clashed with their personal sense of female identity, so too Boeing could insist that transgendered women like Doe project androgyny in their appearance as the only acceptance performance of female identity on their part that Boeing would tolerate.

12.4.3.1 Dress and the Performance of Gender Identity

Under the Benjamin protocols establishing psychological readiness for sex reassignment surgery, Doe's counselor advised that Doe present herself full time as a woman for at least a year prior to the surgery. Thus, she needed not just to have the interior state of mind of being a woman during that preparatory year but must project that identity to the outside world as well. In response, Boeing's mandate that Doe refrain from wearing what it considered excessively feminine clothing was inadequate as an accommodation to her situation. It was beside the point that a biologically born woman engineer might well have chosen to wear androgynous clothing on the job; what Doe needed was to express through her clothing an unmistakable performance of female identity in order to establish that she was prepared for the major commitment of sex reassignment surgery.

12.4.3.2 The Semiotics of Pearls and the Performance of Gender Identity

Having been forbidden from expressing her female gender identity through the most obvious means—that is, by wearing unambiguously feminine coded clothing such as dresses, skirts, and clothing whose decorations such as frills or lace are clearly coded as feminine—Doe had no choice but to resort to wearing feminine accessories if the required "unisex" outfits Boeing prescribed were to serve the function of projecting her female identity on the job. When she did so by wearing a set of pink pearls to accessorize an otherwise androgynous pantsuit, Boeing fired her, giving as their reason the wearing of the strand of pink pearls.

Both Doe and Boeing understood the semiotic meaning of the pink pearls in the same way—as a clear signal of female identity. In contemporary dress norms, jewelry and decoration such as beading, lace, and appliqués are generally coded as feminine (Workman and Johnson 1993, 97). Certain kinds of jewelry have long

been acceptable for males to wear, such as rings on the fingers—especially rings signaling married status, school ties, or membership in clubs and organizations—and functional jewelry associated with specifically masculine items of dress, such as tie tacks to anchor a tie or cuff links to secure French cuffs on men's dress shirts. In recent years, particularly in some subcultures, wearing stud earrings and chain-style necklaces has also become part of accepted masculine attire. For example, professional male athletes frequently wear diamond and gold rings, necklaces, and earrings without any sense that these items are "feminizing." Quite the contrary—they represent achievement and wealth derived from exceptional athletic prowess—both quintessentially masculine identification attributes. These athletes and those who emulate their style, however, never include pearls among the jewelry that they choose to wear.

Pearls have long been considered unmistakably feminine. In his 1912 essay entitled, "The Pearl," Gustav Kobbé (1912, 12) considered the cultural meaning of pearls. He begins:

> A pearl worn by a woman is more than a mere jewel. It is the most distinctly feminine article of adornment there is. Sexless, for after all a pearl is a thing, not a person, yet it ever has seemed so much a part of the personality of the woman it adorns, that it has come to partake of sex and may be regarded as the eternal feminine among jewels.

More recently, wearing a strand of pearls has often been interpreted as signifying an adherence to and commitment to conservative gender-specific norms of behavior derived from patriarchal ideology, as when mothers and wives in 1950s television sitcoms wore "ubiquitous pearls" and high-heeled pumps while supposedly engaged in housewifely chores of cooking and cleaning for the family (Haralovich 1989, 77–78). Thus Doe's selection of pearls to wear transformed the unisex pantsuit into a "female" outfit—a semiotic coding necessary to her purposes to publicly project her female identity and simultaneously unacceptable to her employer who insisted that the only permitted gender identity for her on the job was an ambiguous androgyny.

12.4.3.3 The Semiotics of the Color Pink and the Performance of Gender Identity

If the semiotics of pearls gave Doe's jewelry the power to convert a unisex outfit into a feminine one, the pink color of the strand underlined that message and made it unmistakable. Far from being an incidental aspect of objects, color carries with it a range both of cognitive effects and social meanings. From the perspective of social psychologists, the cognitive semantics of color perception and color naming is crucial to an understanding of the links between visual perception, memory, and language use (Rosch 1972; Gage 1995, 1999). From the perspective of social semiotics, color serves as a rich and complex source of semiotic meaning in human culture (Kress and Van Leeuwen 2002). Combining these approaches demonstrates how the structured systems of meaning given to particular colors

may be grounded in visual perception and cognition but are then given cultural salience through semiotic coding (Koller 2008, 396–398). The meanings that are culturally ascribed to particular colors may come to seem universal and natural, but even the most entrenched color associations are products of historically and culturally contingent semiotic codes. For example, the association of pale blue with male infants and pale pink with female infants, however obvious and natural it seems to us today, is of relatively recent origin. In fact, until World War I, the association was the other way around. Pink was seen as a lighter version of the strong masculine color red, associated with blood and bravery, and was thus the "right" color for baby boys, whereas blue was the traditional color of purity associated with the Virgin Mary, and thus the "right" color for baby girls to wear (Koller 2008, 404).

Veronika Koller (2008) recently conducted an extensive survey on color attitudes and associations. Not surprisingly, perhaps, the color pink sparked both more consistent associations than other colors and stronger reactions as well—some positive but many more negative—on the part of subjects (Koller 2008, 404–408). Overwhelmingly, both male and female respondents associated pink with femininity. In comparison with other colors, pink was not a particularly favored color, with only 7.7% of respondents claiming it as their favorite color, but more than 10% singling it out as their least favorite color. Here, male respondents were far more negative in their evaluation of pink than were female respondents; better than 20% called pink their least favorite color, and not a single male respondent picked pink as his favorite color (Koller 2008, 401).

Pink clearly acts as a sign indexing femininity, but it does so in complex ways because the discourses of femininity and female identity are themselves complex and at times contradictory (Koller 2008; Kress and Van Leeuwen 2002, 363). Penny Sparke (1995, 198) has suggested that pink serves as a semiotic marker through which women are able to "constantly reaffirm their unambiguously gendered selves." For that reason, women who chafe at traditional gender roles often react very negatively to pink and actively avoid it because they associate the color with conventional ideas about women and femininity. Many of the respondents' unprompted associations linking pink to femininity did so in overtly negative ways; pink was associated with "false femininity," "stupidity," and "being too sweet" (Koller 2008, 408, 415). Respondents also associated pink—particularly bright, saturated hues of pink—with such negative gender stereotypes as artificial "fake" femininity, cheapness, and working class femininity (Koller 2008, 404).

Saturated hues of pink were associated not just with problematic versions of feminine identity but also specifically with exaggerated female sexuality (Koller 2008, 409; Sparke 1995, 198). It is this twin association of pink with feminine identity and aggressive female sexuality that may explain why so many men reported that pink was their least favorite color and why none of Koller's male respondents were willing to claim it as his favorite color. As this semiotic analysis of the color pink suggests, Doe's wearing of pink pearls so directly indexed both female identity and threatening female sexuality that this one seemingly

insignificant sartorial item was enough for Boeing to justify the ultimate disciplinary sanction of firing her.

12.5 Workplace Culture and the Contested Construction of Identity as "Employee"

From the point of view of the employee, the workplace is of crucial importance as a site in which personal identity is performed. The workplace is not just the place in which employment duties are carried out; it is the physical space in which most people spend the majority of their waking hours, the place where much quotidian human interaction occurs. Because of this, workers think of the workplace as a primary venue for the realization and projection of their authentic selves. Workers often seek to personalize their workspaces in an attempt to communicate who they "really are," displaying family photographs, sports team logos, comics clipped from periodicals, bits of artwork, Bible verses, inspirational aphorisms, drawings of cats or angels, pornographic images, stuffed toys, potted plants, and other symbolic items of their identity, their relationships, and their values. So it can come as no surprise that workers tenaciously fight for the right to perform central aspects of their authentic selves—especially race and gender identity—in the workplace.

What is at stake for employers is a bit more subtle but no less powerful as a motivator to enforce worker appearance codes. While employers sometimes try to assert that employee dress codes serve a business need—the desire to project a particular corporate image to the outside world through the bodies of their employees, as argued by American Airlines in the *Rogers* case—this appears to be a rationalization for a deeper motivation on their part. After all, these dress codes are enforced even in circumstances in which the employee is never seen on the job by members of the public, as in the case of the transgendered Boeing employee who worked in a cubicle and had no contact with customers or anyone other than fellow employees. It seems entirely counterproductive for employers to fire good workers simply because they desire to express their identity in ways that stray from employer-preferred norms. As Judge Kozinski wrote in his dissent in the *Jespersen* case:

> I note with dismay the employer's decision to let go a valued, experienced employee who had gained accolades from her customers, over what, in the end, is a trivial matter. Quality employees are difficult to find in any industry and I would think an employer would long hesitate before forcing a loyal, long-time employee to quit over an honest and heartfelt difference of opinion about a matter of personal significance to her (*Jespersen v. Harrah's Operating Company* 2006, 1118).

So, why do employers so often act this way when it would appear to be clearly against their long-term interests? To understand why employers insist on worker adherence to dress codes, even to the point of firing workers whose job performance is in every other way superlative, it is important to consider the modern workplace and its self-conscious development and imposition of workplace culture as a set of values and practices. Workplace culture has always existed, of course, but it is only

in recent years that employers have consciously and deliberately inculcated an explicit "company culture" as part of the workplace environment. Attention was first drawn to workplace culture in the late 1970s, as American businesses became fearful that they could not compete with what they saw as the corporate juggernaut of Japan, Inc. Japanese corporations were thought to be successful because they had developed an explicit corporate culture which was intentionally and comprehensively implemented in the workplace. This kind of corporate culture, it was argued, leads to committed, loyal, productive workers, which in turn would lead to corporate dominance. Authors like William Ouchi (1981), Thomas Peter and Robert Waterman (1982), and Terrence Deal and Allen Kennedy (1982) wrote best sellers urging American businesses to rise to the Japanese challenge by inculcating their own forms of corporate culture in the workplace. Ever since, there has continued to be a cottage industry in books, consultants, and mandatory managerial training emphasizing the importance of developing and maintaining workplace culture (Green 2005, 639–640).

Developing a solid workplace culture, these workplace culture advocates argue, means cultivating a sense in employees of loyalty to the company and its values. Ideal workers put the company's interests above their own. They identify with the company, are unswervingly loyal to the company, and adopt the company's values as their own. Above all, ideal workers make work the central focus of their lives and consider their identity as employees the central identity in their lives (Roberts and Roberts 2007, 372–374).

A second overarching value in contemporary workplace culture is an emphasis on cohesion and homogeneity. Because worker cohesion and homogeneity are valued as promoting a harmonious and efficient working environment, identity difference lurks as a threatening source of potential discord and inefficiency. Thus, overt displays of difference in identity performance by employees must be policed lest they erupt into worker conflict or, worse, encourage workers to think of identity attributes other than their identity as employee as core to their identity on the job (Roberts and Roberts 2007, 373–374).

Since workplace culture unselfconsciously expresses white, middle-class male norms of behavior and values (Green, 643–650), its imposition of those norms in the name of corporate cohesion creates terrific pressure on those whose core identities diverge from those unspoken norms. Either they must conform to the corporate culture and suffer from a sense of insincerity and betrayal of their authentic selves or they must risk engaging in behavior which is congruent with their sense of their authentic selves, with the ever-present possibility that their employers will notice and will take punitive actions against them (Green 2005, 651–653; Roberts and Roberts 2007, 383). No wonder the burden of assimilating one's behavior to the requirements of corporate culture can seem like a double bind in which employees are unable to fully conform to the expectations of the employer and simultaneously unable to fully be true to their authentic selves, either.

Dress codes in the workplace, then, can be seen as an instantiation of the employer's desire to impose a homogenous corporate culture in the workplace—in this case, through dress and appearance codes that will create a consistent personal

appearance in employees. Appearance codes promote employee conformity in order to increase their worker's identification with the employer and to make their identity as employees visually primary. This may explain why they are insisted upon even in circumstances in which the employer will potentially lose a valuable worker in the process. The clash between employer and employee over whether the worker's primary identity is as employee or something else—race and gender in these cases—gives both sides of these cases powerful incentives to pursue conflicts over dress and appearance codes even at the cost of jobs, in the case of the worker, or valuable workers, in the case of the employer.

12.6 Conclusion

The cases discussed demonstrate worker resistance to dress codes that force them to perform perceived core identity attributes—in this case race and gender—in ways that contradict and undermine their individual sense of racial and gender identity. For the employee, it is not just hair or makeup or jewelry that is at issue, it is their sense of the authentic self that is at stake. For the employer, what is at stake is control of worker identity within the workplace. By insisting that the performance on the job of identities such as race and gender by their workers is a matter for the employer to determine, employers are asserting the primacy for the workers of their identity as "employee" over their racial, gender, and sexual identities. The courts' approval of these codes gives apparent legitimacy to the employers' demand for primacy.

The employer's choice of how their employees should perform their gender and racial identity is to a considerable extent a reflection of the hegemonic racism and sexism of the dominant culture. What Camille Rich calls the "aversive racism" of employers causes them to demand that nonwhite employees dress and comport themselves in ways that efface their racial identity to the greatest degree possible (Rich 2004, 1186–1194). Likewise, gay male employees may be forced by heteronormative workplace dress codes to adopt hypermasculine attire—and lesbians' similarly hyperfeminine attire—to "cover" their sexual orientations. In some instances, an employer might demand that employees "reverse cover" or wear an exaggerated version of women's clothing to emphasize the presumed natural differences between the genders (Yoshino 2002, 781). Darlene Jespersen's case can be seen just such an example of an employer using a dress and grooming code to impose stereotypical notions of appropriate femininity on its female employees, regardless of how they might individually choose to express their gender identity. Employer demands like these are expressions of more generally held ideologies of racial and gender hierarchy and superiority. But there is more to the story than that.

By controlling the expression by employees of the culturally salient categories of race and gender, employers are insisting that worker identity as "employee" trumps other asserted roles and identities. Because the "employee" identity is being asserted

as the primary identity of the worker, the employer has the right to control the expression of other, supposedly lesser and subordinate identities in the workplace. Take expression of gender identity, for example. Darlene Jespersen's case is a prime example of the many cases involving women workers whose employers required them to dress and groom themselves in a fashion exemplifying a conservative ideology of hyperfemininity that many workers find at odds with their authentic female selves. However, female employees have also been fired for expressing themselves in too feminine a manner on the job, as when Marsha Wislocki-Goin was fired from her teaching job in a juvenile detention facility for wearing her hair down and wearing what her employer thought was too much makeup for what was considered a "man's workplace" (Wislocki-Goin v. Mears 1987). That is, Wislocki-Goin's employer demanded that she cover her female identity, whereas Jespersen's employer demanded that she reverse cover and exaggerate the stereotypically feminine aspects of her appearance. What unites both of these lines of cases is not a consistent ideology of appropriate feminine appearance but, rather, the insistence that employers have the unilateral power and the right to decide which standards of feminine grooming they will impose on their female workers.

As the discussion of these case studies has demonstrated, dress codes regulating employee appearance occur at the crossroads of power and meaning in the workplace. Far from being about trivial matters of personal taste and style, conflict between employers and employees over dress codes serves both as an arena for worker resistance to employer assertions of control over the construction and performance of their authentic selves and as a prime site for cultural contests over the meaning and instantiation of race and gender identities more generally in the modern world.

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Chapter 13
Semiotic Interpretation in Trademark Law: The Empirical Study of Commercial Meanings in American English of {  } "Checkered Pattern"

Ronald R. Butters

Abstract In trademark law, commercial entities may assert a proprietary interest in images as well as words and sentences. No trademark may be "generic," and even trademarked images have to mean something other than merely "a kind of thing." Thus, a marketer of bananas could not prevent others from using all images of bananas in their advertising, though they could own a particular unique image of a banana (say, a blue one, half peeled). Thus, the use of "checkered patterns" (e.g., ) in product marketing exemplifies how the semiotic sense of signs can be crucial in trademark litigation. Checkered patterns are widely used ornamentally in packaging and advertising, and the issue of the acceptability of a particular pattern as a legitimate trademark depends in part upon the relevant public's ordinary analysis of the meaning of the pattern in relationship to the product being identified. The issue of genericness arises because the checkered pattern in itself has identifiable meanings that extend beyond that of particular products: legal and semiotic issues arise as to whether a particular checkered pattern will be understood as signifying (1) a particular brand of products and services or (2) the general class to which the product or service belongs.

My analysis of commercial advertising and product labeling identified four fields in which the checkered pattern is generic in the United States: (1) automobiles, (2) food and food service, (3) tile floors and walls, and (4) cleaning products and services. Marrying basic semiotic analysis and lexicosemantic pragmatic research within a legal framework, I have relied on the methodology that lexicographers normally use in studying names and common nouns: inductively analyzing systematically collected data.

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In trademark cases under American civil law, linguistic testimony has a lengthy history reaching back at least several decades (Butters 2007b, 2008b, 2010). This chapter proposes to show how the standard linguistic methodology that language specialists have applied for decades in preparing testimony in such cases can be fruitfully extended to the analysis of semiotic aspects of trademarks. While there is a small body of scholarship generated largely by law-school professors that concerns itself with general theoretical semiotic analysis of trademarks (e.g., Beebe 2004; Dinwoodie 2008; Gibbons 2005; Durant 2008), little of the existing scholarship addresses images per se (but see Morgado 1993), and the linguistic semiotic analysis of trademarks in court cases has been rare (and even somewhat controversial; see Sect. 13.2)—it is my contention that such methodological extensions can greatly assist the courts in determining the facts in trademark suits where semiotic issues are relevant. The relative rarity of semiotic-based testimony seems to stem from three historical issues: (1) the reluctance of some linguists to work with semiotic data, (2) the general conservatism of the American legal system, and (3) the absence of a widely discussed use of linguistic methodology for analyzing the semiotic data of trademarks. It is hoped that the present essay will remedy all three of these problems.

13.1 Reluctance of Forensic Linguists to Work with Semiotic Data

A scholar who is rightly generally considered the foremost American forensic linguist writes, concerning the taxonomic question of the borderline between pragmatics and semiotics:

> There is some disagreement about the boundaries of pragmatic meaning.… Whether it extends to conventional areas of semiotics (the study of signs, traffic lights, colors, and Christmas trees), is still debated. [Shuy 2002: 23]

It is important to note that Shuy does not himself declare semiotic methodology to be outside the competence of linguists. Later in the same book, in commenting on my own analysis of semiotic data in my arguments in a case in which he and I testified on opposing sides,[1] he writes:

> Butters then pointed out how the use of color, type case, and size indicate important semiotic differences [between the two trademarks at issue in the case].… [The two parties,]

[1] *AutoNation, Inc., v. Acme Commercial Corp., d/b/a CarMax the Auto Superstore, and Circuit City Stores West Coast, Inc., No. 98–5848 (S.D. Fla., Dec. 9,* 1999*).* The contested marks were *AutoNation,* the name of the firm, and CarMax's senior mark, *AutoMation*, which CarMax used only as the name of its in-house computerized inventory display system. (Although AutoNation is listed as the complaining party in the caption, CarMax was actually the putatively aggrieved party, its mark being the older of the two.) Part of the argument between the parties had thus to do with whether the public could find the marks confusing as to source, given that they referred to quite different entities in contexts in which they were at best in very weakly contrasting. The case was decided by the jury in favor of AutoNation.

> AutoNation USA and CarMax, were different in these respects, AutoNation USA making extensive [advertising] use of US interstate highway geographical informational signs …. [Shuy 2002:135]

Thus, Shuy does not rule it out as scientifically inappropriate for other linguists to consider semiotic features and context in analyzing trademarks; he simply declines to do so himself because his "comfort level" does not extend to the consideration of semiotic features as part of the context of interpretation based on his own linguistic specialization and knowledge. Importantly, his discussion offers no reason why, in principle, a linguist should view the consideration of culturally understood meanings for contrasting shapes and colors as any different from other aspects of marks and their contexts that linguists regularly take into account. Sociolinguists and pragmatic analysts regularly interpret texts and conversations on the basis of their own intuitive knowledge of the relevance of such contextual features as the age and sex of speakers, the formality of the utterance situation, and speaker expectation that hearers will assume that they are telling the truth. Even in the case of *AutoNation v. CarMax*, Shuy was willing to consider the relevance of "the context of a car store and the use of AutoMation as a computerized inventory system that was the first step in CarMax's car store operation" (2002, 141). If linguists can consider these aspects of context even though they are not marketing experts or car-store inventory specialists, other aspects of context should not be ruled out simply because they have to do with the color and shapes of advertising images associated with the marks rather than with the location and inferred purpose of the marks in their presentation to the public.

Indeed, in still other cases that involved his legal testimony, Shuy has shown no reluctance to consider data that seem clearly "semiotic." For example, in a published account of one of his legal consulting experiences, Shuy (1990) criticized the clarity of a printed product-directions insert because (1) it employed too few bullets, (2) with respect to what he called (2002: 135) "type case," a portion of the text was entirely in capital letters, and (3) there was too little white space.[2]

It is not apparent that any principle of linguistics allows Shuy (1990) to consider "type case" and other semiotic features in discussing the readability of product inserts but not in discussing the likelihood of confusion of trademarks. Shuy's own semiotic criticisms were based on putative principles for effective document design that he noted in a government publication, *Guidelines for Document Designers* (Felker et al. 1981), which itself merely cites other scholarly resources for its precepts. Shuy (1990) reports on no empirical testing of the materials he was evaluating, nor does he cite to any primary legibility research of his own or others. Likewise,

[2] "The Warning Labels section is crowded with words, in sharp contrast with the Usage section. Bullets are used to highlight equivalent points in the Usage section but are totally absent in the Warning section" (300–301); "The Warning section contains twelve consecutive lines of all capital letters, producing a readability problem … since readers are unaccustomed to seeing texts all in capital letters" (301); "more white space should [have] be[en] provided" (302).

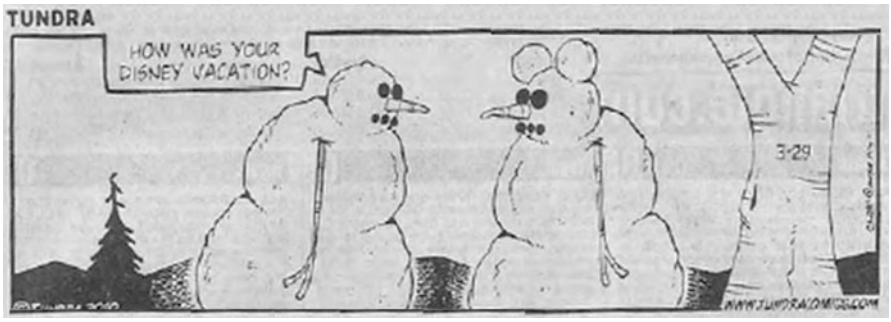

Fig. 13.1 "Tundra" Cartoon Strip, Raleigh, NC, *News and* Observer, 29.3.2010, 5D

there appears to be no clear principle that would (1) rule out the consideration of the simple distinctiveness for readers of differing shapes of highway signs in trademark representations—while at the same time (2) allow, in a product-liability case, Shuy's unanalyzed opining that the warning label's "three … line illustrations" of a uterus cross section "are simple, but effective" visual devices for demonstrating proper tampon-insertion technique for a feminine hygiene product (1990, 301). And while Shuy was silent about the insert's apparent lack of use of color (which could have contributed greatly to the clarity of the document that he analyzed), he freely opined about the effects of the absence of "white space."

Certainly, ethical and practical considerations ought always to preclude linguists from testifying about matters that they feel are outside their areas of expertise (Hollien 1990; Butters 2009). One must applaud Shuy for refusing to enter into areas of forensic analysis that he feels are beyond his competence. However, just as there are widely agreed-upon meaning associations that distinguish traffic-light colors and just as there are iconic shapes that will be interpreted as pine trees and associated in American culture with Christmas, so, too, are shapes and colors meaningfully associated with specific trademarks (think of McDonald's golden arches, the apple-with-a-bite-out trademark of Apple computers, or the shape of the head and ears of Mickey Mouse that is instantly associated with Disney). A telling example of the strength of such icons as Disney's Mickey's head trademark is apparent in the comic-strip cartoon shown in Fig. 13.1.

Shuy's reluctance to consider semiotic aspects of trademarks also precluded the consideration of important semiotic differences in form and meaning between the trademarks, differences that would assist potential users of the products and services so named to distinguish the one trademark from the other. The likelihood of confusion of the trademarks at issue in *AutoNation v. CarMax* was clearly lessened because of the association of iconic interstate highway signs with the name *AutoNation* in advertisements and signage that did not appear in the CarMax ads, and the predominance of green and white in AutoNation's ads and signage contrasted dramatically with the blue and yellow of those of CarMax. One does not really need to be a "color expert" or a psychologist specializing in the differentiation

of shapes to consider the effects of such meaningful contextual features. A linguist's knowledge and experience with standard linguistic methodology concerning the interaction of context and meaning will be enough.

13.2 Conservatism of the American Judicial System and the Implementation of Semiotic Methodology in Forensic Linguistic Trademark Work

American courts place upon judges the responsibility for deciding on the qualifications of expert witnesses.[3] Judges base their decisions on the positive answers to three questions: (1) Is there enough data for anyone to make a reliable scientific decision? (2) Is the proffered expert someone who will most likely arrive at an expert opinion by reliably employing an established scientific methodology? (3) Will the expert's knowledge assist the jury in understanding issues that are not open to analysis that is based only on the education and training of laypersons?[4] Linguistic experts have traditionally been deemed qualified to testify about phonology, orthography, and the semantics of words and phrases because these aspects of linguistics have long been established as complex sciences which require study and training to gain a scientific understanding—and trademark cases often hinge upon (1) the relationship between spelling and pronunciation and (2) the acoustic properties of the pronunciations of words that are alleged to be confusingly similar. In addition, with respect to trademark issues that turn upon the meanings of words and phrases, the courts in American trademark litigation have long held great respect for the authority of dictionaries—and, therefore, lexicographers, as well as linguists who specialize in lexicology, morphology, and dialectology.

Thus, the use of semiotic methodology must be seriously proposed to the courts in a way that demonstrates its scientific credentials if it is to be accepted as a legitimate aide to the judge and jury who are trying to understand complex issues of communicative symbolic behavior based only on their layman's knowledge of the scientific basis of the enterprise. The purpose of this chapter is to make precisely such a serious proposal—by examining a case in which semiotic material, the

[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993): "The trial judge is generally the final arbiter of the admissibility of expert testimony and the qualification of witnesses as experts (the 'gatekeeper' function). Almost never is a trial judge's decision to allow or exclude the testimony of an expert overturned on appeal."

[4] "Federal Rule of Evidence 702 (2011)": "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." See also Ainsworth (2006), Howald (2006), and Wallace (1986).

checkerboard pattern, was the center of successful forensic linguistic analysis and describing the methodology that was employed.

There is a further reason why the linguistic relevance of semiotic data has not been much in evidence in trademark cases, and this is the lack of availability of the quantity and quality of data that would meet the court's announced stringent criteria for admissibility. The central focus of my discussion in this chapter addresses the extent to which the advent of the internet and of powerful personal computers makes semiotic data available to us today in manners and in quantities that simply was never before possible. The linguist who undertakes forensic semiotic analysis of trademarks can now make use of precisely the same data and inductive methodology that is used by lexicographers, lexicologists, and scholars of morphology in more traditional analyses.

13.3 Forensic Linguistic Trademark Analysis

Linguistic testimony in trademark cases generally is almost always concerned with one of two areas of the law.[5] Litigation about (1) likelihood of confusion originates because the law limits the use of proposed trademarks to those that are not likely to be confused with existing trademarks. For example, a court agreed, basing the decision in part on my linguistic testimony, that an established pharmaceutical firm's established trademark *Aventis* was too likely to be confused with a start-up firm's mark *Advancis*, and the junior firm therefore was forced to abandon its proposed used of *Advancis* as a trademark (see Butters 2008b). Litigation about (2) strength of mark stems from the general legal denial of the validity of trademarks that are generic names for the product or service they are intended to refer to or merely descriptive of the product or service. For example, *Delivery Service* is a generic identifier; *Speedy Delivery Service* would be merely descriptive. A term such as *Rocket* would have stronger trademark protection as the name for a delivery service (because it suggests a metaphorical connection between the name and the speed of the service); this class of marks[6] is technically termed suggestive. Even stronger would be an arbitrary term such as *Lighthouse* (one with little or no connection to

[5] Linguists have also consulted on cases involving allegations that potential or actual trademarks are derogatory (Butters 1997, 2009; Nunberg 2009) or obscene (Butters 2008b). In addition, linguistics may bear on the question of the FAME of marks that is involved in claims of trademark dilution (Butters 2008b) as well as the criterion of FAME that is often addressed in attempts at establishing proprietary rights for descriptive trademarks on the basis of what is known as secondary meaning. It is not inconceivable that semiotic analysis could be relevant to these areas of trademark law, but that is not the focus of this chapter.

[6] Because the term trademark itself is distinguished in trademark law (as the name of a particular product or family of products, e.g., *Xerox*) from the term service mark (the name of a service, e.g., *Federal Express*), the term mark is employed to refer in general to commercial symbolic identifiers of all sorts.

the service so denoted, though it presumably would convey a culturally positive connotation).[7]

Within the law, the likelihood of linguistic confusion of two trademarks is considered from the perspective of the three criteria of (1) sight, (2) sound, and (3) meaning. The testimony of linguistic experts has generally been restricted to the core issue of likelihood of confusion of two marks based on spelling (with respect to "sight"), phonology (with respect to "sound"), and lexis, morphology, syntax, and (sometimes) discourse context (with respect to "meaning"); pragmatic aspects of lexis such as hyponymic/hypernymic relationships are sometimes considered as well; sociolinguistic variation in lexis and pronunciation are sometimes also relevant. However, semiotic issues that bear upon the similarities and differences of competing trademarks have only relatively rarely been the subject of expert linguistic testimony. For example, in the pharmaceutical firm case involving the trademarks *Aventis* and *Advancis*, I testified with respect to the effects on speakers of American English of pronunciation, spelling, and denotative and connotative meaning (Butters 2008b), but the attorneys with whom I was working cautiously asked me to confine my discussion to those aspects of "sight" involving the traditional linguistic category of orthography, omitting from discussion whatever contribution the logos of the two firms might make to the likelihood of confusion of the two marks.[8] In only a few cases have I touched on semiotic issues—for example, as noted above,I discussed how the use of distinguishing colors and shapes bearing resemblance to US Interstate Highway System markers differentiated the public representation of the trademarks of in *CarMax v. AutoNation USA*.

With respect to strength of mark, again, the linguist's work in this area falls well within the traditional linguistic areas of lexicography, lexicology, semantics, and pragmatics, and I have consulted in a number of cases concerning, for example, the strength of such terms as *steakburger*, *kettle chips*, and *zinger*. However, the use of semiotic material (involving, e.g., packaging images and logos) has rarely been a concern in my reports (but see Butters [2007b, 35] which uses semiotic material in establishing the genericness of with *kettle chips*).

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[7] A special kind of arbitrary mark is known as fanciful; this is the category of made-up words (coinages with no previous meaning in the language), for example, *Advanton* as the name for a delivery service. For detailed discussion of strength of mark issues, see Shuy (2002), Butters (2007a, b, 2008a, b, 2010), Butters and Westerhaus (2004), and Butters and Nichols (2009).

[8] If they wish to place such semiotic evidence before the court, attorneys sometimes consult "marketing experts," who are often associated with university schools of business and rely on a methodology that, at least ultimately, may be grounded in empirical psychological principles. Again, this traditional division of labor reflects the general conservatism of the legal system, which divides up areas of expertise in large part based on precedent. I take the position here, in this discussion, that the theoretical framework and methodology of linguistic/semiotic analysis is as rigorous as that of "marketing"; indeed, the judgments that marketing experts make are in fact semiotic judgments, though such experts generally do not reference semiotic (or, for that matter, linguistic) methodologies.

Fig. 13.2 McDonald's "golden arches" logo and word trademarks

Fig. 13.3 Apple's "apple-with-a-bite-out" logo trademarks

In trademark law, however, businesses may assert a proprietary interest in nonlinguistic signs as well as linguistic ones. For example, McDonald's, the fast-food chain, owns not only the name *McDonald's* but also (and with an equal force of law) the well-known "golden arches" symbol (a distinctively colored and curved rendition of the letter *M*) that is displayed on their restaurant signage, in advertisements, and on product packaging (see Fig. 13.2). Similarly, Apple Computers have proprietary rights not only to the word *Apple* (as it applies to computers and related goods and services) but also to the company's familiar apple-with-a-bite-out-of-it symbol (see Fig. 13.3).

Such logo trademarks—semiotic names for the products and services that they identify—are subject to the same kinds of constraints and rules as their

purely linguistic counterparts. For example, one cannot have basic trademark rights to a symbol that is associated with the product that it is being used to market. Thus, a fruit seller could not per se prevent others from using an image of an apple on a fruit box. Moreover, McDonald's (arguably) could not prevent another hamburger company—one named, say, Mom's—from also using a distinctive letter "M" as a commercial mark, so long as Mom's "M" and McDonald's "M" were different enough that consumers would not be likely to confuse the two marks.[9] Even semiotic symbols that are figuratively related to the trademark are not necessarily proprietary. For example, *Michael Jordan Nissan* is the name of an automobile dealership owned by the famous former professional basketball player, Michael Jordan; the dealership currently makes use of the image of a basketball as a part of the visual display of the name *Michael Jordan Nissan* in television advertising, reminding purchasers that this "Michael Jordan" is the well-known and admired basketball-playing athlete. The dealership, however, could find it difficult to use trademark law to prevent other basketball-player-owned automobile dealerships from merely using a basketball to similar ends in their television advertising, so long as the intent did not seem to be to confuse the public as to ownership or play on Michael Jordan's good name and the business reputation of his dealerships. Arguably, a simple image of a basketball could not very likely be considered the exclusive property of Michael Jordan or Michael Jordan Nissan.

Moreover, certain signs have particular meanings that are not associated with any particular commercial source, but are generically related to a type of industry, service, or product—for example, the red, white, and blue striped barber pole (see Fig. 13.4). Signs such as the barber pole are the semiotic equivalent of common nouns rather than names—no one can own the rights to such semiotic common nouns any more than one can own the rights to words like *automobile* or *barber shop*.

At the end of my research for my report in the checkerboard case that is the focus of this chapter, I concluded that the checkered pattern is much the same sort of semiotic generic noun that the barber pole is, having identifiable meanings that invoke specific types of businesses—associations that are, in effect, the pattern's generic meanings.

Moreover, because the meaning is generic with respect to the industries in which it was employed by the defendant and the plaintiff, there can be little likelihood of confusion between two products bearing the image—at least not based upon the use of the checkered pattern alone.

[9] Of course, Apple's particular rendition of an apple as well as McDonald's distinctive golden-arches image (or, for that matter, Mickey Mouse's ears) may be distinctive enough and famous enough that Apple, McDonald's, and Disney could prevent, say, marketers of fruit, bridge-construction services, or hearing aids from using that particular version of an apple, an "M," or stylized ears (if only because such usages could be prevented on the grounds that they "diluted" the famous mark; see Butters 2008a).

Fig. 13.4 Generic image of barber pole

13.4 Forensic Linguistic Semiotic Analysis: The Checkerboard Case

In the case discussed here, one party claimed trademark rights to the checkered pattern itself,[10] which it had incorporated into its advertising and product packaging for various kinds of cleaning products, as indicated in an image taken from the Hillyard website (see Fig. 13.5).[11]

The defendant, Warren Oil, at that time also incorporated the checkerboard pattern in its advertising and product packaging (see Fig. 13.6). Warren at the time of litigation had (and today maintains) a long-standing (hence incontestable) trademark registration that specifically incorporated the checkerboard pattern (even as it did not lay claim to the checkered pattern in and of itself).[12]

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[10] *Hillyard Enterprises, Inc., v. Warren Oil Company, Inc.,* No. 5:02-CV-329H(4) (E. D. of No. Car., W. Div. 2002).

[11] See http://www.hillyard.com/HillyardHome?asp?catind=1, downloaded March 27, 2010.

[12] See http://tess2.uspto.gov/bin/showfield?f=doc&state=4009:p6bn8n.6.1. Accessed 25 Feb2011 (italics added to original): **Word Mark** WARREN **Goods and Services** IC 001. US 006. G & S: PRODUCTS NAMELY, BRAKE FLUID. FIRST USE: 19711107. FIRST USE IN COMMERCE: 19711107 **Mark Drawing Code** (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS **Design Search Code** 25.03.01 – *Checker board pattern; Checkerboard patterns* 26.11.11 – *Rectangles divided twice into three sections* 26.11.21 – *Rectangles that are completely or partially shaded* **Serial Number 73096117 Filing Date** August 9, 1976 **Current Filing Basis** 1A **Original**

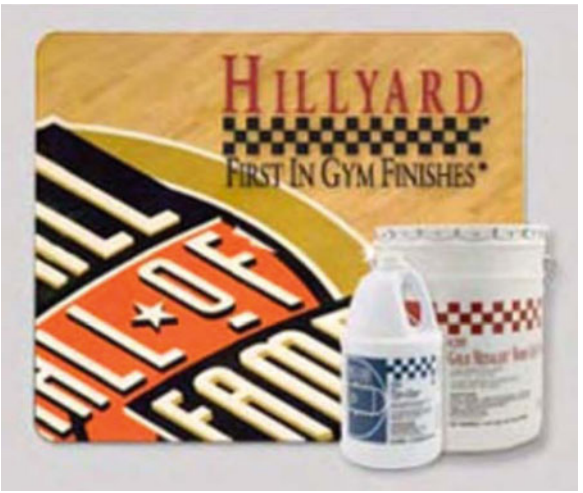

Fig. 13.5 Hillyard's use of checkerboard pattern (from website)

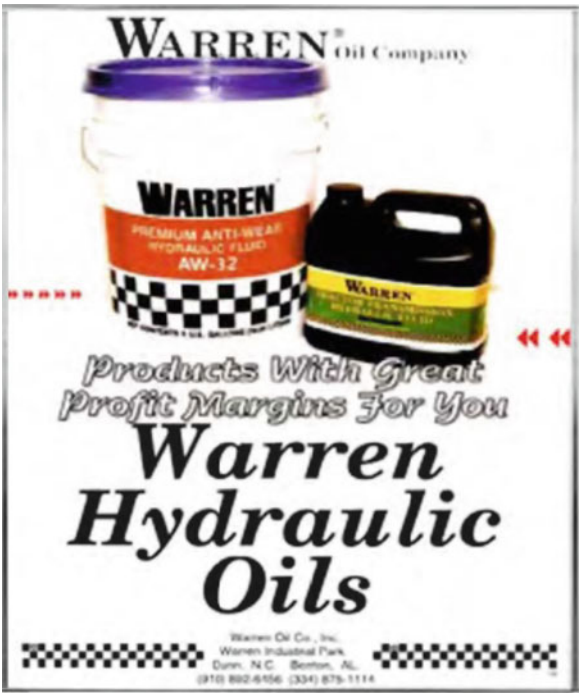

Fig. 13.6 Warren's use of checkerboard pattern

Filing Basis 1A **Registration Number** 1117972 **Registration Date** May 15, 1979 **Owner** (REGISTRANT) WARREN OIL CO., INC. CORPORATION NORTH CAROLINA U.S. HIGHWAY 301 DUNN NORTH CAROLINA 28334 **Attorney of Record** Larry L. Coats **Description of Mark** THE DRAWING IS LINED FOR THE COLORS SILVER AND ORANGE, BUT NO CLAIM IS MADE TO COLOR. **Type of Mark** TRADEMARK **Register** PRINCIPAL **Affidavit Text** SECT 15. SECTION 8(10-YR) 20080624. **Renewal** 2ND RENEWAL 20080624 **Live/Dead Indicator** LIVE.

The legal issue, framed in semiotic terms, is this:

> Can the checkered pattern function as a name in commerce—i.e., as a trademark? That is, can a simple checkered pattern be a semiotic proper noun having the special meaning of a particular company offering goods and services to the public?

That is to say,

> Does the checkered pattern have general meanings that are well known to the public at large, meanings that would in the minds of relevant members of the public make basic checkered patterns semiotic generic common nouns (which therefore by definition cannot be trademarks)?

The case report that I prepared for Warren's attorneys concluded on the basis of considerable empirical evidence that the checkerboard pattern has generic meaning relating the pattern specifically to[13]

> Cleaning products
> Automobile products and enterprises
> Food products and services

Hence, I concluded, the checkerboard pattern in itself could not be a likely source of confusion between Hillyard's products and Warren's (in that they would denote to consumers the distinctive types of products rather than the product sources themselves). Moreover, even if Warren began producing cleaning products for the use of persons servicing and repairing automobiles—a new development at the center of Hillyard's lawsuit against Warren—if the checkerboard pattern generically signaled "cleaning services," it could not be argued that Hillyard had viable trademark rights to the pattern, since the meaning with respect to "cleaning products" is also generic.

13.5 Methodology

Checkered patterns come in various sizes and shapes and colors, and for millennia they have been an ornamental design feature of various artifacts having no apparent other semiotic meaning that I have identified. Dictionaries also define *checker* as a term without meaning apart from a description of what the checkerboard pattern looks like, that is, "a pattern of squares, typically alternately colored" (*New Oxford English Dictionary* (NOAD 2001), hereafter *NOAD*). The pattern is so commonplace that one can even create a checkered pattern using a computer, as I did in typing the title of this chapter onto the manuscript. Mere ornamental application, however, is far from the only use of checkered patterns in contemporary life.

[13] This study is, however, limited to uses within the commercial culture of the United States. Other cultures, even among English-speaking nations, assign different meanings to the pattern. For example, in Australia, black-and-white strings of squares are found on the hats of police officers and on the sides of police cars. Cross-cultural confusion can result from these different meanings—if, for example, an Australian visiting New York tried to enlist a taxi driver to help with a mugger or an American in Sydney attempted to hail a taxi by stepping into the street and waiving at a police car (as nearly happened to this author).

The first step that the lexicographer takes in studying meaning is to examine the results of previous research, in dictionaries of record. This may not always be very revealing in pursuing semiotic interpretation, but certain generic meanings of the checkerboard pattern are so common that dictionaries do in fact offer indications of what it means. According to *NOAD*, a chessboard is a square board divided into 64 alternating dark and light squares, used for playing chess or checkers. *NOAD* also notes an additional generic meaning in its entry for "checkered flag: 1 n. *Auto Racing* a flag with a black and white checkered pattern, displayed to drivers as they finish a race. 2 victory in a race."

Thus, on the basis of dictionary definitions alone, it is clear that (1) the checkerboard pattern is culturally significant and (2) it is associated with automobiles through automobile racing (as well as the board games, checkers, and chess).

But dictionary definitions alone are not sufficient for trademark analysis. One reason for looking beyond dictionaries is simply that dictionary definitions give only minimal information about the cultural meaning of the words that they define; moreover, the information that they do give generally treats all meanings, including even surviving etymological meanings, as of relatively equal importance.[14] The next step is to employ the same methodology that lexicographers use in studying names and common nouns: gathering together a corpus of examples of actual use of the form in question and then looking for patterns in the data.[15] As noted above, my corpus of advertising and product labeling identified three primary semantic fields into which the vast majority of the examples in my data set fell.

13.5.1 Meanings Related to Automobiles

The first semantic category, that of automotive products, especially automobile racing, is suggested by the checkered flag entry in *NOAD*. At the beginning of my research, as a sort of informal pilot study, I asked one of my classes (a small seminar) what the checkered pattern means to them. (I did this by simply showing them the black- and-white pattern shown in my title.) Very few of the students had any immediate response at all (unlike what I assume would have been their response to the barber-pole image, the Apple logo, or a stylized drawing of Mickey Mouse's ears). But among those students who did respond, the most frequent answer was "NASCAR" (an acronym for "National Association for Stock Car Auto Racing").[16] The checkered flag is commonly employed by NASCAR in their advertising, as is depicted in the image shown in Fig. 13.7.

[14] For example, the generic "game" meaning of *checkerboard* is at best a minor aspect of the meaning represented in commercial use.

[15] Lexicographical methodology in large part involves the surveying of large samples of printed material from which definitions are inductively constructed. In the empirical science of dictionary making, lexicographers amass data drawn from the ordinary speakers' and writers' actual use of the language. See Butters (2007a, 2008a, 2010) and Butters and Nichols (2009) for a further discussion of the use of dictionaries in forensic linguistic trademark analysis.

[16] http://www.trinityrvrentals.com/images/checkered%20nascar2.gif

Fig. 13.7 A NASCAR use of the checkerboard pattern

Fig. 13.8 Automobile dealer's generic use of the checkerboard pattern

Space does not permit me to show here any others of the numerous uses that NASCAR makes of the black-and-white checkered pattern—all of which apparently stem from the use of the black-and-white checkered flag as a symbol of victory in auto racing. However, the range of the use extends beyond NASCAR and into advertising and product packaging for automobile-related products in general. Note, for instance, the business card shown in Fig. 13.8.

While the usage undoubtedly has an ornamental purpose, its incorporation into the logo of an automobile dealership is just one instance among a multitude in which the pattern is used in connection with automobiles, both referencing and reinforcing the meaning of the pattern in everyday American life.

The "victory" meaning assigned to the checkered flag entails "superiority"—a meaning that is used quite frequently in the association of the checkered pattern with various automotive products and services as well as the Warren Oil image shown earlier in this chapter (see Figs. 13.9, 13.10 and 13.11). Similarly, the Checker Motors Corporation of Kalamazoo, Michigan, manufactured "the Checker Taxi," and "Checker Taxi" was a taxicab business in Chicago early in the twentieth century. Taxicabs in various cities make use of the checkered symbol—New York City, for example

Fig. 13.9 Sheetz premium motor oil use of checkerboard "victory flag" pattern

Fig. 13.10 Advance AutoParts use of checkerboard "victory flag" pattern

(see image below). This related association of the checker pattern is as a symbol for taxicabs, while very likely a historical accident is nonetheless one that certainly reinforces the "automotive superiority" meaning of checkers (see Fig. 13.12).[17]

[17] Current New York City yellow cabs make use of a stylized version of the traditional checkered pattern; the image begins as full checks and thins to round-edged dots. A similar stylized "disappearing" version of the classic taxicab pattern is seen in the logo of the Chapel Hill automotive dealership shown in Fig. 13.8.

Fig. 13.11 Cottman Transmission use of checkerboard "victory flag" pattern

Fig. 13.12 Classic yellow taxi displaying checkerboard pattern

My research has generated an enormous corpus of data featuring the automotive uses of checkerboard patterns in commercial advertising, labeling, and packaging. Clearly, the appearance of the pattern in connection with automotive products and services cannot signal to American customers any particular company. As a sign, it is semiotically generic. Warren Oil's use of the pattern in identifying its automotive-related products was simply a reference to this generic meaning.

Fig. 13.13 Hillyard soap dispenser displaying checkerboard pattern

13.5.2 Meanings Related to Cleaning Products

The plaintiff, Hillyard, makes use of the checkered pattern not only in packaging and advertising but also even on the soap dispensers that it places in public restrooms, as in the image shown in Fig. 13.13. An examination of product advertising, however, indicates that there are numerous cleaning products that make use of the pattern as well. For example, Pro brand paint thinner and spill cleaner has the package label shown in Fig. 13.14.

This use of the pattern seems to have its origins as a representation of, and reference to, wall and bathroom tile, as suggested by Fig. 13.15.

The checkerboard pattern is even frequently incorporated as an ornamental design feature into such cleaning products as towels (as shown in the packaging of the kitchen towels shown in Fig. 13.16).[18]

As was the case with the automotive use of tile patterns, the images depicted here are but a very few of a genuine multitude that I found in my research. The conclusion is clear: the checkered pattern is polysemous: it means not only "automobiles" but also "cleaning products." Just as Warren's use of the pattern is generic for the automotive products that it offers for sale, so, too, is Hillyard's use of the pattern generic for the cleaning products that it markets. Furthermore, given the association

[18] See http://www.etsy.com/listing/54726702/black-and-white-checkered-dish-towels. Accessed 25 Feb 2011.

Fig. 13.14 PRO paint thinner displaying checkerboard pattern

Fig. 13.15 Tilex Mildew Remover cleaning product displaying checkerboard pattern

of checkers with the commercial category to which the products belong, there is little likelihood of consumer confusion based on the repetition of the checkered pattern as to the source of the products of two companies.

Fig. 13.16 Packaging for Terry Kitchen Towels displaying checkerboard pattern

13.5.3 Meanings Related to Food and Eating

Although the final meaning of the checkerboard pattern had no relevance to the legal proceedings for which my services were engaged, my research determined a third generic meaning for the pattern: "food and restaurants." Again, space does not permit even a small portion of the examples that my research revealed, but the examples in Figs. 13.17, 13.18 and 13.19 suggest the range of material available.

Why a checkered pattern should be associated in general with the food industry is an open question, though the fact that many of the occurrences that I found in my data formed red and white patterns suggests that the use stems from the culturally prominent association of red-and-white checkered tablecloths with informal restaurants and home-kitchen dining in the earlier part of the twentieth century (and perhaps earlier).

13.6 Conclusion

It is important to stress that virtually every example that I found of checkered patterns in commercial use falls into one of the three categories discussed in this chapter. In a few other uses found in my data, it seems clear that the pattern is used simply

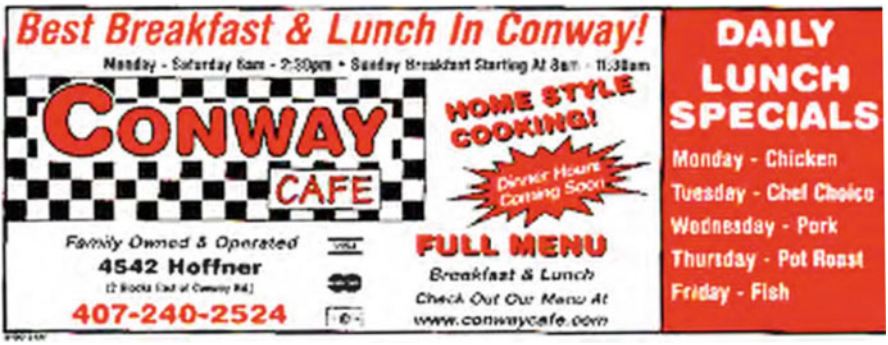

Fig. 13.17 Café advertisement (mailed flier) displaying checkerboard pattern

Fig. 13.18 Newspaper restaurant advertisement displaying checkerboard pattern

as ornament, with little semiotic lexical-like meaning or with a transferred meaning (as in the frame surrounding a furniture-store advertisement, wherein the pattern might conceivably be taken to suggest the parquet ornament found in expensive furniture and flooring). Banks do not use checkered patterns. Office supply stores do not use checkered patterns.

Given the widespread use of the checkered design and its limitation to just a few semiotic environments, it seems clear that checkerboard signs per se are "generic" in their reference. This is not to say that specific, unique renditions of checkerboard motifs might not be proprietary, protectable semiotic proper nouns, particularly in semiotic environments where they are unusual. Nor should the conclusion that the pattern has semiotically definable generic meaning be taken to imply that checkers could not be incorporated into a trademarkable logo that could in itself be

Fig. 13.19 Packaging for frozen foods displaying checkerboard pattern

proprietary—as in the logo shown in the Warren Oil trademark application duplicated above (Fig. 13.6). But for such things as automobiles, fast food, and cleaning products, simple checkered patterns are semiotically generic, having the effect of common nouns that name the thing itself, not a particular brand of thing.

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Chapter 14
A Multimodal Social Semiotic Approach to *Shape* in the Forensic Analysis of Trademarks

Christian Mosbæk Johannessen

Abstract This chapter addresses the lack in explicative power of the forensic analysis of trademarks in the *assessment of likelihood of confusion* between colliding trademarks faced with cases in which the stylistic rendition of the marks is the decisive factor. The chapter analyses the assessment of likelihood of confusion and concludes that legal doctrine regards the event of trademark perception as mainly psychological. The chapter proceeds to examine the productivity of regarding the event as social as well and proposes a grammatical approach to describing the stylistic rendition of trademarks.

14.1 Introduction

This chapter seeks to discuss possible applications of a multimodal social semiotic approach in the forensic analysis of trademarks in trademark collision cases. Trademark doctrine is a highly evolved and extremely well-established legal discipline. But, as the chapter will point out, the *assessment of likelihood of confusion*, as trademark professionals call the forensic comparison of marks, currently lacks explicative power towards a particular kind of cases in which the stylistic rendition of the marks is the decisive factor. The chapter will point out the nature of the problem and suggest a tentative descriptive framework for graphic form, which can hopefully aid in amending it.

Most of what has been written on the subject of trademarks in literature on marketing, branding, graphic design and trademark doctrine leads us to think about trademarks as *symbols* or *signs* in the sense that they *stand for* a company or product

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Fig. 14.1 The opposer (*left*) and applicant's (*right*) marks in Apple Inc. v. NYC & Company Inc.

or organisational entity in some way. This chapter acknowledges the status of the trademark as a sign in its own right, but seeks to understand trademarks as *comprised of signs* in order to gain a firmer grasp on the aspects of meaning, which are difficult to grasp analytically for people without training in graphic design. Further, the chapter proposes to regard graphic form in a way that rather resembles the linguistic principle of *double articulation* (Martinet 1967) or *duality of patterning* (Hockett 1958) and to use this insight – where applicable – to gain a stricter and more detailed understanding of how meaning is made in trademarks.

As a rule, trademark collision cases revolve around some shared aspect of meaning in the involved marks. The names of the company may sound similar or have similar meaning, or the marks may depict the same things or generally look similar. However, not all aspects of their meaning are understood equally well. It can be argued that this is because the actual event of perception of the trademark is regarded as psychological rather than social and because no suitable metalanguage has hitherto been developed to grasp stylistic aspects of meaning analytically.

In order to understand cases where graphic style is an important factor, the chapter must ask what counts as meaningful and how meaning comes about. Hence, the overall aims of this chapter is (1) to show that it can be productive to regard the event of trademark perception as a social event as well as psychological event and (2) to discuss the possibilities for establishing a metalanguage that can capture graphic style analytically. To aid in this undertaking, the chapter refers to two different trademark cases from different parts of the world.

The first case (Fig. 14.1) is *Apple Inc. v. NYC & Company* from the US Trademark Trial and Appeal Board. In this case, the consumer electronics manufacturer Apple Computers Inc. opposed against the registration of the GreeNYC logo as a trademark for an environmental campaign from the city of New York's mayor's office.

The second case (Fig. 14.2, next page) is *Dansk Supermarked A/S v. Net2Maleren* from the Danish Commercial and Maritime Court. In this case, Dansk Supermarked A/S, who owns a Danish chain of discount supermarkets called *Netto*, opposed against the registration and use of an infringing mark by a master painter from the town of Esbjerg. However different they may be, the two cases share one trait. They both revolve around device marks that have strikingly similar outlines. The two apples in *Apple Inc. v. NYC & Company* have outlines, which are close to exact matches except the leaves, stems and bite. The same can be said about the basket-holding terrier and collection of painting utensils in *Dansk Supermarked A/S v. Net2Maleren.* Casual observation reveals that both marks in the first case denote the same object, an apple.

Fig. 14.2 The opposer (*top*) and applicant's (*bottom*) marks in Dansk Supermarked A/S v. Net2Maleren

In the second case, however, they denote different objects: a terrier and painting utensils, respectively. One might be led to believe that the authorities would find the two apples similar and likely to cause confusion and the terrier and painting utensils dissimilar. But the outcome of the cases is in fact the reverse.

The chapter will inquire into these two cases and ask how it can be that one set of marks with almost identical outlines, which denote the same object, can be judged to be dissimilar when a different set of marks, also with almost identical outlines but which denote different objects, are judged to be confusingly similar?[1]

One school of semiotics called *multimodal social semiotics* provides a theoretical framework for close analysis of visual texts that can account for the meaning potential of stylistic qualities of graphic form in great detail.

Accordingly, the overall point of view of the chapter is that of semiotics in general and multimodal social semiotics in particular rather than that of legal sciences, let alone the legal practice of any given country. The chapter fully acknowledges that the practical application of the suggestions presented here are likely to pose different challenges in legal contexts of different countries, but such matters of comparative law will not be addressed.

The following three sections prepare the ground for the chapter's discussion of a multimodal social semiotic approach to forensic analysis of trademarks: Sect. 14.2 gives a brief overview of the different ways in which semiotics have been brought to bear on trademarks in order to understand the very specific nature of trademark doctrine. Section 14.3 introduces the assessment of likelihood of confusion, which is the technical term for the way in which trademarks are compared in legal practice. Section 14.4 offers an analysis of the way trademark doctrine regards one of the cases of this chapter, *Apple Inc. v. NYC & Company Inc.* The following five sections discuss the problems outlined above and present a possible solution: Sect. 14.5 addresses some of the potential issues arising from close analysis in a forensic setting. They have to do with the distinction between synthesis and analysis as modes of inquiry. A solution to the problems is presented in Sect. 14.6, which proposes to

[1] Needless to say, from the point of view of legal doctrine, the above question makes no sense because different courts in different countries made the two rulings. However, the principles of semiosis do not conform to jurisdiction.

regard stylistic features of graphic form as doubly articulated. Section 14.7 presents multimodal social semiotics, which is the overall theoretical framework for the tentative descriptive scheme. The last two sections, Sects. 14.8 and 14.9, outline a distinctive feature approach to graphic form and apply it to our two cases.

14.2 The State of the Art of Trademarks in Semiotics

Many different professions have a keen interest in trademarks. Their function as signs has been the object of study for graphic designers, semioticians, marketing professionals and lawyers alike. Examples abound. From the realm of graphic design comes Mollerup's *Marks of Excellence* (1997), which has received great accolade. Also, a plethora of works on branding such as those of Heilbrunn (1997, 2001) and Floch (1995) present a management perspective on the semiotics of trademarks. As a final example, Beebe (2004) has written a very insightful semiotic account of American legal trademark doctrine.

These works all have a common cynosure based on the communicative function of the trademark – the triadic relation between the representamen (signifier) and interpretant (signified) of the sign on the one hand and its object (referent) on the other. Also, the works mutually refer to each other in order to better illuminate different aspects of their object of study. Terms like trademark, brand and logo are used interchangeably in the literature to describe the complex of intrasign relations, and this causes some confusion. The crux of the matter is that different professions have different motivations for studying trademarks. This causes them to study slightly different functional aspects of trademarks and ultimately to stress intersign and intrasign relations differently.

Beebe (2004, 638) offers a semiotic analysis of American legal trademark doctrine in terms of intersign versus intrasign relations based on Saussurean and post-Saussurean principles of signification and value (see generally Beebe 2004, specifically 638–645).

To be sure, signification involves a relation of equivalence, but this relation occurs *within* the sign and is incomplete. Intersign relations of value are necessary to perfect signification by delimiting it, by placing it within everything that is outside of and different from it (2004, 642).

He proceeds to demonstrate that trademark doctrine is primarily concerned with a trademark's value over its signification. The reason for this is that '[…] the law is trying to promote economic efficiency' (2004, 623) in society in general by:

> […] lessen[ing] consumer search costs by making products and consumers easier to identify in the marketplace and […] encourage producers to invest in quality by ensuring that they, and not their competitors, reap the reputation-related rewards of that investment. (ibid.)

Thus, the comparison of trademark doctrine is designed to test a trademark's ability to differentiate the goods and services of one producer from those of all others.

Conversely, although branding theory is also interested in a brand's ability to differentiate itself from others, the theory is trying to promote the interests of producers (as opposed to society's in general) by enabling them to build brands that encourage consumers to choose their products. Thus, branding theory is primarily concerned with 'the positive meaning of the sign' (id: 239) and only as a means to this end with its 'negative difference or distinctiveness of the sign as against all other signs' (ibid.). These differences in the scope of trademark doctrine and branding theory result in differences in subject matter. On one hand, the *trademark* of legal doctrine encompasses any one sign in any substrate that can differentiate a commercial entity's products or services from those of its competitors. On the other hand, the *brands* of branding theory consist of a complex of signs and stress signification over value. In the words of Per Mollerup:

> A brand is a product (or a class of products) including its trademark, its brand name, its reputation and the atmosphere built up around it […] A brand is fuelled by whatever is associated with the product: always by a trademark and by product quality, sometimes by packaging and often, to a great extent, by advertising. (Mollerup 1997, my italics)

Although, each in its own way, *trademarks* and *brands* are broader yet more precise terms than the vernacular, in many ways the popular *logo* term, which seems to be the preferred term in the graphic industry, occupies the terminological intersection between them.

This chapter focuses on the kind of trademarks popularly referred to as *logos*. That is to say, the object of study is the two-dimensional graphic mark. Furthermore, the chapter focuses on the particular aspect of the meaning of the marks, which is conveyed visually, rather than those that are conveyed verbally.

14.3 Assessment of Likelihood of Confusion and the Principle of Globality

The Danish Trademark Act[2] (§1, 2) defines trademarks as 'special tokens for goods or services, which are used or are intended to be used in a commercial enterprise' (Wallberg 2008, 18). In other words, the Trademark Act recognises the trademark as a *sign* in a very semiotic sense: as something that stands for something else for someone. Trademark law regulates proprietary rights to these signs in order for those to whom the sign stands for something else, that is, the consumers, never to be confused about the origin of goods or services. At the heart of this principle lies the trademark's *distinctiveness* or ability to differentiate the owner's goods and services

[2] Along with *copyrights, design rights, patent and utility model rights* and *domain name rights, trademark rights* are regulated by the overarching legal field of 'intellectual property law' (see Ryberg et al. (2004) for an introduction to intellectual property law in Denmark). Each individual type of rights is governed by its own set of laws known as *the Danish Patent Act*.

from those of his competitors. As we shall see, legal doctrine has established a method for determining whether confusion is likely to occur, the nature of which is unmistakably semiotic.

The legal term for comparing two colliding trademarks is *assessment of likelihood of confusion*. According to the preamble to the European Union's directive on trademarks, the assessment of likelihood of confusion 'depends on numerous elements and, in particular, on the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trade mark and the sign and between the goods and services identified'.[3] In other words, the comparison must include an assessment of two main elements: (1) the similarity of the marks and (2) the similarity of the goods or services. Furthermore, a number of ancillary contextual factors must be assessed as well, as stated in case C251/95, Sabel/Puma, from the European Court of Justice: 'The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case' (22). The same judgement continues to specify that:

> […] the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. (23)

As we can see, in European as well as Danish judicial practice, this kind of comparison rests upon a principle of *globality*. Furthermore, as the Sabel/Puma case illustrates, the assessment seems to consist of two distinct levels. Paragraph 22 of the Sabel/Puma judgement appears to have a contingency point of view on the assessment, which includes 'all factors relevant to the circumstances of the case', whereas paragraph 23 distinctly addresses the *marks* as opposed to *the goods* and *the consumers* and assigns a *decisive role* to this particular aspect of the assessment.

Naturally, the appreciation must be based on information of a kind. Yet the legal discourse mostly avoids specifying the nature of the processes by which this information comes about. A few mentions of the process can be found. In his doctoral thesis from 1948, Danish intellectual property solicitor Hardy Andreasen is quite explicit on what he considers the most appropriate mode of inquiry in the assessment of likelihood of confusion:

> As the distinctive ability of a trademark usually rests upon the co-operation of several elements, a synthetic judgement of the elements of the mark is the more correct way of assessing it. The distinctive ability of a mark should be sought in the global appreciation rather than in the pregnancy of the individual elements. (1948, 284, my italics)

[3] The 11th recital of the preamble to Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the member states relating to trademarks.

In the 4th edition of *Varemærkeret – Varemærkeloven og Fællesmærkeloven med kommentarer*, Knud Wallberg states that 'The global assessment of the likelihood of confusion in a situation of conflict necessarily has a certain approximate and thus subjective quality' (2008, 30, my translation). It seems safe to assume, then, that the heuristic is characterised by *synthesis* and *subjectivity*. One can only guess why it remains unspecified beyond this point, but the question is probably considered of less relevance. However, as we shall see in the following, in this context the question is in fact critical.

14.4 The Apple Case as Conventional Trademark Doctrine Sees It

In order to illustrate how the two illustrative cases of this chapter would be treated by conventional trademark doctrine, let us look at the argumentation presented by the opponent in *Apple Inc. v. NYC & Company Inc.*, the marks of which are represented as Fig. 14.1.

The background for the case is a trademark registration application, which was filed at the Trademark Trial and Appeal Board of the United States Patent and Trademark Office in May of 2007. The applicant was the official marketing, tourism and partnership organisation for the City of New York, NYC & Company Inc. The mark was to be part of the identity for *GreeNYC*, which the mayor's office has called:

> […] an integrated marketing and advertising campaign that is the consumer education component of PlaNYC, [… which] is designed to educate, engage and mobilize all New Yorkers on the simple steps they can take to reduce pollution and greenhouse gases.[4]

The application was published on 18 September 2007. Four months later, Kilpatrick Stockton LLP, legal representatives of Apple Inc., filed a consolidated notice of opposition against the application. Among the 18 grounds for the opposition alleged by Apple Inc. the following copy states 3 (12–14), which are of particular interest in this discussion:

> 12. Applicant's marks are very similar to Opposer's APPLE Marks in appearance and commercial impression. Applicant's Marks consist of an apple with a stylized detached and convex leaf element angled upwards. Similarly, Opposer's APPLE Marks famously evoke an apple and Opposer's Logo consists of an apple shaped logo with a stylized detached and convex leaf element angled upwards.

[4] According to a press release issued by the office of the mayor of New York City on 25 June 2007 (http://nycvisit.com/content/index.cfm?pagePkey=1958).

> 13. Certain of the goods and services cited by Applicant under Applicant's Marks are identical, or highly related, to goods and services Opposer has long offered in connection with its APPLE Marks.
>
> 14. Accordingly, Applicant's Marks so closely resemble Opposer's APPLE Marks that Applicant's use of Applicant's Marks is likely to cause confusion, mistake or deception in the minds of consumers as to the origin or source of Applicant's goods and services in violation of Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d), with consequent injury to Opposer and the public. (Consolidated notice of opposition in the matter of Application Serial Nos. 77/179,942 and 77/179,968, United States Patent and Trademark Office, Trademark Trial and Appeal Board, 16 January 2008.)

We can now begin to see how the grounds for opposition alleged by Apple Inc. in paragraphs 12 and 13 of the consolidated notice of opposition are in fact a comparative analysis of the two marks based on a triadic semiotic conception of trademarks. Paragraph 12 analyses the representamen/interpretant equivalence of the marks and generally states that the marks are 'very similar […] in appearance (representamen) and commercial impression[5] (interpretant)'. Further, the following specific qualities of the equivalence are mentioned: Applicant's mark (1a) consists of an apple with a stylised, detached and convex leaf element angled upwards. Similarly, opposer's mark (1b) consists of an apple-shaped logo with a stylised detached and convex leaf element angled upwards. In other words, the account stresses the coinciding denotation of *apple* and *detached convex leaf angled upwards*. For obvious reasons Apple's representative chooses to mention the factors that support Apple's claim of likeness at the expense of the differences of the marks. Thus, the following features of the marks remain without comment in this particular account. The fact that NYC & Company's mark apart from an apple and a leaf also denotes a stalk on the apple and an infinity symbol. The fact that the Apple mark apart from the apple and leaf also denotes a missing bit (bite).

Paragraph 14 analyses the objects of the respective marks and claims that they are *identical or highly related*. Hence, it is argued that the two tenets of confusability doctrine, *likeness of marks* and *likeness of goods*, are met in the case in question.

As far as the possible connotative meanings of the two marks are concerned, the argumentation is of very few words. The argumentation explicitly states that the leaf elements of both marks are *stylised* and seems to imply that this shared characteristic adds to the similarity of the marks. Further, the argument restricts itself to explicitly ascribe the *stylistic* quality to the leaves in both marks, although it seems evident that the marks in their entirety are characterised by stylisation. The dictionaries[6] tell

[5] In American trademark doctrine, the technical term *commercial impression* covers 'the meaning or idea it [the trademark] conveys, or the mental reaction it invokes' (Mark and Jacoby 2005: 2).

[6] The online Oxford English Dictionary gives this definition of *stylise: trans.* To conform (an artistic representation) to the rules of a conventional style; to conventionalise. Chiefly in *pa. pple.* Hence *stylised ppl. a.*; also *stylisation.*

us that *to stylise* means to *conform to the rules of a conventional style*, and that stylisation generally implies a sort of degeneration of particulars to a generic convention. However, there are many such conventions. Circuit diagrams, cubist art and comic books all apply *stylisation* in their representation but conform to very different conventions. By omitting a specification of the precise nature of the *style(s)* in question and ascribing the *stylistic* quality only to the leaves, the argument presupposes that the leaves and indeed the marks in their entirety are stylised in a similar fashion and thus connote the same meanings.

The case of *Apple Inc. v. NYC & Company Inc.* has since been dismissed. The case took this turn after NYC & Company Inc. obtained Apple's consent to an amended mark, in which the leaf element had been deleted from the design. In order to cater for the overall graphic harmony of the new mark, the slant of the stem on the new mark was also altered slightly to make it fill the open space left by the deletion of the leaf. Other than these changes, the new mark is unaltered. The fact that this matter could be settled by deleting the leaf element in NYC & Company's mark illustrates the significance ascribed to the denotative meaning by contemporary trademark practice.

However, the nature of the graphic *stylisation* of apples in the two marks is radically different. Although it can be argued that Apple Inc.'s representative has abstained from going into this precisely because it could weaken Apple's case, the tendency to treat graphic *style* in a general manner is quite typical in trademark practice. It is possible that this abstinence from comment on style can be ascribed a weak metalanguage with which to capture the nature of these qualities. As stated in the introduction, the discussion of the possibilities for establishing such a metalanguage is the overall aim of this chapter. The discussion will be unfolded from Sect. 14.5 and throughout.

14.5 Problems Arising from the Global Assessment Principle

As stated above, the way trademark doctrine conceptualises the *whole* of the trademark seems to be of a fundamentally communications theoretical and semiotic nature. From such a point of view, it is hard to disagree with the notion that all factors in a communicative context have bearing on meaning making. Therefore, the global assessment principle seems sensible from a semiotic as well as a legal point of view and poses no problem to the particular aim of this chapter. However, Andreasen's (1948) account instructs us that, as a mode of inquiry, the global assessment should be based on *synthesis*. As a term, synthesis can be said to refer to a great many different concepts, and Andreasen's exact understanding of the term is not specified. If by synthesis he merely understands *combination* of parts, the individual nature of which could very well be *analytical* (i.e. analysis of the nature of the goods, of the consumers, of the trade, etc.), an analytical scrutiny of the marks

as signs – as part of an overall assessment of the likelihood of confusion – would be perfectly in line with a synthetic approach.

Unfortunately for the unimpeded application of multimodal social semiotic close analysis, however, this does not seem to be the case. Various sources in both literature and case law addresses the question more in terms of the marks as *gestalts* (see, generally, Koffka 1935) and suggest that any analytical scrutiny of any one part at the expense of other parts would fundamentally bias the assessment. This view is verified in abundance in contemporary literature and case law, for instance, in the Sabel/Puma case:

> That global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The wording of the Article 4(1) (b) of the Directive – […] – shows that the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. (European Court of Justice, C-251/95(23))

The above citation is a testimony to yet another tenet of the assessment of likelihood of confusion, which entails the fact that the ultimate purpose of trademark law is to protect the consumers' ability to determine the origin of a given commodity. Therefore, any person who engages in a forensic assessment of the likelihood of one mark being confused with another should act as an agent for the consumer. As a result, the comparison is contingent with the legal profession's conception of *consumers* in general and the *perception of marks* in *the minds of the consumers* in particular. It follows that the development of a metalanguage, which can grasp the stylistic rendition of marks, might be regarded from such a perspective, as counterintuitive. This is because the only mode of inquiry, which is truly loyal to trademark doctrine, would be the empirical survey. However, such an objection presupposes that the event of confusion is singularly psychological, and that the only way of observing it from the outside is to make consumers put their phenomenological experience of the marks into words in some way. This chapter, however, is based on the assumption that social aspects such as semiotic code and discourse weigh heavily in the event of confusion, and that a study of the grammar of trademarks will have great explicatory power in forensic analysis of conflicting marks.

In canonical Danish trademark literature, the origin of the conception of *mind* and *perception*, which prevails in trademark doctrine, can be traced to the gestalt theory of the 1930s (e.g. Koffka 1935). The current Danish authoritative work (Wallberg 2008, 105) has, in essence, adopted the view put forth by Koktvedgaard (2005[1988], 394), who writes:

> […] Whether one stresses one aspect or the other, the judgement should in principle be based upon the likely use – and experience thereof – of the marks in the day-to-day trade of commodities: How will the *consumers* perceive the marks? […] The principle of the *overall appreciation* is due to the fact that in general the market does not scrutinize the individual marks' specific details. They are perceived as entireties, and so should the judges. (2005[1988], 394, my translation)

This appears to be perfectly in line with the thoughts, which Koktvedgaard had on the subject in his 1965 thesis. Then, he observed that:

> Within psychology, the processes of comparison are sometimes understood as a subordinate feature of the main problem known as 'structuring'. The problem of structuring deals with *the experience of entireties.* (1965, 20, my translation)

Koktvedgaard refrains from elaborating further on what he calls the *common aspects* (ibid.) of the structuring problem, but instead refers to Jørgen Jørgensen's *Psykologi paa et Biologisk Grundlag* (1941). Jørgensen states that:

> […] the gestalt psychologists have drawn attention to a number of facts that show that there is no unequivocal correspondence between certain isolated stimuli and the resulting "phenomena of the consciousness", but rather that the characteristics of the latter depend on the entire constellation of stimuli to which the organism is exposed – a fact which suggests that the brain is not a mere relay for the neurological impulses originating from the receptors, but rather that they somehow undergo so-called processing in the higher faculties. (1941, 136, my translation)

In summary, it seems that, in Danish trademark law at least, whether or not explicitly apparent to contemporary trademark professionals, the concept of the global appreciation follows the tradition of gestalt theory. It would probably also be reasonable to argue that when trademark professionals speak of the way in which *consumers perceive trademarks as entireties*, the underlying event is conceived of as psychological. Yet, one of the key proponents of gestalt theory, Kurt Koffka, has this to say about the study of such processes:

> […] And an ultimate explanation of the problems of thought and imagination will not be possible without a theory of language and the other symbolic functions. But we shall exclude the study of language from our treatise. This restriction is necessary, because it would be impossible to give more than an utterly superficial treatment to this problem, so rich in psychological interest. (Koffka 1935, 422)

The gestalt theoreticians themselves, it seems, were well aware that it is necessary to include the study of signs in order to adequately account for cognition. Further, it seems that, in principle, the perception of trademarks is regarded as having only a single layer of articulation, the one at which trademarks are lexically coupled with their meaning. This chapter, however, suggests that there are compelling reasons why the event of recognition or confusion of trademarks could also be illuminated in terms of a social (social semiotic) event rather than solely psychological. This entails the assumption that trademarks have a socially constructed *grammar* and that meaning is also ascribed to them through a process of double articulation. The following section will elaborate on these points of view.

14.6 Single Articulation or Double Articulation?

The idea that many semiotic systems are organised grammatically is quite common in semiotics (see for instance Groupe μ 1992). It is possible to conceive of many different modalities as made up of an inventory of meaningful units, a *morphology*, and a set of rules, a *syntax*, by which the units can be combined. This is as far as

Fig. 14.3 A simple line, the segmentation of which is difficult

most semioticians are willing to go in the quest for a grammatical approach to visual semiotics. Some attempts (e.g. Lévi-Strauss 1968) have been made to describe visual semiosis in terms of units that can distinguish one meaning from another but are not meaningful in themselves and which can be combined into an infinite number of meanings by a process known in linguistics as *double articulation* (Martinet 1967) or the *duality of patterning* (Hockett 1958).

Double articulation is said to be a characteristic of language, which defines it and is exclusive to it. The question of whether any other semiotic mode than language entails double articulation is much debated (see, e.g., Eco 1968). The crux of the criticism of, for example, Levi-Strauss' approach is that when attempting to analyse a visual text in terms of distinctive units, one cannot delimit the individual distinguishing features. For example, it could be argued that the line in Fig. 14.3 consists of a number of segments that are curved or straight. However, it would not be possible to determine exactly where one segment ends and another begins the way it can be done with phonemes in phonology.

This rationale makes good sense, provided you are looking for the distinctive features in the *segments* of a visual text based on the premise that its primary principle of organisation of meaning is syntactic structure. The concept of syntax is difficult to handle analytically in visual texts, if you can even argue that they properly have this property. As an analytical concept, syntax is at its most powerful surroundings that are sequentially or at least linearly structured. Many visual texts, however, albeit structured, have no inherent sequence. Their parts relate to the whole in a simultaneous fashion rather than a sequential one. It seems, then, that previous attempts at formulating a principle of double articulation in other semiotic systems than language as well as the criticism of them have had a linguistically based syntactic bias, which is alien to visual communication because it does not correspond to an inherent quality of it.

14.7 What Is Multimodal Social Semiotics?

Regardless of their differences, most – if not all – semiotic accounts of trademarks have hitherto conceptualised the relation between the *signifier* and *signified* as singly articulated. Yet, in order to fully appreciate how a set of marks as those of *Apple Inc. v. NYC & Company Inc.* and *Dansk Supermarked A/S v. Net2Maleren* are alike and different, it is useful to do so in terms of the way in which socially constructed possibilities for semiotic choice are put to use in the particular marks, or as social semioticians would put it: How *semiotic resources* are *instantiated*? This entails a systemic view on graphic form, which outlines the semiotic choices available to the designer of a trademark – or indeed any instance of graphic design.

As a semiotic methodology, multimodal social semiotics (see generally Baldry and Thibault 2005; Kress and van Leeuwen 2006[1996], 2001, 2002; Van Leeuwen 2005a) originates from systemic functional linguistics (SFL), which has as its central figure Michael Halliday (see generally Halliday and Matthiessen 2004). Although the theoretical tenets of SFL have been adapted by multimodal social semioticians to reflect the multimodal (as opposed to monomodal linguistics) object of their observation, they are fundamentally similar. The following introduction will serve as a presentation of the tenets of both SFL and multimodal social semiotics.

Many linguistic traditions regard syntax as the primary principle of integration in language and the paradigmatic dimension as secondary to it. Unlike such theories, SFL emphasises the paradigmatic dimension of language through its description of semiotic resources in paradigmatic *system networks* and regards syntactic structure as derived from paradigmatic choice through *realisation*. The system networks and corresponding realisation statements combine into an ambitious attempt at charting the meaning potential of a given language. Halliday expresses the overall outlook like this:

> In the history of western linguistics, from its beginnings in ancient Greece, this was the direction that was taken: first the form of words were studied (morphology); then, in order to explain the forms of words, grammarians explored the forms of sentences (syntax); and once the forms had been established, the question was posed: "what do these forms mean?". In a functional grammar, on the other hand, the direction is reversed. A language is interpreted as a system of meanings, accompanied by forms through which the meanings can be realized. The question is rather: How are these meanings expressed? (Halliday 1994, xiv)

SFL describes the different aspects of language within three global dimensions called *stratification, instantiation* and *metafunction*. Here is a short overview:

14.7.1 Stratification

In SFL, which is a functional theory, the first global dimension of language is called *stratification*. It conceives of language as a stratified system embedded in context. The linguistic system and the context are mutually contingent. There are four linguistic strata: *semantics, lexicogrammar, phonology* and *phonetics*. The function of the lexicogrammatical and phonological strata is to organise language, whereas the semantic and phonetic strata have *interfacing functions* (Halliday and Matthiessen 2004: 25): Semantics is the interface between context and language, and phonetics is the interface between language and the body of the language user. The four strata are interconnected through a process known as *realisation*, which means that a given semantic meaning is realised by lexicogrammar through *wording*, which is in turn realised by phonology through *composing*, which is again realised by phonetics through *sounding* (Halliday and Matthiessen 2004, 26).

14.7.2 Instantiation

The second global dimension is *instantiation*. It captures the linguistic relation between the particular text (what is uttered) and the system (what could have been uttered). The stance towards language in SFL is social semiotic: Language is regarded as a resource (the system), which is put to use by individuals according to their contextually dependent communicative intent (the instance).

14.7.3 Metafunction

The third global dimension in SFL is an expression of the idea that meaning and the means to expressing them can be divided into three functional categories. SFL refers to this aspect of language as *metafunction*. Any instance of language simultaneously performs three semiotic functions.

In this conception communication always performs three general semiotic functions simultaneously. Thus, when an individual communicates (linguistically), simultaneous meaning is always created within these different areas with different consequences. The three basic types of meaning are called *ideational meaning, interpersonal meaning* and *textual meaning* (Boeriis 2009, 37).

Very generally speaking, the *ideational meaning* in SFL refers to *construing experience* (Halliday and Matthiessen 2004, 29–30). This means that the *ideational metafunction* serves to represent elements of our experience and their relations. Very simply put, SFL provides the means to analytically label the functional elements of a text as *participants, processes* and *circumstances*. A *process* is a representation of *something happening*, a *participant* represents an entity involved in what is happening, and a *circumstance* somehow represents the setting.

The *interpersonal metafunction* serves to *enact interpersonal relations* (2004: 30) by supplying us with the communicative means to constitute and express the relations between the communicating parties. Any meaning in the text, which somehow strikes an intersubjective note in the relationship between the communicating parties, is interpersonal. This includes the text as a negotiation of the exchanged meaning, of offering or requesting and of intersubjectively expressing one's subjective stance towards the exchanged meaning through polarity and modality (see generally Halliday and Matthiessen 2004; Kress and van Leeuwen 2006[1996]; Boeriis 2009).

Finally, the textual metafunction supplies us with the structural means to construct a text as a cohesive combination of *ideational* and *interpersonal* meaning (Boeriis 2009, 38).

The failure of trademark doctrine to capture the differences in *style* of the apple marks of *Apple Inc.* and *NYC & Company Inc.* can thus be seen as a failure to acknowledge other kinds of meaning in the marks than the *ideational*. The apples, leaves, bites, stems and infinity symbols are all representations of elements of our experience with the world. They are the represented *participants* of the mere existence or *being there* that is happening, so to speak, in the marks.

Yet, the two representations of apples in the two marks are testimony to the fact that representational *style* can be very different. As stated in Sect. 14.4 of this chapter, to assign a *style* to a representation typically means that it conforms to some socially constructed convention. The term has also acquired a certain meaning of *degeneration* from the particular to the generic.

In the literature on multimodal social semiotics, the term *modality* has been adopted from linguistics and refers to 'the truth value or credibility of (linguistically realized) statements about the world' (Kress and van Leeuwen 2006[1996]). The multimodal social semiotics applies a modality scale, which compared with its linguistic predecessor is inverted. Here, the highest degree of *truth* or naturalism is assigned the highest degree of modality, whereas, in linguistics, modality increases as certainty decreases. In multimodal social semiotic modality is analysed in terms of *modality markers* by which the naturalism of a message can be increased or decreased. For the naturalism of colour, for instance, such markers could include *colour saturation, colour differentiation* and *colour modulation*. However, it is crucial to note that the social semiotic conception of *naturalism* is relative:

> Reality is in the eye of the beholder; or rather, what is real depends on how reality is defined by a particular social group […] Each realism has its naturalism – that is, a realism is a definition of what counts as real – a set of criteria for the real , and it will find its expression in the 'right', the best, the most 'natural' form of representing that kind of reality, be it a photograph, digital or otherwise, or a diagram. (Kress and van Leeuwen 2006[1996], 158)

In other words, high modality or naturalism is not singular. Conversely, there are probably as many ways to represent *unnaturalism* as there are social groups. The images in comic books, instruction manuals and pictograms are all examples of degeneration of the particular to a generic convention. But they are different conventions that base their representations on different qualities of the represented. Kress and Van Leeuwen might say that they have different *coding orientations* (2006[1996], 163). Neither apple in *Apple Inc. v. NYC & Company Inc.* can be said to be a high modality, photorealistic representation of apples, but of that fact does not necessarily follow that the individual nature of their respective low degrees of modality is the same.

14.8 What Is Missing in Multimodal Social Semiotics?

So, how can the differences in coding orientation of the two apple marks actually be discussed in a consistent way? Literature on multimodal social semiotics tends to focus on the way in which units of meaning are combined lexicogrammatically (Baldry and Thibault 2005; Kress and van Leeuwen 2006[1996]) but is less informative about the way the units of meaning themselves are constituted. The nature of the aforementioned *modality markers*, however, might reveal a path.

The general idea of the modality marker, which Kress and Van Leeuwen first presented in 1996, has since been further explored in relation to, for example, colour (Kress and Van Leeuwen 2002) and typography (Van Leeuwen 2005b) adopting Jakobson and Halle's (1956) *distinctive feature* approach:

> These distinctive features indicate, as in Jakobson and Halle's (1956) distinctive feature phonology, a quality which is visual rather than acoustic, and is not systematized, as in phonology, as structural oppositions but as values on a range of scales. One such is the scale that runs from light to dark, another the scale that runs from saturated to desaturated, from high energy to low energy, and so on. Again, in ways that provide echoes of Jakobson and Halle, we see these features not as merely distinctive, as merely serving to distinguish different colours from each other, but also as meaning potentials. (Kress and Van Leeuwen 2002, 355)

In other words, studies such as those of Kress and Van Leeuwen are beginning to reveal a possible methodology for describing what corresponds in a multimodal perspective on communication to Halliday's phonology stratum or *the expression side of the organisation of semiotic systems*. It is important to understand, however, that the pivotal point of this approach to distinctive features is *paradigmatic choice* rather than *syntactic structure*.

However promising this development may be, no studies of the distinctive features of *shape* have so far been undertaken. The final section of this chapter is an attempt at doing just that as such a descriptive scheme would have great explicatory power in cases such as *Apple Inc. v. NYC & Company Inc.* and *Dansk Supermarked A/S v. Net2Maleren*.

14.9 A Distinctive Feature Approach to Graphic Shape

Is shape doubly articulated? Does it make sense to regard *shape* as *made up of* units that are in themselves meaningless, but which can distinguish between meanings? In order to discuss the differences and similarities of the two cases in greater detail than trademark doctrine tends to, we need to better understand the meaning potential of *shape*. But what is *shape* anyway? Francis Ching states one definition of shape, which seems representative of most people's conception of the phenomenon:

> Shape refers to the characteristic outline of a plane figure or the surface configuration of a volumetric form. It is the primary means by which we recognize, identify, and categorize particular figures and forms (1996, 36).

Approaching *shape* analytically is extremely complex because any ascription of meaning to shape raises all sorts of perceptive, cognitive and semiotic issues. The example in Fig. 14.4 illustrates the point. What is the shape of this figure?

You could argue that it is a representation of trapezoid with no straight angles and no opposite parallels. Or you could argue that it is a representation of a rectangle, tilted in three-dimensional space or a black sheet of cardboard lying on a surface. All statements would be equally true. There are two aspects of *shape* at play in every message represented by shape: the shape that *is* and the shape that is

Fig. 14.4 A two-dimensional trapezoid or a rectangular sheet suspended at an oblique angle in three-dimensional space

Fig. 14.5 Two polygons or a cut-out pictographic man suspended in three-dimensional space

represented. In many cases these two aspects of shape converge, but, as in Fig. 14.5, not always. The shape of Fig. 14.4 is a trapezoid if regarded from a point of view of plane geometry, but we can just as easily (or maybe even more easily) perceive it as a rectangle, when we apply our experience with linear perspective. Different schools of psychology (e.g. Koffka 1935; Arnheim 1974[1954]; Gibson 1986[1979]) have pondered over the ambiguity of shape in order to discover the psychological truth of shape perception. Unfortunately, for our purposes, the controlled environments of experimental psychology have not allowed for the kind of complexity of shape, which is displayed in most trademarks.

For the next example, we shall raise the complexity level of shape, both in terms of *structural complexity* and *complexity of meaning*. Figure 14.5 illustrates a very common phenomenon: that of the ubiquitous pictographic man, represented in an uncommon way, as if it were suspended in space. Strictly speaking, the figure illustrates two polygonal shapes, one of which is a tetragon, the other a dodecagon, that combine into a functional *cluster* (Baldry and Thibault 2005, 21–34) of shapes. The point is that – regardless of what someone may take a given shape to stand for – it is also *just* an area in two dimensions or a volume in three dimensions. A transmutation (right) of the two elements, which makes it difficult to uphold an illusion of depth, helps us to appreciate the shapes for what they also are.

Further complexity is introduced when two different shapes refer to the exact same object. Figure 14.6 illustrates two different pictographic humanoids. One (left) is angular; one (right) is curved.

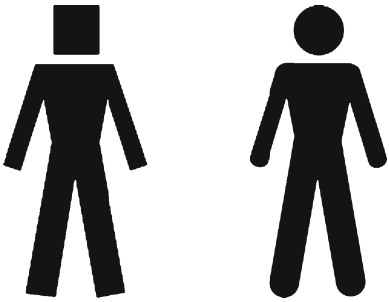

Fig. 14.6 Two pictographic humanoids that may or may not convey the same meaning

Functionally speaking, both would suffice to denote *men's room* in public places – especially when their value in a system of signs denoting different rooms (men's room, ladies' room, disabled's and so on) is evident in context – but of that observation does not necessarily follow that the differences between the two are meaningless. Someone, who had the two to choose from in decorating the rest rooms of a restaurant, would probably prefer one to the other. In other words, the differences would be distinctly meaningful to that person, even if putting words to their respective meaning would be difficult.

This raises the question of the nature of the difference in meaning of the two graphic instances in Fig. 14.6. Surely, it is not an ideational distinction. The difference does not refer to a quality of the object referred to, that is, the man denoted by (left) does not have a square head. Of course, one could think of possible contexts where such a distinction in meaning might be intended, for instance, if the producers of a science fiction show made a joke about rest rooms dedicated to humans and robots. But that is not the case made here. This means that, from a social semiotic point of view, only the first part of Ching's definition of shape applies. A necessary condition of shape is indeed that it is 'the characteristic outline of a plane figure or the surface configuration of a volumetric form'. However, to say 'it is the primary means by which we recognize, identify, and categorize particular figures and forms' does not seem to be an adequate condition because it only captures ideational categories of meaning.

Rather than distinguishing between ideational meanings, the differences between the two pictographic men are distinctions between interpersonal meanings in terms of modality. None of the representations are naturalistic, but their respective *unnaturalness* is subtly yet distinctly different. In *Reading Images* (2006[1996]), Kress and Van Leeuwen draw on Habermas, Bourdieu and Bernstein for their distinction between different *coding orientations*. By a coding orientation, they understand: '[…] sets of abstract principles which inform the way in which texts are coded by different social groups, or within different institutional contexts' (2006[1996]: 165). They proceed to enumerate *technological*, *sensory*, *abstract* and *naturalistic coding orientations*. These are very broad categories, and both pictographic men tend to fall into the *abstract coding orientation*, on which Kress and Van Leeuwen note:

> […] are used by sociocultural elites – in 'high' art, in academic and scientific contexts, and so on. In such contexts modality is higher the more an image reduces the individual to the general, and the concrete to its essential qualities. (ibid.)

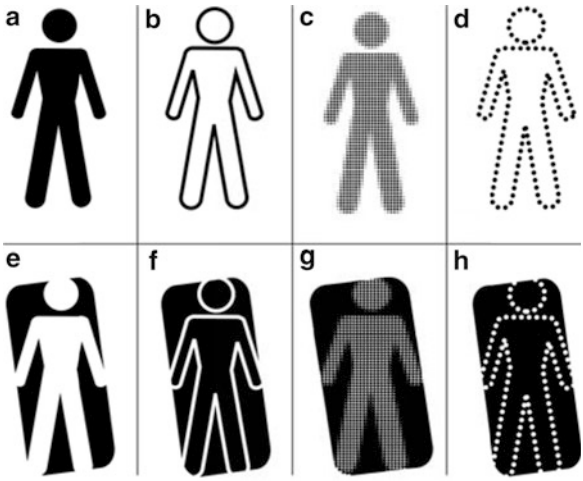

Fig. 14.7 Pictographic man-shape in eight permutations after positive/negative, stroke/fill and compounded/conjoined variables

This reveals that, although useful categories, Kress and Van Leeuwens *coding orientations* only have explicatory power faced with the pictograms in relation to other kinds of representations of humans. The differences between the two instances are too subtle for these categories to register.

A final example will reveal, for the time being, the last layer of complexity in the meaning potential of shape. If a shape, in Ching's words, is 'the characteristic outline of a plane figure or the surface configuration of a volumetric form', then any shape can be *realised* in a number of different ways, as illustrated in Fig. 14.7.

Figure 14.7 illustrates a tentative permutation chart with eight instances of the same pictographic man-shape, which was illustrated in Fig. 14.6. The permutations are based on three discrete variables: positive/negative, stroke/fill and compounded/conjoined. By no means is this an exhaustive inventory of the distinctive features of graphic form. It merely serves to exemplify the potential of such an approach in the forensic analysis of the visual gestalt of trademarks. The three distinctive features in Fig. 14.7 are as follows.

14.9.1 Positive/Negative

Usually, when we think of *shape,* we think of a *figure* as opposed to a *ground*. But, as Edgar Rubin demonstrated with his famous vase (Rubin 1915), positive shapes and negative shapes are equally meaningful. This is expressed in Fig. 14.7 by the fact that any of the positive realisations of the pictographic man (Fig. 14.7a–d) can also be realised as negative shape (Fig. 14.7e–h). Figure 14.8 further illustrates how Fig. 14.7e is comprised of four individual positives.

Fig. 14.8 Transmutation of the four positive shapes from 8e

14.9.2 Stroke/Fill

Any shape can be realised as a positive mass or merely as a representation of the spatial demarcation between positive and negative. Although others have reflected upon this relation in terms such as *character/stroke* (Stötzner 2003: 289), here the terms *stroke* for outline and *fill* for mass have been adopted from graphic software applications, as those are the terms actually used by graphic designers. Figure 14.7b, d, f and h are instances of the pictographic man as a stroked shape, whereas Fig. 14.7a, c, e and g are all filled.

14.9.3 Compounded/Conjoined

The final distinctive difference in the permutation chart is the compounded/conjoined distinction. The terminology is adapted from Kress and Van Leeuwen (2006[1996]: 97). Any shape, which can be realised as a compounded solid (e.g. the polygon of Fig. 14.5), can also be realised as a conjoined functional cluster of smaller, individual shapes. Figure 14.7a, b, e and f are examples of shapes realised as conjoined shapes, whereas Fig. 14.7c, d, g and h are all realised as compounded shapes. Worthy of note is the fact that any stroked outline of a shape can be realised in conjoined states. Any dashed or dotted line is an example of this.

Based on this *phonological* distinctive feature approach to graphic shape within a multimodal social semiotic framework, we now have a tentative descriptive scheme, which allows us to discuss in greater detail the similarities and differences between the marks in *Apple Inc. v. NYC & Company Inc.* and *Dansk Supermarked A/S v. Net2Maleren.*

As stated above, Apple's opposition against NYC & Company's apple logo is based on the fact that both designs incorporate similar ideational elements: an apple and a *stylized, detached and convex leaf element angled upwards*. Conversely, the marks of Dansk Supermarked A/S and Net2Maleren are quite dissimilar in terms of their ideational meaning. Dansk Supermarked's logo represents a sitting terrier, which holds in its mouth a basket by the handle. Net2malerens mark, on the other

hand, represents a selection of the tools of the painting trade: a ladder, a paintbrush, a tapestry brush and a bucket.[7]

The interesting aspect of these cases is not that trademark doctrine has found the marks of one case to be similar and the marks of the other to be dissimilar. Rather, it is the fact that the two marks with similar ideational content have been found to be dissimilar and the marks with dissimilar content to be similar. It seems, then, that in the sum total of meaning that is conveyed by the marks, the ideational meaning is secondary to the interpersonal modality of the marks. The two apples are distinctly different in the way they realise shape. There are certain similarities. Both shapes are positive shapes as opposed to negative shapes. And both are compounded shapes in that the fruit and leaf elements are structurally separated but functionally clustered. Most importantly, however, Apple Inc.'s mark is an example of a *filled* shape, whereas NYC & Company's apple is stroked in a way that is reminiscent of calligraphy. This distinctively differently realised feature gives an overall impression of the marks, which is unlikely to confuse consumers about the origin of goods or services referred to by the marks.

The opposite is true of *Dansk Supermarked A/S v. Net2maleren*. In this case, the shapes of both marks are realised as positive, conjoined and filled shapes. This convergence in the use of the modality resources gives an overall impression that is quite likely to confuse consumers.

14.10 Conclusion

Faced with the fact that there are aspects of the stylistic rendition of trademarks, which current doctrine cannot systematically account for, this chapter set out to inquire into the possible application of multimodal social semiotics in the forensic analysis of colliding marks.

In relation to trademarks, the explicative power of multimodal social semiotics largely rests on the detailed close analysis provided by the approach. This is due to the fact that multimodal social semiotics has inherited key theoretical tenets from its origin in Michael Halliday's systemic functional linguistics:

- The idea that a description of the systemic potential of a given semiotic system is best obtained from a perspective, which has as its focus the paradigmatic relations of the system, rather than a syntagmatic perspective.
- The idea that semiotic systems are stratified into *semantic, lexicogrammatical* and *phonological* strata that are embedded in a context stratum.

[7] This observation is supported by information in the Danish Patent and Trademark Office's database, which states that the figurative element in Dansk Supermarked's mark complies with Vienna class '03.01.08: Dogs, Wolves, Foxes'. In the case of Net2Maleren's mark, however, the database lists these elements: '14.11.01: Ladders, 19.01.04: Tins and cans, pails, watering cans Note: Not including hermetically sealed tins (19.3.1 or 19.3.3), 20.01.05: Paint brushes'. The 'Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks' was conceived in 1973 and amended in 1985.

- The idea that any instance of communication is the realisation of a systemic communicative potential. This idea is known in social semiotics as *instantiation*. Conversely, any instance of a semiotic system affects the underlying potential.
- The idea that meaning is functionally grouped into metafunctions known as the *interpersonal*, *ideational* and *textual* metafunctions.

However, the level of detail in the analysis provided by multimodal social semiotics may be in conflict with *the principle of global appreciation*, which is prevalent in trademark doctrine. The principle stipulates that any appreciation of trademarks in an assessment of likelihood of confusion should favour the whole at the expense of the detail. In order to determine whether this principle does in fact stand in the way of the aim of the chapter, the principle of global appreciation has been subject to inquiry. It turns out that trademark doctrine seems to

- Be based on a fundamentally semiotic conception of the trademark as a sign.
- Regard the perception of trademarks as having only one layer of articulation, the one at which the trademark is lexically coupled with its meaning.
- Only take ideational aspects of meaning in trademarks explicitly into consideration in forensic analysis. Other kinds of meaning tend to be treated in a far less systematic way.
- Generally disregard any social aspect of the event of confusion and rather regard it as singularly psychological. In Danish trademark doctrine, at least, this understanding has been handed down through two generations of trademark theoreticians and can be traced to the gestalt theory of, for example, Kurt Koffka. This raises the concern that Danish trademark doctrine has based its conception of the event of confusion on an incomplete application of gestalt theory, as the gestalt theoreticians themselves were acutely aware of social aspects, for example, symbols and language, of cognition.

In other words, this chapter finds strong indications that, provided that trademark doctrine can cater for a view of trademarks as instances of a systemic semiotic potential, a multimodal social semiotic approach to the forensic analysis of conflicting marks would have great explicatory power.

In order to exploit the full potential of a multimodal social semiotic approach to trademark analysis, the theory needs to be fully elaborated in areas that have hitherto not been paid much attention to, for example, the stratum, which corresponds to *phonology* in language. This chapter proposes to resuscitate attempts at regarding graphic form as doubly articulated, an idea which has been encouraged by the social semiotic paradigm's focus on the paradigmatic relations in the system rather than the syntagmatic. A tentative descriptive scheme for three distinctive features of graphic form is proposed and subsequently applied to the two cases in question. The approach reveals that convergence of visually conveyed ideational meaning is not necessarily decisive in the assessment of likelihood of confusion: In the two cases, the ideational meaning of apples, dogs and painting utensils is less salient than the respective coding orientations of the marks.

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Chapter 15
French Commemorative Postage Stamps as a Means of Legal Culture and Memory

Anne Wagner and Malik Bozzo-Rey

> Science may, without absurdity, be called a monster, being gazed at and admired by the ignorant and unskillful. Her figure and forme is various, by reason of the vast variety of subjects that science considers; her voice and countenance are representated female, by reason of her gay appearance and volubility of speech: wings are added because the sciences and their interventions run and fly about in a moment, for knowledge like light communicated from one torch to another, is presently caught and copiously diffused; sharp and hooked talons are elegantly attributed to her, because the axioms and arguments of science enter the mind, lay hold of it, fix it from, and keep it from moving or slipping always.... Sphynx has no more than two kinds of riddles, one relating to the nature of things, the other to the fable: when Sphynx was conquered, her carcass was laid upon an ass; for there is nothing so subtle and abstruse but after being once made plain, intelligible, and common, it may be received by the slowest capacity.
>
> (Sir Francis Bacon 1922, 138)

Abstract This chapter will explore the way that French stamps (intermedial texts) over the last two centuries reflect the problems of constructing national identity in a small country with rich and heterogeneous cultural, legal backgrounds. Taking the Peircean principle of the triadic structure of semiosis as a theoretical frame, this chapter focuses in particular on the role of historical, cultural and linguistic interpretants

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in the reading process of stamps. The classification and interpretation of 'intermedial texts' (i.e. texts combining words and images) depend on the point of view taken in the context of communication, which implies either the production or the reception of such texts. Production is in some cases simultaneous (posters, comic strips, advertisements) and in others consecutive (art criticism, ekphrasis, illustrations). The reception of an intermedial text is mostly simultaneous (illustrations, posters, advertisements) and in some particular cases (art criticism, ekphrasis) consecutive. Based on these criteria – simultaneity and consecutiveness – a distinction can be made between different degrees of interweaving word and image in intermedial discourse. A third criterion, that of distinctiveness (i.e. the physical possibility of separating word and image), can be applied. The commemorative stamps, almost always an intermedial discourse, demonstrate perfectly the descriptive power of the theory proposed here, at the same time as it illustrates the specific artistic creativity evident in each stamp. An analysis of word and image relations in a corpus of contemporary French stamps supports the validity of the categories of intermedial discourse suggested and the possibility of combining them in a single commemorative stamp.

15.1 Introduction

This chapter will explore the way in which French stamps over the last two centuries reflect the problems of constructing national identity in a small country with richly heterogeneous cultural and legal backgrounds as intermedial texts. Taking the Peircean principle of the triadic structure of semiosis as a theoretical framework (Peirce 1931–1958), the chapter focuses in particular on the role of historical, cultural and linguistic interpretants in the reading process of stamps. The classification and interpretation of 'intermedial texts' (i.e. texts combining words and images) depend on the point of view taken in the context of communication, which implies either the production or the reception of such texts. Production is in some cases simultaneous (posters, comic strips, advertisements) and in others consecutive (art criticism, ekphrasis, illustrations). The reception of an intermedial text is mostly simultaneous (illustrations, posters, advertisements) and in some particular cases consecutive (art criticism, ekphrasis). Based on these criteria – simultaneity and consecutiveness – a distinction can be made between different degrees of interweaving word and image in intermedial discourse. As a result, a third criterion, distinctiveness (i.e. the physical possibility of separating word and image), can be applied. The commemorative stamps, almost always an intermedial discourse, demonstrate the descriptive power of the theory proposed here while at the same time illustrating the specific artistic creativity evident in each stamp. An analysis of word and image relations in a corpus of contemporary French stamps supports the validity of the categories of intermedial discourse and the possibility of combining them in a single commemorative stamp.

15.2 Semiotics and Hermeneutics: Concepts and Methodology

15.2.1 A Semiotic Approach

Law is a system of signs that enables the lawyer, the linguist, the reader and even the viewer to analyse the public space in a semiotic sense. Signs pertain to the verbal and nonverbal sign systems with the visual aspects of signs resembling a web (Eco 1976), an open texture (Hart 1976) and/or a prism (Wagner 2004). They have plurality in meaning (Bhatia et al. 2005) and are situated in flux spaces (Wagner 2011). Rich in terms of connotation, the sign systems of law bear hidden messages and have no direct connections to legal reality. These visual signs form part of what we could consider an abbreviated sign system, which needs to be decoded and repositioned within a specific context. Because nonverbal communication is dynamic and multidimensional, the construction of a visual medium is designed to yield meaning through hermeneutic and historical deciphering. Consequently, substantial analyses that uncover the multiplicity of layers in meanings as well as their variability in terms of cognition, recognition and interpretation from a specific community are a must. Such a dynamic is parallel to that of society, in terms of popular knowledge, background and understanding. Therefore, a synergy of the conceptual imports and the discovery of shared values and properties compels exposure. This synergy between identity, function and representation draws attention to the visual dimension on the one hand and to the conveyed ideological convergence on the other hand. This move seeks to formulate inclusive, interdisciplinary and even permeable perspectives:

> The real, then, is that which, sooner or later, information and reasoning would finally result in, and which is therefore independent of the vagaries of 'me' and 'you'. Thus, the very origin of the conception of reality shows that this conception essentially involves the notion of a community, without definite limits, and capable of a definite increase of knowledge (Peirce – Note 10, vol.2, 228).

Peirce relates to the sign as a *representamen*:

> A sign, or representamen, is something, which stands to somebody for something in some respect or capacity. It addresses somebody, that is, creates in the mind of that person an equivalent sign, or perhaps a more developed sign. That sign which it creates I call the interpreter of the first sign. The sign stands for something, its object. It stands for that object, not in all respects, but in reference to a sort of idea, which I have sometimes called the ground of the representamen. (Peirce: note 10, vol. 2, 228)

One innovative aspect of our present study is to reveal the connections and consequential relations inherent to the notion of a visual sign system and its role as a 'shaper' of identities. Three foci include (1) the meaning, sense and resource of nonverbal communication; (2) the criteria featuring the forms of symbolic representations; and (3) the various pictorial representations used for that specific purpose. The cultural aspect of identity is promoted with a strong visual image of the community. As such, notions of community and of belonging are enshrined and protected through the use of such sign systems. As exposed by Danesi (2004), 'a community is essential because it demonstrates semiotic relevance through its

unity of interpretation and experience'. Kevelson (1988, 22) gives another dimension when she states that:

> All human societies have developed complex systems of both verbal and nonverbal sign systems which are not static but which evolve continuously to correspond with and to represent changing social norms and the evolving, growing social consciousness of any given community.

The community is composed of people having variable knowledge. So the nonverbal sign system needs to strive to communicate and encapsulate this variability through several visual layers. Visual structures are often mythic and archetypal and work at historical and ideological levels with variations in forms of symbolism (pictures, colours, designs, texts, etc.):

> Every myth is still a kind of configuration of reality. As the expressivity of the world, it necessarily involves its metamorphosis, its transformation into an image. (Coskun 2007, 141)

The semiotic modus operandi appreciates surface and underlying levels of communication (Barthes 1970; Danesi and Sbrocchi 1995). Nonverbal sign systems lead us to consider the trichotomy of visual communication:

> When we think, then, we ourselves, as we are at that moment, appear as a sign. Now a sign has, as such, three references: first, it is a sign to some thought which interprets it; second, it is a sign for some object to which in that thought it is equivalent; third, it is a sign, in some respect or quality, which brings it into connection with its object. (Peirce, vol. 5, 238)

In our present study, stamps create a web of plural meanings and lead to an encapsulated visual sign system – codification. The symbolic forms deriving from stamps reveal icons, indices and symbols and subsequently relate to three types of structures (Greimas and Rastier 1968; Wagner 2011) or three levels of language: the *ideational*, *textual* and *interpersonal* levels (Halliday 2003). Stamps convey processes of communication, of exchanges and of affects where the intellect, the mind and the culture of the interpreter (the receiver if we refer to the Saussurian terminology) are being stimulated. They cohere thematically in order to weave and project the message as in our present study, the commemoration of historical French events. These stamps can be analysed and interpreted according to the nature of shape (ref. to superficial structure), aesthetics (ref. to structure of manifestation) and ideology (ref. to the deep structure) if we apply the concepts developed by Greimas and Rastier (1968). Visual signs have potential significations. They are fragments of the 'living reality' (Gény 1922). The role of the interpretant is to read the dynamics in order to transpose a potential meaning into a manifest reality; consequently, he is a manager of meanings who serves to fill the gap between the observable and the understandable, between the visible and the invisible, between the said and the unsaid.

15.2.2 Hermeneutic Approach's Contribution

Following the method taken by David Scott (Scott 2002a, 5–8), we think it could be worthwhile to develop a semiotic approach with hermeneutic flair. Context

and interpretation will then be at the core of our analysis. Hermeneutics, from 'hermeneutikè' (Greek word meaning art of interpretation) and from the name of Greek God 'Hermès', who was messenger and interpreter of God orders, can be understood as a theory trying to disclose what is lecture, explanation and/or interpretation of texts. There are two kinds of hermeneutics. Philological hermeneutics considers ancient texts as having a specific meaning that could be found in studying the circumstances in which they appear. Philosophical hermeneutics, on the other hand, investigates the transcendental conditions of every interpretation. For example, Michel Foucault considers hermeneutics as '[the] whole body of knowledge and techniques which enables us to make signs visible and discover their meaning' (Foucault 1966). Philosophical hermeneutics and semiotics are then deeply and clearly linked. They develop a specific methodology that supports an analysis of commemorative postage stamps.

Paul Ricœur's account of hermeneutics insists on the idea that to define clearly what is hermeneutics, we have to keep in mind that understanding uses signs, symbols and texts as media; hermeneutics is then the 'doctrine of comprehension and interpretation of written and spoken speeches which have a meaning or make up a system of meanings' (Ineichen 1995). Therefore, the science of interpretation could be summarized as 'the working thought which consists in deciphering hidden meaning in visible meaning, developing the levels of meaning implied in literal meaning' (Ricœur 1969, 16). It aims to unveil and decode indirect references and multiple levels of interpretation: 'The body of double-entendres really makes up the hermeneutic field' (Ricœur 1969, 16).

What is at stake is then to interpret hidden meanings at work within texts and symbols, supposing there is some sort of pre-understanding fused with interpretation. Ricœur's earlier statement has three consequences: (1) Plurality of meanings belonging to a symbol can only be unveiled through interpretation, so hermeneutics and symbols are deeply linked; they are necessarily co-dependent. (2) Hermeneutics goes beyond symbol because symbol extends beyond meaning. A text then reveals a fundamental specificity of historicity belonging to human experience (Ricœur 1986, 137–138). Every word has a referent and a peculiar manner to deal with the world. Interpretation is also a means to understand oneself. (3) The interpretative process consists in constructing meaning, which is at the same time a way to construct the self (Ricœur 1986, 83). Interpretation is actualized through an appropriation of meaning in conjunction with this last process. Therefore, understanding the self and appropriating of meaning are contemporaneous with subjectivity and objectivity linked within interpretation (Aguirre 1998). The interpretant becomes part of an interpretative tradition that preconstructs his universe of meaning. Ricœur can then present hermeneutics as a 'chain of interpretations built by the interpreting community and included in the rhythm of the text as the work of meaning on itself. Within this chain, the first interpretants represent tradition for the last interpretants who embody interpretation itself' (Ricœur 1986, 158). Hermeneutics allows us to reactivate 'the meaning of the text from the angle of a series of interpretants' appropriations' (Avonyo 2009).

This chapter focuses on commemorative stamps as a new object for hermeneutic study. Potentialities of such an approach can be summarized as follows. Hermeneutics insists on the symbolic dimension of commemorative stamps even if it also sheds light on the understanding process needed by an interpretation. What is new is the possibility of unveiling meaning in the several levels of signs contained in the delimited space of a commemorative stamp. We already noted how a dynamic constitution of meaning is correlative to a construction of the self requiring an appropriation, but we should also notice how such an appropriation implies the reference to a common cultural space, which in turn is reactivated by the interpretant. Consequently, the main characteristics of commemorative stamps are identified. One of the points is indeed to understand the context in which stamps are issued. Another is to identify the multiple levels of meaning linked to a heterogeneity of signs within stamps and to analyse their message. This point can only be clearly understood if it is contextualized through an interpretant. Lastly, we will focus on the way by which the constitution of meaning develops the construction of an individual or collective/common/shared identity. Such an identity refers to a shared significant space, which could be historical, cultural or symbolic.

15.2.3 Stamps as Bearers of Memory and Identity

French commemorative postage stamps support both voluntary and discreet actions from the state in highlighting some historical key events involving the constitution of the French Republic (Stamp 5) and the creation of the French Civil Code (Stamp 1). They are 'windows of the State that illustrate how [they] wish to be seen by [their] own citizens and those beyond [their] boundaries' (Brunn 2000, 316). They are valuable instruments and also strong visual statements where they discreetly celebrate the French advances in the multicultural composition of the French Republic on national, European and international settings.

Stamps are the 'paper ambassadors' (Altman 1991) or 'refuges' (Nora 1984) of the French national identity, whereas others considered them as 'ideal propaganda' (McQueen 1988, 1). Visual communication is conditioned by the cognition and recognition of the interpretants of such supporting *media*. These interpretants need to construct a relation between past historical events and the conveyed visual means in order to 'overcome a quite modern kind of fragmentation and loss of identity' (Fishman 1972, 9). Indeed, the perception of French history is incomplete 'as the essence of a nation is that all individual members have many things in common and all have also forgotten many things' (Renan 1947, 891). Consequently, the social and cultural equilibrium has to be re-established between the sender and receiver of the message under the visual mode of communication. Nora (1984, xxv) proposes that the poorer the individual memory, the more external signs are needed to revive it. As a result, there is an interplay for interpretants between the visual and interpretative perspectives of commemorative postage stamps. The tangible point of articulation remains 'vagueness' (Williamson 1994), 'a set of

different legal landscapes' (Vanderlinden 1987) and 'a multilevel law' (Tierney 2006) where multiplicity and fragmentation may affect the signification of the intended meaning:

> The meaning of a representation can be nothing but a representation. In fact, it is nothing but the representation itself conceived as stripped of irrelevant clothing. But this clothing never can be completely stripped out, it is only changed for something more diaphanous. So there is an infinite regression here. Finally, the interpretant is nothing but another representation to which the torch of truth is handed along; and as a representation, it has its interpretant again. (Fish 1980, 492)

The 'ongoing discursive negotiation of what it imaginatively means to be a member of a Nation' as 'a national identity is not simply a narrative or set of narratives' (Bruner 2002, 7). The role of the artist commissioned by the state will then be to bring to the forefront a multiplicity of visual elements rooted in French history. Nora (1984, xxxv) notes that there is a need to encapsulate the maximum of meanings in a minimum of visual signs. The artist will focus on the 'ethnocultural characterization and on the authenticity, purity, and mobility of the beliefs, values and behaviours that typify the community of reference' (Fishman 1972, 8). These exchange processes operate at different levels where the key visual elements representing the French nation cooperate to negotiate and find transitional spaces:

> We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*. Interlegality is the phenomenological counterpart of legal pluralism, and a key concept in a postmodern conception of law. (Santos 1995, 473)

15.3 French Commemorative Stamps and Their Specificities

Stamps resemble a theatre scene where, when the curtains open, the viewer can see many semiotic representations on the stage. Stamps convey a triadic dimension, that is, index, icon and symbol. The index points to the country of reference, the icon depicts the graphic historical reference (i.e. national characters, emblems, an important event, a historical place, etc.), and the symbol provides the element of useful information (i.e. name of the country, commemoration day or name, artist's name, name of the postal service and year of issue). If we apply the structures of representation given by Greimas and Rastier, we can give complementary information under three perspectives: (1) aesthetics (commemorative stamps show the artist's work of art and reflect one 'material fragment of this reality' (Mikhaîl 1987, 27). This element is extracted from its context and is exposed to give prestige to the French Republic), (2) symbolism (the means of representation are chosen to federate 'the historical sentiment of a people' (Snyder 1976, 43)), and (3) ideology (commemorative stamps show 'the nobility of the beliefs, values and behaviours' (Fishman 1972, 8). The means employed in this third perspective stress the ethnocultural characterization of a people).

Decoding this trichotomy requires sensitivity to the cultural and legal environments; subsequently, the connotations of value and belief systems and symbolism ensure conformity to French history in the applied icons, index and symbols. The coding and even decoding govern the selection of forms as contents consisting in multiple layers within the stamp. The communicative strategy facilitates the differentiations in terms of historical evocations, manners and modes of presentations and considers this form of transmission as an intermedial discourse, the 'icono-textual discourse' (Hoek 2002, 35), in which both verbal and visual elements are combined and even overlapped. This strategy includes two layers of analyses. The first layer involves the verbal communication of the stamp in which different means avail different approaches in the form of elements and styles setting the commemorative event under the past space and time framework. The second layer synthesizes the various approaches tackled in the first layer under a visual perspective and thus creates optimum impact and awareness by the interpretant about the actual space and time framework.

15.3.1 Stamp Specificities

The stamp is an object of everyday life. We can find it everywhere in the world either for internal or external sending within a country or to a foreign country. It is essentially double in meaning as one of its specificities is to be at the meeting of several – complementary or opposite – requirements. This relationship of internality/externality is constitutive of the semantic object known as the 'stamp'. One of the most striking things in the material form of a stamp is its narrowed and limited space, as its perforations along its borders reveal both its use and the possibility of an unfinished space in perpetual junction. Ironically, the limited boundaries of its graphical space correspond to potential unlimited multiplicity of its meaning(s).

As an everyday life object, a stamp can be used in two ways. First, it is commonly sent as part of millions of objects used by people. However, it can be turned into a collector's item for its value and status change radically. This change comes from the fact that a stamp is essentially dualistic in aim, as both expressive and poetic. It is on the one hand a simple – but necessary – tool used to send mails, cards or parcels and, on the other, an aesthetic and meaningful object. It has an intrinsic value (price for sending) and an extrinsic one (providing meaning and being a piece of art).

Let us go back to this point later, but we can already assert its meaning as a key to understanding the history of a specific country. This is why the stamp is closely studied by historians, ethnologists, sociologists and aesthetes. This tension between meaning, art and usefulness is also what justifies stamps as collector's items. Nevertheless, stamps attempt to express values from issuers while aspiring to propose an artistic representation. In this way, the stamp is part of a specific time and reflects values of the society in which it is issued, even if they are not effectively uniform or representative (Scott 1997, 305). Value is a very important question here since stamps are a

nodal point between values and norms. Let us be more specific to say that stamps aim to promote some values and, through this promotion, attempt to impose a peculiar image or discourse. The stamp is at the same time axiological and normative as we can find here an expression of the relation between norm and value (Debray 2001, 28).

Whoever issuing stamps is interested in such a representation insofar as such object*s* used express it as legitimate. A stamp is legitimate because it is an iconic rhematic legisign, that is, a sign that is a law, a sort of ideogram, issued by an official authority ('La Poste'), commonly shared and used by a wide range of people. Once again, we can observe that the stamp has a dual nature, which is also one of its specificities: It is characterized by its source and its addressee(s). There is a kind of evidence attached to the stamp, a sort of instant recognition concerning its source and its function. These are unquestionable facts. What should stimulate our inquiry is the relationship between issuer and receiver. What kind of information does the stamp convey? What kind of tools could it use to convey such a message?

In considering the tension between expressive and poetic aims, let us take the example of Stamp 6, designed by Jean-Michel Folon. This stamp marked the beginning of Bicentenary of the French Revolution celebrations. It is a commemorative stamp that allows Folon to make use of collective memory or symbols rather than real and precise elements. It is indeed a true piece of artwork. Jean-Michel Folon is a Belgian artist renowned for his penchant to paint wide watercolour gradations and characters with schematic outlines and a lost expression. They seem to be wandering, to be sort of weightless within large bare landscape. His work expresses deep questioning from occidental society. He is also a strong defender of human rights. The choice to use his design for such a commemorative stamp is definitely not a coincidence.

We can find in this stamp the whole elements characterizing French Revolution values, that is, the double trinity, blue-white-red and Freedom-Equality-Fraternity, enshrined in the French Constitution, article 2. They are cleverly represented: a daring gradation from blue to red with a light white as a transition. Characters conveying information are in white letters. There are three famous birds – official emblem for bicentenary communication – symbolizing the three values quoted above and the joining of the three colours of the French Revolution. A closer look reveals these three birds to be actually one bird symbolizing Fraternity but also the indissociable nature of the three fundamental values of the French Revolution. Their identical size expresses Equality as they seem to fly towards the outside of the stamp, a move symbolizing Freedom. Expressive and aesthetic aims are not in opposition, but they rather are in symbiotic appeal to the spectator's (the interpreter's) intellect and feelings. The resultant heterogeneity of signs, peace, calmness and simplicity emanates from these images reinforcing the strength of the ideological message conveyed by this stamp. To commemorate the Bicentenary of the French Revolution, Folon uses a bird motif with a white outline on a blue and red sky; he then turns it into a symbol of the French Republic and sign of democratic freedom (Scott 2002b, p. 58).

Beyond its apparent simplicity, there is a deep complexity corresponding to numerous functions of the postage stamp. Firstly, it uses symbols (words and numbers), which indicate the issuing country and its monetary value. Secondly, it is an icon

because of the symbolic image within its narrowed space. By adding an additional icon (character, site or event), a stamp becomes an object of commemoration, that is, a commemorative stamp. It is then the site of several functions as the postage stamp is structured in semiotic levels reflecting these same functions. Official function cannot be separated from underlying ideological messages expressed by the heterogeneity of signs found on a stamp. The language specific to philatelic symbolism is infinitely flexible and can propose some new and complex articulations, such as elements organized in several layers, encroaching images and the mixing of heterogeneous signs. The material frame of stamps is also very flexible in accommodating the message desired by the issuer (Stamps 2, 3 and 5).

15.3.2 Representation and Communication

The artist uses different ways of presenting commemorative events as a way to affect the interpreter. The main goal is to lure the viewer's attention, therefore leading to the adoption and recognition of such presentations. Intermedial discourse brings together the properties of the scenic art and accompanying linguistic layers. The scenic art primarily depends on the artist's imagery to show as many visual layers as possible, while the linguistic aspects lead to a repetition of the visual layers (Scott 1995). Every single space is pervaded with signs. Nothing is neutral as even the smallest and least visible sign gives cohesion to the commemorated events.

Stamps move between abstraction and concreteness. The projected idealization is extracted from its context and leads to assimilation by a broad spectrum of interpretants. Techniques applied in the conception of commemorative stamps package macro and micro sign systems. These techniques are dynamic processes in the sense that they can be interpreted differently pertaining to the elements the interpretant considers. It then facilitates the differentiations in the evocation of the event, manner and mode used for that purpose. These techniques can be categorized into three aspects: play on colours, verbal elements and pictures. They involve the design and meaning in the narration of an event and form the basic common denominator. They facilitate capture through the interpretation of French identity. The artist not only plays on the background but also on the forefront of the stamps.

Stamp 1 evokes the preparation of the Civil Code in 1800–1804 where the artist – Decaris – uses the three historical colours in more or less visible layers. The first layer, which is the most striking, uses blue. Its interpretation can be twofold as the simplest interpretation reveals a clear blue sky where the two main characters – Napoleon representing the French State and Félix Julien Jean Bigot de Préameneu representing the law (the book in his hands letting us understand he is one of the writers) – peacefully collaborate to draft the Civil Code. The deepest meaning is linked to the way it expresses French identity, as we can find the three French colours (blue, white and red) but very lightly and subtly painted. The second colour is red and appears in a less visible way. One of the strategies is to use *light* red in order to make sure it appears second – in terms of a layering effect – within the

stamp. Red is the colour of the revolution and both characters are drawn using light red; they are key figures following the French Revolution period and the drafting of the Civil Code. So, red characterizes the turning point, that is, the end of the Kingdom of France and a new era for France with the creation of the Republic and the drafting of the Civil Code. The least visible colour remains white, which plays the transitory role between the two other colours. It is hardly distinguishable (see also Stamps 2, 5 and 6). The artist not only plays with colours but also with the words that are being emphasized with such colours. Indeed the key elements of the French Revolution and the drafting of the Civil Code are brought to the forefront with such a technique as shown in Stamps 2, 5 and 6. Stamp 2 was issued in commemoration of the Bicentenary of the French Revolution and the Declaration of the Rights of Man and of the Citizen written by the Marquis de Lafayette and approved by the National Assembly in August 26, 1789.[1] There is a play between the two main colours and two tints: light blue/red vs. dark blue/red. Both of them are treated equally. The background uses light tints to show the three main aspects of the French Republic, whereas the forefront privileges dark tints and visually emphasizes the key words in blue and key dates in red. The key date – 89 – in dark red is a strong visual statement. The verbal elements are also crucial in that they give the interpretant additional information on the key events being dealt with (see also Stamp 5). Indeed, 89 is really interesting as it shows that the artist emphasizes the last two digits. 89 remains vague, out of space and time, and could be deciphered as either 1789, 1989 or could even bear both meanings.

The scenic art shown in Stamp 3 brings another dimension to the study of commemorative stamps. Indeed after the dark period (the revolutionary period) represented with dark clouds and moving out from the scene, the light comes out again under the eyes of justice with a mix of colours – white and yellow. One character representing fraternity and equality with red and blue clothing unchains herself from the past and looks for new directions – the angel, freedom, pointing her finger at the sacred Tables of the Declaration of the Rights of Man and of the Citizen proclaimed after the French Revolution as shown by the sword in the middle of the tables with the Phrygian cap on top of it. Victory is expressed with the laurels in green, positioned as if they were curtains as they show new directions to the new French Republic, enshrined in the Preamble of the French Constitution of 1958. The Phrygian cap is viewed distinctively with the commemoration in particular consideration. Indeed in Stamp 2, the cap is being considered through two perspectives,

[1] The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect or contempt of the rights of man is the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable and sacred rights of man, in order that this declaration, being constantly before all the members of the social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected; and, lastly, in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all.

blue and red, merging together, whereas in Stamps 3 and 5, it has only one visual colour meaning – that of the revolution. Deciphering stamps is like being an expert in precious jewels where the interpretant uses a magnifying glass to see all the details. The artist draws the same effects as the technique of inclusions. A small detail is visible within the Phrygian cap where a small inclusion of the Eiffel tower is inserted to position the stamp under the correct context: France (see also Stamp 5).

Stamp 5 refers to the revolutionary period and the artist still uses blue and red. However, the technique of the artist is distinctive. Indeed these colours are only used with verbal elements. The revolutionary period is highlighted in red with the names of the two events at the bottom, and blue is used to emphasize the decisive change in governing the country. If we now turn to the picture itself, only black and white are used. Black still marks the dark and bloody period of the revolution. White is to the left of the weapons and emphasizes the fights in the street, whereas on the right, it would represent light and wisdom.

15.3.3 Commemoration: Space and Temporality

The stamp has the possibility to turn heterogeneous spaces into one single space, to be a place that does not exist but can represent real places and different temporalities in one single space. In other words, it creates fictions, as it gives substance to one or several fictitious spaces joined to one or several fictitious temporalities. This fictitiousness belonging to the stamp refers to its material existence used by a given community for everyday purposes. The fictitious process at work here comes from representation or from what the stamp brings to view.

For example, Stamps 2 and 3 are autonomous and independent; they can be understood individually, but their very meaning appears when they are considered as a whole, that is, including other stamps but also the paper surrounding them. Here, the whole is much more than the sum of its parts. Now, what is at stake is the re-creation of the fiction of a collective entity enduring for a long time and from whom one could claim to be a part of. Representing the French Republic, understood as a collective identity untemporal and unspatialized but one we hope to be able to temporalize and spatialize, consists in indicating its endurance in time and its materiality in space. The commemorative stamp is this other space fictitiously created to make real something that, by definition, cannot be. It succeeds in combining space and time into one fiction put into reality and then everyday life. In other words, the specificity of a commemorative stamp is to give substance to a past reality in a particular space so that a present reality can be created. A collective identity can only be constructed by adding temporality to spatiality. Stamp 2 allows the embodiment of values, seeking to turn these values into some kind of necessary reality and to turn that into norms.

While there is no doubt concerning the ideological value of a commemorative stamp, we should notice what kind of process is at work. The point is to render alive a past event through its present representation, which can only be a representation

in a present space of something that has already happened in another time. Stamps 2 and 5 are perfect examples of this construction. In Stamp 5, the postage stamp reconciles two incompatible extremes: the past event it represents and the event of its existence right here, right now. In Stamp 2, the trinity (Liberty, Equality and Fraternity) shows that (1) 'no section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof (French Constitution of 1958, article 3), visualized by a monster being killed by Liberty, and (2) the 'Government of the People, by the People and for the people' (French Constitution, article 2) shall ensure equality of all citizens (expressed with the scale of justice) and shall afford protection to all citizens 'without distinction of sex, class or race'[2] as shown with white and black children. This function of actualization is fundamental.

The fictitious process at work in the commemorative stamp has only one aim: to create a unity from a multiplicity. This can only be achieved through symbolization. One should render visible a totality by essence invisible, needed to be embodied to be seen, to be symbolized before being loved, to be imagined before being conceived. But such a unity built from a multiplicity is based on the idea that individuals composing it are no longer discernible. This is exactly why we should speak of totality rather than multiplicity. This totality would substitute for individuality. The figure of Marianne can be interpreted in this way since it is only a figure insofar as it subsumes under its totality all French women; it allows no personal or individual projection and this is precisely why it could become the symbol of the Republic.

15.4 Identities and Values (Practice)

15.4.1 Commemorative Stamps

Our last point concerns the commemorative stamp as a way to convey values. Its message is based on a mixed discourse acquiring a meaning through the complementarity between text and image. Let's go back to Stamp 6 and have a closer look. We can detect several elements: the country from where it comes (République française – French Republic), postage (2, 20), its motive (Bicentenary of the French Revolution) and year of issue (1989) with the public institution issuing stamps (La Poste). While these indications are only words and texts, they are combined with an image illustrating the reason of its issue, such as the three birds drawn by Folon. Folon's use of colours is also important and noticeable as the entire text is written in Arial white and the motif is composed of three colours, blue, white and red, with blue and red prevailing. White texts inserted on gradation of blue and red

[2] French Constitution of 1958, article 1 stipulates that: France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

are then highlighted, emphasizing the reason of issuing such a stamp in bold and italics. The meaning of this stamp is then presented as a mixed discourse combining image and text. We can then speak of a multimedial discourse amalgamating one single work in two distinct discourses. The first one, verbal, is inserted into the second, which is visual.

One last point, we said earlier the commemorative stamp conveys values. To do so, it is necessary to ensure its message is well received. Pierce (1931–1958) showed clearly the semiotic process is based on a triadic relationship between a representamen (first), an object (second) and an interpretant (third). The stamp, as a representamen, is part of a process called semiosis. The representamen can only convey meaning if it is accompanied by interpreters, for they allow interpreters to reach the object of sign: meaning. In other words, it is something representing another thing but not in relation to knowledge; before being interpreted, the representamen is a pure potentiality.

As an object open to analysis, it has three aspects: iconicity, indiciarity and symbolicity. But a stamp has a specific role; neither icon alone, indication alone nor symbol alone can exist without interpretants. Because a stamp needs all its aspects to be perceived and understood to function, the stamp, and more specifically the commemorative stamp, needs context to be taken into account to convey its meaning. It implies something like a collective memory or conscience: a covenant, an agreement and a cultural and historical common knowledge allowing some historical events to be recognized and identified as a representation of the French nation.

15.4.2 Building a Common Memory: The Identity of the French People

The typical qualities considered of identity generally include age, race, class and gender. In the present study, the identification of French identity employs culturally specific colour codes and historical key figures that conceal assumptions about members of the French people. The history of our people narrates negotiations for power and resistance to the influence of the former French Kingdom. Bennett et al. (2005, 172) define identity as ‘the imagined sameness of a person or social group at all times and in all circumstances’.

The French flag – known as ‘Tricolore’ – is associated with the revolutionary period and later with Imperial France. The three colours in vertical stripes were first used on Naval flags in 1790 and extended to the nation in 1794. The French National Convention adopted the modern blue–white–red flag as the national flag on 15 February 1794 (27 pluviôse an II) even though it was not applied. The relevant part of the decree stipulated that:

> The national flag shall be formed of the three national colours, set in three equal bands, vertically arranged so that the blue is nearest to the staff, the white in the middle, and the red flying.

The *Tricolore* was no longer of use after Napoleon's defeat at Waterloo. It was replaced by a white flag (the old royal flag) from 1814 to 1830. The Marquis de Lafayette re-established the *Tricolore* as from the July revolution of 1830. The constitutions of 1946 and 1958 (article 2) instituted the 'blue, white and red' flag as the national emblem of the Republic. There are several ways of analysing the colours of the French flag, but the most established ones are that (1) they are believed to be derived from those of Paris (blue and red) and the Bourbon Dynasty (white); (2) they are usually associated with the ideals of the French Revolution – that is, Liberty, Equality and Fraternity (Stamp 2) – and enshrined in the French Constitution, article 2; and (3) they derive from heraldic traditions with (a) *white* symbolizing the clergy, peace and honesty; (b) *red* representing nobility, strength and pride in wartime fighting for liberty; and (c) *blue* showing vigilance, truth, perseverance and justice.

Today, the French flag enshrined in the French Constitution is flown on all public buildings for special events and/or ceremonies but is also used as an ambassador, an official representative of the French identity in French stamps with more or less colour shade (Stamps 1, 2, 5, and 6).

15.4.3 Transmission of Republican and Democratic Values

If we just insisted on the commemorative stamp's capacity to transmit values, we need to go back to our case: stamps commemorating the French Revolution. They are indeed designed to transmit some specific values: those from the French Republic and subsequent democracy. Strongly ideological and political, they are like 'little windows full of ideology' (Brunn 2000, 316). Knowing this and their function, we should investigate these transmitted values: Which are they? What are their sources? As underlined by Brunn, 'stamps are products of "windows" of the state that illustrate how it wishes to be seen by its own citizens and those beyond its boundaries' (Brunn 2000, 316).

This is particularly clear in the case of Stamp 3, which associates the French Republic and the Declaration of Human Rights as stipulated in the Preamble of the French Constitution of 1958.[3] We should even say that this stamp identifies the French Republic to the Declaration of Human Rights. Even if it is divided into four

[3] The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.

By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development.

stamps complete with illustration, as a whole they symbolize the fact that human rights are a solid foundation (stoned pillars express also this same idea). Each stamp has an autonomous and intrinsic meaning but refers to each other because of its incompleteness. Nevertheless, we can notice they all have some text and a piece of pillar as the symbol of a solid foundation is still present even when stamps themselves are considered.

Such a shared and cultural memory gives Stamp 4 all of its meaning. It is no more an issue to recognize and to build a French Republic based on human rights but to insist on its universality (a part of the Earth could be seen in the bottom right-hand corner) and hope associated to such a declaration (this stamp is a gradation of blue – which is also one of the colours used in the French flag). We could extend this interpretation and assert that this stamp glorifies the image of France through the universality and universalizability of principles on which it is founded. It is both a representation of France as well as an image of France.

Lastly, collective memory allows some stamps to refer implicitly to other stamps. This is particularly clear in the case of Stamp(s) 2: It represents the tryptic of the founding values of the French Republic and of French mottoes, which is nothing else than the social and political ideal defended in 1789. The 'Liberty' stamp refers implicitly to 'Equality' and 'Fraternity' because the French nation couldn't be depicted and understood without such unity. The commemorative stamp tries to bring up to date several elements coming from a collective and shared memory to reaffirm this consistency, cohesion and unity of the nation through founding values.

15.5 Conclusion

In a beautiful tale, Jorge Luis Borges (1976) writes about a garden of forking paths. The presented analysis here can be read in different ways. It can be read as a detective novel, in which the reader is accompanying the main character in a murder investigation. However, this is not the main point. What is most interesting about the story is like the idea of a garden of forking paths. At the beginning, the reader is led to believe that the main character is looking for an actual garden where a path leads to another and so on ad infinitum. In fact, Borges is trying to show us the difference between the traditional conception of infinity and the modern idea of it, established by German mathematician Georg Cantor. According to Cantor, there is a possibility of an abstract yet real infinity. When we say that the natural numbers are infinite, we are not only saying that to any number we can add 1 and keep the count going endlessly, but he is also saying that in the series 1–2 there is an infinite number of numbers, and if we draw a line that goes from point 1 to point 2, we are seeing actual infinity (Hernandez 2001; Hofstadter 1999). The garden of forking paths is not, then, an actual garden but an object that conveys the idea of transfinite numbers, that is, an object that has the possibility of different paths leading to an infinite number of points. In Borges, one story leads to another, and so on, until it returns to the story's beginning, keeping the paths opening endlessly. This account reminds us, as

is Borges' intention, of Scheherazade's *Arabian Nights* (Anonymous 1959) where Scheherazade, the narrator, tells the story of a girl who tells stories to the emperor in order to avoid being killed.

The law can be seen from the point of view of a garden of forking paths. When we read any handbook on legal theory, we see that every theory leads to another, with some paths diverting in search of new destinies, in an endless discussion about the real nature of the law. The research on law contained in this chapter draws on many theories, refining legal analysis. The meeting point of this research seems to be the relationship between law and culture and visual studies, that is, the understanding of law as a system of signs, and interpretation is the meeting point of that discussion. In fact, in the analyses of the law, contained herein, we find different common grounds and we also find that the differences between the theories can have a meeting point. Considering the complexity and diversity of the French identity construction, we have examined from a socio-semiotic perspective how the commemorative stamps shaped the identity of the French values of the Republic, and we have argued that the identity visible in commemorative stamps is constrained by a complex of sign system which is a configuration not only of historical, social and cultural conditions but also of colour-coded system.

Stamps

Stamp 1

Preparation of the Civil Code (1800–1804)

It was created by Bonaparte who appointed a six-member committee controlled by Portalis in 1800.

The draft code was elaborated in four months and was examined before it was voted as a whole in 1803. The Civil Code included 2281 articles and four volumes with different titles and was completed by experts on 21 March 1804. It is still applicable after some additions and was even adopted in most European States and as far as Asia and America and is known as the 'Code Napoleon'.

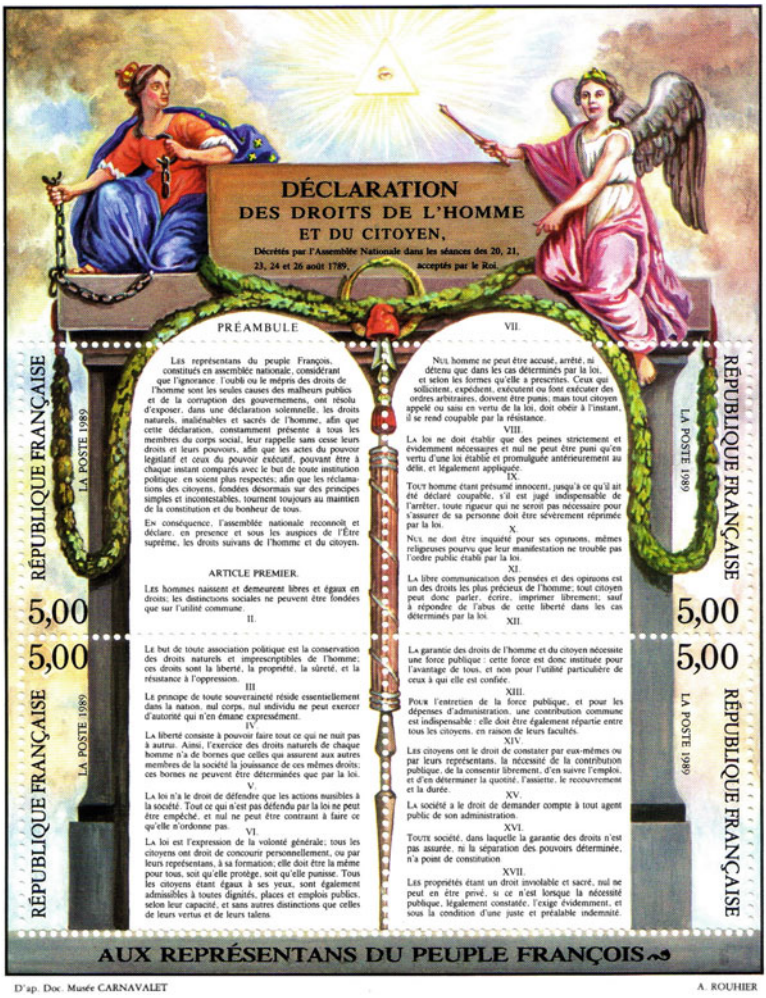
Stamp 2

Liberty, Equality, Fraternity

14th July 1989 – Paris

The motto 'Liberty, Equality, Fraternity' has represented the Bicentenary of the French Revolution and the Declaration of the Rights of Man and of the Citizen for two centuries and stands at the head of official documents as a symbol of the social and political ideal that the men of 1789 left behind as a legacy to the French Republic.

Stamp 3

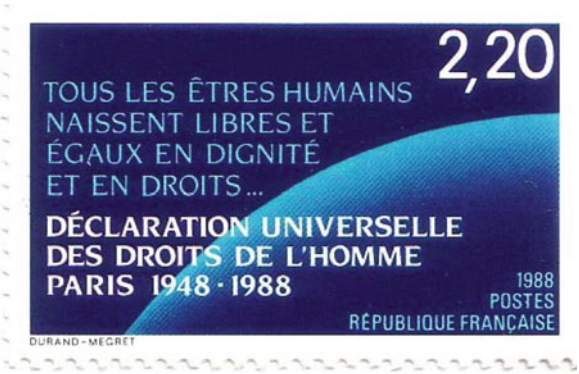


BICENTENAIRE DE LA RÉVOLUTION FRANÇAISE
ET DE LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN

PHILEXFRANCE 89

Declaration of the Rights of Man and of the Citizen – Versailles, 26th August 1789

Stamp 4



The Universal Declaration of Human Rights was adopted and proclaimed at the Palais Chaillot on 10th December 1948. It lists in a preamble and 30 articles the rights (civil, political, social, economic and cultural) to which any person can lay claim throughout the whole world.

Stamp 5

Grenoble 1788, Tiles Day

The strongest opposition to the new taxes decided by King Louis XVI was in Dauphiné. The Grenoble Parliament objected. In return, the magistrates received letters of banishment. On 7 June 1788, the date set for the magistrates to leave office, the people rose up. Some people climbed on the rooftops, took tiles and threw them at the patrols which were going through the streets. This 'tiles' day marked the beginning of a truly revolutionary turmoil in Dauphiné.

Assembly of the three chambers, Vizille

The assembly, inspired by Mounier, claimed the re-establishment of the parliaments, but above all the convening of the General Assembly which was 'the only option left to fight against the ministers' tyranny'. The assembly was becoming aware of nation-

hood. 'The three Dauphiné chambers will never distinguish between their cause and those of the other provinces and while they are standing up for their rights they will not give up on those of the Nation'. Brienne gave in and set the opening of the General Assembly on 1 May 1789.

Stamp 6

This stamp marks the beginning of events for the celebration of the Bicentenary of the French Revolution. It's the work of Jean-Michel Folon.

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Chapter 16
The Criminal Trial as Theater: The Semiotic Power of the Image

Denis J. Brion

Abstract Under the adversarial nature of the judicial process in the United States, Prague School theory provides a lens for understanding the criminal trial as a complex form of theater, with the opposing attorneys, by their trial performances, creating competing performance texts from the dramatic text of what the various witnesses potentially can offer by their evidence and testimony. The jurors, as the audience of these competing performances, have the responsibility for participating in the creation of the meaning of the dramatic text, a meaning embodied in the verdict of guilt or acquittal. The competing trial performances of the opposing counsel are, in essence, extended arguments for the meaning of the dramatic text, and the jurors will understand these performances to be extended arguments. The jurors, as well, can understand, however, much subconsciously that the trial is theatrical in nature. As such, the individual juror can understand that any element of, or action occurring anywhere within, the courtroom as being situated in the theatrical frame. And, if these elements and actions are situated within the theatrical frame, then they can be understood as part of the extended argument that constitutes the trial performance. In the course of criminal trials, particular elements and actions occurring within the theatrical frame have come under challenge as being prejudicial to the accused – such as the clothing that the accused is required to wear, the presence of uniformed officials in the courtroom, and the clothing, bearing texts or images, worn by trial spectators. Because the juror can, primarily at a subconscious level, understand that these elements and actions constitute arguments either for guilt or for the exercise of vengeance, then they are procedurally improper, coming into the trial in violation of the rules of evidence and process; they violate the due process rights of the accused. Although an argument for guilt, of itself, is substantively proper, an argument for vengeance is not; thus, an element of the theatrical frame that can be understood as an argument for vengeance is both procedurally and substantively

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improper. It is altogether prejudicial to the accused and altogether in violation of the due process rights of the accused. Unfortunately, the judiciary has only fitfully recognized the semiotic power of these elements and actions for creating prejudice to the accused.

16.1 Introduction

In 1994, in California, a domestic dispute got out of hand, and someone was killed.[1] Mathew Musladin was estranged from his wife, Pamela. She and their young son were living with Tom Studer, who was now Pamela's fiancé. On May 13, Musladin went to where Pamela was now living in order to pick up their son for a weekend visit. In the front yard outside the house, an argument between Musladin and Pamela broke out. Studer and Michael Albaugh, Pamela's brother, came out of the house in order to intervene. In the course of events, Musladin reached into his automobile, retrieved a handgun, and shot and killed Studer.

Musladin was tried in a California trial court for murder in the first degree. In his defense, Musladin did not deny that he had killed Studer. Instead, he claimed that he had shot Studer in self-defense.

During the trial, several members of Studer's family sat in the spectator area of the courtroom wearing large buttons bearing the image of the deceased, Tom Studer. Musladin's defense counsel objected, arguing that the presence of these buttons was prejudicial to Musladin and ought to be removed from the visual field of the jurors. The trial judge overruled the objection, the trial proceeded, and the jury returned a verdict of guilty.

Musladin embarked upon a long and complex series of appeals, arguing that the presence of these buttons bearing Studer's image, worn by his family members throughout the trial, denied Musladin his due process right to a fair trial. Ultimately, the courts denied his claims and upheld his conviction for the crime of murder in the first degree (*Carey v. Musladin* 2006). The judicial system in effect concluded that Musladin's appeal of his conviction for murder was simply based on the post hoc fallacy that the fact that the guilty verdict returned by the jury temporally followed the wearing of the buttons by Studer's family members did not demonstrate cause and effect.

The purpose of this chapter is to argue that there can be a causal link between image and verdict – in particular, between particular visual aspects of the courtroom scene visible to the jurors, aspects that are not part of the formal structure of the trial itself, and the decision of these jurors as to the legal meaning of the information (evidence, testimony, and argumentation) presented to the jurors within the formal structure of the trial. Thus, this chapter will argue that, in the instance of the trial of Mathew Musladin and in many similar instances, the judiciary, by not fully

[1] The facts in this case are set out in *Musladin v. Lamarque* (2005, 654–655).

understanding the process of meaning creation[2] that the criminal trial in essence constitutes, has failed to enforce the fundamental constitutional principle of due process that ought to govern the criminal justice process.

Establishing the possibility of a causal link between image and verdict will involve the exploration of three questions. To state these questions in the context of the trial of Mathew Musladin: first, why might the jurors understand the image on the buttons as a communication, integral to the trial process, to them? Second, by what process might the jurors come to understand a particular substantive content to that communication? And third, in what ways might that substantive content be prejudicial to the accused at trial and therefore a violation of the due process principle?

The exploration of these questions will begin with the constitutional and doctrinal background to these questions and the contours of the due process principle; the general principles, established in judicial doctrine, that define the constraints on the process of communication to the jury during the trial; and a general discussion of the judicial treatment of cases, like the trial of Mathew Musladin, involving what will be termed, at a substantial level of generalization, visual aspects of criminal trials that recur with some considerable frequency. The nature of the criminal trial as a process of meaning creation will then be explored through an understanding of the criminal trial as a complex form of theater. This will provide a basis for understanding the potential prejudicial effect of these visual matters and for assessing the judicial response to challenges to these visual matters as a failure of the judiciary to understand fully the impact of such matters on the process of meaning creation.

16.2 Communication to the Jury

16.2.1 The Due Process Principle

In the United States, criminal trials are governed by the constitutional principle of due process. The Fifth Amendment to the US Constitution provides, for the criminal process in federal courts, "No person shall be … deprived of life, liberty, or property, without due process of law …" (US Constitution 1791, Amend. V). The Fourteenth Amendment, which provides "… nor shall any State deprive any person of life, liberty or property, without due process of law," makes this principle applicable to the courts of the several states (US Constitution 1868, Amend. XIV).

[2] It is a fact that Musladin killed Studer. The fundamental question at trial is what is the legal meaning of that fact: Was it murder? Was it a justified homicide? Thus, the locution: Before the trial is concluded, it is not correct to say that Studer was a murder victim. Unlike the term "kill," "murder" and "victim" are legal conclusions. And those conclusions have not yet been reached. Thus, before the trial is concluded, the proper locution is that Musladin killed Studer, and Studer is a deceased. Only if the jury returns a verdict of guilt is it correct to announce these legal conclusions: Musladin *murdered* Studer, and Studer is a *murder victim*.

The Sixth Amendment implements the due process principle by establishing particular elements to the criminal process:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (US Constitution 1791, Amend. VI)

Under other constitutional provisions, the accused enjoys a right against self-incrimination (US Constitution 1791, Amend. V.), cannot be tried twice for the same offense (Id), and, in the investigation of the offense, cannot be subjected to unreasonable searches and seizures (US Constitution 1791, Amend IV.). The accused also enters the trial process favored by a presumption of innocence (*US v. Coffin* 1895). Thus, the Prosecution must come forward with a direct, positive case for guilt and must convince the jury that the accused is guilty by an exacting standard: beyond a reasonable doubt. Because, under the Sixth Amendment, the accused has a right to counsel, the criminal trial process is adversarial, rather than inquisitorial, in nature. Thus, the accused has the opportunity not only to subject the Prosecution's case for guilt to a rigorous test but also to present a positive, responsive case for acquittal.

Human institutions are not capable of perfection. Thus, stated as polar extremes, the criminal trial can have one of two goals. It can seek to maximize the punishment of people who have done wrong at the cost of sometimes punishing people who have not done wrong. Or it can seek to minimize the punishment of people who have not done wrong at the cost of sometimes allowing people who have done wrong to escape punishment. The due process principle stands as a commitment to that latter goal. The consequence is a distinct formal bias in favor of the accused in the criminal justice process.

16.2.2 Overt Communication to the Jury

Consistently with the thrust of the due process principle, the criminal trial can be understood as a strictly controlled process of communication to the jurors. This flow of communication comes in three forms: information, argumentation, and instruction. Information is placed before the jury as the evidence and testimony of the witnesses, brought out through the examination and cross-examination by the prosecutor and defense counsel. This information flow is governed by an elaborate structure of rules, and is strongly policed by the trial judge for relevance and materiality (*Federal Rules of Evidence* and *Federal Rules of Criminal Procedure*). And even evidence that is altogether relevant and material can be excluded if it had been obtained in violation of the limitations on unreasonable searches and seizures.

As a formal matter, argumentation by trial counsel is confined to two phases of the trial: the opening statement and the closing argument offered by each. The

substantive content of this argumentation is policed as well by the trial judge for prejudicial content, particularly appeals to emotion.[3] As a practical matter, a skilled trial counsel will use the process of examination and cross-examination of witnesses to bring out the elements of the overall argument that she will then arrange for effect and present in her closing argument. Thus, in this phase of the trial, she will in effect be engaging as well in a form of argumentation. The trial judge, however, will police this aspect of the examination of witnesses, rejecting questions to witnesses that are expressly argumentative, in order to prevent this phase of the trial from becoming a process of overt argumentation.

Instructional communication to the jurors comes in the form of instructions on the law determined by the trial judge. The trial judge delivers these instructions to the jurors after the evidence and testimony phase and closing arguments have been completed.[4] Trial counsel is generally not permitted, in their argumentation, to elaborate on the substance of the trial judge's instructions or to offer their own interpretations of the law.

In the context of a trial process that substantially limits the flow of communication to the jurors, the courts have in numerous instances addressed the issue of communication to the jurors from outside of the formal process, that is, communication that comes from outside of either the conceptual space created by the complex of procedural rules that govern the conduct of the trial or the physical courtroom space, inside the bar that separates the spectators from the arena of action, that includes the judge's bench, the witness stand, the jury box, and the separate places for the trial counsel and parties. Whether the communication comes in the form of the shouts of angry white men both inside the courtroom and outside the courthouse during a trial of several African Americans for the murder of a white man (*Moore v. Dempsey* 1923); an unidentified individual saying to a juror during a break in the trial that he could profit by bringing in a verdict favorable to the defendant (*Remmer v. US* 1954); two sheriff's deputies who appeared as witnesses for the prosecution and who also had custody over the jurors and openly fraternized with them during the trial (*Turner v. Louisiana* 1965, 379); a bailiff who had custody over the jurors in a trial for murder and who was heard to say to them, "Oh, that wicked fellow, he is guilty" (*Parker v. Gladden* 1966); an article from the local newspaper, brought into the jury room during deliberations in a murder trial, that stated, "The evidence against [the defendant] is very strong" (*Mattox v. United States* 1892); a juror in a trial for drug possession, in an intervening evening during the course of jury deliberations, determining the potential sentence from the Internet and reporting this to her fellow jurors despite the instruction by the trial judge that the jury not consider the matter of punishment (*People v. Kriho* 1999); or a juror bringing into the jury room during the deliberations in the penalty phase of a capital murder trial Bible

[3] Extended discussion of the bases on which the judiciary will deem particular kinds of argument improper are set out in Anderson (2002), 45–77 and Stein (2005), §§1:1–1:114.

[4] The trial judge will also deliver preliminary and interlocutory instructions, which for the most part relate to the role and conduct of the jury during the trial.

passages that had the effect of exhorting the jurors to ignore the statutory penalty phase process and vote to impose the death penalty (*People v. Harlan* 2005), the courts have developed a consistent judicial position. Whether the content of the overt communication involves information, argumentation, or instruction on the law, whether the communication is verbal or textual, and whether the communication comes from an outsider, a court official, or even one of the jurors, if the communication is made to the jurors outside of the formal processes of the trial, the courts will treat it as presumptively prejudicial to the fairness of the trial, and thus a violation of the due process principle.

The courts tend to split, however, over the matter of the proper response to the fact of such communication coming to light. Some courts treat this communication as grounds for declaring a mistrial or invalidation of a verdict of guilt.[5] Other courts refrain from such intervention if it can be shown that no actual prejudice to the deliberations of the jurors occurred.[6]

16.2.3 The Problem

16.2.3.1 Visual Communication to the Jury

The courts have had little hesitation in finding that overt verbal and textual communication to the jurors outside the formal processes of the criminal trial can be prejudicial to the accused. The judiciary, however, has found that challenges to instances of more implicit forms of communication raise issues that they have much more difficulty in resolving. Consider two cases in which the court did find potential prejudice not from a verbal or textual communication but instead from an aspect or circumstance of the accused clearly visible to the jury. In *Estelle v. Williams* (1976), Harry Lee Williams had been held in jail without bail pending his trial for assault with intent to murder. When it came time for his trial, Williams asked the jail officials for his own clothing; his request, however, was denied. Thus, he was forced to attend his trial dressed in the clothing of jail inmates: a white T-shirt with "Harris County Jail" stenciled across the back and oversized white dungarees with "Harris County Jail" stenciled down each leg (*Estelle v. William* 1976, 525).

On appeal of the verdict of guilt, the US Supreme Court held that the "defendant's clothing is so likely to be a continuing influence throughout that trial that… an unacceptable risk is presented of impermissible factors coming into play" (*Estelle v. Williams* 1976, 505). In the words of a dissenting justice, the jail inmate clothing tended "to brand [Williams] in the eyes of the jurors with an unmistakable mark of guilt" (Id). The Supreme Court's analysis of the circumstances in which Williams found himself was not couched in terms of the sophisticated language of visual semiotics. The Court clearly understood, however, that a visual aspect of the accused

[5] For example, *Turner v. Louisiana*, 379 US 466 (1965).

[6] For example, *Marshall v. United States*, 360 US 310 (1959).

at trial can convey meaning to the observer, particularly if it is a highly interested observer of the proceedings, the juror[7].

George Agiasottelis was kept manacled during his trial for armed robbery (Id). Defense counsel requested that the manacles be removed because they were prejudicial to Agiasottelis; the trial judge, however, denied this request. On appeal, the Massachusetts Supreme Judicial Court held that this was not improper: "Here the defendant was charged with a crime of violence while armed…. The judge might reasonably have regarded the sheriff as thoroughly justified in keeping the prisoner shackled to reduce the risk of an attempt at escape and possible injury to bystanders" (*Commonwealth v. Agiasottelis* 1957, 389).

The problem for George Agiasottelis is that this reasoning is rather circular. To an observer, most importantly, a juror, the presence of manacles marks him as a violent person, with the connotation that, as a violent person, he is quite capable of committing the violent crime for which he is being tried. Because he is charged with a violent crime, however, he must be kept in manacles.

The practice, in a trial for a crime of violence, of keeping the accused in restraints, typically manacles or leg irons, comes under challenge repeatedly. In reviewing these challenges, most courts agree that this practice is, of itself, prejudicial to the accused.[8] Most courts agree, however, that if it can be demonstrated that there is a substantial possibility that the accused will engage in disruptive acts at trial,[9] or will pose a danger to court personnel,[10] or is a substantial threat to attempt to escape,[11] then the restraints are permissible and the right of the accused to a fair trial is not violated.

Estelle v. Williams and *Commonwealth v. Agiasotellis* involved aspects of the accused, visible to the jurors, that the courts found to involve the potential for prejudice to the accused. These matters occurred inside the bar that separates the physical arena of the trial itself from the area set part for the spectators. Another common thread in these two cases is the fact that, as the Supreme Court noted with regard to the jail inmate clothing in *Estelle v. Williams*, these aspects of the accused came about by the action of public officials.

Holbrook v. Flynn (1986) involved actions that occurred outside the bar but that created a visual aspect of the accused. In this case, Charles Flynn was tried, along with five codefendants, for armed robbery. Throughout the trial, four uniformed and

[7] As a general matter, courts tend to agree that requiring the defendant to appear at trial in jail inmate or prison inmate of clothing is, of itself, potentially prejudicial. For example, Gaito v. Brierly, 485 F.2d 86 (3d Cir. 1973); Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971); Bently v. Crist, 469 F.2d 854 (9th Cir. 1972)

[8] For example, Illinois v. Allen, 397 US 337 (1970); Woodwards v. Caldwell, 430 F.2d 978 (6th Cir. 1970); People v. Boose, 337 N.E.2d 338 (Ill. 1975); State v. Rice, 149 S.W.2d 347 (Mo. 1941); State v. Roberts, 206 A.2d 200 (N.J. 1965).

[9] For example, Illinois v. Allen, 397 US 337 (1970); United States v. Bentrena, 319F.2d 916 (2d Cir. 1963).

[10] For example, Kennedy v. Cardwell, 487 F.2d 101 (6th Cir. 1973); United States v. Samuel, 431F.2d 610 (4th Cir. 1970).

[11] Loux v. United States, 389F.2d 911 (9th Cir. 1968); Hill v. Commonwealth, 125 S.W. 3d 221 (Ky. 2004).

armed state troopers sat in the front row of the spectator area immediately behind the space where the defendants sat, placed there to provide security additional to the security routinely provided by court bailiffs. Defense counsel challenged this circumstance as prejudicial to the defendants, particularly because there had been no showing that the defendants posed a security risk; the trial judge rejected this challenge. Rather than being a visual aspect of the accused, as the jail inmate's clothing and the restraints are, the visually striking presence of the troopers served to place the accused within a visual frame. The same connotations, however, arise when the accused, on trial for a crime of violence, are violent persons. In its ruling on defense counsel's appeal of the guilty verdict, the US Supreme Court held that no potential prejudice to the defendants had been caused by the presence of the troopers.[12]

Similarly to *Estelle v. Williams* and *Commonwealth v. Agiasottelis*, the visual aspect challenged as prejudicial in *Holbrook v. Flynn* was created by the actions of public officials. Now consider a variety of instances that are the principal focus of this chapter – instances, taking place outside the bar in the spectator area, that involve visible circumstances or attributes of individuals who are spectators to the trial rather than public officials, such as the troopers in *Holbrook v. Flynn* who are involved in some way in the conduct of the trial, in particular, what these spectators do and what they wear. Defense counsel challenges to these matters as prejudicial to the accused meet with success far less frequently.

In *United States v. Rutherford* (9th Cir. 2004), a case involving what spectators did, the Rutherfords, a couple, were on trial for income tax evasion. Throughout the trial, several Internal Revenue Service agents sat in the front row of the spectator area, immediately behind the prosecution table on the other side of the bar, staring at the jurors. Defense counsel challenged the validity of the verdict of guilt on the grounds that the actions of the IRS agents might have been interpreted as a threat – that, if the jury were to return a verdict of acquittal, the jurors could be subjected to retaliatory action by the IRS. On appeal, the US Court of Appeal noted that the relevant issue was not the intent of the IRS agents in doing what they did; the relevant issue is how the jurors interpreted what the IRS agents did.

The trial of Ronald Gibson for the murder of a police officer involved the matter of what particular spectators wore. During Gibson's trial, several police officers, dressed in their full uniforms, sat in the spectator area of the courtroom, apparently to show solidarity with a fallen fellow officer (Commonwealth v. Gibson 2003). The Pennsylvania Supreme Court rejected Gibson's challenge that this presence was prejudicial to him on the grounds that Gibson had not demonstrated that prejudice had occurred from the mere presence of these officers, without there having been any demonstrative acts on their part (Commonwealth v. Gibson 2003, 1139). In *Carey v. Musladin* (2006), recounted at the outset, Mathew Musladin unsuccessfully

[12] The Supreme Court did, however, make clear that it was not reconsidering its decisions in *Estelle v. Williams* and *Illinois v. Allen* that jail inmate clothing and restraints can be prejudicial (*Holbrook v. Flynn* 1986, 568).

challenged the presence of several family members of the deceased, Tom Studer, in Musladin's trial for murder, sitting throughout the trial in the spectator area of the courtroom wearing large buttons bearing an image of Studer.[13]

In Dwayne Woods's trial on two counts of aggravated first degree murder, the family members of the two young women Woods was alleged to have murdered attended the trial wearing orange and black ribbons in memory of them (*In re Woods* 2005). One of the jurors, on being questioned about the matter, stated "that he understood that the wearing of the ribbons was a sign of their mourning their loss of a daughter or loved one" (Id, 617). He also stated, "I thought the ribbons were nice, but they did not influence my decision or that of the other jurors" (Id). Because the ribbons did "not express any conclusion about Woods' guilt or innocence" (Id, 616), and because of the juror's statements, the Washington Supreme Court held "that Woods does not meet the burden of proving that his right to a fair trial was prejudiced" (Id).

In Thomas McNaught's trial for vehicular homicide and driving under the influence of alcohol, several spectators wore buttons displaying the acronym of two prominent advocacy groups, Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD) (*State v. McNaught* 1986). McNaught challenged this circumstance as prejudicial; the Kansas Supreme Court rejected McNaught's challenge on the grounds that he "had failed to show that he was prejudiced in any way by the conduct of the spectators" (468 in [44]).[14] In *Pachl v. Zenon* [46], Randol Lawrence Pachel was being tried for aiding and abetting murder. Throughout the trial, several spectators wore buttons, visible to the jurors, with the legend, "Crime Victims United." The Oregon Court of Appeals held that these buttons were "not inherently prejudicial" (Pachl v. Zenon 1996, 1093).

A successful challenge to the matter of what particular spectators wore was brought in *Norris v. Risley* (1990). In Robert Lee Norris' trial on the charge of rape, several spectators, self-styled as the Rape Task Force, wore buttons, two and a half inches in diameter, with the legend, "Women Against Rape." In an appeal from the trial judge's denial of a defense request that the buttons be removed, the US Court of Appeals held that the message of the buttons "implied that Norris raped the complaining witness" (*Norris v. Risley* 1990, 831). Thus, the implied message of the buttons eroded Norris' presumption of innocence (Id, 834). Under the formulation

[13] Other courts as well, in cases involving similar circumstances, have dismissed defense challenges for prejudice. For example, Kenyon v. State (1997) (buttons bearing image of deceased; no evidence of prejudice shown); Buckner v. State (1998) (8 × 10 photos of deceased; jurors assert that they were not prejudiced); State v. Braxton (1996) (buttons); Nguyen v. State (1998) (buttons bearing image of deceased; defendant did not show that there was prejudice); State v. Lord (2007) (buttons bearing image of deceased; there is no message that would imply guilt). In *Musladin v. Lamarque* (2005), the US Court of Appeals did hold that buttons bearing the image of the deceased in a trial for murder were prejudicial, requiring the invalidation of a verdict of guilt. This decision was overturned, however, by the US Supreme Court in *Carey v. Musladin* (2006).

[14] The West Virginia Supreme Court did find similar spectator conduct to be prejudicial to the accused in a trial for felony driving under the influence of alcohol resulting in death. State v. Franklin (1985).

of the US Supreme Court in *Estelle v. Williams*: did the buttons create "an unreasonable risk…of impermissible factors coming into play?" (*Estelle v. Williams* 1976, 505) so that the failure of the trial judge to order that the buttons be removed "tainted Norris' right to a fair trial" (*Norris v. Risley* 1990, 834).

Taken as a whole, the accumulated decisions of the courts are in considerable conflict over the issue whether these various instances of deliberate actions, visible to the jurors, by spectators do create the potential for prejudice. And, even when particular courts do recognize this potential in particular circumstances, they quite often will nevertheless hold that judicial intervention is unnecessary. The basis for such decisions varies. Sometimes, these justifications appear to be valid. For example, in the cases in which the defendant appears at trial in restraints, if there is a strong possibility that the defendant will disrupt the proceedings, pose a danger to court personnel or spectators, or attempt to escape, then the defendant has brought his situation upon himself and ought not be heard to complain about the potentially prejudicial consequences of his situation.[15]

More often, these justifications do not appear to be valid. For example, the prejudicial aspect was brief or fleeting.[16] Or, the trial judge offered curative instructions to the effect that the jurors ought not take the prejudicial matter into consideration in reaching their verdict.[17] Or, there was no actual prejudice because the evidence of guilt offered in the trial was so overwhelming.[18] Or, there is no

[15] For example, Illinois v. Allen, 397 US 337 (1970); Kennedy v. Cardwell, 487 F.2d 101 (6th Cir. 1973); United States v. Samuel, 431F.2d 610 (4th Cir. 1970); Commonwealth v. Gibson, 951 A.2d 1110 (Pa. 2003).

[16] For example, United States v. Acosta-Garcia, 448 F.2d 395 (9th Cir. 1971); McCoy v. Wainwright, 396 F.2d 818 (5th Cir. 1968); Williams v. Commonwealth, 474 S.W.2d 381 (Ky. 1971); State v. Sanders, 903 S.W.2d 234 (Mo. 1995). The problem with this reasoning is that there can be potential prejudice no matter how briefly the jurors might see the defendant in restraints. It does not matter whether the defendant is in restraints throughout the trial or just when, for example, he is brought into, or led out of, the courtroom.

[17] For example, United States v. Samuel, 431 F.2d 610 (4th Cir. 1970); Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1983); Commonwealth v. Agiasottelis, 142 N.E.2d 386 (Mass. 1957); State v. Dusenberry, 20 S.W. 461 (Mo. 1892). The problem with this reasoning is the matter of the negative suggestion. If you tell someone not to think about pink and green elephants for the next 2 h, it is highly likely that they will think quite abundantly about pink and green elephants for the next 2 h. To give curative instructions runs a substantial risk of calling attention to the action or circumstance in issue, exacerbating its prejudicial effect.

[18] For example, State v. McKay, 167 P.2d 476 (Nev. 1946). The problem with this reasoning is that, according to the hoary aphorism, beauty is in the eyes of the beholder. The standard for a verdict of guilt is not that the trial judge believes beyond a reasonable doubt that the accused is guilty; rather, it is that *the jury finds* beyond a reasonable doubt that the accused is guilty. The Prosecution case might convince the judge beyond a reasonable doubt, yet fall short of so convincing the jury. In that circumstance, the prejudicial matter that occurs during the trial might then tip the scales in favor of a verdict of guilt. Long ago, in his decision in *Bushell's Case* (1670) in 1690, Lord Chief Justice Vaughan emphatically made the point that the judge on the one hand and the jurors on the other can interpret the evidence and testimony quite differently. This same point, in the context of a video recording of a traffic stop, was made in a recent article, "Whose Eyes Are You Going to Believe?" (Kahan et al. 2009, 122:837–906).

basis for judicial intervention because the accused has not shown that prejudice actually occurred.[19]

It is the argument of this chapter that the semiotic impact of all of these instances, whether they involve visual aspects of the accused, the visual frame in which the accused is placed, or visual aspects of particular individuals seated in the spectator area of the courtroom, creates the potential for substantial prejudice to the accused. Thus, when courts reject challenges to these practices and circumstances, they in effect allow trials to go forward in substantial violation of the due process principle. What, however, is the basis for this argument? That is, why might jurors understand that these various instances constitute a communication to them that is integral to the trial process? By what process might jurors come to understand a particular substantive content to that communication? And, in what ways might that communication thereby be impermissible under the due process principle? An understanding of how these visual aspects of the criminal trial can have the potential for creating prejudice to the accused can be gained by pursuing the proposition that the criminal trial is a form of theater.

16.3 Theater

16.3.1 The Semiotics of Theater

In the 1930s and 1940s, the Prague Linguistic School developed an incisive concept of theater as a semiotic process (Aston and Savona 1991; Elam 1980; Vachek 1966). Theater, according to Prague School Theory, is "the complex of phenomena associated with the performer-audience transaction: that is, with the production and communication of meaning in the performance itself and with the systems underlying it" (Elam 1980, 2). Consider theater as a performance art that takes place within a particular physical space. Within this space, in traditional theater, there are two physically demarcated and functionally distinct elements, the stage as performance space and the audience. Because of this physical demarcation, the stage appears to

[19] For example, Allen v. Montgomery, 728 F.2d 1409 (11th Cir. 1984); State v. Wilson, 406 N.W.2d 442 (Iowa 1987); State v. McNaught, 713 P.2d 457 (Kan. 1986); Murray v. Commonwealth, 474 S.W.2d 359 (Ky. 1971); Cline v. State, 463 S.W. 2d 441 (Tex. 1971). The problem with this reasoning is twofold. First, in any inquiry into prejudicial effect, the matter under inquiry is whether the trial judge allowed impermissible matters to be placed before the jurors for their consideration in reaching their verdict. Such an inquiry, however, from the point of view of the jurors can carry the implicit suggestion that *they* may have done something blameworthy by considering these matters. Thus, in such an inquiry, they have a strong incentive to deny that the potentially prejudicial matter did consciously affect them. Second, much of the effect of a prejudicial matter takes place in the subconscious minds of jurors; thus, jurors, even if being scrupulously honest, are not in a position to say whether the matter affected them. If the standard for judicial intervention is that the accused must show that prejudice actually occurred, the accused is in an extremely disadvantageous position in being able to make that showing.

the audience within a bounded frame. This physical framing has psychic consequences when it charges all within it as meaningful. It announces all objects, persons, actions, and expressions within this space not only denote but also connote. By the fact of the framing, the stage is a highly charged physical space. Thus, the very fact of the appearance of an object on a stage suppresses its practical function in favor of a symbolic or signifying role (Id, 8).

Thus, "while in real life the utilitarian function of an object is usually more important than its signification, on a theatrical set the signification is all important" (Brusak 1976, 62). That is, everything within the theatrical frame is a sign (Applebome 1999, 74).[20] In "real life," a table, for example, placed within a room denotes a piece of furniture with a utilitarian function. In a theater space, that same table placed on a stage also connotes and does so by the fact that it is set within the theatrical frame. It acquires, as it were, a set of quotation marks (Elam 1980, 8). It now stands for the class of objects of which it is a member. And the audience is able to infer from it the presence of another member of the same class in the represented dramatic world, a table which may or may not be physically identical to the actual object on the stage, but which carries meaning in accordance with the represented dramatic world in which it occurs (Id, 8). In the terminology of Charles Sanders Peirce, the *dynamic object* of the table on the stage becomes an *immediate object*, having a meaning appropriate to the dramatic world the performance of which the table is a part (Honzl 1976, 183).

Two questions arise from the understanding of theater as "the complex of phenomena associated with… the production and communication of meaning…" (Elam 1980, 2): From what is this meaning created? And what is the process by which this meaning is created?

The process begins with a text, the script created by the dramatist. This text, the *dramatic text* (Veltrusky 1976, 83), has been created to be performed. It is, however, only an enabling text:

> Playwrights do not include because of a shortage of notation all those details of prosody, inflexion, stress, tempo, and rhythm. A script tells us nothing about the gestures, the stance, the facial expressions, the dress, the weight, or the grouping or the movements. So although the text is a necessary condition for the performance it is by no means a sufficient one. It is short of all these accessories which are, in a sense, the *essence* of performance. The literal act of reading the words of a script does not constitute a performance. (Miller 1986, 34)

The actors, thus, in the process of a "dialectical tension between dramatic text and actor" create a performance that necessarily amounts to an interpretation of the dramatic text (Pavis 1976, 29). The space within the theatrical frame – the carefully designed physical setting, the stage set, and the carefully selected objects placed within this physical setting, the props – as well can be understood as an interpretive performance of the dramatic text (Fischer-Lichte 1992, 14–15). And the carefully determined pattern of lighting in which actors and scenery are cast constitutes a further interpretive performance of the dramatic text (Id, 15). It is this complex of performances, this "web of signs," that constitutes the performance of the play (Id, 71).

[20] "All that is on the stage is a sign" (Veltrusky 1964, 83–840).

All that is contained within the theatrical frame is charged with signification.[21] The interpretations of the dramatic text, the performance, that takes place within this frame, thereby constitutes a second text, the *performance text* (Veltrusky 1976, 94–117). It is this text, made up of the charged content of the theatrical frame, that is communicated to the audience.

The meaning of the play thus is not contained in the dramatic text, the script itself. The playwright Tom Stoppard understood this when, at the end of a lecture in an academic setting, he was asked by a member of the audience during the question and answer period what his reaction was when directors staged his plays in ways that clearly got their meaning wrong. Stoppard replied, "Well, actually, I look forward to seeing my plays staged so that I can find out what they mean" (Stoppard 1981).[22]

The nature of the performance text, created by the performance of the script, is illustrated by two seminal productions of Eugene O'Neill's *The Iceman Cometh* (O'Neill 1946). The central character is one Theodore Hickman, "The Iceman," who, for years, had been showing up at a seedy bar in Hell's Kitchen in New York City for one of his epic binges. When he does so, he stands all of the regulars at this bar to an extended siege of serious drinking. These regulars have come to accept Hickman as someone who ratifies the pipe dreams each has about himself; he does not, however, make any demands on them that they actually seek to fulfill their pipe dreams.

The play opens as the regulars are anticipating the arrival of Hickman for his latest binge. When he arrives, it is clear that he has now reformed his alcoholism. This time, he is coming to save his pals, to rescue them from their pipe dreams.

O'Neill completed the script of *The Iceman Cometh* in 1939. The script was not staged, however, until 1946 (Applebome 1999). That first production was modestly received. A 1956 revival, however, became a classic. Jason Robards, Jr. was cast in the lead role. His performance overflowed with a warm, slightly sticky charm. Robards played Hickman as a seducer, a master of the old blarney, selling by flirtation (Rose 1999). Hickman, however, in actuality was dead inside, a heap of cold ashes, suggesting neediness in his soul – in his loneliness, he is trying to get his old pals to accompany him in his new fate. In that 1956 revival, Robards played Hickman as a tragic figure – "a man trying to outrun his own shame" (Id).

The Iceman Cometh was revived again in 1999. Kevin Spacey played the lead role. His performance, however, differed markedly from the performance of Robards. Hickman now had the aggressive energy of a used-car salesman who yells at us on television – we must come down to his sales lot at once, and he is going to sell us even if he has to choke us to do it (Id). This Hickman is never more at peace with himself as he shoots down the pipe dreams of his pals, pipe dreams that constitute their reasons to live. This performance portrays Hickman not as a tragic figure but instead as a figure of malevolence.

[21] "Everything that makes up reality on the stage - the playwright's text, the actor's acting, the stage lighting – all these things in every case stand for other things. In other words, dramatic performance is a set of signs" (Honzl 1976, 74).

[22] The self-selected title of Stoppard's lecture, *The Text and the Event*, reveals that he well understood that the script – the dramatic text – is distinct from the performance, the performance text.

Thus, from the same dramatic text, Eugene O'Neill's script, *The Iceman Cometh*, there are, between Jason Robards, Jr. and Kevin Spacey, two different performance texts. And these two performance texts, each an interpretation of the same dramatic text, are offered to the audience. Similarly, two:

> performances of, say, *Agamemnon* may give more or less the same dramatic information (regarding the state of Greek society, the course of events in the Trojan Wars, the interaction between the dramatis personae, etc.), but if one performance is austerely 'poor', limited to reproducing the main elements of the Greek stage, and the other lavishly modern in its representational means, the differences in signal-information involved will have drastic effects upon the spectator's decoding of the text (one performance may be understood, say, in terms of universal metaphysical conflicts and the other in terms of personal and material struggles between the participants). (Elam 1980, 41–42)

Do these two performance texts, then, constitute alternative meanings of the play? In Prague School theory, the audience has the responsibility, coequal with that of the performers, to create the meaning of the play. The audience "enter[s] the theatre and agree[s] to participate in the performer-spectator transaction" (Id, 52). The performance text is presented to the audience, the audience reads it, and, in reading it, interprets it, creating meaning.

A seminal dramatic text illustrates the audience role. Hamlet, Prince of Denmark, asserts, "The play's the thing, wherein I'll catch the conscience of the king" (Shakespeare 1601, act 2, sc. 2). Hamlet has learned in a dream that the King, Claudius, has come to the throne by murdering Hamlet's father, King Hamlet. A troupe of actors has come to the royal castle, Elsinore. Hamlet rewrites the script of the performance that the troupe is to offer that evening, changing it in a way that suggests that Hamlet knows of the King's crime. The actors perform the rewritten script in a way that suggests that fact. The King, himself performing as a well-skilled audience member, interprets the performance in the way in which Hamlet desires. The conscience of the King has been caught, and in the wake of his violent reaction to the play, his guilt is no longer his secret.

Thus, Prague School theory teaches us that the meaning process of theater progresses from dramatic text, through performance text, to audience. And, in answer to the question, do the performance texts in the Jason Robards and Kevin Spacey productions constitute the meaning of *The Iceman Cometh*?, we understand that the meaning of the play does not lie in these alternative performance texts. It lies in the performer-audience transaction.

What, then, is the play? Arthur Miller's script, *Death of a Salesman* (Miller 2006), is not the play, *Death of a Salesman*. The original 1949 production of *Death of a Salesman*, with Lee J. Cobb in the lead role of Willie Loman, is not the play, *Death of a Salesman*. "The play happens halfway between the stage and the audience."[23] The play *Death of a Salesman* is a matrix of meaning emerging from an evanescent event, the creation of a performance text, based on a dramatic text, offered to an

[23] The author remembers this statement from an interview of a playwright on National Public Radio several years ago. Efforts to track down the particulars have been, unfortunately, unsuccessful.

attending and attentive audience. It comes into being in the event, arises from a performer-audience transaction, and, at the end of the event, ceases to be.[24]

16.3.2 The Criminal Trial as Theater

It is a commonplace that a criminal trial is *like* theater. The fact of the matter is that a criminal trial *is* theater. It is, however, a complex form of theater, consisting of two distinct, but interrelated, theatrical productions that are directed toward two distinct audiences for two different purposes. And, within that second production, there are two distinct performances of a dramatic text.

These two productions might be called the *formal theater* and the *real theater*. The formal theater takes the form of a public ritual. Its function is to announce to the community at large the purpose of the criminal process, which is to reinforce the commitment of the society to the principles of due process and The Rule of Law. The fact of conducting a trial following the proper form and process announces that the awesome power of the State to punish is exerted against the accused only in a way that is consistent with the strong array of civil rights with which all citizens are endowed.

The performers in the *formal theater* are the judge, the accused, prosecutor and defense counsel, the witnesses, the bailiff and other functionaries, and the jury. The audience is made up of the spectators and journalists attending the trial who function as the representatives of the community at large. The audience, on behalf of the

[24] Erika Fischer-Lichte captures the concept of the play as evanescent event in this way:

> A further important feature of theater arises from this, the specific ontological state of theatrical performance: namely, its complete contemporaneity. Whereas I can observe pictures that were painted many hundreds of years ago, read novels that were written in times long past, I can only watch theater performances that occur today, in the present. I can, as Steinbeck fittingly puts it, only involve myself theoretically, and not aesthetically, with past theater performances. For the web of signs of the performance is indissolubly bound up with the actor who creates them, present only in the moment of their production. Nothing is changed by bearing in mind that some of the signs here – such as costumes, props, stage decor – outlast the performance. For what can endure are individual signs torn out of their context. but never the web of signs from which they originate. This cannot be handed down as tradition. (Fischer-Lichte 1992, 7)

Interestingly then Judge of the New York Court of Appeals Benjamin N. Cardozo, in his Storrs Lectures at Yale University in 1920, described the trial in similar terms:

> [P]ast decisions are not law. The courts may overrule them. For the same reason present decisions are not law, except for the parties litigant. Men go about their business from day to day, and govern their affairs by an ignis fatuus. The rules to which they yield obedience are in truth not law at all. Law never *is*, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires. There are no such things as rules and principles: there are only isolated dooms. (Cardozo 1921)

community at large, ratifies and internalizes the implicit message announced by the fact of conducting the trial, thereby completing the ritual.

The function of the second, simultaneous, production, the *real theater* of the criminal trial, is to determine the meaning of the events that form the basis of the charge against the accused, a meaning expressed in the form of the general verdict, guilty or not guilty. The principal performers are the trial counsel and the trial judge. The script, the dramatic text, is made up of the evidence and testimony of the witnesses, what they come to the trial able to say – the recollections of the witnesses to the event; the results of the scientific, medical, and technological investigations carried out by the expert witnesses; and the reports of the investigations and interrogations of the police investigators. Unlike the script created by a playwright, the dramatic text of the real theater of the criminal trial exists in written form only in part. And, because it is made up of what the several witnesses come to the trial able to say, the dramatic text has not been composed by a single author.

Everything that trial counsel does at trial is an argument, in two senses. Everything that trial counsel does at trial ought to feed into the overall argument that lies at the essence of her performance, for either the guilt or the innocence of the accused. And, in any event, everything that trial counsel does at trial will be understood by the audience to be an argument.

Trial counsel overtly engages in argumentation in her opening and closing arguments. When she engages in the direct examination of the witnesses sponsored by opposing counsel, she in effect is trying to bring out particular elements of the overall argument that she is trying to make, elements that she will weave into a logical form in her closing argument. Thus, in the process of examining witnesses, she also is engaging in argumentation. Thus, as well, in the process of examining the witnesses, she is seeking to interpret what they have to say – she is in fact performing the dramatic text. In effect, unlike theater generally, where the dramatic text preexists the performance in express form as the script, in the theater of the criminal trial, the dramatic text remains latent behind the performance. Thus, it is a further measure of complexity that this dramatic text does not come fully into existence until it is brought out through the examination and cross-examination of the witnesses by opposing counsel. And, depending on the skill and effectiveness of trial counsel, their examination may or may not bring out all that the witnesses are able to say. They may well not perform the entirety of the dramatic text.[25]

As a yet further measure of complexity, because of the adversarial nature of the trial, the audience is presented with two performance texts. In different productions of *The Iceman Cometh*, Jason Robards, Jr. and Kevin Spacey can perform the dramatic text of the role of Theodore Hickman in different ways, thereby offering different meanings of who Theodore Hickman is. Similarly, although

[25] It is not a peculiarity of the criminal trial as theater that the dramatic text is not always fully performed. For example, a comparative analysis of two productions of Thomas Beckett's *Krapp's Last Tape*, which observes that the performances of each of the productions intentionally omitted different portions of the dramatic text, is set out at pp. 162–168 in *Theatre As a Sign-System* (Aston and Savona 1991).

this takes place in the same production, the prosecutor and defense counsel can perform in different ways the dramatic text of what the witnesses are able to say, thereby offering different meanings of who the accused is in the law, whether or not, that is, he is to be subjected to punishment at the hands of the State. The prosecutor seeks to perform the dramatic text as an argument for culpability; defense counsel seeks to perform the dramatic text as an argument for non-culpability.

The audience of the real theater of the criminal trial is the jury. As an audience, the jury is responsible for determining the meaning of the events on which the charge against the accused is based. Unlike the audience in theater generally, the criminal trial jury determines meaning collaboratively, through deliberation carried out in secret. The jury-audience then announces its collaboratively determined meaning publicly.[26]

Because the performance text is made up of all that is contained and occurs within the theatrical frame – not only the interpretations of the dramatic text offered by the performance but also the interpretation offered by the stage sets, the props, and the lighting – then central to the understanding of the criminal trial as a complex form of theater is the identification of what constitutes the stage. In the formal theater, the criminal trial as public ritual, the stage is all that space inside the traditional bar that separates the formal elements of the trial from the spectators. This includes the judge's bench, the witness stand, the tables for prosecution and defense, and the jury box. The audience space is that remaining part of the courtroom outside the bar, set aside for the spectators and journalists in attendance. The audience for the real theater of the criminal trial is the jury. The jury box is the space set aside for the jury-audience. Thus, the stage for the real theater includes all that area inside the bar except the jury box. This area is the principal scene of action of the trial.

What, however, is the status of the balance of the courtroom space, the spectator area? For several reasons, it is altogether possible for the jurors to understand that the spectator area is included within the theatrical frame. First, at an altogether basic level, the spectator area is well within the view of the jury. Despite the presence of the bar, the spectator area is visually a contiguous part of the scene of the trial, the courtroom. The architecture, the treatment of the interior surfaces of walls and ceiling, the design of the windows, and the furnishings are all the same within and outside of the bar. The entirety of the courtroom space outside the jury box appears as a visual whole.

Second, there is a palpable sense at a criminal trial that a public ritual is taking place, however much this sense is experienced by the jurors in their subconscious. In a ritual, the spectators have an integral role, that of the internalization and ratification of the message of the ritual. Thus, the spectators, as well as the jurors,

[26] In the *formal theater* of the criminal trial, the announcement of the verdict is a salient part of the performance. In the *real theater* of the criminal trial, the announcement of the verdict comes in the aftermath of the performance; it is, in an important sense, a commentary on the quality of the competing performances.

are part of the ritual, and the spectator area thereby is part of the performance space of the formal theater. Particularly if this understanding takes place in the subconscious, however, the juror might not understand that two distinct productions are taking place, let alone keep these two productions distinct in her mind. If that is the case, then, because, in terms of physical space, the two productions largely overlap, the juror could well understand that the spectator area lies as well within the theatrical frame of the real theater of the trial.

Third, on a functional level, the spectator area can often be a scene of action. A court official stands at the door, seeing to the admittance and exit of witnesses as their turns to testify occur. As well, the trial judge will exert control over the conduct of the spectators,[27] just as she does over the actions and expressions of opposing trial counsel, implying that the spectators are part of the action, in a sense, potential performers. And, consistently with the constitutional requirement that trials be public,[28] as a check on the State to insure that the proper process is followed, the spectators and the space set aside for them are an essential part of the trial, carrying out the function of establishing publicness.

Thus, the jurors can understand that, visually, psychically, and functionally, the performance space for the real theater of the criminal trial includes the spectator area. So understood, the spectator area is within the theatrical frame. Everything within the theatrical frame is charged with significance. And, everything that occurs within this space can be understood to be an integral part of the performance.

The essence of the performance of trial counsel is argumentation. The jurors will understand that everything that the principal performers, prosecutor and defense counsel, do within the theatrical frame is argumentative in nature. Little wonder that the jurors will understand that everything else that occurs within the theatrical frame is also argumentative in nature. And, because the trial judge does exert control over the spectator area, then the juror will understand that everything that is present in, or occurs in, this area without objection by the judge is properly there.

An understanding of the criminal trial as theater thus makes it possible to see that everything within the visual field of the juror can have significance to her in the performance texts that emerge from the conduct of the trial – whether it is the clothing that the accused is wearing, the immediate setting in which the accused is placed, the actions of the spectators, or the accouterments with which the spectators might be adorned. If these matters can have significance in the performance texts, then, to the extent that they do so, they are integral to the meaning creation process of the criminal trial. With this understanding, we can turn to the question of what substantive effect these matters have on the meaning created in the carrying out of these performances.

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[27] For example, State v. Gevrez, 148 P.2d 829 (Ariz. 1944); Doyle v. Commonwealth, 40 S.E. 925 (Va. 1902).

[28] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial… (US Constitution 1791, Amend VI.).

16.4 The Visual Semiotics of the Criminal Trial

We have seen several cases in which defense counsel has challenged either a visual aspect of the accused or a visual aspect of the spectators on the grounds that the visual aspect was prejudicial to the accused, thereby undermining the fairness of the trial. In many of these cases, the courts have rejected these challenges. Are the courts improperly rejecting these challenges? What, specifically, is the potential meaning that a juror might understand as being offered by these various visual circumstances? And in what ways might this potential meaning be prejudicial to the accused?

16.4.1 Visual Aspects of the Accused

Begin with a case in which the court did find prejudice. In *Estelle v. Williams* [20], Harry Lee Williams was on trial for assault with intent to murder. During the trial, he was made to wear jail inmate clothes stenciled with the prominent legend, "Harris County Jail." In considering the challenge before it to this circumstance, the US Supreme Court defined the issue as whether this circumstance was so likely to be a continuing influence throughout the trial that "an unacceptable risk was presented of impermissible factors coming into play" (*Estelle v. Williams* 1976, 505). The Court held that this indeed was prejudicial – it undercut the presumption of innocence by branding Williams "in the eyes of the jurors with an unmistakable mark of guilt" (Id, 518).

Exactly how, however, did the particular clothing that Williams was required to wear brand him with a mark of guilt? And exactly how can this cause prejudice to Williams? Consider the position of a juror in Williams' trial. Assume that, as is strongly possible, she understands, however subconsciously, the trial to be a form of theater. Williams is situated well within the theatrical frame. Every aspect of everything within that frame has significance: "All that is on the stage is a sign" (pp. 83–84 in [67]). Thus, the clothing that Williams wears "acquires a set of quotation marks" (p. 8 in [62]). The juror-audience member will subconsciously understand that it is there for a purpose. The purpose is to contribute to the meaning intended to be conveyed by the overall performance. And the function of that overall performance is argumentation.

The juror thus could interpret the presence of the jail inmate clothes as part of the overall argument over the culpability of Williams, thereby engaging, however subconsciously, in this chain of reasoning:

1. Williams is on trial for assault with intent to commit murder.
2. He is wearing jail inmate clothing.
3. Thus, he is already incarcerated.
4. Thus, he must be a convicted criminal, a violent person.
5. This violent person is on trial for a violent crime.
6. As a violent person, he is altogether capable of committing a violent crime.

7. Thus, he most likely is also guilty of the violent crime for which he is being tried today.

Charles Sanders Peirce incisively distinguished between experience and understanding. Experience is the dyadic encounter of the individual with her environment – reality – the effect of an object or event on her sensory organs.[29] This is the ordinary meaning of *seeing*. Understanding is the triadic product, mediated by the sign, of that encounter with her environment, its meaning.[30]

Attributed to Paul Valéry is the assertion, "To see is to forget the name of the thing one sees" (*Grand Strategy: The View from Oregon* website). Here, Valéry can be understood to be using *see* not in the sense of *experience* but instead in the sense of *understanding*. Thus, we have the object within the theatrical frame, Williams' clothing – "What in real life the utilitarian function of an object is usually more important than its signification, on a theatrical set the signification is all important" (Brusak 1976, 62). The juror observes – experiences – Williams' jail inmate clothing, the utilitarian function of which is to facilitate the recapture of the inmate in the event of an escape from confinement. The juror sees – understands – Williams' clothing as an argument for his guilt, thereby forgetting the name of the clothing, its utilitarian function. The jail inmate clothing, situated within the theatrical frame, functions as an argument, an argument for guilt. The US Supreme Court was correct when it recognized that the clothing branded Williams with a mark of guilt.

Res ipsa loquitur – "the thing speaks for itself" – goes the hoary phrase in the law.[31] A fact, however, does not speak for itself. It simply *is*. A juror experiences that fact – an action, an object, or an event – within a theatrical frame and then speaks that fact, giving it meaning.

This argument for guilt is doubly improper. It is procedurally improper because it comes to the juror from outside of the formal processes of the trial, which in concept function as a carefully controlled and restricted flow of communication to the jurors. Courts routinely hold that, within the *formal* processes of the trial, it is substantively improper for, say, a prosecutor to refer to the prior criminal record of the defendant. And the prosecutor may not use evidence of prior criminal acts to suggest the propensity of the defendant to commit the offense for which he is on trial (Stein 2005, §1:43). In order to gain a verdict of guilt, the prosecutor is to demonstrate, beyond a reasonable doubt, through relevant, material, and admissible evidence and testimony, that the defendant committed the acts that underlie the charge for which he is on trial, and not to argue that the defendant has engaged in similar acts at other times. If the substance of this argument is improper if it is made expressly within the formal process of the trial, it is no less improper if it is made

[29] *See* Pierce (1931, 163).

[30] *See* Pierce (1935, 73).

[31] Res ipsa loquitur:

> The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. (Garner 1999)

subtly, by implication, outside of the formal process of the trial but well within the theatrical frame.

The procedurally and substantively improper argument that the juror understands from Williams's jail inmate clothing is especially prejudicial because it is powerful and persuasive. It is powerful because it is continuous throughout the trial and not episodic and expressly rebutted as the counter argument of defense counsel necessarily is. Although Williams carries a formal presumption of innocence, the argument from his clothing, continuously throughout the trial insists to the juror that Williams is guilty. And the argument is powerful because it is, in a sense, subliminal; to the extent that it comes to bear in the subconscious of the juror, she is not in a position to resist it – the argument brings its power to bear outside of her consciousness.

The argument is, as well, especially prejudicial because it is persuasive. It is persuasive because of the way in which it comes into being – it is not offered expressly by one of the principal performers; instead, it is constructed, consciously or subconsciously, in the mind of the juror herself. By constructing the argument herself, the juror unavoidably becomes invested in it, and thereby is more strongly open to being convinced by it – she now has a stake in the argument being persuasive. And it is persuasive because the juror, by completing the argument, solves something of a puzzle. The jail inmate clothing, situated within the theatrical frame of the trial, "acquires a set of quotation marks." Thereby, the juror is subtly challenged to determine its meaning within the performative event of the trial. By determining a meaning, the juror experiences, however subconsciously, a measure of satisfaction in successfully answering that challenge.

The physical restraints involved in *Commonwealth v. Agiasottelis* (1957) function in a similar way: the restraints mark George Agiasottelis, on trial for the violent crime of armed robbery, with an attribute of violence, just as the jail inmate clothing so marks Harry Lee Williams. The four uniformed state troopers who surrounded Charles Flynn in *Holbrook v. Flynn* (1986) thereby placed him within a visual frame – a subframe within the theatrical frame. And this frame functioned, in exactly the same way as the jail inmate clothing and the restraints, to mark Flynn with an attribute of violence: because he is a violent person, he must be guilty of the violent crime, armed robbery, for which he is being tried.

In *Moore v. Dempsey* (1923), the US Supreme Court did not hesitate to hold that the express and emphatic demands for a guilty verdict by angry spectators denied the accused of a fair trial. It is no less a denial of a fair trial if the improper argument for guilt, no less insistent than the angry spectators, comes subtly and by implication.

16.4.2 Visual Aspects of the Spectators

What is the potential impact of actions and circumstances involving the spectators themselves? In *Commonwealth v. Gibson* (Pa. 20003), several uniformed police officers sat in the spectator area while Ronald Gibson was being tried for the murder of a police officer. Although there was no allegation that these officers stared at the

jurors in a menacing way, as the IRS agents did in the trial for tax evasion in *United States v. Rutherford* [36], nevertheless a juror could interpret the visually striking presence of the police officers as a threat of repercussions were the jury to return a verdict of acquittal. This in itself is highly prejudicial to the accused.

This is not, however, the only visual impact that the presence of the police officers might engender. On a more complex level, a juror could also interpret the visual impact of their presence in this way:

1. Ronald Gibson is on trial for the murder of a police officer.
2. Police officers always act in solidarity with a fallen fellow officer.
3. The fallen police officer in this trial was our colleague.
4. As police officers, we wish to see his murderer punished.
5. We are here because we believe that Gibson did murder our colleague.
6. Thus, you must find Gibson guilty.

Again, the visual impact of the presence of the officers can be interpreted as an argument for guilt. In its opinion, the Pennsylvania Supreme Court, by way of rejecting Gibson's claim of prejudice, noted that it was not shown that the police officers in attendance engaged in any disruptive activity, a circumstance that "would establish a significant irregularity in the proceedings" (Id, pp. 1138–1139 and n. 20). The problem with this reasoning is that the challenge was not to the mere presence of the police officers. Given the Sixth Amendment guarantee that the trial be public, the presence of these officers was altogether legitimate. The matter under challenge was indeed a demonstrative act, however muted – the choice by the police officers to attend the trial wearing their very visible and striking uniforms, even though their attendance was not a part of their official duties. And demonstrative acts, despite the Sixth Amendment guarantee that the trial be public, can be grounds for the exclusion of particular spectators.[32]

The argument that can be understood by the visually striking presence of the police officers, like the arguments in *Estelle v. Williams, Commonwealth v. Agiasottelis*, and *Holbrook v. Flynn*, is both procedurally and substantively improper and highly

[32] Courts have long understood the potential for prejudice by demonstrative acts by spectators at trial, for example, Moore v. Dempsey (1923) (murder trial; angry, shouting spectators inside and outside the courtroom); White v. State (1933) (manslaughter trial; widow shouting form spectator area); State v. Gevrez (1944) (murder trial; mother of deceased loudly weeping); Cartwright v. State [86] (manslaughter trial; applause for prosecutor). A number of courts, however, as many courts do in instances of potentially prejudicial visual matters, do not hold that a mistrial must be declared when demonstrative acts occur. For example, State v. Killian (1915) (murder trial; applause for prosecutor; defendant did not show that jurors were prejudiced); State v. Dusenberry (1892) (rape trial; applause for prosecutor; trial judge gave curative instructions); Doyle v. Commonwealth (1902) (assault & battery trial; applause for prosecutor; spectators reprimanded). An especially relevant case in point is *State v. Franklin* (1985), a trial for homicide during which, while the accused was on the witness stand, the mother of the deceased screamed four times in rapid succession, "He killed my son." Although the Kansas Supreme Court held that there was no prejudice to the accused in the particular circumstances of that trial, the Court observed that, in a proper case, exclusion of even a highly interested spectator engaging in demonstrative acts can validly be done.

prejudicial to Ronald Gibson. It is procedurally improper because it comes to the jurors outside of the formal processes of the trial. It is substantively improper because of the fifth term of the argument: "We are here because *we believe* that Gibson murdered our colleague." It is improper for the prosecutor, in express argumentation, to state a personal belief in the guilt of the defendant (Anderson 2002, 51–52; Stein 2005, §1:86).[33] This is an opinion, not an argument based on the evidence and testimony adduced at trial. The prejudicial problem is that the prosecutor, as an official of the State, is an authority figure, and his statement of belief can carry considerable persuasive authority.[34] The uniformed police officers attending Ronald Gibson's trial as spectators as well can be perceived by the jurors to be authority figures, and their implicit statement of belief to be similarly authoritative.

A trial judge assuredly would not allow a prosecutor to argue to the jury:

> Look at those police officers sitting out there. Why are they here, dressed in their uniforms, even though they are off duty and on their own time? Do you really think that they would be wasting their time to be here if they didn't think that the accused would be guilty?

Surely the same argument, engendered by their visually striking presence, is equally disallowable.

In *Carey v. Musladin* (2006), the case recounted at the outset, Mathew Musladin was on trial for the murder of Tom Studer. Members of Studer's family sat in the spectator area wearing large buttons that carried Studer's image. How might a juror interpret these images? Consider this assertion by a linguist, William Labov, a student of urban street language:

There are many ways to tell the same story, to make very different points, or to make no point at all. Pointless stores are met (in English) with the withering rejoinder, "So what?" Every good narrator is continually warding off this question; when his narrative is over, it should be unthinkable for a bystander to say, "So what?" Instead, the appropriate remark would be "He did?" or similar means of registering the reportable character of the events of the narrative. (Labov 1972, 366)

Note how Labov elides from *story* to *narrative*. What do these terms mean? And what lies behind this elision? E.M. Forster observed, "The king died and then the queen died" is a story. "The king died, and then the queen died of grief" is a plot (Forster 1927, 136). Substitute *narrative* for *plot*. Labov's narrator asserts, "The king died and then the queen died." The likely response is, "So what?" Labov's narrator asserts, "The king died, and then the queen died of grief." The likely response is, "She did?" In Labov's usage, a story is a mere chronology and is pointless. A narrative is a chronology that offers the meaning of events. The *reportable character* refers to that quality of the narrative that answers the "So what?" question.

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[33] It also is a violation of the rules of professional ethics: "A lawyer shall not … [i]n trial … state a personal opinion as to … the guilt or innocence of an accused …" (American Bar Assoc. 1998, Rule 2.4(e)).

[34] Just as the Bible passages brought into the jury room in *People v. Harlan* (2005), carry considerable weight because of the authoritative status of the Bible in the culture of the United States.

The same rejoinder is appropriate for assertions and arguments – pointless assertions and arguments as well are rightly met with the withering rejoinder, "So what?" What, however, is it that renders an expression, a story, assertion, or argument, *pointless*? To answer that question, consider the nature of the human mind. In our encounters with reality, our environment – in Peirce's terms, experience – we seek the meaning of those encounters – in Peirce's terms, understanding. That is, we seek to become *conscious of* our environment. In doing so, we create a World, a model of our environment that explains it, a normative milieu that forms the substantive content of consciousness.

Thus, a pointless expression is one that offers no meaning. Thus the rejoinder to such an expression – "So what?" What the rejoinder is asking is, "Why are you saying this to me?" "What is it about what you are saying that helps me in the urgent task of fashioning my World – the ongoing, dynamic, normative model of the environment that enables me to function successfully?"

What is it, then, that keeps the story, assertion, or argument from being pointless, that enables it to offer meaning? In Peirce's terms, what is the link between experience and understanding? Peirce asserts that understanding is the triadic product, mediated by the sign, of the encounter with the environment, its meaning, whether the encounter is with an object, event, or an expression. How, however, does the sign go about its function of mediation?

Peirce defined the sign in this way:

> A sign or *representamen* is something which stands to somebody for something is some respect or capacity. … The sign stands for something, its *object*. It stands for that object, not in all respects, but in reference to a sort of idea, which I have called the ground. (Pierce 1933, 228)

What, however, is the *ground*? The anthropologist Mary Douglas explains:

> Anything whatsoever that is perceived at all must pass by perceptual controls. In the sifting process something is admitted, something rejected and something supplemented to make the event cognizable. The process is largely cultural. A cultural bias puts moral problems under a particular light. Once shaped, the individual choices come catalogued according to the structuring of consciousness, which is far from being a private affair. (Douglas 1982, 1)

The cultural bias, or cosmology, provides a cognitive frame that makes the meaning of the event possible. It provides the substantive content of the ground of the Peircean sign. In Douglas's anthropology, there are four different cosmologies – individualism, hierarchy, communality, and naturalism. These are alternatives, available to the choice of the individual for fashioning the individual's world, the substantive content of her consciousness. The sign, then, goes about its function of mediation of the encounter with the environment through the cosmology, which forms content of the ground of the sign. A pointless expression is one that is not grounded in a cosmology.

A juror at the trial of Mathew Musladin observes that there are spectators, situated within the theatrical frame, wearing buttons bearing the image of an individual. From the evidence and testimony already introduced, she knows that this image depicts Tom Studer, who died in the incident that led to this trial. The medical examiner

is on the witness stand, describing in a soporific drone, laced with abstruse medical terminology, the physiological mechanism by which the bullet from Mathew Musladin's handgun caused Studer's death.

The juror's attention drifts back to the images on those buttons. The buttons, quite overtly, announce, "This is an image of Tom Studer." In her subconscious mind, the juror would like to respond, "So what?" This, however, she cannot actually do. As her attention repeatedly is drawn to those images, however, that question is repeated, each time becoming more nagging. It is entirely possible that the juror will, sooner or later, enter into a dialogue with herself, a dialogue through which she seeks to answer for herself that nagging question:

1. This is an image of Tom Studer, who died in the incident involving Mathew Musladin. *So what*?
2. You are presented with this image so that you will not forget Tom Studer. *So what*?
3. Studer should not be forgotten because he is the victim of a heinous act – gunned down at his own home defending his fianceé from violence. *So what?*
4. The victim of such a heinous act must be vindicated so that the community can have catharsis. *So what*?
5. Studer can be vindicated by avenging this heinous act, an act that cries out for vengeance. *So what*?
6. Vengeance can best be served by visiting punishment – literally, "taking it out on someone." *So what*?
7. You have the power to avenge this heinous act, to visit punishment on someone, by finding the defendant, Mathew Musladin, guilty.

The substantive problem is that the buttons can be understood as presenting an argument that the juror vote for a verdict of guilt on a basis other than the formally proper basis, that, under the evidence and testimony adduced at trial, the prosecutor has proven beyond a reasonable doubt that Mathew Musladin is properly culpable for the death of Tom Studer. In the aftermath of the occurrence of a shocking event, such as the altogether public and doubtlessly newsworthy incident in which Studer died, there is a natural psychic need for community catharsis – the community must be cleansed of an instance of evil that has occurred in its midst. Indeed, serving this need for catharsis is one of the justifications for requiring that the criminal trial be conducted in public.

It is not the case, however, that this catharsis can be achieved only by the public trial of the suspected perpetrator. Visiting punishment on *anyone*, if it is announced that the act of punishment is tied to the shocking event, can have the same cathartic effect. This in fact is the basis for the ancient scapegoat ritual, by which a society cleansed itself of accumulated evil by the ritual killing of a selected individual (Douglas 1982; Frazer 1950, 655–675; Girard 1986). For the ritual to be efficacious, the scapegoat need not be in any way culpable for any of that accumulated evil. The buttons bearing Tom Studer's image thus can engender the highly prejudicial argument for vengeance that Musladin be found guilty not because he is culpable for Studer's death but instead because Studer's death must be avenged, and that this can

be achieved by placing responsibility on Musladin and symbolically removing him from the community.[35]

In *In re Woods* (2005), a trial on two counts of aggravated first degree murder, family members attended the trial wearing orange and black ribbons in memory of the two young women who died in the incident that was the subject of the trial. In holding that Dwayne Woods's right to a fair trial was not thereby prejudiced, the Washington Supreme Court observed that the ribbons did "not express any conclusions about Woods's guilt or innocence" (*In re Woods*, 616), and that one of the jurors had stated afterward "that he understood that the wearing of the ribbons was a sign of their mourning their loss of a daughter or loved one" (*In re Woods*, 617). The problem with the ribbons, however, is not what express message that they might offer; instead, it is what chain of reasoning that the visual impact of the *presence* of the ribbons might *imply*. The juror who stated that he understood the ribbons to be a sign of mourning on the part of those spectators was tacitly admitting that he understood the ribbons to be a memorial to the deceased. This, however, is the same as the third element of the chain of reasoning engendered by the image buttons in *Carey v. Musladin* – "Studer should not be forgotten." The ribbons in *In re Woods* thus can be understood as offering the highly prejudicial and highly improper argument for vengeance.

The *Woods* juror asserted, "I thought the ribbons were nice, but they did not influence my decision or that of the other jurors" (*In re Woods*, 617). It may well be that, in his conscious mind, the juror was not prejudiced by the presence of the memorial ribbons. What that juror cannot do is know what the effect of the ribbons was on his subconscious mind, or on the conscious or subconscious minds of the other jurors.

In *Norris v. Risley* (1990), in which Robert Lee Norris was on trial for rape, several women sat in the spectator area wearing large buttons with the legend, "Women Against Rape." This text can be interpreted in two different ways. First:

1. We are against rape.
2. We wouldn't be here if we didn't believe that there had been a rape.
3. If this was a rape, then the accused defense of consent does not hold – there could not have been consent.
4. Thus, the accused must be found guilty.

The term *rape* is not a statement of fact; instead, it is a legal conclusion, the answer to the fundamental question posed to the jurors by putting Norris on trial. The buttons can be interpreted as offering the same prejudicial and improper "We believe" argument for guilt that could be engendered by the presence of the uniformed police officers in *Commonwealth v. Gibson* (2003). The US Court of Appeals

[35] The argument for vengeance is grounded in the cosmology of Communality. In the noteworthy murder trial of the English *au pair* Louise Woodward in Massachusetts in 1997, the prosecutor offered an implicit argument for vengeance, expressly grounded in the cosmology of Communality. As discussed in *Transferring Blame* (Douglas 1995), it seems to be clear that, in reaching a verdict of guilt, the jury engaged in what was in effect the scapegoat ritual.

for the Ninth Circuit was correct in its conclusion that the buttons "implied that Norris raped the complaining witness" (*Norris v. Risley* 1990, 831).

The women wearing the buttons are not, of course, patently authority figures as are the uniformed police officers in *Commonwealth v. Gibson*. With each wearing the same button, however, and given the text on the buttons, they could appear to be an organized, formal group. Because they are present within the theatrical frame and because the trial judge has to power to control the actions of the spectators within that frame, and even to exclude particular spectators on the grounds of improper conduct, then the presence of the women as an organized group can be understood to have been sanctioned by the judge. Thus, though they are not authority figures of themselves, their presence can carry implicit, derivative authority from the trial judge, and the "We believe" argument that they can be seen to offer becomes authoritative in the eyes of the juror.

The "Women Against Rape" buttons do not call attention to the complaining witness as the image buttons in *Carey v. Musladin* call attention to Tom Studer or the memorial ribbons call attention to the two deceased young women in *In re Woods*. Because rape is primarily a crime of male against female, and because all of the spectators who wore those buttons at Norris' trial were women, it is possible that, very subtly, the buttons could call attention to the complaining witness. If that is the case, then the "Women Against Rape" buttons can also be understood to offer a second argument, the prejudicial and improper argument for vengeance:

1. We are against rape.
2. We wouldn't be here if there hadn't been a rape.
3. Rape is a horrific crime, devastating in its impact on the victim.
4. The victim of this rape thus must be vindicated.
5. This can be done by achieving vengeance for her.
6. You have the power to do this by finding the defendant, Norris, guilty.

The "Crime Victims United" buttons worn by spectators in *Pachl v. Zenon* (1996) have a similar potentially prejudicial effect. The terms *crime* and *victim* are legal conclusions, thereby suggesting an authoritative "We believe" argument for guilt. And, because the buttons appear to call attention to the alleged victim more subtly than an image or a memorial ribbon would but less subtly than the "Women Against Rape" buttons would, then the "Crime Victims United" buttons can well be interpreted as suggesting the argument for vengeance.

In *State v. McNaught* [(1986)], a case in which Thomas McNaught was on trial for vehicular homicide and driving under the influence of alcohol, several of the spectators wore large buttons bearing the letters "MADD," the acronym of the well-known national advocacy group, Mothers Against Drunk Driving. The term *drunk driving*, however, is not a statement of fact; it is a legal conclusion about one of the charges for which McNaught was being tried. Thus, the buttons could be interpreted as presenting the "We believe" argument for guilt. And, to the extent that MADD, as a well-known, principled advocacy group carries, by its presence, derivative authority, this argument can be understood as authoritative.

In these nine cases, it is possible to understand that jurors might interpret these various visual circumstances, aspects, and images within the theatrical frame as offering three distinct improper arguments. The jail inmate clothing in *Estelle v. Williams* (1976), the restraints in *Commonwealth v. Agiasottelis* (1957), and the framing of the defendant with uniformed state troopers in *Holbrook v. Flynn* (1986) can be understood as offering the *argument from character* grounded in the cosmology of Individuality: "The defendant is a violent person; therefore, he must have committed the crime of violence for which he is charged." The uniformed police spectators in *Commonwealth v. Gibson* (2003), the Women Against Rape buttons in *Norris v. Risley* (1990), the Crime Victims United buttons in *Pachl v. Zenon* (1996), and the MADD buttons in *State v. McNaught* (1986) can be understood as offering the *argument from authority* grounded in the cosmology of Hierarchy: "We, authoritatively, believe that the defendant is guilty of the crime charged." And the image of the deceased buttons in *Carey v. Musladin* (2006), the memorial ribbons in *In re Woods* (2005), the Women Against Rape buttons in *Norris v. Risley* (1990), and the Crime Victims United buttons in *Pachl v. Zenon* (1996) can be understood as offering the *argument for vengeance*, grounded in the cosmology of Communality.

16.5 Conclusion

In a considerable number and variety of instances in the ongoing stream of criminal trials in the United States, the visual aspect of a circumstance, practice, or action in a particular trial has come under challenge on the basis of its effect on the mental processes of the jurors, resulting in prejudice against the defendant. This prejudicial effect is the consequence of the semiotic power of these various visual matters. Everything within the theatrical frame is a sign (Veltrusky 1964, 74). Analyzing the criminal trial as a complex form of theater provides an understanding of the *Why*, the *How*, and the *What* of this semiotic power.

In terms of *Why*, theater functions as a complex form of meaning creation; thus, everything contained within the theatrical frame has auditory or visual semiotic impact. In terms of *How*, an understanding of the meaning creation process of theater through the performer-audience transaction reveals how this meaning is created in the mind of the juror-audience. In terms of *What*, this analysis reveals the particular substantive meaning that these visual matters can generate: the Argument from Character, the Argument from Authority, and the Argument for Vengeance.

The courts in the United States, taken as a whole, have only a fitful understanding of this semiotic power and the consequences of this power coming into play. Some courts, in some circumstances, do recognize the prejudicial effect of some visual aspects; most courts, in most circumstances, do not. And even when particular courts do recognize the potential for prejudice of a particular visual aspect, quite often these courts, for one or another of a variety of not entirely convincing reasons, will nevertheless allow it to occur. The result is that, in practice, many criminal trials

proceed in substantial violation of the due process principle. In these widespread instances, practice trumps principle.

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Part III
Law and Iconic Art

Chapter 17
Do You See What I See? Iconic Art and Culture and the Judicial Eye in Australian Law

Marett Leiboff

Abstract Visuals and images challenge law's positivistic faith: they are ambiguous and threatening to law's stability precisely because they cannot be corralled into a safe territory – unless they are read literally. Because they are always open to interpretation, law will rein them into a reading that suits and that does not transgress, for instance, sanctioned narratives or accounts of national identities. A 'juridical-aesthetic state of exception' enables the courts, as sovereign, to create and constitute the aesthetic mode in which visuals and images are read, allowing them to radically create and recreate the image or visual to achieve a desired aesthetic or political reading. By being 'rule-exempt', the courts create the law of the visual as they go along, saturating them with meanings as they choose, deploying interpretations and readings of images as it suits. Their purported indifference is made in deference to art, but as I suggest, the very act of disengagement is ascriptive, through the intervention of the judicial eye. In its place, I suggest the deployment of a Panofskian iconological schema in order to give law some tools to assist with the reading of images beyond the literal and formal. It is precisely for the reasons that Panofsky is criticised by art historians that I see a value in the use of this hermeneutic in the legal context through its creation of a 'synthetic intuition'. Iconology not only demonstrates that empiricist and literal readings of images and visuals are misleading and partial, but its schema offers a certainty and methodological rigour enabling 'the vibe' of art, culture and images to move from being a mere feeling to something which can be ascertained through a method, providing a sense of certainty while curtailing unbounded interpretations that abound in the juridical-aesthetic state of exception.

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17.1 Talking to Strangers

Law, as a practice, makes the claim that it deals in clear, verifiable and ascertainable facts and knowledge, eschewing the insensible, or what can only be 'felt' or 'sensed'. And this is the rub; what happens when the courts make decisions about visuals and images? What *exactly* do they *see*?

My purpose in this chapter is to explore how Australian courts, in a diverse set of circumstances, have 'seen' visuals or images, such as art or other cultural and creative outputs, and to propose a corrective to their empiricist reading of them, through the use of a Panofskian iconological schema. As in other jurisdictions, Australian courts have engaged in decision-making about matters typically relevant to images and visuals in disputes over copyright law, commercial transactions, blasphemy and taxation law. But for the purposes of this chapter, I explore how Australian judges 'see' visuals and images in areas of law concerned with, or drawn upon, uniquely Australian experiences: in broadcasting law, cultural heritage law and the trust establishing a famous annual portraiture prize featuring Australians – the Archibald Prize.

The examples provide extraordinary insights into the choices the courts make when looking at art. They show that the courts will acknowledge or occlude what is in front of them in ways that under- or overread the visual in question, from focussing on literal identifiable physical minutiae on the one hand, while floridly embroidering national narratives associated with visuals on the other. The examples have been chosen because all deal with a very public vision of *Australia*, albeit one that is grounded in a mythologised and imaginary conception of an idealised Australia. The examples reveal a series of paradoxes that characterise the judicial reading of visual texts. Like other common law jurisdictions, the Australian courts ground their readings of visuals in empiricist analytical terms, which, it is claimed, will result in clear sighted decision-making in cases involving art or culture (Leiboff 2001). For this reason, ostensibly at least, they purport to avoid entering into questions concerning aesthetics in deference to art itself (Kirby 2006). Yet the courts maintain that they can tell 'what makes something art' or 'what makes some creative output recognisably Australian', despite such disavowals. So in the course of reaching a decision about whether an image was or was not painted, Harrison J in New South Wales Supreme Court could claim that 'I do not think it goes outside the bounds of judicial knowledge, but is common knowledge, that line drawing is among the techniques used by painters in the course of creating paintings in the strictest sense'.[1]

17.1.1 The Juridical-Aesthetic State of Exception

Examples of this kind reveal that law's claimed disengagement with the visual is weak and, as this chapter will reveal, latently corruptible (in the sense that perverse

[1] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [18].

and peculiar readings of the visual and thus the law will result). The courts engage in readings that are fundamentally *a*scriptive (not *de*scriptive as they would hope) that can result in a judicial reinscription of the image or visual itself (Douzinas and Nead 1999; Barron 2006; Leiboff 2006, 2007, 2009). Yet rather than achieve certainty in fact and law, the methods used by the courts are radically *uncertain*, able to vouchsafe only the *elements* or *indicia certa* used to that construct the visual. This leaves the visual, as rendered by law, in a juridical-aesthetic state of exception, able to be deployed and redeployed for the desired and desirable legal outcome, reflecting Richard Sherwin's observations that 'Aesthetics isolated from some grounding in the ethical offers no protection against, and might even invite, a sense of law as being rooted in no more than subjective preferences, or perhaps the will to power alone' (Sherwin 2007, 71).

The idea that these judicial readings could be conceived as a juridical-aesthetic rendering of the politically grounded Schmittian state of exception may seem surprising, given that Schmitt asserted that the political and the aesthetic are radically distinct, opposing domains (Levi 2007, 33), and the state of exception is itself problematic. However, the state of exception as conceived by Schmitt functions in realms that 'cannot be circumscribed factually, made to conform to a preformed law, or be otherwise anticipated' (Levi 2007, 29). And this is precisely what happens when the courts read images: the object is discursively stripped of its narrative, and the empiricist eye of the naïve judicial everyman, or court as sovereign, radically reconceives it for the purposes of legal interpretation. The resulting visual may bear no resemblance to its existence in other dimensions and other domains, or as conceived by its creator, but is now open to be deployed in aid of whatever legal purpose it needs to fulfil. By treating visuals and images as 'rule-exempt', textual recreations of the visual needed to fill the void created through their initial abnegation of the visual are both tolerated and sanctioned. The courts have freed themselves to construct the law of the visual as they go along, saturating the visuals with meanings as they choose, deploying interpretations and readings of images as it suits.

This juridical-aesthetic state of exception has another dimension to it. For Schmitt, the aesthetic in all of its variants 'negates and threatens' the political (Levi 2007, 38), making the 'aesthetic not simply a rival term to the political but its enemy' (Levi 2007, 40). In many respects, visuals and images are also law's enemy, being profoundly anarchic in contradistinction to law's serious enterprise. Paradoxically, this facilitates the conditions that allow the court as 'artistic everymen', knowing everything and nothing about images, to hide behind an aesthetic naïveté to impose readings of images that conform with sanctioned national narratives. And this is doubly problematic for images and visuals that can be read as Australian only through their 'vibe'. For if the courts cannot 'see' them in the first place because they do not meet the expectations of literally, truthfully, obvious Australian archetype, then the image and its legal fate sit in the aporia created by juridical-aesthetic state of exception.

17.1.2 What Do You See?

One of the few identifiably Australian features of the defunct Australian band, *Hunters & Collectors*, is that its members were (mostly) Australian and the place they created most of their music was Australia. Few other indicia point to the band's place in the world. Its name came from a track by the German band *Can*, but the band's cultural status meant it was a natural choice as the title of a scholarly cultural history of the people who developed ethnographic and archaeological collections in Australia (Griffiths 1996).[2] Growing out of late 1970s Melbourne, the band blended an art house style intellectualism with a post-punk grinding, percussion and horn sound,[3] a 'reggae-funk fusion with rock roots and a tinge of New York underground in the guitars' (Forster 2008).[4] Their first single, 'Talking to a Stranger', released in 1982 (*Hunters & Collectors*, Seymour 1982), began with a line repeated throughout: 'Souvent pour j'amuser [sic] les hommes d'équipage', an imperfect rendering of the opening line of Charles Baudelaire's poem, 'L' Albatros',[5] while the title referenced a path-breaking 1966 BBC television drama series (Janet Moat, 'Talking to a Stranger' 1966). Curiously, European ears heard the raw pulsating sound as that of indigenous Australians, which was not intended by the band (Seymour 2008, 215–218).[6]

Despite critical acclaim, the band changed course during the 1980s, and now answering to (though not wearing) the abbreviated moniker of 'Hunnas', the band reinvented themselves as exponents of a quintessential, mainstream, Australian-style 'pub rock'.[7] Now archetypally Australian as captured through its popularity,

[2] Griffiths' book is entitled *Hunters and Collectors: the antiquarian imagination in Australia*. Griffiths notes: 'To European eyes, Australia had relic forms of nature and a primitive people. It was a land of living fossils, a continental museum where the past was made present in nature, a 'palaeontological penal colony' (Griffiths 1996, 9). One of the areas of law which will be explored in this chapter is Australia's *Protection of Movable Cultural Heritage Act* 1986 (Cth), which protects these kinds of cultural objects.

[3] To most Australian ears, this could not possibly be an Australian song in the literal sense, though it was embraced by an Australian art-punk subculture who adored this band and its raw sound and reliance on extraordinary visual images created by the filmmaker Richard Lowenstein in their early film clips.

[4] Forster was a founding member of another iconic Australian band, *The Go-Betweens*, whose song 'Cattle and Cane' is a classic that drips with the torpor of a blindingly hot, humid Queensland summer.

[5] The actual first line of the Baudelaire poem is 'Souvent, pour *s'amuser*, les hommes d'équipage'.

[6] Seymour refers to a Swedish press conference in 1988 where local journalists made this connection, which the band sought to disabuse.

[7] 'Hunnas' is the phonetic rendering of the first part of the band's name. The 't' consonant is often lost in the working class 'broad Australian' accent where it meets another softer consonant, so that 'hunter' sounds like 'hunna' and 'winter' like 'winna'. Not all Australians have this accent, but the phonetic spelling of the first part of the name became a nickname for the band. The contraction of the name to its first word only is typical of Australian speech in general, where contractions will be used whenever they can – so 'sunglasses' become 'sunnies', 'journalists' become 'journos' and 'hunters and collectors' become 'hunters' or 'hunnas'.

the songwriting of its lead singer, Mark Seymour, continued to be esoteric. It was into this mix that the band had a hit that seemed to capture an enduring image of Australia in the 1987 lament, *Do You See What I See*?, from which this chapter's title is taken.[8] With its invocations of heat and summer, love and memories lost, existential and discordant, and redolent of a blinding and harsh summer light, this song signifies a singular Australian experience. With a grinding bassline and references to suburbs and cities, 'tea towels flying by', 'long drives north to the ocean', 'light shining … hotter than the sun', this could only be Australia in summer. But the linear notes about the song published on a compilation album 16 years later confound this reading (*Natural Selection*, Liberation Records, 2003). Its inspiration is not Australian at all; instead the song comes from an experience in neighbouring New Zealand, a three-hour flight from the east coast of Australia. The linear notes reference archetypically *New Zealand* images, including references to an Auckland suburb, a beach region near Auckland called Coromandel, the city of Dunedin, a hangi, an Aoteroroa tea towel, a Steinlager shower and among other things.[9] A song which could only be about an Australian experience has its provenance shattered and its origins confused.[10]

The information about the song's New Zealand origins confounds its status and character as an Australian song. A song like this, with an invisible invocation of place and identity, is emblematic of the porosity of text, language and experience – there is nothing that obviously makes it Australian, except, perhaps, its vibe.[11] It does not accord to 'typical' notions or images of Australia: koalas or kangaroos, Uluru, the Sydney Opera House or Bondi Beach. A decision by the Australian High Court in 1998, the year that *Hunters & Collectors* broke up, decided that the phrase the 'Australian content of programs' meant television content typically 'Australian'.[12] A song like *Do You See What I See*?, within the parameters of the test created by the court, would struggle to be treated as an Australian song and would instead, at best,

[8] The song has been confused with the gentle 1960s American Christmas song, Noël Regney and Gloria Shayne Baker, *Do You Hear What I Hear*?, which includes the phrase 'do you see what I see' throughout.

[9] http://www.humanfrailty.com.au/songs/do_you_see_what_i_see.htm

[10] New Zealand and Australia are near neighbours, fierce sporting rivals, share a common bond through the loss of its troops in World War I along with the Anzac memorial and are parties to a Closer Economic Relationship Treaty, but are not the same culturally, politically or socially. Ask a New Zealander to say 'six', and Australian ears hear 'sex' or 'sucks'; ask an Australian to say 'six', and New Zealand ears will hear 'seeeks'.

[11] The idea that Australian creative outputs can only be truly Australian if they 'look' or 'sound' Australian is not confined to the courts. When an Australian music writer, Craig Mathieson, suggested in 2009 that there was such a thing as an 'Australian sound', the author of a letter to the editor in Sydney's major daily newspaper bristled, claiming that only *lyrics* about Australian culture, history or politics would qualify, or singers with certain accents, but there could certainly not be an Australian sound. The author of the letter approached the question of 'sound' as the courts do, by extracting out those things that are 'typical' and can be known with certainty (Conomy 2009).

[12] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 255.

be characterised as a *New Zealand* song.[13] If it ever became a legal question to be resolved, however, the song would 'count' as an Australian song, but not because of its content – its provenance, genesis, lyrics or sound – but solely because of the barest of reference points: the nationality of its creators.

So this is the problem. Because the judicial eye is empiricist (Leiboff 2007, 2009) and relies on literal and 'common-sense' readings of the visual or other cultural texts (Hasenmueller 1989; Leiboff 1998), it can identify elements that are typically or archetypically Australian only because it draws on visual clues that conform to a preimposed vision of what should be 'there'. The method discards images and visuals unrecognisably Australian, easily comprehending clichéd images or visuals but failing to comprehend anything else (Mount 2006). Law can find identifiable ideas and elements – *indicia certa* – which it will trust as a vehicle capable of truth-telling. But these *indicia certa* are untrustworthy, capable only of knowing parts of an image or visual and the resulting image that discards what it cannot comprehend results is partial, distorted and incomplete. What is left is a misshapen, misapprehension of the image that is now used as the basis for legal decision-making in which the juridical-aesthetic state of exception can operate to achieve whatever legal outcome is desired in the case.

So *Do You See What I See*?'s national identity, in law, would be ascertained outside the song's frame, in the linear notes that will identify song's content as verifiably New Zealand images, thus shrinking the unverifiable Australian 'vibe' of the song from view. The content of the song is read absent its content, in effect, leaving a nonsensical reading behind. Because New Zealand origins aside, the sound and lyrics of this song speak with an Australian vernacular, were created out of the Australian experience and are experienced as Australian by other Australians. This, for what it is worth, is what *I* see. What, then, did you see?

17.2 'The Vibe'

17.2.1 Hooked on a Feeling: The Vibe

'Vibe' is a word of the late twentieth century; its origins found in the world of rock and pop music. Included in its uses in the *Oxford English Dictionary* is one of its verb forms: 'To transmit or express (a feeling, attitude, etc.) to others in the form of intuitive signals or "vibes"'. In the Australian Macquarie Dictionary, 'vibe' is defined as a colloquial term meaning 'a dominant quality, mood or atmosphere'. 'Vibe', then, captures the notion of a communication of a 'feel' without recourse to the sensational or verifiable. For this reason, it lacks the quality that law prizes, namely, an ability of things to be determined with certainty. Law must, because of

[13] The reading of Australian content by the High Court will be considered later in this chapter.

its empiricist methods, discard 'the vibe' from the mix in reading visuals and images because its truth cannot be secured with any empiricist precision; the vibe cannot be determined with certainly, so it simply does not exist.

However, 'the vibe' has the potential to function as a vivid heuristic device through its denotative capacities, charmingly illustrated in a moment from the iconic 1997 Australian comedy film *The Castle* (Beckingham 2000), where 'the vibe' was used by a barely competent lawyer to explain a gap in the text of the Australian Constitution when trying to argue why Australians have an unusual relationship to home ownership: 'There is no one section [of the Constitution], it's just the vibe of the thing … In summing up, it's the Constitution, it's *Mabo*, it's justice, it's law, it's the vibe and -- No, that's it. It's the vibe!' This marvellous passage (which was unsurprisingly unconvincing as an argument before the fictional court) sought to capture a sense of the relationship Australians have with home ownership that could not be described to the court in any 'real' terms nor could be defined with precision through the literal texts of the law (MacNeil 2007, 116–131). Yet the concept of home ownership, as an expression of property rights, is something embedded in the interstices of law through its jurisprudence, which the lawyer attempted to capture through 'the vibe'. But 'the vibe', as expressed in this passage from the film, has created its own denotation, 'a vibe' of its own, a shared meaning about the Australian experience. 'The vibe', in the Australian context at least, means *this* vibe, referenced in *this* scene. The word still captures its dictionary meanings *and* it leaves an image in the mind of this moment from this film. Despite this, ironically almost, the vibe is unconvincing for law. But I will suggest 'the vibe', as expressed through the schema of a Panofskian iconology, can be the tool through which that indefinable 'something' can be 'seen' by the judicial eye and perhaps enable it to see what *I* see.

17.2.2 A Panofskian Semiotic of the Visual: A Methodology of the Vibe

As I have suggested here, law has no effective language, no logic, through which it can read images or visuals in any way other than its conventional practices will allow (Goodrich 1996, 52; Darian-Smith 1999, 56–57). In order to find another way to comprehend them, I propose that it draws on insights provided by art history, a discipline skilled at reading visuals and images through processes of signification (Bal and Bryson 1991, 188–191; Potts 2003). Indeed, semiotics is used to enable art historians to explore 'the polysemy of meaning; the problematics of authorship, context, and reception … the claims to truth of interpretation' (Bal and Bryson 1991, 174). Yet as Pettersson implies, the readings of images are always open to interpretation, especially in poststructural readings of images (Pettersson 2001, 65). So in a sense, the open meanings that are of value to art history become, within law's empiricist logic, nothing other than the reading of signs as simply another form of the ideational or elemental. *Plus ça change*.

So rather than draw on a semiotics of the visual in its broadest sense, I propose the use of a more confined semiotic: Erwin Panofsky's iconology (Hasenmueller 1978). Developed in the 1930s, iconology is an interpretative method of reading images which aims to establish their meanings (Timmermann 2001). Interdisciplinary and contextual, the technique draws on a range of disciplines in order to 'find' objectively determinable meanings. Panofsky's work has thus been criticised because of its desire for certainty and truth and has been dismissed as an idiosyncratic, culturally conditioned, pre-war precursor to a more explicitly developed semiotic and its desire for objective, definable readings of the texts of visuals and images (Bann 2003; Preziosi 2009, 218–219). But while an open sign system is of fundamental value to art historians (Bal and Bryson 1991, 186–187), lawyers merely need to be given tools to assist them read images beyond the literal and formal, and it is precisely for the reasons Panofsky is criticised by art historians that I see a value in the use of this hermeneutic in the legal context through its creation of a 'synthetic intuition' that would establish a method to avoid the aporetic problems of the juridical-aesthetic state of exception that would dismiss 'the vibe' and replace its lack of form with a reconstructed image of the visual or the image for the purposes of law's empire.

Firstly, the technique shows that empiricist and literal readings of images and visuals are misleading and partial, and secondly, its schema offers a certainty and methodological rigour so that 'the vibe' moves from being a mere feeling to something which can be ascertained through a method, providing a sense of certainty while curtailing unbounded interpretations. Grounded in a tripartite schema of pre-iconography (observation), iconography (analysis) and iconology (meaning), the pre-iconographic description and iconographical levels function as correctives or controls to temper subjective interpretation pregnant within the iconological and thus open to the charge that the reading of the image will be irrational because of the interpretive tendencies of the viewer (Panofsky 1955, 38). In other words, a Panofskian iconology provides a technique to give the judicial everyman a device to construe visuals and images and in doing so allows the courts to see visuals that do not meet the expectations of literally, truthfully, obvious Australian archetype.

17.2.3 Speaking to Law: Meanings and the Place of Iconology

To the legal mind, superficially at least, the phases of the Panofskian iconological schema may seem familiar. A similar technique is found in Ronald Dworkin's interpretative schema used to find the law in hard cases. Law, as Dworkin reminds us, is not found through literal readings of statutes or cases, but exists as a complex set of rules and principles located within the interstices of its own texts. Dworkin's method aims to find those principles, its fundamental meanings, through a set of methods that speak to law's conservative practices and desire for certainty.

My purpose here is not to praise Dworkin, or to sanction his methods, which are problematic and impose their own limitations, but to explore how the legal imaginary can work within interpretative schemas and structures of the kind Panofsky constructed.

Like Panofsky, Dworkin uses a three-stage process: a pre-interpretive stage where a rule is found from the vast panoply of law, followed by an interpretative stage which seeks to find out what the rule actually means, and a final post-interpretive stage that uses the interpretation of the rule as the guide to ascertain the correct law to be used in the hard case under consideration (Dworkin 1986). There are differences of course, not least Dworkin's internalised hermeneutic differs from Panofsky's interdisciplinary and contextual hermeneutic, but both seek to interpret the correct meaning of either the law or the image in question.

So if law and its practitioners are more than capable of reading texts using interpretative devices, they should be open to be convinced that the reading of *images* as literal and descriptive is as problematic as reading *law* only through a literal and descriptive lens (Leiboff and Thomas 2009). Panofsky shows that visuals or images are much more than their literal or descriptive elements, thus showing in full light the problems that arise when the courts rely on the juridical-aesthetic state of exception.

So what does the method propose? Panofsky articulated his conception of the iconological through a series of different works (Panofsky 1955, 40–41), but for the purposes of this chapter, I rely on his celebrated synoptical table of art historical interpretations. The table sets up four delineators which are used in the process of engaging with the image or visual. These delineators are structural and formal in nature and seek to identify (1) the object of interpretation (what is being read or seen), (2) the act of interpretation (whether it is pre-iconographic, etc.) and (3) the equipment needed for interpretation (visual literacy), tempered by (4) a corrective principle of interpretation (evidence) (Panofsky 1972, 5–9). As will become apparent, the phases exist both independently and interdependently in their development of the process of interpretation of the visual or image under consideration.

The first phase, the pre-iconographic, concerns the reading of 'primary or natural subject matter' of the image or visual, which takes either a factual or expressive form, a process roughly similar to Dworkin's pre-interpretive stage. This matter, reminiscent of the literal and empiricist modes of viewing images used by the courts, is something capable of description by a viewer. Panofsky identified that the equipment needed here is simply practical experience or a familiarity with objects and events. While it may seem that 'any reading is good enough', this is tempered by the corrective principle of interpretation – here, the history of style or an insight into the manner in which, under varying historical conditions, objects and events were expressed by forms. This phase demonstrates that a bare reading of an image relying on certainties of the empiricist methods favoured by law is likely to be erroneous, as they fail to draw on correctives of the kind identified here.

The second phase – the iconographic – is interpretative and has some similarities with Dworkin's second stage. The object of interpretation of the iconographic is secondary or conventional subject matter, constituting the world of images, stories and allegories. The equipment needed for interpretation is knowledge of literary sources or familiarity with specific themes and concepts. The corrective principle of interpretation is the history of types, that is, insight into the manner in which, under varying historical conditions, specific themes or concepts were expressed by objects and events. These factors will be read into a visual or image, if the viewer has been introduced to these textual interpretants.

The third phase, in some ways reminiscent of Dworkin's third stage, is the iconological, which has as its object of interpretation the intrinsic meaning or content of an image or visual. The equipment needed for interpretation is synthetic intuition, a familiarity with the essential tendencies of the human mind, conditioned by personal psychology and *Weltanschauung*, which roughly translates to mean a fundamental cognitive orientation of an individual or society, the lens through which an individual interprets the world and interacts with it. In short, the ability to understand the meaning of a work requires an understanding of the conditions or circumstances involved in its creation. This, then, is an objectively grounded interpretation, tempered moreover by the corrective principle of interpretation for this category, namely, an understanding of the deep structures of the social condition underpinning the creation of the visual or image.

In order to ascertain the iconological, Panofsky requires the viewer to rely on the history of cultural symptoms or 'symbols' in general or an insight into the manner in which, under varying historical conditions, essential tendencies of the human mind were expressed by specific themes. So the visual or image is 'a manifestation of fundamental principles in a culture, a period or a philosophical attitude. Following Cassirer, Panofsky regards artistic motifs, images and allegories as 'symbolic forms', as 'symbolic equivalents of reality constructed by the intellect' (Timmermann 2001). In effect, the iconological phase seeks to find 'the vibe' by drawing on what is known about image or visual through symbols that represent the character of its creation. In short, to read an image or visual absent, the iconological or the 'vibe' is to read a partial and incomplete account of the image, as is the case in images foreclosed through the readings imposed by courts of a partial, literal and empiricist reading that characterises the juridical-aesthetic state of exception.

17.2.4 Hunnas, the Vibe and Panofsky's Method

In order to see the difference that exists between the two methods – the legal empiricist approach and Panofskian iconography – what happens when a song like *Do You See What I See*? is read against Panofsky's schema? Panofsky owned that each of his phases was interlinked and intertwined, and it is apparent when reading the song that it would be impossible to conceive of the phases as clear and distinct, but that

each contributes to build a reading of the visual or sound, in this case, that results in confirming the 'vibe' of the song as Australian. It is as though the 'synthetic intuition' he proposed, when employed to read a visual conforms with intuition more generally. In this case, the vibe starts to become apparent through reading the key images in the song of the summer, the sun, the light, the beach and a grinding and harsh sound, using knowledge of the time and place and oeuvre of Australian music in the 1980s. This iconographic method gives us a technique, formal though it is, to read the song as a whole, a sum of its parts both visible and invisible, as each phase is revealed.

In terms of the pre-iconographic phase, the primary or natural subject matter of the images created by song is that of a summer road trip to the ocean. Made concrete through images of tea towels flying by, light is hotter than the sun; its sound is harsh and grinding, not lyrical and sweet, suggesting a harsh Australian summer experience. The pre-iconographic must include knowledge about the song's New Zealand connections and images. The iconographic, or the secondary or conventional subject matter constituting the world of images, stories and allegories, makes meaning out the images of a blinding Australian summer and knowledge that the description of such an intense light could only exist in Australia. New Zealand is not a hot country; its light is diffuse and gentle, and the music it produces for the most part is lyrical and gentle. The sounds of 1980s Australian pub rock are evident in the harsh and discordant sounds; Mark Seymour's lyrics sit with the esoteric music of Nick Cave; The Go-Betweens, and The Cruel Sea, places music within both oeuvres. Iconographically, this could only be an Australian song. Finally, the iconology of the song, its meaning, is found in its harsh and discordant sounds and plaintive, angry lyric, a motif not of kangaroos and koalas, but of a middle-class angst that found its expression in pub rock laments. This is a very different Australia from one found in the picture postcards and newsreels. This, then, is the song's 'vibe'.

Yet there is always the chance that another person will read the song differently (Hasenmueller 1981). For all of its claims to finding an essential position, despite the objective correctives contained within the method, competing readings can still be made. And this is a complication; the chance that competing readings of the same visual or image will mean the courts will have to make decisions based, in existing terms, on mere opinion. Yet this is what courts always do; they are presented with different readings of the law and accounts of events from both 'sides', and they make decisions one way or another. The vibe, in the terms proposed here, establishes some kind of common ground in order to read the text of an image or visual – and if a choice needs to be made between competing readings, then the court will need to make a decision one way or the other. But first and foremost 'the vibe' – the adoption of the Panofskian schema – is designed to give voice to the meanings excluded from the reading of images and visuals by the courts. In the remainder of this chapter, I will consider what would happen if the court's reading of the images and visuals in question is tested against Panofsky's schema.

17.3 A Reverse Iconography: The *Project Blue Sky* Case

17.3.1 An Australian Television Industry

This word picture contained in *Do You See What I See*? has a certain ironic, real-life legal counterpart in a case that tells us that though the song would be treated as Australian because of the origins of its creators, the song itself would not be Australian. In 1998 Australia's ultimate court, the Australian High Court, decided that New Zealand television content had to count as 'Australian content' on television (Leiboff 1998). The decision was grounded in a Closer Economic Relationship Treaty between the two countries, which had been breached by rules establishing a transmission quota designed to ensure that Australian content would be shown on television, thus favouring the provision of services by Australians over New Zealanders. The rules breached the treaty because they tested the character of the content through a 'creative control test' designed to embed an Australian perspective through the input of Australian creators. The High Court decided that 'creative control' could not be squared with the meaning of 'the Australian content of programs', though the rules could count content created by Australians – for historical reasons. New Zealand content thus had to be counted in the transmission quota, and Australian prime-time television now shows New Zealand programmes about motorway patrols and ambulance services, displacing Australian cultural material.

While grounded in the primacy of a trade treaty, the decision could not have been made without an interpretation of what was meant by Australian content. Grounded in the factual, objective and elemental, the High Court's decision was based in their own common-sense view of the status of images and visuals, and through the *indicia certa* of those things recognisably Australian, a reverse iconography which 'corrected' an aberrant 'creative control' test to one grounded in literal, corporeal content. I will reach into the decision and the engaging set of encounters between the bench and counsel, where the court's idea of Australianness is open for all to see.

17.3.2 Images, Content or Origins: The Making of Australian Content

Australia encourages the creation and production of its own 'audiovisual content' in order to support a production sector and provide audiences with their 'own' content. Since television began in the late 1950s in Australia, broadcasters have been required to broadcast certain amounts of content created by Australians.[14] In the early 1990s

[14] Section 114 of the *Broadcasting Act 1942* (Cth) required the use of the services of Australians as far as possible in the production and presentation of programs, subsequently mandated in the mid-1060s as a quantitative requirement that 45% of commercial television content be Australian content. During the 1970s and 1980s, a more qualitative approach was taken, requiring amounts of Australian drama, variety programs, information programming and so on. A transmission percentage or point system operated.

a new Australian content standard, Television Program Standard 14 ('TPS 14'), was promulgated, but because of changes in the law,[15] it was speedily replaced in 1996 by the Australian Content Standard, as the contemporaneous *Explanatory Notes to the Australian Content Standard* indicated 'commercial television services to be predominantly Australian by requiring a minimum amount of Australian programming and minimum amounts of first release drama, documentary, children's drama and other children's programs'. It counted programmes created by Australian nationals or permanent residents as Australian content, and if key positions were filled by Australians – producers, directors and writers and actors or on-screen presenters – content could be made anywhere, so long as it was 'under Australian creative control'.

Recognising the difficulties that may be found in the court embracing 'the vibe', the test sought to construct an Australian culture *through* the nationality of the creators of the work, rather than trying to rely upon the *indicia certa* of Australianness that would deny an Australia identity to creative outputs like those of *Hunters & Collectors*. Yet in the *Project Blue Sky* case, the High Court could not accommodate and could not understand that a creativity without literal, clichéd or stereotypical elements was capable of constituting Australian content. These readings can be found throughout the judgments, which I will come to shortly, but there is another extraordinary source that reveals quite what the court was struggling with in the exchanges between members of the Bench and counsel in the transcripts of the hearings in the case. I will let these encounters speak for themselves.

The first exchange occurred in the very short special leave hearing between counsel for the regulator, Mr Gyles QC and one of the members of the Bench, which resulted in the High Court deciding to hear the case in full:

KIRBY J: Is it possible to make the whole thing work by saying, "You have got certain Australian content obligations but because of 160, for "Australia" read "Australia and New Zealand".

MR GYLES: That, your Honour, is the argument which my learned friend has eschewed at all times.

KIRBY J: Why? New Zealand is very close. It almost did join us. It is still in the covering clauses [of the Australian Constitution].

MR GYLES: Yes, and it is said, except in matters of rugby, they are quite close, your Honour. It is, in our submission, not logical to suggest that you can have Australian content fixed by a standard which fixes a particular level of Australian content but says you can satisfy that by New Zealand content. We submit that that is logically and legally nonsensical.[16]

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[15] The *Broadcasting Act 1942 (Cth)* was repealed in 1992 and replaced with the *Broadcasting Services Act 1992* (Cth). Old s 114 was replaced with s 122 (2) (b), which required the regulator to make standards for commercial television, 'in relation to the Australian content of programs'. It also had to conform to s 160 (d), requiring it to act in a manner consistent with Australia's obligations under any convention to which Australia was a party or any agreement between Australia and a foreign country.

[16] Project Blue Sky Inc and ORS v Australian Broadcasting Authority S219/1996 [1997] HCA Trans 135 (11 April 1997) http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/1997/135.html

Rugby matches between the two countries were of real significance in this case. Rugby, or Rugby Union, is a code of football that is, generally speaking, popular with members of Australia's legal profession.[17] Australian content, as conceived by the regulator, is much broader and much more comprehensive than a football match between two countries, comprising rules about news, current affairs, drama, comedy, documentaries and much more. But this theme was to continue in the full hearing, where the problem of characterising the 'content' of rugby matches was central to considering the meaning of the 'Australian content of programs'. It is found again in this second exchange which occurred in argument before the court, this time between a vexed Chief Justice and Counsel for the New Zealand production company which had commenced action against the regulator:

BRENNAN CJ: Mr Ellicott, I am having a difficulty understanding the Standards definition of Australian programmes. This is clause 7 of the Standards. If the Bledisloe Cup is played in Melbourne, is that an Australian programme?[18] If it was played in Auckland, is it not?[19]

MR ELLICOTT: I think there is an exception in relation to that, your Honour. It is still an Australian programme … [clause 7] would take the Bledisloe Cup in Auckland into account by Australian film crews.

BRENNAN CJ: Provided the earlier paragraphs of that subclause are satisfied as well.

MR ELLICOTT: Yes, it is oriented towards Australian producers and actors and I do not think finance…

BRENNAN CJ: Then the Bledisloe Cup in Auckland with a cast of thousands would be mainly New Zealanders, would they not?

MR ELLICOTT: They certainly would, your Honour. It is much better when you are watching the AFL grand final, your Honour [sic].

BRENNAN CJ: It seems that this definition though is really looking at two quite disparate matters. One is the cultural content of a programme and the second is its origins … so that one says, "Well here is an Australian content. It was made by Jane Campion in New Zealand,[20] but *it is an Australian story about the outback". Well then, one can see very clearly that that can be an Australian programme* [emphasis added].

MR ELLICOTT: What is important first of all, in answering what your Honour has put to me, is to look at what [the regulator has] actually done …: 'it is produced under the creative control of Australians who ensure an Australian perspective'.[21]

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[17] A little explanation is needed however. Two of Australia's states are 'rugby' states – Queensland and New South Wales. It is noted that the Chief Justice was from Queensland, while Mr Ellicott QC was from Victoria, where Australian rules football (AFL) holds sway, and its inhabitants on the whole have a lesser familiarity with the nuances of rugby.

[18] The annual series of rugby matches between Australia and New Zealand – some matches are played in each country.

[19] New Zealand's largest city.

[20] A New Zealand film director who also works in Australia.

[21] Project Blue Sky Inc and ORS v Australian Broadcasting Authority S41/1997 [1997] HCATrans 302 (29 September 1997) http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/1997/302.html

The problem of the rugby match continues in the final encounter, again between Mr Gyles QC and Kirby J. Mr Gyles QC tries to continue the rugby analogy:

> **MR GYLES**: Your Honour, whilst you have the content Standard open at page 17, I could work the Chief Justice through the Bledisloe Cup – it might be interesting to see how that works its way through.
> **KIRBY J**: Would you explain to me what that Cup is all about?
> **MR GYLES**: Your Honour, it is about a game called Rugby between Australians and New Zealanders which is from time to time played in New Zealand. Let us consider a game played at Wellington. It is 7(4). The producer of the programme must be Australian under (a) and the director must be an Australian under (b), (c) "not less than 50% … of the on-screen presenters … are Australians. So if one has Simon Poidevin and Chris Handy and Gordon Bray and nobody else,[22] you comply with that …
> **KIRBY J**: It does not qualify as a drama programme?
> **MR GYLES**: No; not under the definition, your Honour, although it does, from time to time, in the living room.

The rugby match became the ideal vehicle through which the court ventilated its confusion about the meaning of Australian content – or was it New Zealand content. It reveals the extent to which it focussed on the physical and tangible – players, supporters, commentators and locations – and not the feel or the vibe of the game and its atmosphere. But it was the Chief Justice's mystification about 'the cultural content of a programme' on the one hand and its 'origins' on the other and the problem of 'seeing' content created in New Zealand as Australian that is most telling. There is a clear sense of what makes something Australian – a film about the outback, for instance, even in the hands of a New Zealand director – would qualify as Australian because it is visibly, definably, verifiably Australian. But the music of a band like *Hunters & Collectors* would struggle.

17.3.3 The Australian Content of Programmes

The narrow conception of Australian content, in the eyes of the court, found full expression in the judgment itself where it relied upon the juridical-aesthetic state of exception to 'correct' the misconceived polysemous 'vibe' that the broadcasting regulator had included in its Australian content rules, and reconstitute a 'true' conception of what constituted Australian content in its place (though the court conceded that vibe-based rules could remain but only because they had been relied upon historically).

Two judgments were delivered, in much the same terms, one by the Chief Justice and the other by the remainder of the court as a majority, the latter deciding that the Australian content of programmes:

> is a flexible expression that includes, inter alia, matter that reflects Australian identity, character and culture. A program will contain Australian content if it shows *aspects of life*

[22] The former are Australian representative players who at the time were commentators, and the latter is a renowned Australian rugby commentator.

> *in Australia* or the *life, work, art, leisure or sporting activities* of Australians or if its *scenes are or appear to be set in Australia* or if it focuses on *social, economic or political issues* concerning Australia or Australians.[23]

Yet there is nothing flexible about this interpretation. It is a literal pre-iconographic reading of images identifiable because they 'look' Australian. This reading ignored the possibility that the iconological, the vibe would also constitute Australian content. The majority appeared to recognise, at a practical level, that such an open test would allow any content created about Australia, wherever it was created would count as Australian content, and they grudgingly accepted that

> Given the history of the concept of Australian content as demonstrated by the provisions of TPS 14, a program must also be taken to contain Australian content if the participants, creators or producers of a program are Australian. *Nothing in the notion of the Australian content of programs requires … that such programs should be under Australian creative control*.[24] (emphasis added)

This abrupt dismissal of the creative control test denies the possibility that 'the vibe' or nonliteral Australian content may 'count' under the rules. But the Chief Justice would not have accepted even the limited concession of the history of TPS 14; for him, Australian content is only to be found in its literal presentation: 'The "content" of a "program" is what a program contains … "Australian" is the adjective describing the matter contained in the program; but the matter contained in a program is not its provenance'.[25] Unlike the majority, he refused to allow the creators a stake: 'There is neither historical nor textual foundation for the proposition that the term can be used to classify programs by reference to their provenance'.[26] But the Chief Justice went on to engage in an exegesis of elemental and the ideational in determining what was meant by content, which he saw as the expression of ideas, retrofitted to a particular iconography of Australia:

> The content of a program for broadcast may be difficult to define in a statute, for it has to do with the communication of sights and sounds that convey ideas and the classification of an idea as "Australian" is a rather elusive concept. But that is not to deny the reality of Australian ideas; they are identifiable by reference to the sights and sounds that depict or evoke a particular connection with Australia, its land, sea and sky, its people, its fauna and its flora. They include our national or regional symbols, our topography and environment, our history and culture, the achievements and failures of our people, our relations with other nations, peoples and cultures and the contemporary issues of particular relevance or interest to Australians.[27]

But there is something in this characterisation of Australian content by the Chief Justice, through the sights and sounds included in his list, that is reminiscent of Cassirer and Panofsky's 'symbolic forms', an attempt by him to capture the sense in which forms function as symbolic equivalents of reality constructed by the intellect.

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[23] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 255 [88].

[24] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 255 [88].

[25] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 255 [22].

[26] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 255 [26].

[27] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 255 [22].

Following from his vexed response to the characterisation of the rugby match as both placeless and placed in one, the Chief Justice ultimately set out a listing of Australian types as archetypes. Rather than embedding content, this is mere empty symbolism, through the denial of the role of the creator in embedding their experiences into the text of that content. This is a literal pre-iconography, through which stories and events that do not function within a preconceived notion of Australianness cannot be given voice. The iconological is thus dismissed through the attempt to capture a literal image, but the image without meaning cannot carry the iconological.

17.3.4 Retrieving the Iconological in the Australian Content of Programmes

The High Court's conception of a circumscribed Australian content has excluded nonliteral forms of Australian content from law's conception of what constitutes Australian; ironically, the test created by the court permits content created by non-Australians to count as Australian, if they display images of Australia. This is the juridical-aesthetic state of exception rendered as a state of confusion, as literal text as misconceived text. So, would the use of Panofsky's schema have enabled the High Court to comprehend a vibe-based creative control test of the kind constructed by the broadcasting regulator that would find a space for creative outputs that are not literally or stereotypically Australian?

To find this out, I will also use the trope of the rugby match and the polysemy of the literal reading of the visual references that so vexed the Chief Justice – would the location matter, would the preponderance of New Zealand spectators matter, and so forth? The pre-iconographic shows us that the teams from each country, unequal numbers of supporters in team colours, commentators, camera angles, and so on mean that literally speaking, the literal reading of the rugby match results in a nonsense interpretation of the event. It is neither Australian nor New Zealand but a set of bare elements that are devoid of meaning. It takes more to create an image or visual expression, and this is found in taking the bare and literal pre-iconographic elements to shape them into more than the elements that constitute the pre-iconographic. This may be found in the super-added elements that go on to create a television programme and that shape its content to create a vibe, which may include the views expressed by and the call made by commentators, the camera angles chosen by the director, and so on. To watch this rugby match in New Zealand on New Zealand television is a very different experience to watching it in Australia on Australian television. Even if both use exactly the same feed, the commentary differs, the replays differ, and the directorial choices of crowd images differ. The creation is not the same as the bare material, the *indicia certa* which can be vouchsafed through one team which wears gold and one which wears black, and a location either in Australia or New Zealand.

But there is more. These rugby matches are iconological in their own term, which informs the iconographic and is easily read through the history of the matches and the epic and enduring struggle for supremacy between the two countries, perhaps exemplified by the New Zealand Haka grounded in Maori tradition that is used as a challenge to Australia. And, unfortunately for Australian fans, Australia routinely loses to New Zealand. Iconologically, the *Weltanschauung* will, as Mr Gyles QC recognised, constitute the drama that occurs in the living room when watching the game,[28] and that is the vibe that makes the content Australian, even though the original text from which that vibe is created is identical.

The decision of the High Court to misread the text of the Bledisloe Cup is an exemplar of the juridical-aesthetic state of exception. Here it resulted in a legal interpretation that has created a precedent that is perverse in its practical consequences, because it abjured a complete rendering of the text of a trans-Tasman football match by focussing on the pre-iconographic at the expense of the iconological.

17.4 Making the Image Fit the Legend

17.4.1 Iconology and Australia's Movable Cultural Heritage Law

Australia's *Protection of Movable Cultural Heritage Act* 1986 (Cth) protects its culturally significant objects, or movable cultural heritage, by retaining them in Australia using the device of refusing an export permit for an object.[29] Deciding which objects are to be protected occurs in a number of stages and includes the searching of a taxonomic listing of objects, after which a series of tests are used to determine the relative cultural significance of the object in question. Decisions to refuse exports are routinely reviewed, in order to have the object's status overturned, and through these reviews, we find what the judicial eye sees when looking at culturally significant objects.[30]

[28] Having been in New Zealand once during the Cup and having watched the broadcast of the match, I know just how different the vibe was – the images emphasised the accent and demeanour of the commentators and the proliferation of black (the New Zealand team is the All Blacks).

[29] Supplemented by the *Protection of Movable Cultural Heritage Regulations* 1987 in Australia is a party to the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 17 November 1970, Paris, and this legislative schema has been created in order to meet the requirements of this convention.

[30] Reviews are carried out on the facts, by judges, other lawyers and sometimes laypeople with particular expertise, who sit on the administrative tribunal responsible for reviewing government decisions.

17.4.2 Misreading Iconologies and Misreading Legislation

Law sees objects in much the same way it sees other images and visuals as elemental, ideational and describable in physical terms only. The problem for Australia's legal decision-makers is how to construe the cultural significance of an object if its meaning is determined only through its describable and quantifiable physical characteristics. In the leading decision determining what makes an object culturally significant, the relevant administrative tribunal was faced with a conundrum involving a physically insignificant metal object that was considered for cultural heritage protection. The metal object in question was a Victoria Cross ('VC') medal, the rarest and highest award in British and Australian military honours. The particular medal had been awarded to an Australian for bravery in World War I,[31] but the tribunal could see nothing in the legislation that would let it protect it because it was not an Australian but a British Imperial medal minted in England using gunmetal from Crimean War cannon.

This disjuncture between object and its cultural value and significance is exemplary of the interpretive practices undertaken in the juridical-aesthetic state of exception. 'Seeing', in this situation, was not believing until the tribunal creatively construed (or perhaps invented) a way to protect the medal for the nation, which it did by conceptually detaching the physical object from its political and social significances for Australia through narrative:

> Certainly, it is the power of emotion which endows an otherwise unexceptional piece of gunmetal with the heroic status a VC possesses. But it is the power of emotion which is responsible for idealism, loyalty, patriotism, and so many other attributes to which we, as individuals and as a community, aspire. Similarly it is the power of emotion, as well as reason, which makes us respect our history and learn from its lessons.[32]

The tribunal, much like the High Court in the Australian content case, had a keen sense of Australianness in mind when making its decision. But this time, the tribunal turned to iconology writ large in order to read the object in a way that corresponded a sanctioned national narrative and identity. But this was a reading that had come about because it misread the object vis-a-vis the legislation. It had to play with the law to help the object conform to its iconological status as an emblem of the Anzac spirit and personal bravery. In doing so, the tribunal drew on the bifurcation in the law relating to art objects, especially concerning their authenticity, between the description of the object on the one hand (as fact) and questions about its qualities or attributes on the other (as opinion) (Leiboff 2001). But if it had read the object using a Panofskian schema, it would have seen that the legislation actually protected objects because of their meaning and vibe; the objects in terms of describable physical characteristics were not meant to be distinct but integral to its cultural significance.

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[31] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275.

[32] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 296.

17.4.3 A Piece of Moulded Gunmetal Decorated with a Ribbon

Section 7 (1) of the *Protection of Movable Cultural Heritage Act* establishes what is conceived of as the 'movable cultural heritage of Australia' through the listing of certain types of objects which are of 'importance to Australia'. It sets out the reasons why certain objects are important to Australia in order to establish a National Cultural Heritage Control List,[33] which is to be made up of 'objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons'.[34] But this enumeration and description of important objects is also used to guide the reading of an object's cultural significance under the key decision-making provision in the Act, s 10 (6).[35] Section 10 (6) (a) requires that the decision maker has regard, among other things, to the reasons referred in s 7(1) that are relevant to the object to which the application relates, and s 10 (6) (b) provides that it has to refuse an export permit

[33] *Protection of Movable Cultural Heritage Act* 1986 (Cth) s 8; s 7 (1) lists categories of objects:

(a) Objects recovered from
  (i) The soil or inland waters of Australia
  (ii) The coastal sea of Australia or the waters above the continental shelf of Australia
  (iii) The seabed or subsoil beneath the sea or waters referred to in subparagraph (ii)
(b) Objects relating to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands
(c) Objects of ethnographic art or ethnography
(d) Military objects
(e) Objects of decorative art
(f) Objects of fine art
(g) Objects of scientific or technological interest
(h) Books, records, documents or photographs, graphic, film or television material or sound recordings
(j) Any other prescribed categories (there is no (i))

[34] *Protection of Movable Cultural Heritage Act* 1986 (Cth) s 7 (1).

[35] The Protection of Movable Cultural Heritage Bill 1985 (Cth) *Explanatory Memorandum*, Clause 8: National Cultural Heritage Control List indicated that

> The List will be based on the categories given in clause 7 and will set out for each category those criteria which will be used to determine whether or not an object falling within that category may be judged to be of such importance that its loss would significantly diminish the cultural heritage of Australia.

The Protection of Movable Cultural Heritage Bill 1985 (Cth) *Explanatory Memorandum*, Clause 10: Grant of Permits provided that

> When considering the application, the expert examiner, the Committee and the Minister shall all take into account, amongst other things, the reasons listed in clause 7 which are relevant to the object the subject of the application and whether or not for those reasons as elaborated in the categories and criteria prescribed in the Control List the object is of such importance that its loss will significantly diminish the cultural heritage of Australia.

if it is satisfied that the object is of such importance to Australia, or a part of Australia, for the reasons in s 7 (1) that its loss to Australia would significantly diminish the cultural heritage of Australia. These tests are replete with signification and are built out of a Panofskian model, from the pre-iconographic descriptives of objects and the reasons for their significance to a series of indicia of value and significance through which the iconographic is determined, before the final determination of the iconological in s 10 (6) (b).

But in this case, the tribunal misread this structure and treated the pre-iconographic in an entirely different sphere of analysis from the iconological. It recognised that the value of each Victoria Cross 'entirely transcends its physical manifestation',[36] but that on the basis only of its physical characteristics … there would be no question of withholding an export permit'.[37] Instead, to protect the iconological, it bypassed the object, by creating a different vehicle through which the iconological would be recognised: a separate and distinct 'intangible'.[38] Ignoring what was already contained in the legislation, because it could see nothing there that would allow it to protect a physically valueless object, 'a piece of moulded gunmetal decorated with a ribbon',[39] it misread both object and legislation (Leiboff 2007).

For the tribunal, an object could only have cultural value if it was materially and physically valuable. It could not see value beneath the skin, beneath the veneer of its materiality and corporeality. In its eyes, the medal was an insignificant object made up of gunmetal and a ribbon. Its eye misread the Victoria Cross as having *no* significance because of its material composition, and from there it misread what 'movable cultural heritage' sought to comprehend that it incorporated within it a value other than its material form. So the tribunal dismissed the phrase, the 'movable cultural heritage' as being merely *descriptive* of a physical object. It then had to try to explain why a physically insignificant object could be important, which it did by looking outside this statute in order to determine what was meant by 'cultural heritage' generally. Deciding that it included customs, outlook, religion, folklore, music or history, it conceived that while the VC was physically lacking as movable cultural heritage, the associated accounts and stories related to the VC would be recognised separately, as a discrete intangible:

> [Its] value lies not in its tangible qualities but in its intangible. Its intangible qualities are twofold. The first is its symbolic quality. It symbolises courage, bravery, devotion to duty and self-sacrifice. It is public evidence of the very great value that we as a community place upon these qualities. A VC's intangible quality also lies in its power to direct the community's attention to an event or time in its history. This is a quality shared by objects such as the Old Gum Tree at Glenelg in South Australia and the Dig Tree in New South Wales which is associated with Burke and Wills' last expedition.[40]

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[36] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 295.

[37] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 295.

[38] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 294.

[39] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 295.

[40] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 295–296.

The language of 'quality' used here reinforces the tribunal's reliance on the conventional bifurcated model of reading objects in art law. But its approach helped it deal with another problem – its origins: 'There is thus nothing Australian about its origins or its physical properties. The … medals regarded as Australian have acquired their Australian identity solely through the nationality of their recipients'.[41] Unlike the court in the Australian content case, the tribunal was not shy about making a connection between the object and the person who was able to give the object its meanings, its vibe. The tribunal seemed very pleased with its sophistry, in which this construction, or invention, of the intangible cleared the way to save this object from export.

But the tribunal still had to make a decision about the medals against s 10 (6) (b).[42] Armed with the newly minted 'intangible' and with the characterisation of VCs as unique symbolic objects,[43] the tribunal inevitably concluded that if the medals were to be exported, then they must be regarded as lost to Australia's cultural heritage, as an important or notable signpost to an outstanding Australian action in World War I and a symbol of heroic qualities which were exhibited in that action and which are themselves part of Australia's cultural heritage.[44] Therefore, the decision under review was affirmed.[45]

17.4.4 Retrieving the Pre-iconographic and Iconographic

While the creation of the intangible 'worked' to achieve the outcome that conformed to the iconological, thus protecting the medal, the tribunal made a serious mistake in its interpretation both of the object and the legislation itself. It effectively cleaved the object and its iconology into two separate and distinct modes of reading, divorcing the iconological from the objective correctives found in the pre-iconographic and iconographic.

Yet despite the rupture, the tribunal had relied upon these two other factors throughout their reading of the VC. In terms of the pre-iconographic, the medal itself and the associated material relating to the circumstances surrounding the award of the medal were considered in detail in the judgment. From this point, the iconographic, the world of images, stories and allegories, was replete throughout the judgment. All the elements needed were at play, but because the tribunal could not see the object beyond its literal physical form, it could not bring these facets to play in reading the object. Here, it resulted in an iconological reading of the

[41] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 296.
[42] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 296–297.
[43] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 296–297.
[44] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 297–298.
[45] *Re Truswell and Minister for Communications and the Arts* (1996) 42 ALD 275, 298.

circumstances surrounding the award of the medal in which the tribunal drew on a Weltanschauung that perhaps saw much more in the relationship between war and the actions of its heroes and its relationship with the Australian identity than was actually there to see.

But it is the footprint, or trace of the law left behind by the decision is problematic. By treating the physical object as merely describable fact, it leaves the meanings of the object open for any interpretation at all, leaving a mawing gap to be filled in the juridical-aesthetic state of exception.

17.5 The Archibald Prize

17.5.1 An Artistic State of Exception

The annual Archibald Prize for portraiture awarded by the trustees of the Art Gallery of New South Wales has been the subject of controversies and disputes since it was first awarded in 1921. Most of them have been played out in the public arena, occasionally spilling into the courts, where, as the examples in this part of the chapter show, the judicial eye deploys the juridical-aesthetic state of exception to achieve the desired result by engaging in a strategic act of visual dysphasia. In short, the courts explicitly avoid looking at the images or visuals at all and are thus grounded in an almost 'pre' pre-iconographic, to avoid seeing the obvious state of the images, as a device to protect the integrity of the trustees' aesthetic judgement against the terms of the trust document establishing the prize. In a sense, the prize, its associated competition and the legend of its benefactor are what act as the iconology, and the pictures themselves are almost a sideshow, rather than the main event.

The prize and its stipulations are constituted through the terms of the will of the late Mr J F Archibald.[46] Archibald may well have approved of all the controversy surrounding the award of the prize because he was a controversial character himself. Born in 1850s Victoria, he co-founded the magazine *The Bulletin* in pre-Federation Australian in 1880 in order to advocate for an Australian nationhood, culture and identity in place of the series of separate British colonies located on the Australian continent. But he was inconsistent in the extreme. A champion of a racist white Australia policy through the pages of his publication, John Feltham Archibald, chose to change his name to Jules François, a curious French conceit indeed. His legacy looms large in Australia, and the prize and its reputation are legendary, even

[46] Archibald was interested in art, and he served as a Trustee of the Art Gallery of New South Wales. In 1900, he commissioned a portrait of the poet Henry Lawson and was so pleased with it that he left money in his will for the prize. Art Gallery of New South Wales Archibald. Prize.09, History: Who was JF Archibald? http://www.thearchibaldprize.com.au/history/jf_archibald

among people who have no real interest in visual culture. Winning the prize or having a picture included in the associated exhibition can make an artist's name.

But the legal controversies surrounding the prize are not, ostensibly at least, about art at all (it is claimed) and are instead grounded in the drafting of the terms of the will.[47] Yet it is the character of the visual that is central to the existence of the dispute and the way in which that visual is created fundamental to the interpretation of the text of the will. With its references to 'best', 'portraiture', 'preferentially of some man or woman distinguished in Art Letters Science or Politics', 'painted' and 'picture', the award of the prize to aberrant images have been challenged by adherents of a traditional and conservative portraiture practice, when the prize has been awarded to images that challenge and confront the notion of portraiture, painting, and pictures.

17.5.2 A Human Being Painted by an Artist

The most celebrated (and perhaps most tragic) of the Archibald disputes occurred in 1943 (Eagle undated). The award of the prize to the acclaimed Australian artist, William Dobell of his friend and fellow artist, Joshua Smith,[48] was challenged in court.[49] Smith was disturbed by the representation of him, and he suffered a breakdown as a result of seeing his image as depicted by Dobell.[50] Dobell's health was to suffer as well as a consequence of the legal dispute itself. Joshua Smith is depicted in a nonliteral, mannerist style of a kind made famous by El Greco that Dobell made his own. Joshua Smith is shown with elongated neck and limbs, his

[47] Clause 10 (a) of Archibald's will provides for the award of

> 'an annual prize to be styled 'The Archibald Prize' for the best portrait preferentially of some man or woman distinguished in Art Letters Science or Politics painted by any Artist resident in Australasia during the twelve months preceding the date fixed by the Trustees for sending in the Pictures the Trustees to have the right to exhibit such winning Picture in the said Gallery for a space of not more than two months from the date so fixed. If during any such twelve months no competing picture shall in the opinion of the trustees be painted worthy of being awarded a prize then such income shall be accumulated and invested as hereinafter authorised with liberty to the trustees at any part of such period to purchase by such accumulations or part thereof any portrait that may have won any prize so given such exhibited or purchased prize to bear a label endorsed 'The Archibald Prize'. (Extracted in *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [4])

[48] Australian Government Culture Portal: "The Archibald Prize and Australia's premier art awards" http://www.cultureandrecreation.gov.au/articles/archibald/

[49] *Attorney-General v Trustees of National Art Gallery of NSW* (1944) 62 WN (NSW) 212

[50] Joshua Smith's parents wanted to buy the painting, but Dobell refused to sell it to them as he thought they may destroy it, selling it to Hayward instead. Eagle Joshua Smith himself won the prize the following year: Joshua Smith http://en.wikipedia.org/wiki/Joshua_Smith_(artist)

face gaunt and linear.[51] The style and character of the painting was impugned on the basis that it was not a portrait, but it was, instead, a caricature. The case against the trustees failed, because Roper J would not interfere with their decision because they had not demonstrated any *mala fides* in awarding the prize to Dobell.[52] Despite this, Roper J engaged in an analysis of the image, in order to ascertain if the trustee were correct in their decision that the picture was a portrait:

> The question of whether a particular picture is a portrait … depends on the formation of opinions by the observer to whom it is propounded … before this Court should interfere in the administration of the trust it must be satisfied that *as a matter of objective fact and not of mere opinion the picture is not a portrait*, so that the opinion formed by the trustees to the contrary is founded upon a wrong basis of fact and is not truly an opinion upon the question to which the minds of the trustees should have been directed. If this is the proper test, as I think it is, it is not necessary to interpret the word portrait in order to come to the conclusion that the suit fails; because the evidence is overwhelming, in my opinion, that at least there is a proper basis for forming an intelligent opinion that the picture in question is a portrait.[53] (emphasis added)

This passage reveals that Roper J shifted his gaze to interrogate the notion of *portrait* as 'fact' rather as 'opinion', a device that allowed him to avoid considering whether Dobell's elongated visual style would be open to a challenge on the basis that the image was not a portrait. By shifting the judicial eye away from *style* to one grounded in a literal meaning of portrait as an image of 'a human being and painted by an artist',[54] the court neatly avoided the problem of 'style', and the decision of the trustees vouchsafed. In short, the painting merely had to be 'a pictorial representation of a person, painted by an artist. This definition connotes that some degree of likeness is essential, and for the purpose of achieving it, the inclusion of the face of the subject is desirable and perhaps also essential'.[55] So if that bare minimum were achieved, then the picture would be a portrait, even if it might have fitted into another genre or type of painting such as the type proposed by the relators in the case, as a caricature or fantasy. In a final opinion on the character of the picture, he noted:

> Finally I think that it is necessary to state my opinion on the claim that the picture cannot be included as a portrait because it is proper to classify it in another realm of art … that would only establish to my mind that the fields are not mutually exclusive, because in my opinion it is in any event properly classed as a portrait.[56]

In a set of reasons replete with 'opinions', Roper J seemed to disown the criticism that he was engaged in aesthetic decision-making or intrusion into the realm

[51] In a coda that seems almost impossible to credit, in 1958 the picture was burnt in a fire at the home of its owner. In 1969, it was poorly restored and was effectively disowned by Dobell. Images of the restored painting and its state after the fire can be seen at Archibald Controversy Painting http://www.artquotes.net/masters/william-dobell/portrait-of-an-artist.htm

[52] *Attorney-General v Trustees of National Art Gallery of NSW* (1944) 62 WN (NSW) 212, 214.

[53] *Attorney-General v Trustees of National Art Gallery of NSW* (1944) 62 WN (NSW) 212, 214.

[54] *Attorney-General v Trustees of National Art Gallery of NSW* (1944) 62 WN (NSW) 212, 215.

[55] *Attorney-General v Trustees of National Art Gallery of NSW* (1944) 62 WN (NSW) 212, 215.

[56] *Attorney-General v Trustees of National Art Gallery of NSW* (1944) 62 WN (NSW) 212, 215.

of art. But though he used the word 'opinion' on numerous occasions, he had not engaged in any opinion-making at all that would, to his mind, constitute aesthetic decision-making. By simply treating the image as a fact – a human being painted by an artist that bore some resemblance to that person – Roper J read the image to identify a known human, an exercise within conventional legal analysis of 'fact finding'. In doing so, whether he meant to do so or not, he engaged in one aspect of Panofsky's tripartite system, namely, the pre-iconographic practice of identification of the image, leaving its meaning and value open to radical interpretations that are the stuff of the juridical-aesthetic state of exception.

17.5.3 It Is Hard to Think How It Could Be Otherwise

While the interpretative openness of the juridical-aesthetic state of exception was used in the Dobell case to achieve the desired outcome, the most recent Archibald Prize dispute some 60 years later is an exemplary rendering of its use, in which images are construed as textually impotent to achieve the desired legal outcome. In 2004, the award of the prize by the trustees was impugned by a rival artist who asserted that the portrait had not been 'painted' as required under the terms of the prize trust. The winning portrait by artist Craig Ruddy of the indigenous actor David Gulpilil was created from a mass of lines, which appeared to have been 'drawn' rather than 'painted'.[57] Relying on the reasoning in the Dobell case,[58] Hamilton J found that the trustees had awarded the prize to a portrait that had been 'painted'. There were no grounds on which to find that they had not properly exercised their duties, so the prize could not be interfered with.[59]

While reaching the same conclusion as Roper J, Hamilton J radically avoided entering into a reading of the visual in order to do so. This time, the case centred on the techniques and media used to create the portrait, and not the mode of representation concerned. And because of this, it seems, Hamilton J felt obliged to observe that 'The Court is in no way concerned with the merits of the portrait … The sole issue for the Court as a court of equity is whether the award was in breach of the terms of the charitable trust in the execution of which the first defendant awarded the prize'.[60] I suspect he realised that there was more to visual than the judgment could bear to see, because the technique used to create it was that of 'drawing', making it impossible for the image to be read in Roper J's terms, as 'human being

[57] The image may be seen at Australian Government Culture Portal: The Archibald Prize and Australia's premier art awards http://www.cultureandrecreation.gov.au/articles/archibald/

[58] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [20].

[59] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [31].

[60] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [3].

painted by an artist'. If he had looked too closely, he could only have decided the image was drawn, and not painted. Thus, in an extraordinary interpretative gesture at the conclusion of the judgment, Hamilton J demurred from making any finding of fact about the visual at all:

> I do not intend to proceed to a judicial finding of fact as to whether or not the work is 'painted'. I have already commented that there is a certain appearance of strangeness in courts making determinations concerning the qualities of works of art. That matter is better left to those involved in the art world … or, for that matter to any 'intelligent' viewer, using the word 'intelligent' in the manner in which it was employed by Roper J. Since a judicial finding on this subject matter is not necessary for the determination of the proceedings, I think it better not made.[61]

But throughout the judgment, Hamilton J had to consider what was obvious to anyone looking at the image. Accepting the position of the (losing) plaintiffs and Roper J that '"painted" conveys the meaning that the portrait must be a painting, not a work made by some other means',[62] Hamilton J took 'into account the impression the portrait creates on the viewer' to decide that he really could not decide if this was a painting or a drawing:[63]

> minds may well differ as to whether, if the picture must be placed in a single category, that category should be "painting" or "drawing". But, in view of those matters, I find it impossible on any objective basis to exclude the portrait from the category of a work which has been "painted", which is the real issue here … whichever characterisation was made, it was a matter of judgment or opinion.[64]

The impression, of course, is that the painting's 'vibe', its feeling, is that of a painting. But facing the facts that he decided not to find, there is no question that Hamilton J would have had to have seen a drawing. So he radically avoided looking at the image at all, other than listing and describing a preponderance of elements that constituted the contents of the canvas – how could tangled hair be represented other than the ideation of lines – leaving an impression that he had seen what to his eyes was very much a drawing:

> The portrait depicts Mr Gulpilil's head, shoulders and upper torso. It appears, from the evidence, that Mr Gulpilil has a mass of tangled hair. This is represented in the portrait by a mass of lines. It is hard to think how it could be otherwise. Close examination of the portrait shows the presence of many lines, some appearing almost as line on line, as has been said, in the depiction of Mr Gulpilil's face and body. On the other hand, there are present in the face and parts of the body substantial areas which appear as solid masses of black. The portrait is supported upon wallpaper, which appears to have a yellow pattern on a light background. Despite this colouring in the wallpaper, the principal impression of the portrait is that it is in black or shades of grey.[65]

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[61] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [32].

[62] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [25].

[63] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [29].

[64] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [29]–[30].

[65] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [6].

Hamilton J chose to avoid Panofsky's pre-iconographic phase by electing *not* to read the primary or natural subject matter of the visual, instead only seeing lines and impressions on a canvas. Those lines and impressions were dangerous to the interpretation of the law under consideration, for these would take the image into the realm of drawing and not painting, thus leaving the award of the prize invalid and void. But this reading of the lines without more is, in Panofsky's schema (and in the terms of the will), a nonsense, for no image, no portrait that is painted is comprised of its elements at the expense of the whole. The reliance on the *indicia certa*, the lines and methods used to create the image, meant that Hamilton J was painted into a corner, as it were, leaving the image disassembled into its elemental parts which could not be retrieved. If on the other hand the Panofskian schema were employed, the court would have seen much more than lines on a canvas, and it would have been able to read the visual intuitively. Even though a synthetic intuition, Panofsky's iconological approach would require a court to see what was actually there to be seen as a whole. But this would require an acceptance that law's reliance on and belief in the clarity provided by the verifiable and identifiable is more radically uncertain, nihilistic even, that the visual as vibe. Instead, Hamilton J radically sees nothing, resulting in a paradoxical visual nihilism, by preferring the iconology of the law as a precise and perfected form of viewing the image instead of accepting the iconography or iconology of the visual or the image.

17.6 Conclusion

This aporetic gesture by Hamilton J is an application of the juridical-aesthetic state of exception in its archest form, in which *everything* that is visible to the eye is invisible to the court, in order to achieve the desired legal outcome in the case that the decision of the trustees should not be interfered with. But this process of avoidance shows that it is impossible for law to do what it claims, and not engage with the visual, as law must read the images given to it to interpret and consider. It is a mere empty gesture to suggest that law leaves the reading and interpreting of visuals and images to others. But even if the courts were to be convinced that guidance from interpretative schemas, such as Panofsky's, would assist them in the process of dealing with the visuals and images that so vex them, they would find ways to avoid its tests and techniques, because it is just so legally useful to pick and choose from the mass of elements and stories that sit in and around canvases, lyrics, music and film, instead of accepting the potentially truth claims that are located in the vibe. So I suspect that the courts would always find a way to occlude what they did not want to see and see what they want, leaving visuals and images in a perpetual *legal* state of exception. Do you see what I see?

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Chapter 18
The Iconography of the Giving of the Law: A Semiotic Overview

Massimo Leone

Abstract Biblical passages that narrate how the Tables of the Law were transmitted from God to the people of Israel have been the object of many interpretations, both in Jewish commentaries, Christian exegeses, and secular analyses. A semiotic ambiguity characterizes these passages: on the one hand, Moses is described as the one who transmits to the people of Israel a normative message written directly by God; on the other hand, he is described as the one who transcribes for the people of Israel a normative message that God has transmitted to him orally. Interpretations emphasize either the former or the latter version, with important consequences for the way in which the semiotic status of the Tables of the Law is imagined: sculpted directly by God or carved by human hand, a written message from God or a 'divine dictation' from God to Moses. Furthermore, Christian interpretations of such ambiguity play a fundamental role in the way Christianity proposes itself as an alternative to Judaism: a religion where the Law is written on hearts versus a religion where the Law is written on stone.

From the first centuries CE on, both Jewish and Christian images have represented the Biblical passages mentioned above, but it would be superficial to consider these visual representations as mere illustrations of the Biblical text and its commentaries. On the contrary, in many cases images too work as commentaries, proposing their own interpretation about the semiotic status of the Law. For once, it is not verbal language that develops a metadiscourse on images, but images that embody a visual metalanguage on words (although this visual metadiscourse, in turn, needs the verbal metadiscourse of semiotics in order to be analyzed and interpreted). The chapter proposes a survey of these visual commentaries on the key Biblical episode of the Giving of the Law, from the frescos on the walls of the synagogue of Dura-Europos to Chagall.

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18.1 Introduction

The Biblical passages that narrate how the Tables of the Law were transmitted from God to the people of Israel have been the object of many interpretations, both in Jewish commentaries, in Christian exegeses, and in secular analyses. A semiotic ambiguity characterizes these passages. On the one hand, Moses is described as the one who transmits to the people of Israel a normative message written directly by God; on the other hand, he is described as the one who transcribes for the people of Israel a normative message that God has transmitted to him orally (Leone 2001). Interpretations emphasize either the former or the latter version, with important consequences for the way in which the semiotic status of the Tables of the Law is imagined: Is it sculpted directly by God or carved by human hand? Is it a written message from God or a 'divine dictation' from God to Moses? Furthermore, Christian interpretations of such ambiguity play a fundamental role in the way in which Christianity proposes itself as an alternative to Judaism: a religion where the Law is written on hearts versus a religion where the Law is written on stone (Leone 2000).

Starting from the first centuries CE, both Jewish and Christian images have represented the Biblical passages mentioned above. Yet, it would be superficial to consider these visual representations as mere illustrations of the Biblical text and its commentaries. In many cases, images too work as commentaries, proposing their own interpretation of the semiotic status of the Law. For once, it is not the verbal language that develops a metadiscourse on images, but images that embody a visual metalanguage on words (although this visual metadiscourse, in its turn, needs the verbal metadiscourse of semiotics in order to be analyzed and interpreted).

As regards Jewish visual representations of the Giving of the Law, they face the paradox of depicting an episode that is probably the most central Biblical reference for the characteristic 'aniconicity' of Judaism: How can some Jewish images represent this episode, given its narrative proximity with the episode of the Golden Calf and the consequent interdiction of any idolatrous image?

As regards Christian visual representations of the Giving of the Law, they face the opposite challenge of legitimizing such transposition from the written text to its depiction. In the patristic typological exegesis of the Giving of the Law, this Biblical episode is turned into a figure—a prefiguration—of both the advent of Christianity (the Law carved on stone will be replaced by the Law instilled in hearts) and the so-called *traditio legis*, the transmission of the religious jurisdiction over the Christian Church from Jesus to Peter (Moses then becoming a typological prefiguration of Peter). As a consequence, Christian images (figures) seek to reveal, through their visual language, this relation between the Biblical episode of the Giving of the Law in the Old Testament and what it signifies in relation to the 'New Testament.' However, Christian visual representations of the Giving of the Law often propose their own interpretations, which contradict the main trends of Christian exegesis.

The Judeo-Christian iconography of the Giving of the Law is old, abundant, and complicated. The following sections will propose a general overview and dwell on the most significant visual representations of this theme.

18.2 The Early Jewish Iconography: Dura-Europos

One of the first known visual representations of the Giving of the Law is in the cycle of frescos depicting Biblical episodes that decorated the third-century synagogue of Dura-Europos (currently in the Damascus National Museum), located near what is today the village of Salhiyé, Syria (Rostovtzeff 1932, 1938; Sonne 1947; Goodenough 1953–1968, 11: 3; Perkins 1973; Kraeling 1979). The second wall of the synagogue was decorated with an image of Moses on the Sinai. Unfortunately, the upper part of the fresco is missing. Moses' legs and a fragment of one of the Tables are visible, but the precise postures, gestures, and movements involved in the Giving of the Law are not.

The following fresco in the cycle, which decorated the third wall of the synagogue, represents Moses reading the Law for the people of Israel. To most regards, this last image can be considered as denying the idea of any direct communication between God and the people of Israel. The role of Moses as a mediator is strongly emphasized. He is depicted while he reads and, maybe, also interprets for the people of Israel the Law that God dictated to him. Furthermore, the Law is not represented as a series of characters sculpted on stone by 'the finger of God,' but as a series of lines written on papyrus or parchment, as a 'humanized' script. The Jewish religious doctrine of a divine writing is therefore contradicted, or at least downplayed, by an image depicting the human practice of reading.

And yet, this interpretation is uncertain. The frescos of Dura-Europos have triggered a debate developing on several levels. At the central level of methodology, interpreters of these Jewish frescos have been confronted with the key problem of all interpretations of Biblical images: Should visual representations be 'read' through the written text, or should images be considered as an autonomous interpretation, beyond the written text? Two scholars, both prominent in the literature about the depictions of Dura-Europos, answered this question in opposite ways.

Carl H. Kraeling, the archeologist who led the team that 'discovered' Dura-Europos, in *The Synagogue*, which is the final report of research conducted on the site by the joint archeological mission of Yale University and the French Academy, seems to interpret the frescos as a visual representation that does not contradict the Bible and the early Jewish religious literature (Kraeling 1979). Kraeling does not deny the exegetical value of the frescos of the synagogue of Dura-Europos but believes that they do not challenge the established knowledge about the early history of the religion of Israel. According to Kraeling, these images belong to an old tradition and have their origin in illustrations that can be found in mostly propagandistic works of Jewish religious literature in the Hellenistic era.

On the contrary, Goodenough, who wrote a monumental work on Jewish symbols, and devoted three volumes exclusively to the synagogue of Dura-Europos, holds a different opinion: images must be interpreted with reference to their independent and specific meaning, beyond the meaning that they receive from verbal texts:

> That these artifacts are unrelated to proof texts is a statement which one can no more make at the outset than one can begin with the assumption of most of my predecessors, that if the symbols had meaning for Jews, that meaning must be found by correlating them with Talmudic and biblical phrases. (Goodenough 1953–1968, 4: 10)

On the basis of these methodological stands, Kraeling and Goodenough propose different interpretations of the role of the frescos of Dura-Europos in relation with the early Jewish religious culture. According to Kraeling, these images can be easily integrated in the religious culture of early Judaism:

> If our understanding of the pictures is correct, they reveal on the part of those who commissioned them an intense, well-informed devotion to the established traditions of Judaism, close contact with both the Palestinian and the Babylonian centers of Jewish religious thought, and a very real understanding of the peculiar problems and needs of a community living in a strongly competitive religious environment, and in an exposed political position. (Kraeling 1979, 353)

Goodenough, on the contrary, situates these frescos outside of the orthodoxy of the early Jewish religious tradition:

> While the theme of the synagogue as a whole might be called the celebration of the glory and power of Judaism and its God, and was conceived and planned by men intensely loyal to the Torah, those people who designed it did not understand the Torah as did the rabbis in general. Scraps stand here which also appear in rabbinic haggadah, to be sure […] But in general the artist seems to have chosen Biblical scenes not to represent them but, by allegorizing them, to make them say much not remotely implicit in the texts […] The Jews here, while utterly devoted to their traditions and Torah, had to express what this meant to them in a building designed to copy the inner shrine of a pagan temple, filled with images of human beings and Greek and Iranian divinities, and carefully designed to interpret the Torah in a way profoundly mystical. (Goodenough 1953–1968, 10: 206)

Any semiotic interpretation of the way in which the Giving of the Law is visually represented in the frescos of the synagogue of Dura-Europos must take the same dilemma into account. On the one hand, the image of Moses reading the Law can be interpreted with reference to Kraeling's perspective. Hence, it would not be a visual representation downplaying the early Jewish tradition of the divine origin of the Law but a simply descriptive image where Moses is depicted while reading and interpreting for the people of Israel the Law that he has received from God. Moreover, the fact that the Law appears not as carved on stone but as written on papyrus or parchment would not strange. It would be nothing but a visual reference to the Jewish idea of the possibility of producing human replicas of the divine message in keeping with rules that are thoroughly described in the Deuteronomy.

On the other hand, according to Goodenough's perspective, this image of Moses is 'revolutionary': first, because it gives an iconic shape to the very moment when the interdiction of an iconic shape is solemnly established and, second, because it hints at the human nature of the Law, represented as written on a scroll that Moses calmly unrolls in his hands.

It is impossible to choose between Kraeling and Goodenough. The dilemma must remain unresolved. Images reject a definitive interpretation and open a gap of ambiguity between the verbal text and its visual rendition. However, if one accepts the hypothesis that the frescos in the synagogue of Dura-Europos constitute a visual semiotic system, then it is important to point out the following difference: the fragment of fresco representing Moses on the Sinai contains a depiction of the stone Tables, whereas in the following fresco Moses is reading from a scroll of papyrus or

parchment. This visual difference seems to suggest a semantic difference between the Commandments, carved on stone, and the Law, written on other materials. The former is written directly by God, while the latter is the object of a tradition requiring a human activity.

The two poles of this visual and semantic difference characterize, in increasingly complex ways, all the following iconography of the Giving of the Law.

18.3 The Early Christian Iconography

Scholars have been expressing diverging opinions as regards the influence of the frescos of the synagogue of Dura-Europos on the early Christian iconography. There is convincing evidence that this influence was minimal (Gutmann 1988). However, Goodenough's thesis according to which early Christian iconography was strongly influenced by early Jewish iconography is also persuasive:

> A very small amount of investigation showed that Christian art had not begun with representations of the Christian message directly. The mosaic designs in Santa Maria Maggiore, which represented scenes from the Old Testament, for example, appeared to be older than those which represented specifically Christian scenes or figures. (Goodenough 1953–1968, 1: 26)

Goodenough rejects the hypothesis of an autopoiesis of the Christian imagery. According to him, Christian visual representations do not originate in the aniconic desert of Judaism but in relation to the vast quantity of visual material provided by the early Jewish iconography. It is in the framework of the typological relation between the Christian and the Jewish early iconographies that depictions of the Giving of the Law in the Roman catacombs must be interpreted.

In the Roman catacombs, the Giving of the Law is visually represented 15 times (Fiocchi Nicolai 1998). A typological reading would immediately suggest a comparison between the depiction of Moses and that of Jesus in the same context: just as Jesus is the Logos of the 'New Testament,' Moses, who is the agent of the Logos in the 'Old Testament,' appears in the catacombs as Jesus' prefiguration. However, if Jesus is undoubtedly the agent of "the writing of the Law on human hearts" (the writing that Paul celebrates in his exegesis), then the agent of the writing of the Law on stone (that of the 'Old Testament,' according to the Christian point of view) is an enigma: the parallel between Jesus and Moses falls short of taking into account the difference between the human nature of the former and the divine/human nature of the latter. And the question remains: Does Moses in the catacombs receive the Law directly by God, the real agent of its writing?

The iconography of the Giving of the Law in Christian images of the first centuries seems to embrace the interpretation that the Law is directly transmitted from the finger of God to the hand of Moses. However, an important change in the iconography of Moses takes place from the fourth century on. Inspired by coeval exegeses, Christian images begin to represent Moses, no longer as the prefiguration of Jesus, but as the prefiguration of Peter (Wilpert 1903). In relieves of sarcophagi (120 times)

(Benoît 1954), funerary paintings (26 times), glass decorations (4 times), and also on a brass lamp (Florence, Archeological Museum), Peter is represented through a typical Mosaic iconography: he hits a rock with a stick, and water miraculously springs out.

In the fifth century, influenced by Augustine's typological reading of Moses, the Christian iconography systematically represents Peter as Moses. However, Peter becomes the protagonist of a new iconographic theme, the *traditio legis*, where Jesus gives the Law to him (Vieillard 1929, 6; Gerke 1932; Cecchelli 1937). Probably inspired by a lost mosaic that used to decorate the church of Saint Peter in Rome—first reproduced in a little apse in the church of Saint Constance (third century) and subsequently in the sarcophagus of Saint Sebastian (370 circa)—from the fifth century on, this iconography becomes quite common, often accompanied by the caption: *dominus legem dat*, "the Lord gives the Law."

This iconographic theme is central in relation to a semiotic history of the depictions of the Giving of the Law. Whereas the early Jewish literature insists on the exclusively divine origin of the Law (maybe with the only exception of the frescos of the synagogue of Dura-Europos), the early Christian iconography absorbs this interpretation but adapts it to the relation between Jesus and Peter. The Law is still written by a divine agent (albeit under a human guise), but it is given to Peter, founder of the Catholic Church. The effects of this parallel on the visual legitimization of the Church as an institution are difficult to overestimate.

Furthermore, writing is still the medium chosen by God, and by Jesus, to communicate the Law, but the Tables of stone disappear from the iconography of the *traditio legis*: the transition from the Law of the 'Old Testament' to that of the 'New Testament' is visually embodied by the passage from stone to parchment. The early Christian iconography of Moses also manifests the same passage (see, for instance, the visual representation of some episodes from the life of Moses in the wooden relieves of the gates of the Roman Basilica of Saint Sabine, fifth century [Wiegand 1900]).

18.4 The Christian Iconography in the Middle Ages

The Ashburnham Pentateuch (seventh century, Paris, National Library, nouv. acq. lat. 2334) depicts the Giving of the Law with new features. The image of this Biblical episode is juxtaposed with the visual representation of the Giving of the Law from Moses to the people of Israel. The Tables, which are completely absent in the first scene, are perfectly visible in the second. Hence, this new iconography represents Moses' mediation between God and human beings, but simultaneously rules out any direct intervention of Moses on the text of the Law. As soon as the Tables are given to him, they disappear in order to subsequently reappear before the assembly of the people of Israel. The same visual

composition characterizes also some later medieval depictions of the Giving of the Law, for instance, those of two twelfth-century manuscript Bibles executed in Tour.

In this new iconography, the support of the divine writing changes again. The Law is neither carved on stone nor written on papyrus or parchment scrolls but on a support that looks like a volume. This passage from the Tables of stones to the scroll of papyrus and consequently to the volume of parchment is a result of the technical evolution of human writing, but it also embodies an evident semantic transition between different conceptions of the divine/human origin of the Law and of the permanence/impermanence of its message.

A seventh-century stone carving from Constantinople clearly shows Moses as he receives the Law from the hand of God. Even though coeval Biblical commentaries usually adhere to Augustine's exegesis of this Biblical episode (Leone 2001), depictions often represent the communication of the Law as unidirectional, where human beings are totally passive in receiving the Divine writing. Thus, images contradict the Biblical narration and contribute to the shaping of the idea of a divine writing of the Law: when God decides to communicate with human beings, he adopts their own instruments. However, in the Constantinople carving, the distinction that the early Jewish iconography usually maintained between the writing of the Law and that of the Decalogue is obliterated. The support of the writing of the former becomes the form of the writing of the latter.[1] Therefore, images attribute to the writing of scribes the same status of the divine writing.

In the ninth century, the iconography of the Ashburnham Pentateuch is still predominant, but with a significant difference. In a miniature of the Grandval Bible (834–843 circa, London, British Museum), for instance, the writing of the Law is present in the upper part of the image (transmission between God and Moses) as well as in the lower part (transmission between Moses and the people of Israel). The Giving of the Law therefore assumes a vertical structure, but simultaneously Moses becomes more and more the protagonist of the institution of the divine Law among human beings.

The Carolingian Bibles of Charles the Bold (National Library) and Louis the Fat (Basilica of Saint Paul outside the walls) show a similar visual structure. The Bible of Alcuin at the British Museum also depicts the Giving of the Law by an image divided into two parts: the first occupied by God and Moses, the second by Moses and its people.

An exception to this medieval visual structure is represented by a later Spanish-Jewish manuscript (fourteenth century, Sarajevo Haggadah, currently at the Museum of Sarajevo). The composition is still predominantly vertical, but God disappears from the image. Not even His hand is visible. However, the context that this image was supposed to illustrate might explain this exception: not a Bible, but a "haggadah," an anthology of mostly apocryphal stories related to the Biblical narration (Derenbourg 1898).

[1] See Ginzberg (1998, 3: 119) that mentions the Jewish legend according to which it would be possible to roll the Tables of stone like a parchment scroll.

18.5 The Christian Iconography in the Renaissance

In the fifteenth century, the Christian iconography of the Giving of the Law was strongly influenced by Lorenzo Ghiberti's visual representation of it in the decorative plaques of the *Gates of Paradise* for the Baptistery of Saint John in Florence. Commissioned on January 2, 1425, the plaques were installed, 27 years later, on the door of the baptistery facing the cathedral (Paulucci 1996, 124–126). This iconographic invention was influenced, in turn, by the new fifteenth-century Florentine taste for Biblical scholarship. One of the most acclaimed interpreters of Ghiberti's *Gates of Paradise*, Richard Krautheimer, suggests that the iconography of the Giving of the Law was inspired, particular, by the fifteenth-century Florentine literate Leonardo Bruni: "The Giving of the Law is presented just as he proposed it, with the sound of trumpets (*buccina suonante*), corresponding to the description in Exodus 20:18" (Krautheimer 1956, 170–171). Furthermore, Krautheimer stresses the dependence of the new iconography elaborated by Ghiberti on the prominence of Ambrose's exegesis among fifteenth-century Florentine literates:

> The very simplicity of the scheme of the Gates of Paradise suggests a new and different exegetic approach. In opposition to the scholastic approach of the Middle Ages, which ultimately stems from Saint Augustine, this simplicity of symbolism is much closer to the writings of Saint Ambrose. Such a direct approach as the program of the Gates of Paradise brings to mind patristic, rather than scholastic writings.
> Patristic, not medieval, ideas do, indeed, underlie the entire final plan of the Gates of Paradise. (ibidem)

Krautheimer claims that Ghiberti was influenced by Ambrose's Biblical exegesis through the fifteenth-century Florentine humanist Ambrogio Traversari, whose personal library contained "a complete collection of the Latin *patres*: 49 volumes of Saint-Augustine, 17 of Saint Jerome, 9 of Saint Ambrose, 20 of Saint Hilarius" (ibidem). According to Krautheimer, there is strong correspondence between the way in which Ambrose interpreted the Bible and the way in which Ghiberti depicted it:

> In the history of scriptural exegesis Saint Ambrose had been first and foremost in working out a comprehensive and intelligible outline of the whole Bible. His allegorical commentaries on the Old Testament show his method. *Hexaëmeron* in six books and *De Paradiso* concern the Creation. They are followed by *De Cain et Abel* in two books, *De Noe et Arca* in one book, and *De Abraham* in two books. *De Isaac et anima* and *De bono mortis* treat the story of Isaac and Rebecca, and *De fuga sæculi* and *De Jacob et vita beata* that of Jacob. *De Joseph patriarcha* concludes the series.
> By and large, then, the division of Ambrose's treatise into chapters corresponds to the layout of the first six relieves of the Gates of Paradise in which are represented the stories of the Creation, Cain and Abel, Noah, Abraham, Isaac and Jacob, and Joseph. (ibidem, 175–176)

However, Krautheimer's hypothesis seems to excessively downplay the importance of Augustine's Biblical exegesis in fifteenth-century Florentine scholarship, which is evident also in the composition of Ambrogio Traversari's library. In the specific case of Ghiberti's iconography of the Giving of the Law, Ambrose could

Fig. 18.1 Lorenzo Ghiberti. 1425–1452. *Moses receives the Tables of the Law* (Bronze panel n. 8 from the "Gates of Paradise," Florence, Baptistery of Saint John (East door). Currently at the Museo dell'Opera del Duomo, Florence)

hardly replace Augustine as an exegetical source of the visual representation, since the bishop of Milan devotes little consideration to this Biblical episode in his writings (Leone 2001). On the contrary, it seems quite evident that Ghiberti and his intellectual entourage were still, at least as far as this specific plaque is concerned, under the influence of Augustine. A semiotic analysis of this image will corroborate this hypothesis (Fig. 18.1[2]).

On the one hand, Ghiberti's Giving of the Law contradicts the Biblical text by eliminating the scriptural ambiguity that the Fathers of the Church were confronted with. In Ghiberti's iconography, the Law is only one, and God writes it and gives it to Moses. There is no human contribution to this transmission. The image works as an agent of simplification of the exegetical doctrine, since it cannot visually transpose all the interpretative nuances that characterize the exegesis of this episode.

On the other hand, scholars' contribution to Ghiberti's iconography is evident in the way in which some of these nuances are visually translated by certain details in the visual composition. For example, the posture of the arms of both God and Moses is quite significant. The two Tables do not look as joint, as in the previous iconography, but separated and even at a certain distance from each other. God's deictic gestures emphasize this separation. The first Table is vertically presented to Moses

[2] All figures are partial reproductions for scientific purposes only.

by God's left hand, whereas the second Table is horizontally placed by God's right hand into Moses' left hand. Such composition of the visual scene is not fortuitous but probably refers to the exegesis of the Biblical episode that Augustine proposes in the *Quaestiones*, largely followed by medieval and early modern interpreters (Leone 2001): one of the two Tables regulates the relation between God and human beings, while the other regulates the relation among human beings. Thus, there are two Laws that are transmitted from God to Moses and from Moses to the people of Israel, not one.

The post-Ghibertian iconography of the Giving of the Law adopts the exegetical simplification of the image by often representing the Biblical episode as isolated, as *una tantum*. The Biblical episodes of the broken Tables and of the second Giving of the Law are often neglected, and the Deuteronomy is usually excluded from the iconographic project. Insofar as the image is obliged to represent instants, the process of the Giving of the Law becomes *momentum* in its iconography.

The entire fifteenth century is dominated by the iconographic invention of Ghiberti, subsequently adopted by Cosimo Rosselli in the frescos of the Sistine Chapel (1481–1483). However, the Spanish altarpiece of Ona constitutes a remarkable exception to this iconographic trend: God appears as a personal agent, and instead of giving the Tables with the Law carved in them to Moses, He dictates the Law to him, who writes it down on a diptych with a pen. Such peculiar iconography is probably influenced by the Augustinian exegesis of this Biblical episode through the commentaries of Isidore of Seville, as well as by the Spanish iconography of Saint John at Pathmos.

Fifteenth-century Flemish Biblical illustrations of the Giving of the Law hardly ever follow the example of coeval Renaissance depictions, but adopt a more conservative iconography. In the De Keyser Bible, for instance, printed by Merten de Keyser in Antwerp in 1530, Moses receives from God two Tables of stone. The horns on the head of Moses, consequence of an erroneous translation from Hebrew ("horned" instead of "beaming"), become a recurrent iconographic attribute (which appear, for instance, even in Michelangelo) and signal an emphasis on the depiction of the second Tables of the Law, after the Biblical episode of the Golden Calf. However, such iconography is mostly modeled after earlier representations (Baudrier 1964–1965, 12: 347–8, 351, 357–8):

> There are some free-style imitations of the woodcuts made by Erhard Schön, Hans Springinklee and several anonymous artists for the *Biblia cum concordantiis Veteris et Novi Testamenti*, which was printed and published from 1518 onward by Jacob Sacon in Lyons though financed by Anton Koberger of Nuremberg. (Rosier and Bart 1997, 1: 19)

18.6 The Christian Iconography in the Early Modern Period

In the sixteenth century, Giulio Romano replaced Ghiberti as the main source of visual representations of the Giving of the Law. Romano's depiction of the Biblical episode in the *Vatican Logge*, whose authorship has been confirmed by most art historians (Hartt 1981: 28), tends to depict the writing of the Law as an

exclusively divine activity, in line with the most prominent exegetical tradition of the time.

Giulio Romano's frescos also inspired the sixteenth-century Flemish tapestries representing the Giving of the Law. Ferrante Gonzaga's tapestries, for instance, woven by the workshop of Dermoyen in Brussels between 1545 and 1550, represented certain episodes of Moses' life after the model of the Vatican *Logge* (the series has been lost entirely, with the exception of an element now at the Museum of Historical Monuments at Châteaudun). Early modern tapestries usually follow the coeval pictorial iconography of this Biblical episode, with some exceptions: a tapestry made in Brussels around 1550, now at the Museum of Vienna, represents Prometheus as a 'pagan' prefiguration of Moses, according to the cultural trend of Christian 'moralization' of the Greek and Latin mythology, quite common in the sixteenth and the seventeenth centuries. As Prometheus stole fire from the pagan Gods, so Moses 'stole' the Law from the Biblical God. The parallel evidently suggests an active human participation in the passage of the Law from God to human beings, in keeping with the cultural and ideological episteme of Renaissance humanism. Other sixteenth-century tapestries, instead, suggest a more orthodox comparison between the Giving of the Law in the 'Old Testament' and the evangelical episode of the Pentecost in the 'new one' (see, for instance, the tapestries of La Chaise-Dieu, fabricated around 1518).

In the seventeenth century, the popularity of the life of Moses, in general, and of the Giving of the Law, in particular, as iconographic theme for tapestries is attested by a cycle modeled after Charles Poerson (before 1663) and by the Gobelins tapestries modeled after Poussin and Le Brun (1683–1684) (Delmarchel 1999, 323). The trend of composing the iconography of these tapestries following those of famous pictorial representations continues throughout the eighteenth century, but usually with the mediation of tapestries fabricated in the previous century (for instance, the *Life of Moses* woven by van der Borcht's workshop in 1730, inspired by the Gobelins series).

18.7 The Christian Iconography in the Modern Era

In the eighteenth century, a new parallel enriches the already complex metaphoric history of the iconography of the Giving of the Law. Moses is no longer compared to Jesus, or Peter, or Prometheus, or the Apostles in the day of the Pentecost, but to Saint Marc the Evangelist. An illustrated in-folio English version of the Bible printed in Oxford in 1723 by John Baskett, "Printer to the King's Most Excellent Majesty," avoids depicting the Giving of the Law but includes an engraving that represents Moses while descending from the Sinai with the written Tables. The agency of the writing of the Law is not explicitly represented, but it is implied through the visual parallel between the main scene and a secondary scene below it, which is a visual representation of Saint Marc writing his Gospel. The new parallel suggests that the Law of the 'Old Testament,' carved on stone during a mysterious

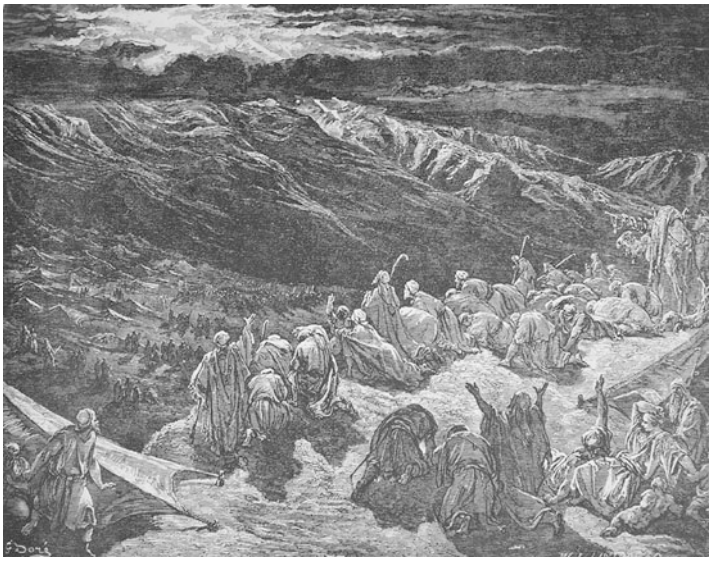

Fig. 18.2 Gustave Doré. 1866. *Moses receives the Tables of the Law* (Cupper engraving from *La Sainte Bible selon la Vulgate*, 2 vols, French Trans. J.-J. Bourassé. Tours: A. Mame et fils, in-folio)

moment of communication between God and Moses, is superseded by the Law of the 'New Testament,' whose human origin is clearly recognizable not only in the Evangelists, but also in the incarnated divinity of Jesus. The Law carved on stone Tables, as Saint Paul suggested in his interpretation, is replaced by the Law written on human hearts.

However, the more traditional iconography of the Giving of the Law, meant as a transmission of the divine writing to Moses, does not disappear in the modern era. On the contrary, the *Illustrations of the New Testament by Westall and Martin, with description by the Reverend Hobert Counter*, published in London by Edward Churton in 1836, represent Moses reaching his hands out to God in order to receive the Law. In his commentary to the engraving, Hobert Counter writes:

> From the summit of this holy hill the Deity proclaimed in an audible voice the terms of the covenant which he made with his chosen people, together with the precepts of the moral law; and when this was done, he delivered to his accredited minister Moses, the tables of stone upon which these precepts were "written with the finger of God," and designed to be a rule of life "for perpetual generation." (*Illustrations* 1836, commentary of the engraving "Moses receiving the Tables")

This commentary demonstrates that Augustine's interpretation of the duality of the Tables as related to the duality of the Law (the Law of the Covenant and the moral Law) is still prominent in the Christian culture of the first half of the nineteenth century, and any reference to Moses' participation in the Giving of the Law is excluded.

However, no depiction of the Giving of the Law is more representative of the nineteenth-century iconography of this Biblical episode than Gustave Doré's visual representation of it (1866) (Fig. 18.2).

The engraving representing Moses on the Sinai iconically translates the ambiguity of the Biblical text without pushing it toward a precise direction. The image does not show either God or his human interlocutor, and the perspective chosen by the illustrator places the people of Israel in the foreground. Thus, in this visual composition, the Giving of the Law is interpreted as a mythical moment of religious foundation, where clouds and mist surround human history. Unlike any previous image, this one proposes to viewers a point of observation that coincides with that of the Israeli crowd. In other words, the viewers' point of view is construed in a way that they feel the same incertitude of the people of Israel: What is happening on the Mount Sinai? Is God dictating the Law to Moses? Is he giving the Law to him, already perfectly written on the Tables of stone? When Moses descends from the Sinai with the Tables of the Law, will they have the authority of a divine writing or the incertitude of a human transcription?

18.8 The Postmodern Iconography: Focus on Marc Chagall

Postmodern visual representations of the Biblical Giving of the Law are too numerous and various to be effectively summarized in a short article. In the postmodern era, the 'secularization' of 'Western' culture breaks the ties between the exegesis of the Biblical text and the iconography of its visual representations. The artist becomes an autonomous exegete of the Bible, and, to a certain extent, the exegete becomes an autonomous artist of interpretation.

Among the dozens of twentieth-century artists that have visually represented the Giving of the Law, perhaps none did it with more sensibility toward both the past exegetic and iconographic tradition of this Biblical episode and its new connotations in the postmodern era than Marc Chagall.

Chagall[3] was raised in the Russian village of Peskovatiki (Harshav 2006), at the periphery of Vitebsk (Amishai-Maisels 1994), where he came in contact with both the religious culture of Chassidic Judaism and the visual culture of Russian Orthodox Christianity. He also trained as a visual artist in Saint Petersburg and Paris, and witnessed both the extraordinary human developments and the terrible human tragedies of the twentieth century (Harshav and Harshav 2004).

Chagall's Biblical illustrations must be placed in the context of the artist's long collaboration with the Parisian art merchant and publisher Ambroise Vollard,[4] which began in 1923 with the commission of the illustrations for Gogol's *Dead souls* (1923–1925), continued with the commission for the illustrations of La Fontaine's *Fables* (1926–1930) (Pontiggia 2003), and eventually, around 1930, led Chagall

[3] Peskovatiki, at the periphery of Vitebsk, at that time Russia, now Belarus, 1887—Saint Paul de Vence, 1985 (Wullschlager 2008).

[4] Saint Denis (Réunion), 1866—Versailles, 1939; see Sorlier et al. (1981).

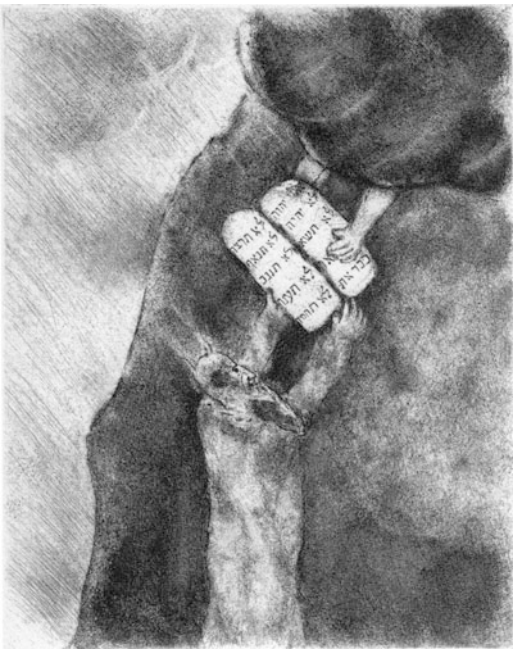

Fig. 18.3 Marc Chagall. 1956. *Moses receives the Tables of the Law* (Etching. 45.5 × 34.5 cm. Illustration n. 37 of *La Bible* by Marc Chagall, 2 vols, 105 illustrations. Paris: É. Tériade (editions Verve))

himself to propose to Vollard a five-volume illustrated version of the Bible, including the books of *Genesis*, *Kings*, *Prophets*, the *Song of Songs*, and the *Revelation.*[5]

Chagall's engravings were inspired by the artist's journey to Palestine, and preceded by 40 sketches (gouaches and oil paintings). Elaborated under the influence of Maritain's integral humanism, the 105 engravings were published in two sections: 66 of them were printed by Maurice Pontin before Vollard's death in 1939, the remaining engravings by Raymond Haasen between 1952 and 1956.

In its original 1956 version, Chagall's engraving *Moses Receives the Tables of the Law* is a 282 × 227-mm etching, bound in a volume together with 104 more etchings and placed as the 37th illustration of the series *The Bible* (Fig. 18.3).

The paratext of the illustrations, for instance, the Biblical captions from the 1638 edition of the Geneva Bible, orient the interpretation of the viewer. However, this section of the chapter will deal mainly with the way in which the chromatic patterns created by Chagall give rise to a specific visual exegesis of the Giving of the Law.

The abovementioned etching is offered to the viewer as a perceptible surface emerging from a conglomeration of colors, figures, and positions. The spectator can easily single out the plastic formants[6] of some of the figures (the Tables of the Law,

[5] The literature on this project is quite vast; see Maritain (1934, 1935), Shapiro (1956), Bellini (1985), Rosensaft (1987), Dall'Aglio (1989), Di Martino and Forte (1999), Corradini (2000), Pontiggia (2003), Martini and Ronchetti (2004), and Schröder (2004).

[6] In Greimas's semiotic theory, plastic formants are configurations of shapes, colors, and positions that are recognizable, in a certain visual culture, as simulating objects of the "macrosemiotics" of 'the real world.'

the face of Moses, a cloud), but the plastic organization that underlies these figures is not obliterated by their recognition; on the contrary, it keeps expressing an autonomous meaning, connoting both that of the figures and that of the deeper levels of the semantic articulation of the image.

The semiotics of the fine arts, among all visual disciplines, can rely on a specific method to describe and analyze this plastic level (Calabrese 2003). Faithful to one of the central postulates of semiotics—the one inherited from Ferdinand de Saussure's linguistics according to which meaning emerges as difference within a relation—the semiotics of the fine arts describes and analyzes the plastic level underlying the manifestation of a visual text as a network of relations that express differences and, hence, possible paths of meaning, among chromatic, eidetic, and topological elements.

As regards the chromatic dimension of Chagall's etching—the dimension on which the present chapter focuses upon—the series of illustrations that compose Chagall's *Bible* relies only on the spectrum from white to black, through different nuances of saturation and brightness of gray. Hence, given its 'nonchromaticity,' the 37th illustration of the series presents itself as a system of relations between more or less saturated and bright nuances of gray. Describing and analyzing them is impossible without considering the way in which the chromatic dimension interweaves with the eidetic dimension of shapes and the topological dimension of positions. It should not be forgotten either that, especially in the perceptible manifestation of an engraving, color is offered to perception also as print of the artist's gesture, as texture (an element that, unfortunately, disappears in digital reproductions of engravings).

In the top-right corner, there is an area that appears as deep-dark gray, almost black if confronted with the other areas of gray along the diagonal stretching from one angle to the opposite one: a very circumscribed and bright white area almost at the center of the image and a more elongated area below, where levels of saturation and brightness in gray are intermediate between those of the first two areas.

The spectator recognizes in these three plastic formants (the black stain top-right, the white stain in the middle, and the gray one bottom-left) three figures of the engraving, respectively, the cloud that hides the face of God, the Tables of the Law, and the body of Moses, but does not cease to receive the semantic connotation that the structure of these plastic formants projects over the figures they underlie. In order to prove it, it is sufficient to proceed with a simple test of mental commutation: What different meaning would come about if the cloud hiding the complexion of God was candid, if the body of Moses was pitch black, if the Tables of the Law were off-gray?

Before jumping to the level of interpretation, it is necessary to complete, inasmuch as it is possible in this circumstance, the description and the analysis of the plastic-chromatic dimension of this etching. An irregular line proceeding from the bottom-left toward the top-right corner divides it into two chromatically different areas: a clearer area on the left and a darker one on the right where the spectator is able to identify, through a series of complex but instantaneous inferences, the Mount Sinai. Such difference resonates with the system of chromatic relations already described. The dark gray of Sinai is slightly less dark than that of the divine cloud, whereas the clearer gray of the area on the left of the Sinai recalls that of the figure of Moses.

Limiting the description and the analysis of the chromatic dimension of this etching to such cursory indications would be tantamount to betraying the visual text and the way in which the typical graphic language of Chagall expresses itself therein. This etching, indeed, does not present itself as a neat contraposition between uniform chromatic blocks (dark gray versus white versus light gray, etc.) but as tension between chromatic microareas, further complicated by their appearing as internally agitated by the tension between microareas of chromaticity and texture.

Let us consider, for instance, the blackish block of the cloud. Bright variations are visible both near its borders (in particular, in the 'arms of God') and in the circumvolutions of the cloud itself. Let us consider the Tables of the Law. The black of the Jewish characters of the Commandments stands out, being even sharper than that of the divine cloud. Let us consider the figure of Moses. It is all a tension between different kinds of gray. The eyes, the temples, and the beard are quite dark gray, but the body and the arms are lighter, and the face, the head, and its horned rays are almost as white as the Tables of the Law. The dark gray of the Sinai is not uniform either: the part on the right of Moses, the one under the divine cloud, is lighter, while the part on his left is darker. And also in the latter part, some relevant nuances can be perceived: two thin streams of light seem to depart from the horned rays of Moses' head, run through his dark body, light up the Sinai, and cross the threshold between the mount and the light area of the sky. Finally, the sky too is agitated not only by the 'oblique rain' texture typical of Chagall's etchings but also by a 'patchwork' of clearer and darker spots.

A tentative interpretation of the etching will now be proposed in order to be re-elaborated and reconsidered after the analysis of the other levels where the meaning of the image can be articulated. If, as one deduces from the description and the analysis of the narrative level of this etching, the tale of the Biblical episode of the Tables of the Law represented in Chagall's etching is the tale of a communication, the chromatic dimension of the etching contributes to this tale by depicting the communication of the Law as a communication of Light. This effect of meaning is further emphasized by the choice of an achromaticity where the only salient differences are those of brightness between different nuances of gray.

Hence, the Tables of the Law are a luminous object that God—hidden underneath a thick layer of blackish clouds through which, nevertheless, the divine luminescence filters—hands to Moses; his body is gray, but his arms, and especially his face, light up at the moment of the transmission. The horned rays of Moses project the Light of the Tables, which is the Light of God, beyond the blackish curtain of the Sinai, toward a clearer elsewhere—the one beyond the oblique line that runs across the etching—whose gray color is very similar to that characterizing the part of the Sinai below the divine Light.

To summarize, the gray nuances of Chagall's etching seem to narrate the Biblical episode of the Tables of the Law through a mystique of Light, in which a very luminous but invisible God chooses to communicate a part of His own Light to the gray world of human beings through the Law, the only visible aspect of the divine Light, whose transmission to Moses lights him up and turns him into a channel of communication.

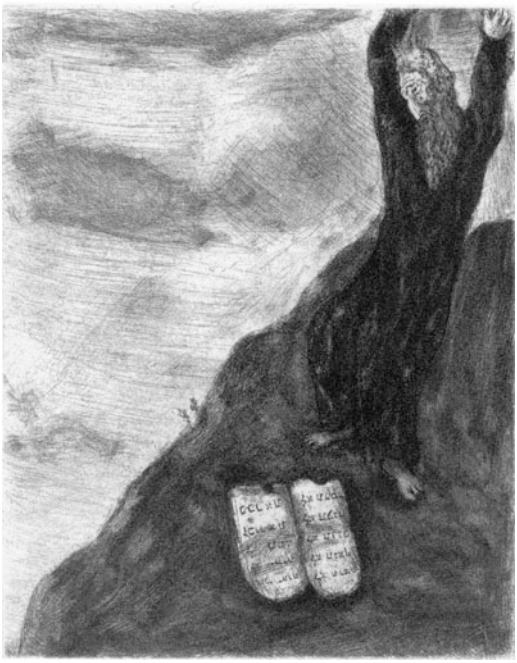

Fig. 18.4 Marc Chagall. 1956. *Moses breaks the Tables of the Law* (Etching. 45.5 × 34.5 cm. Illustration n. 39 of *La Bible* by Marc Chagall, 2 vols, 105 illustrations. Paris: É. Tériade (editions Verve))

In this tale of nuances of gray, the very dark gray bordering on black does not characterize only the cloud that hides the face of God and the Mount Sinai before it gets lit by the Light of the Law but also the Hebrew characters that inscribe the Law on the Tables. Chagall, indeed, does not represent Moses as the scribe of God but as the one who receives from God a Law already inscribed by the divine writing (Leone 2001). That the darkness of the hiding place of God characterizes also his writing is perhaps not casual. As the blackish layer of clouds simultaneously veils and unveils the divine face and his Light, so the obscure divine writing simultaneously veils and unveils the Law, handing it to human beings and to the fallibility of their interpretations.

Such reading of the chromatic dimension of this visual text is corroborated by contextual elements such as the Jewish religiosity to which Chagall was exposed since his childhood, the characteristic conceptions of the Law of this religiosity, as well as by textual elements, such as the chromatic structure of the 39th engraving, which visually narrates how Moses, angered by the episode of the Golden Calf, broke the Tables of the Law (Fig. 18.4).

Here, the clothes of Moses immediately become pitch black, a black even darker than that of the cloud covering the face of God in the previous engraving. No filtering of Light lights up these cloths. The Tables of the Law lose their whiteness and take on the dirty gray of the slopes of the Sinai, a gray where the Hebrew characters of the Law do not stand out any longer but become opaque and blurry. Finally, the demarcation line between the sacred space of the Sinai and the profane one of the

Fig. 18.5 Marc Chagall. 1956. *Moses and the Tables of the Law* (Project for a poster never printed. II test. 52.07 × 36.83 cm. Source: Cain 1960: ill. 115)

surrounding territory tightens up hermetically, blocking any passage of Light between the divine and the human, between transcendence and immanence. In short, as Chagall narrated the giving of the Tables of the Law through a configuration of nuances of Light, so this second etching narrates the loss of the Law through a reversal of such luminous configuration.

Chagall depicted the same episode in many color engravings as well. Observing the series of these artworks on the basis of what the semiotic analysis was able to detect in the grayscale etchings, one has the impression that Chagall seeks to find the right chromatic arrangement to communicate through colors what the etchings of *The Bible* express through their 'chromatic asceticism.'

The project for a poster, never printed, reproduced in the following figure, represents a narrative moment that, in the Biblical episode of the Tables of the Law, follows their transmission to Moses and precedes their being broken by him (Fig. 18.5).

It shows Moses hit in the face by a yellowish halo that propagates from the top-left corner of the image, departing from the top of the Tables of the Law. This impression is confirmed by the analysis of the posture of Moses, his horned head turned away from the Light so as to escape its unsustainable glare.

The way in which the arrangement of the chromatic dimension of the plastic formants contributes to the textual manifestation of this visual narration of the Giving of the Law—meant as a tale of communication of Light—and thus giving a 'chromatic coat' to the actants of this communication (the divine, the human, the

Fig. 18.6 Marc Chagall. 1956. *Moses and the Tables of the Law* (Lithograph. 59.05×41.27 cm. Poster advertising the issues of *Verve* devoted to *La Bible* by Marc Chagall. Source: Cain 1960: ill. 114)

object of communication), is even more evident in the lithograph executed by Chagall in 1956 to advertise for the issues of the magazine *Verve* devoted to his *Bible* (Fig. 18.6).

Here the same interaction of meaning between the chromatic dimension and the posture of Moses, characteristic of the previous image, is articulated with further precision. Moses turns away from the glare of the Law, but at the same time embraces the Tables as if they were a beloved body (also a heavy body, held from below with both hands!). The elegance of this posture lies in the fact that it manifests itself as a chromatic narration: the vivid yellow of the Tables rejects the blue of Moses' body, which nevertheless turns blood red in the hand that has received the Tables of the Law. As it has been already pointed out in the literature on Chagall's *Bible*, his iconography of the Giving of the Law often proposes an anthropomorphic representation of God as well as a theomorphic representation of Moses. Both are expressed mostly through arms and hands—those that give the Tables of the Law and those that receive them—represented as very similar if not identical.

The chromatic dimension, interlacing with the other dimensions that compose the visual narration, seems to unfold the story through the semantic opposition between the yellow of the Tables, a 'warm color,' and the blue of the body of Moses, a 'cold color,' where blue is also a 'celestial color' opposed to the 'terrestrial color' of

Moses' hand. The deep meaning of this lithograph hides behind this chromatic yellow-blue-red triangulation, a meaning that can be interpreted, of course, in many different ways, but can be summarized as follows: through the giving of the Tables, the divine transcendence 'infects' the body of Moses, but this lithograph of Chagall is not so much about the body of Moses becoming 'celestial' and hieratic as about the Law becoming 'terrestrial' and corporeal. In other words, through the Giving of the Law, Moses is tainted by transcendence, but at the same time, the Law, which he transmits from God to human beings, is tainted by immanence.

In this lithograph, color is manifested not only as a uniform chromatic diffusion (as in the poster reproduced in Fig. 18.5) but as "chromatic graphics." It is associated with the print of the artist's gesture and manifested as texture from the point of view of the plastic formants' structure. Hence, the Light of the Tables is embodied in two intensely yellow beams that—as if they were the sign of an instantaneous divine writing—dynamically 'scrape' the stylized shapes of the Tables. The blue of Moses' face 'breaks' the borders of its eidetic structure and, as in the previous image, spills out, giving rise to a sort of halo. Finally, the red spot expressing the embodiment of the Law not only reproduces this 'aesthetics of smear' but also contains a vortex of dark-red lines, suggesting that all the energy of the image (as well as that of the artist) is concentrated in this spot.

All the artworks by Chagall representing the Giving of the Law deserve an in-depth semiotic analysis, as regards not only their chromatic dimension but also all the levels in which the generation of their meaning can be decomposed. Each of these artworks proposes a 'theological-visual laboratory' where a certain arrangement of forms, colors, postures, and textures, together with that of figures, discourse, and narration, embodies a variant of the relation between the actants involved (God, Moses, the Law, sometimes also human beings) and the values they incarnate (transcendence, immanence, the Norm, etc.). However, despite these variants, or maybe exactly because of them, a certain way of conceiving and visually representing the giving of the Tables of the Law is revealed, a way that is typical of Chagall and that it would be difficult to grasp without the transversal and serial point of view of the semiotic gaze.

In the lithograph reproduced in Fig. 18.7, for instance, the triangulation of blue, red, and yellow appears again as a typical element of Chagall's iconography. Yet this time, it is the Tables that have a 'celestial' color, whereas the face and the body of Moses light up in red (Fig. 18.7).

The peculiarity of this lithograph resides above all in the introduction of certain plastic details that underline the dynamism of the communication God-Law-Moses-human beings: a clump of tiny yellow stain, of increasing dimension, seems to spring from the Tables and spread beyond their surface, 'staining' the face of Moses.

It is interesting to notice the way in which the representation of the divine writing changes in Chagall's artworks. Whereas in the etchings of *The Bible* such writing consisted in neatly carved Hebrew characters, in the lithographs this writing either disappears completely (replaced by color as in Figs. 18.5 and 18.6) or becomes a tangle of colorful lines (as in Fig. 18.7). In other cases, writing is evoked by a stylization

Fig. 18.7 Marc Chagall. 1956. *Moses and the Tables of the Law* (Lithograph. 35.56×26.67 cm. Published in *Verve: an Artistic and Literary Quarterly*, nn. 33–34 (ed. Tériade). Source: Cain 1960: ill. 124)

of lines and dots. The effect of meaning entailed in these changes is not easy to univocally identify. Certainly, the absence of the Hebrew script bestows a more abstract character not only upon the visual representation but also upon the narration that it embodies (God gives to Moses a Law that transcends the specificity of a language and its alphabet).

By comparing these lithographs, one realizes that the 'theological-visual laboratory' of Chagall explores different possible chromatic arrangements but usually within a certain combinatory grid that may constitute the core style of the artist's visual language, at least as regards this iconographic theme. The posture of Moses in relation to the Tables, the triangulation of colors, the quality of the texture, and the interlacing between the various dimensions of the plastic level do not change, and yet each lithograph, albeit in the framework of these regularities, is unique for it proposes small variations in the chromatic, eidetic, and topologic style, in the figurative, discursive, and narrative arrangement, which sometimes bring about considerable differences in the overall semantic structure of the image.

A detailed analysis of all these variants would require an entire volume, but let us consider, for instance, the lithograph reproduced in the following figure (Fig. 18.8).

The cloud that in *The Bible* covered the face of God was turned into a couple of curb and black lines, which confine the yellow of the divine Light in the top-right corner of the image. The predominant chromatic tonalities of this lithograph are

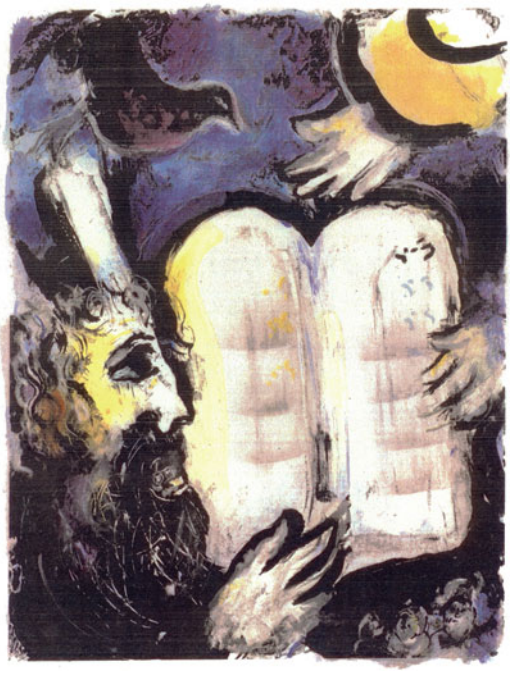

Fig. 18.8 Marc Chagall. 1962. *Moses and the Tables of the Law* (Lithograph. 128.27 × 165.1. Poster for the exhibition "Chagall et la Bible," Geneva, Rath Museum, July-August 1962. II version. Source: Cain 1960: ill. 362)

dark, but it is evident that the yellow stripe that appears on the left border of the Tables—the one contiguous to the face of Moses—and the stain of analogous color that taints the face narrate the communication of the Law-Light through a gradient of saturations of yellow, from the intense yellow of the full transcendence to the less saturated yellow of Moses' face.

18.9 Conclusions

Given its limits, the present chapter could only propose a necessarily sketchy and cursory exploration of the iconography of the Giving of the Law through two millennia of Jewish and Christian visual representations. Some interesting trends were detected: first of all, images of the Law and its transmission from God to Moses and from Moses to the people of Israel are not merely a visual translation of the Biblical text and its Jewish or Christian commentaries, but constitute a rich corpus of 'visual exegesis,' a 'visual theological laboratory' which is sometimes at odds with the more traditional written exegesis. The impact of frescos, miniatures, paintings, engravings, etc., on the way in which believers imagined this foundational moment of the history of both Judaism and Christianity throughout the centuries should not be underestimated. Through these images, indeed, and depending on the specific historical and sociocultural contexts, the Law was pre-

Fig. 18.9 Marc Chagall. 1956. *Moses receives the Tables of the Law* (Lithograph. 35.56×26.67 cm. Published in *Verve: an Artistic and Literary Quarterly*, 33–34 (ed. É. Teriade). Source: Cain 1960: ill. 126)

sented either as the product of a purely divine writing or as the product of Moses' mediation between the communicative intention of God and the human reception of His message.

One of the most elegant lithographs Chagall devoted to this iconographic theme may represent a very accomplished depiction of this dilemma (Fig. 18.9).

God is a black cloud with two small pale blue reflexes on the edges. As it happens with clouds, everyone can stare at it and imagine a face therein. Along the diagonal running from the top-right corner to the opposite one, a left hand comes out of the cloud. It is a stylized hand, drawn with four black strokes that do not 'close' the line of the fingertips but open it toward the space below. Down appears the Law, evoked through two black strokes—which look like the wings of a seagull (a Law that flies through the air between God and Moses)—and few dots, also black. Further down, the right hand of Moses is identical to the left hand of God, the head of Moses is lit after the encounter with God on the Sinai.

This story has been told thousands of times, and yet this lithograph by Chagall renews it by narrating it through colors. The whole background is pale blue, but the part between God and Moses is agitated by more saturated stains, as if they were animated by a shock of colorful energy. Two white stains light up the body of Moses, the first on the face that sees God and the second on the hand that receives the Law. But the visual pivot of the lithograph is in the two thick sun-yellow strokes that explode in the pale blue of the sky, between the black of the divine cloud and 'the

wings' of the Law. As in a mystical comic strip, Chagall's lithograph does not represent a God who carves the Law on the Tables of stone and silently hands them to Moses, but a God who speaks, a God-Logos, a God whose sun-yellow voice accompanies the Giving of the Law to human beings.

This is an artist-God who, like Chagall, does not dictate his Law with a stony alphabet but transmits it through a colorful voice.

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Chapter 19
Daumier and Replacing the King's Body

Oliver Watts

Abstract This chapter follows a politico-theological approach to the law, which also includes among other trappings of theology, icons. The law's image is based on command, authority and sovereignty and relates to the order of the Lacanian big other, or the symbolic order. Subjects, however, respond to this symbolic order in different ways: some may hysterically call out to be recognised and some may follow blindly. This chapter looks at art in early modernism when the authority of the law and particularly sovereign power is still effective. We will explore early modernism as the original attack against the State's right to make and control images. On the cusp of monarchical control and the birth of democratic freedom, a particular challenge was mounted by Honoré Daumier's paintings and caricatures. His battle and jailing for his terrible indignity against the king's body marks the birth of an emancipated space for the modernist artist (outside the power of the court). His freedom is guaranteed from some other sovereign body outside the frame. This chapter suggests a new approach to the modernist canon and the avant-garde. It suggests that modern art's seminal attack was an attack against the sovereign (monarchical) effigy and its replacement by the republican effigy or Marianne. In this way even in democracy the effigy is persistent; democracy was still imaged in relation to the monarch and an alternative sovereign body.

> This is no longer a riot, this is a revolution![1]
>
> The trouble with this country is that there are many men who, like you, imagine to themselves that there was a revolution in France. No Monsieur, there was not a revolution; there was but a simple change in the person of the Head of State.[2]

[1] Auguste Marmont, Duke of Ragusa, major general of the Royal Guard in a note to Charles X during the 1830 July Revolution.

[2] Casimir Périer to Odilon Barrot 1831, quoted in Petrey (1991, 65).

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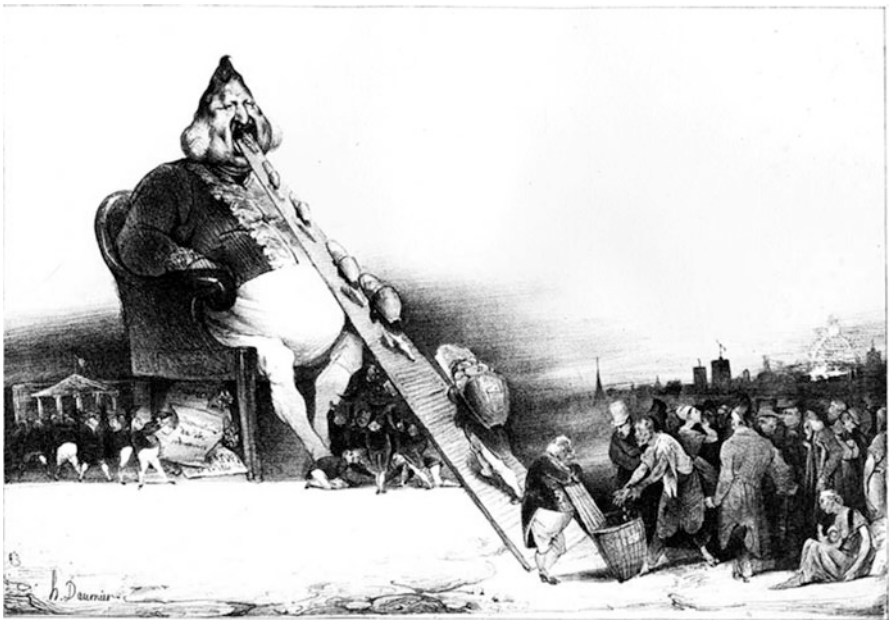

Fig. 19.1 Honoré Daumier, *Gargantua,* 1831, 30 cm × 21 cm, lithograph

19.1 Finding the Effigy in the Modernist Canon

Honoré Daumier moved art inexorably away from the royal court towards everyday life and social themes. In responding to the common man (the peasant in a train carriage, the worker) and by pillorying the lawyers, aristocrats and academician snobs, art moves from a courtly, State-sanctioned purpose, to bourgeois autonomy. The artist fights for freedom, and the 'halo of martyrdom' was assured by Daumier's trial and sentencing for depicting the king, Louis-Philippe, unfavourably in *Gargantua*, 1831 (Fig. 19.1). By placing Daumier on the limen of the *new regime* and the new, Daumier's art relates to the revolutionary shift into modernity. The early period of Daumier's career coincides with the July Revolution that created a *tabula rasa* upon which everyone tried to write their own ideology. It was an extremely volatile and unstable period with many competing political interests. Daumier was merely one of many gaoled and censored for questioning, through images and text, the king's legitimacy (see Goldstein 1989). Beyond that he was merely one of a large popular movement against the Orléanist monarchy, which crumbled in 1848. Daumier's trial will be used to delve into something beside his own legacy of modernist rebellion. The archaic charge of *lèse majesté* is the crime against the defamation of an effigy; it cannot exist without the belief in the 'second body' of the king. Early modernism is revisited as a response to this effigy as defamed by Daumier to create a republican polemic. In this extended revolutionary period the image was of primary propagandistic

importance to both the king and the artist. The king too had his artists, and there was a fight to see whose images would prevail.

19.2 Riot and Revolution in the July Monarchy

The substantial modernist blind spot in the reception of Daumier's work between 1830 and 1835 is that it relates to revolution not riot. Daumier's work is often determined from a modern viewpoint as a satirical critique against the government in an effort to petition for political change. However, this work – on the threshold of modernism – aimed for the complete disavowal and revolutionary overthrow of a governmental system. The period of 1830–1835 is characterised by a struggle for legitimacy. Louis-Philippe had to legitimate his accession to the throne and continually appease competing ideological positions. His reign was one of great tension and consensus building between 1830 and 1848 (Collingham 1988). The king's position was Orléanist constitutionalism, which became a desperately centrist position between monarchical and republican interests. The monarchical legitimists believed that only a Bourbon should rightfully accede the throne and championed a return to *ancien régime* tradition. This position had been greatly undermined by the July Revolution and the uprising against Charles X and his repressive, autocratic rule. The republican side broadly includes the Orléanist constitutionalists (the resistance party) but more usually refers to the Movement Party that was more radically republican and wanted to see the overthrow of Louis-Philippe (see Harsin 2002).[3]

The period transformed France into a modern capitalist economy. There was a consolidation of the power of the middle class and the rise of industry. This created a popular political consciousness and press power. It also created the shift towards a modern autonomous art, brought about by the middle class alongside the State-sanctioned academic art of the Salon. The shift from monarchy to a republic was ongoing and had begun with Napoleon, who Foucault sees as embodying this shift: 'The importance, in historical mythology, of the Napoleonic character probably derives from the fact that it is at the point of junction between the monarchical, ritual exercise of sovereignty and the hierarchical, permanent exercise of indefinite discipline' (Foucault 1975, 217). Underlying these regime changes was the effect of the 1789 French Revolution, but it was not until 1877 that the monarchy was totally overthrown and the crown jewels sold and melted down (Furet 1992, 510–511). The July Monarchy tried to maintain a synthesis of both the monarchical past and republican ideals, in what was called the *juste milieu* (the middle way), but in the end increased polarisation between the two positions leads to the overthrow of the July Monarchy (Fortescue 2005).[4]

[3] There was an even more radical fringe the Montagnards.

[4] Fortescue sees the failure of the July Monarchy as the inability to reach a consensus. As a matter of interest, Fortescue, *contra* Furet, sees 1848 as the end of the monarchy because Napoleon III was forced to give away so many absolutist, monarchical rights.

Daumier and the satirical lithographic journals represent an example of the incessant republican questioning of the legitimacy of the regime. Buoyed by their role in the overthrow of Charles X, their revolutionary power was unquestionable (Kenney and Merriman 1991; Cuno 1985; Kerr 2000). This ideological positioning underpins any discussion of art in this period, for it was one important part of the juridical push to create belief and legitimacy in the regime. Revolution and democratic ideals drive the gradual retreat of the aristocracy to the rising bourgeois and the birth of the modern state (Rosanvallon 2007). Francois Furet explains the 1848 Revolution in these terms:

> This bastard monarchy had never found its national footing: it was too monarchic to be republican, and too republican to be monarchic. This was evidenced by the new dynasty's inability to entrench itself as the founder of legitimacy despite all the efforts it had made to reunify national history to its advantage… Instead of terminating the French Revolution… it had given it fresh vitality. (1992, 385–386)

Following Furet, Pierre Rosanvallon recently theorised the import of this gradual shift from monarchy to republic during the nineteenth century (Rosanvallon 2006). Rosanvallon astutely draws the mystical and pseudo-religious underpinnings of democracy.[5] This void was held by a unified, absolute and undivided sovereignty where the individual will was replaced by a transcendent 'common will'. It is my contention that this particular conception of democracy in France sees a direct transference of the king's effigy, representing absolute sovereignty, to the profusion of the Marianne as a representative body of the republic (Ribner 1993). Both these 'second bodies' find themselves on the same page, though in tension, in Daumier's lithographs.

19.3 The Middle Way: Steering a Course Between Two Poles

At the beginning of the July Monarchy, on August 7 the Charter of 1814 was revised and called the *Charter of 1830*. It was imposed by the nation on the king who then swore to uphold the *Charter* and accept his title 'King of the French', the Citizen King (Beik 1965). From the very beginning of his reign, there were many contradictions. Although there was no coronation, at the inauguration Louis-Philippe dressed in seventeenth-century costume so as to directly recall Louis XIV, to whom Louis-Philippe bore more than a passing resemblance (see Boime 1987, 302). Louis-Philippe had been chosen as a hopeful consensus builder between both sides of the revolution. According to the wishes of the allies, the Bourbon monarchy was restored in the figure of Louis XVIII by Talleyrand at the Congress of Vienna

[5] Rosanvallon, like Pierre Legendre, is influenced by Claude Lefort on this score and sees the 'unknowability' of democracy as a primary characteristic. Rosanvallon follows Lefort and Francois Furet (a mentor of Rosanvallon) in seeing democracy in Rousseau's terms as a unified popular sovereignty, which replaces the absolute sovereignty of the king.

between 1814 and 1815. He agreed however to rule under a *Charter* drawn up by the allies which allowed for a parliament, preventing the return to absolute rule. The freedom of the press, freedom of religion and *habeas corpus* were also assured. At his death, his brother Charles X became king. Unlike Louis XVIII, who had no coronation, the spectacle of Charles X's coronation was purposively linked to the *ancien régime*. Indeed the 1824 coronation even included the laying of the king's hands to heal the sick, in a resurrection of the divine right (Jackson 1984; Bloch 1973). He explained his monarchical position with the statement, 'I had rather chop wood than reign after the fashion of the King of England'. Although the reign started favourably, with freedom of the press and amnesties for political prisoners, the reign of Charles X became more conservative. Between 1829 and 1830 the Prince de Polignac programmed changes reverting back to before the revolution, giving more power to the church and aristocracy. Parliament opposed the changes, so Charles X dissolved parliament. When the dust settled, the new Parliament was weighted more heavily against Polignac. Clutching at straws, Charles X passed the *Ordinances of St Cloud* (1830), which tightened press controls, took away voting privileges from the majority and dissolved parliament again; the aim was to destroy rule by the *Charter of the Allies*. The Revolution of 1830 broke out, and events were moving to a republic when Thiers suggested an alternative monarch from a younger Bourbon line, Louis-Philippe. So instead of a republic, Louis-Philippe was the compromise: a constitutional monarch.

Louis-Philippe is an example of a notable and effective strategy that has been called the middle way or the *juste milieu*. Its aim was to keep the bourgeoisie on side and to stave off revolution. It was an important strategy in the nineteenth century in France and in other European nations, including England (Starzinger 1991). Francois Guizot, Louis-Philippe's primary advisor, expressed the strategy as one that 'rejects absolute principles, extreme principles; it is adaptable to the diverse needs of society; it manages to stay abreast of ongoing social changes, and in turn engages in combat whenever necessary' (Boime 1987, 272). Another contemporary source from Scotland saw the connection between England and France's new king in supportive light:

> The cause of peace in Europe and of good government in France is staked on the stability of the throne of Louis-Philippe. The intermediate position which his government has taken up between two irreconcilable extremes is precisely identical with the intermediate position at present occupied by the administration of Earl Grey. (Quoted in Starzinger 1991, 6)

This chapter relies on the assertion that these two sides can never be fully conflated. Lafayette at the time tended to agree: 'To say the truth France likes not the *juste milieu* because she knows not *juste milieu* between the ancient and the new dynasty… – between the liberty and the censorship of the press – between the freedom and the monopoly of commerce…France thinks, in truth, that *juste milieu* means nothing when applied to questions of actual policy' (Lafayette 1833, 317). The split between the republic and the monarchy characterises France's approach to democracy. Both positions countered the other with an uncompromising absolute, the king or the republic, respectively.

19.4 Lacan, Art and the Attacks on the Master

This ideological battling is well expressed through the Lacanian idea of the master signifier and how it quilts meaning. As both ideologies are based on a transcendental other, the working of this master signifier fits strongly within the master discourse. The master rules as an absolute authority. To make the situation even clearer, the Revolution of 1830 provides a point from which no master signifier can yet claim total legitimacy. The starting point is the anomie of revolution, a vacuum of power or the violent foundation of the law. In this way a revolution is a violent breach, a suspension of law. In Lacanian terminology a revolution is an 'act'. As Rex Butler asks: 'Is the act the passage between two different symbolic orders or between two different states of the same symbolic order? Or is it, on the contrary what founds the symbolic order, but what must be covered over or effaced by it?' (2005, 67). It is Žižek who suggests the act and the master signifier are intertwined in a 'constitutive way', where the master signifier is 'being' and the act is a 'becoming'. The act opens up a space of potentiality through a complete cut in the symbolic field. For Žižek the French Revolution is such an act, and we have already argued that this act still haunts the July Monarchy (Zizek 2000, 136–137). The very designation of the July Revolution implies this event cannot be explained as mere knowledge but is a subjective proposition; it remains on the plain of the Lacanian (Symbolic) Real, which cannot be symbolised as knowledge. The peace treaty, including the inauguration of Louis-Philippe, is the beginning of the symbolic sublimation of this violence into something sociable and acceptable, which represses the violence of this founding in revolution. It is the beginning of the necessary ideological work so that the 'becoming' of the act turns to the 'being' of the master signifier. Louis-Philippe tried to turn himself into an all-encompassing *point de capiton* (as master signifier, the signifier with no signified); he emptied himself out as a signifier to become all things. The Citizen King attempted to be both a modern citizen and an *ancien régime* king, assuming the labels of revolution, liberty, freedom, democracy as well as those of stability, tradition, legitimacy and authority. In many political arenas, and especially in England and Germany, this process was very successful (see Sperber 2005). As Žižek notes, only by emptying the master signifier of all meaning can it most efficiently quilt the field of signifiers. Louis-Philippe's aim was to elicit belief from all sides.

Readings of Daumier's art, and that of other radical lithographers, have not fully addressed their relationship to these ideological processes. The most common reading sees Daumier as already 'modern' in what amounts to a circular definition. Daumier is on the cusp of the modern and represents a threshold in his mode of representation. Under the historicity of the four discourses, modernism is the gradual overtaking of the master discourse by the university and hysterical discourses (Zizek 2006, 298–299). To summarise, for Lacan the university discourse is the movement towards the disciplinary society, where scientific knowledge becomes the ruling force (Boucher 2006, 274). The hysteric's discourse is the parallel rise of individualistic capitalism where the individual is the driver rather than overarching traditional authority. Although Lacan's matrix of the four discourses suggests all modes coexist in tension, there is this historical underpinning.

Daumier is a good example of an artist, on the cusp of modernity, who acted in a few modes. The common reading of Daumier is influenced by the university discourse, where his lithographs 'show' the corruption of power. They declare the cruelty of the judge, the poverty of the poor and the nepotism of the king. In this reading Daumier is the declarative rebellious artist who depicts power for what it is.

A broader picture can be drawn through the master discourse, which sees Daumier's work as toying with the effigy. Here effigy implies the sacred presence of the king *in* the image, rather than merely a representation – a premodern belief in the power of the king's image to embody the 'king effect'. It questioned the authority of the king's effigy to represent France and kept the alternative image of the republic in play in order to render the king's effigy as illegitimate. In this sense, Daumier's art between 1830 and 1835 constituted a violent act and not merely a riotous protest. Instead of seeing 1830 as the birth of the July Monarchy, it is important to remember that it was still a period of flux and that Louis-Philippe's regime was under constant pressure from republican and legitimist interests. The period 1830–1835 was in effect an extension of the revolutionary period, a period of becoming rather than of being. If the master signifier is used to sublimate the founding laws, in this period no master signifier could definitively finish or sublimate the revolutionary phase. The art of caricaturists, such as Philipon and Daumier, can be seen here as Lacanian Acts, as an extension of the revolution, because they attempted to problematise the king's legitimacy and keep that legitimacy open to questioning. As Furet suggests, it was the spirit of the French Revolution that pervaded this republican political movement, and it is this authority that Daumier draws on to contrast the republic and the constitutional monarchy.

State reaction to Daumier and the other lithographers, and the popular uprising they spearheaded, was violent and efficient. This was because what Daumier and the others were suggesting was nothing short of total upheaval. Within the master discourse, Daumier is willing, like Hegel's slave, to risk his life in a struggle for mastery and domination. Although Louis-Philippe wins the struggle (at least until 1848), this does not diminish 1830–1835 as an important site of ideological struggle. To be sure, the king's reforms were popular, and the republicans did poorly in the elections of 1834. After 1835 and the attempted assassination of the king, the September Laws were harsh and thorough, and Louis-Philippe was finally able to exert enough control through the modern censorship laws to quash any dissent. There were to be no political cartoons at all between 1835 and 1848 in the Philipon journal *Le Charivari*, and *La Caricature* was closed in 1835 (Hanoosh 1992, 115). The virulence of the State response shows the battle was not merely fought in the arena of facts, but between two alternative and possible masters.

19.5 Daumier, Lèse Majesté and the Birth of Modernity

Two famous trials can be reassessed in relation to this understanding of the art of the period. Both published in 1831, the first relates to Charles Philipon's The *Pear*, 1831 (Fig. 19.2) and the second to Daumier's *Gargantua*. Daumier's appropriation of Philipon's image of the king transforming into a pear was widely circulated. Both

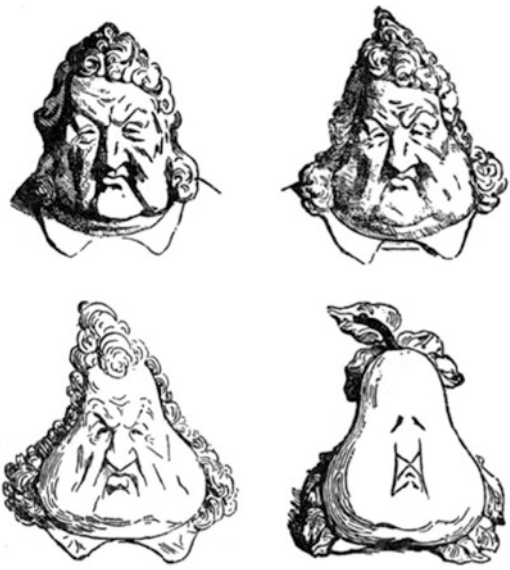

Fig. 19.2 Charles Philipon, *The Pears*, 1831, pen and bistre ink sketch

artists were brought to court for *lèse majesté*. These trials, especially the trial and imprisonment of Daumier, are famous as proof of their modernist, transgressive credentials. However, we should not forget that these trials centred on a legal question that is central to the birth of modern art: whether the image of the king was an effigy or merely a representation. In other words, the way the law controlled the image as *lèse majesté* or later through censorship marks the shift between courtly and autonomous art and from the politics of the absolute master to the disciplinary society. The other issue it raises is the violence of the image and the importance of the legal image to quilt the society. *Lèse majesté* is a law that for the last time in Western society admits the use of the image to bind the legal subject; the God of Nation in the disciplinary society was framed by knowledge so that its mystical base was repressed.

Soon after the signing in of Louis-Philippe and the rewriting of the *Charter of 1830*, new press laws introduced in November 1830 included *lèse majesté*. Philipon's first trial in 1831 was over a simple cartoon called *Soap Bubbles*, which showed the king blowing bubbles like Chardin's boy (*Soap Bubbles*, 1734), but what was popping in the air were all the virtues of republicanism, including freedom of the press. In the more notable trial of 14 November 1831, for *The Plasterer*, Philipon was found guilty and gaoled; in this image the king is shown to be plastering over the virtues of the republic. Similarly on February 22, 1832, Daumier was brought to trial for composing *Gargantua*. The charge was breaking the press law of November 1830 by arousing hatred and contempt of the king's government and by offending the king's person, the crime of *lèse majesté*. Daumier's mercy plea was unsuccessful as his 'seditious crayon had traced the guilty image' (quoted in Childs 1992, 26–27).

Before further analysing the political context of these trials, it is necessary to discuss the largely archaic law of *lèse majesté*. The crime of *lèse majesté* is the criminal corollary of the cultural existence of the sacred 'second body' or effigy: it is the criminalisation of the unauthorised effigy. This crime can only exist in a functioning discourse of the master, where the master acts through the effigy; the crime cannot exist in a disciplinary society, other than as an anachronism. The crime of *lèse majesté* is shared by many civil law jurisdictions and is based on the Roman crime of *laesae majestatis*, literally injury that diminishes the majesty. Floyd Lear describes the many acts that this crime covered in ancient Rome including rules pertaining to the image, 'respect for the images of the emperor, including unseemly acts real or alleged, committed in the presence or in the proximity of an imperial image; and the act of defacing, melting, or destroying a statue of the prince which had been consecrated' (1965, 29). The destruction of or injury to the image of the prince was not seen merely as an insult or injury but as an impiety. It was a crime that involved the relationship between the individual and the public authority and so became a question of loyalty and trustworthiness. This squares with our notion of subjectivisation through the legal image; in Roman law this enemy *within* the symbolic order was different to the alien enemy and was called *perduellis*.[6] The crime was linked to early Roman religious sanctions against the killing of the father or head of the household (*parricidium*) (Lear 1965, 24). As the effigy is a sacred body, the act of treason or *lèse majesté* is close to a sacrilegious offence. Again the make-up of the law is connected to Pierre Legendre's reading of the sovereign as conflated to the father figure.[7]

By 1830, *lèse majesté* was already itself in a threshold moment (between the absolute master and disciplinary power). The crime of an 'imagined' treason that is a form of (blasphemous) libel, as opposed to an actual regicide or planning for regicide, was already waning in France by the eighteenth century (Coleman 1990). Kelly suggests that after the French Revolution in France, there was a shift to limiting treason to merely attempts of *actual* regicide as a safeguard to free speech (1981, 270). So to some extent, the *lèse majesté* laws of November 1830 could be seen as a disciplinary style of censorship given legitimacy through the older absolutist idea. Regardless of the mode, the effect was a return to treason, and after 1835, the censorship laws were bolstered by a rule making it 'illegal to advocate republicanism'

[6] Literally 'the hidden enemy' as opposed to the *hostis*, which was a foreign enemy.

[7] In the English system, the crime is subsumed under treason and is presently based on the *Great Statute of Treasons*, 1351. Treason here is understood as distinguishable from the crimes of murder and even regicide; treason is a symbolic crime against a 'symbolic body' or 'second body' of the king. First codified in England by the 1351 *Statute of Treasons* (25 Edward III, St 5, c 2) during the reign of Edward III, treason has as a central aspect in imagining or compassing the death of the King. In 1534 Henry VIII passed legislation which made it possible to commit treason by words or writing (Act of Treasons Henry VIII c 13) further clarifying the ways in which such an 'imagining' could manifest. In the English system, this was considered 'treason by words', a designation suggested by Henry VIII on his road to absolute power; the crime of *lèse majesté* was thus made redundant. This had the paradoxical effect in England, of increased debate and dissent over the definition of treason (see Lemon 2006).

(see Aminzade 1993, 55). So in the end, *lèse majesté* was stopped along Foucault's lines 'to punish less perhaps but to punish better'. The violence of the assassination was a perfect precipitant for the crackdown. Fieschi took lodgings on the Boulevard du Temple, and there, with two members of the Société des droits de l'homme, Morey and Pépin, contrived a *machine infernale*, consisting of 20 gun barrels, to be fired simultaneously on July 28, 1835. There had been numerous attacks on the king's life, and there were many apologists in the press. In September 1835, the National Assembly passed new press laws (the September Laws). Here the law of *lèse majesté* was redrawn in a modern guise; any reference to the king that tried 'exciter a la haine ou au méprise de sa personne ou de son autorité constitutionelle' was seen as an attack against the State and punishable by up to 1 year in prison and a 5000 franc fine (Articles 2 and 4). The 'September Laws' remained in use throughout the July Monarchy.

In an 'Age of Terror', it is not all that difficult to empathise with a period in which distinctions between friend and enemy were being drawn. The reinvigoration of the premodern crimes of sedition across the world was surprisingly 'kingly'. *Lèse majesté* is still on the books in many countries and has been used most recently in Thailand, although in another kingly right, the criminal is often pardoned. What is common to both our contemporary perspective and the absolute monarch is the background of the Lacanian master's discourse. In the master's discourse, the master signifier is unchallengeable. It is the same iconoclastic imperative of the original Old Testament master-God. Identifying with this system is relatively intrinsic, having lived through the response to terror and the control of dissenting voices. Generally, however, the workings of contemporary society would not accept a crime of *lèse majesté*. Within the university discourse, the disciplinary society, criminal sanction is based not so much on imperatives as on power/knowledge. The crime of *lèse majesté* gradually gave way to the regime of censorship and control of information rather than the symbolic attack against the king's authority. The difference can be summed up with respect to the Danish cartoon that caused worldwide riots in 2006. On one level Western countries called for freedom of speech, but on the other hand, Muslims from around the world appealed to the blasphemy of imaging Mohammad. To argue that the image was a vilification of Muslims (i.e. calling *all* Muslims, represented by Mohammad, terrorists) was to miss the point of the protestors, who were not attacking the message but upholding the Islamic ban against images. The issue highlights the risk in forgetting the power of the effigy now and in modernism as a whole.

Charged with *lèse majesté*, little theoretical attention has been done to follow the logic of this indictment in the trials of both Philipon and Daumier. What was at issue was the very question that concerns art and sovereignty: can an image function as a presence or does it remain as mere representation? This question defines a major shift from courtly to modern art. Philipon argued that the second body of the king did not exist, insisting that the king was merely a symbolic representation. This issue was central to Philipon's famous image showing the head of Louis-Philippe metamorphosing into a pear. Philipon's argument, expressed through this image, was that it was not enough to draw the king's likeness (to defame him)

because it was not certain whether that was actually the king. The likeness for Philipon needed framing by text or insignia to prove the connection to the 'second body' of the king (Hanoosh 1992, 118). This argument follows the logic that an effigy, to act with 'king effect', must be clearly authorised by the symbolic order, through either State use, State promulgation or the use in State-sanctioned space or festival. The journal complicated this usage because it was not State sanctioned. Philipon argued:

> A resemblance, even if perfect, is never an attack; you must not recognize it as such, and you must above all refrain from sanctioning it by conviction. The injury is precise and proven solely by the name of the king, by titles, insignia coupled with his image, which is then, whether there's a resemblance or not, culpable and deserving of punishment…but it's not the king. (quoted in Petrey 1991, 52)

He suggested that the king merely represented the government in symbolic guise. Indeed in the same tirade quoted above, Philipon wrote in *La Caricature*, November 24, 1831: 'Yes we have the right to personify power. Yes we have the right to take for this personification, whatever resemblance suits our needs! Yes all resemblances belong to us!' Similarly Elizabeth Childs has astutely seen that the issue of Daumier's case turned on 'whether or not *Gargantua* actually represented the king, or was intended as a more symbolic representation of the government's swollen budget'. Childs has done the most to look at the relationship between Daumier's images, the trial and the context of censorship laws (Childs 1999). She dismisses the importance of Philipon's argument by calling it 'a strained defense necessitated by the concept of *lèse majesté*', as if any argument against the body politic was merely for pragmatic reasons (Childs 1999, 49). Childs suggests that the image was actually both the 'second body' and a representation, but does not take her own claim seriously. She understands the 'hybrid figure' of Louis-Philippe as both modern and absolute, an amalgam of *ancien régime* and the modern. Most importantly in relation to Daumier, Philipon and other caricaturists of the time, she notes their 'humour of the body politic' and footnotes Ernst Kantorowicz to highlight her meaning of the 'second body'. Although this idea titles her article, it is not followed up, and the 'body politic' is treated as a symbolic representation of France, not as an effigy. This essay recovers the ability to use the term effigy; the caricatures of Philipon and Daumier respond to and point to the existence of the effigy in early modern art. It suggests to its existence in contemporary democracy but disguised. *The Pear* became famously known as an effigy. In *Les Misérables*, Victor Hugo wrote:

> One summer evening, Louis-Philippe, returning home on foot, saw an undersized urchin straining on tip-toe to draw an enormous pear on one of the pillars of the Neuilly gateway. With the amiability which he inherited from Henri IV, the King helped him to finish it and then gave him a coin, a louis d'or. 'There's a pear on that too,' he said. (Hugo 1976, 503)

Whether as a pear or as a Gargantua, the 'second body' of the king, his effigy, was alluded and indeed so serious was the misuse of the image that a bizarre law was passed outlawing any image of a pear in 1835. The pear symbol had become a commonplace, and one even found its way onto the pyramids.

19.6 Pears, the Master Discourse and Presence

Apart from the trials asserting the existence of *lèse majesté* (and the effigy), there are other examples of the confusion, in the early nineteenth century, between the image as presence (effigy) and as representation (portrait, image), a confusion explained by the shift from the courtly to the bourgeois autonomous art of modernity. Daumier's early cartoons and caricatures of 1830–1835 have been largely overlooked because they do not fit within the realist mould of his later work. Their overtly political character creates a blind spot for modern art history, but it is of particular interest to this chapter. After 1835, caricatures of manners became a popular response to the strict September Laws. The mode of caricature itself has a bearing on the question of the effigy and modernity that has also been broadly suppressed by art history. Ernst Gombrich suggests that 'One of the things the study of cartoons may reveal with greater clarity is the role and power of the mythological imagination on our political thought and decisions' (Gombrich 1963). As Gombrich reminds us, the portrait caricature can be linked to images of infamy:

> The public enemy would be represented hanging from the gallows on the façade of the town hall, and such hangings in effigy, as Kris has reminded us, were still closer to witchcraft than they were to art. Their aim was to wreak vengeance on the enemy and to destroy, if not the person, at least the aura that was his honour (Gombrich 1963, 134–135).

The defamation of character is the opposite of the honouring of the *dignitas* found in the kingly portrait; both ideas are connected. For Gombrich and Kris, the caricature is an extension of the effigy (Gombrich and Kris 1940). Gombrich and Kris in their study of caricature see its very power linked to the magic and presence inherent to the image:

> If we ask the psychologist he tells us again that, as with caricature, the hidden and unconscious aim of such fun is connected with magic. To copy a person, to mimic his behaviour, means to annihilate his individuality. The very word 'individual' means inseparable. If we succeed in singling out and imitating a man's expression or way of walking we have destroyed this individuality. It is as if we declare to our laughing fellow-creatures, 'Look, here is his whole secret. You need not be afraid nor even impressed; it is all a hollow sham'. (1940, 14)

Gombrich goes on to suggest that the caricature's late arrival as an art form was its success in conjuring the sitter; 'We think that the portrait caricature was not practiced earlier because of the dire power it was felt to possess; out of conscious fear of its effect' (1940, 15). So that caricature is part effigy belief, part modern naturalism and realism and part defamatory. It comes from the long line of images of infamy. But the difference was that the images of infamy were a legal remedy, a State-sanctioned violence. The move to creating your *own* images of infamy, for example, of a king, was tentative. Running parallel to the history of duelling, the image was seen as a direct attack against the enemy's *dignitas*, a slap in the face.

The Pear and the *Gargantua* represent the threshold moment between presence and representation (Petrey 1991, 2005; Cuno 1985; Kenney and Merriman 1991). It seems to express both modes. As Childs writes, 'The defiant pear thrived as a symbol of resistance in the margins of the law and the margins of the official culture' (1999, 49).

Fig. 19.3 Honoré Daumier, *The Masks*, 1831, 29 cm × 21 cm, lithograph

It was at one time the actual king and on the other just far enough removed. It should be remembered too that *Gargantua* was not published by Philipon in *La Caricature*, but was merely sold as a loose-leaf image, suggesting that even Philipon was weary of this particular image. On the level of knowledge (the university discourse), many art historians examine *The Pear* as a sign, a mere representation and symbol of monarchy. *The Pear* was attacked in the most obscene ways, and in Lacanese these responses could be seen as responses of the hysteric. They show that the king is not symbolic enough, not 'castrated enough' but has all-too-human corruptions and vices. Daumier's *Gargantua* fuses these two approaches. On the one hand, it directs the viewer to read a story of avarice and greed. On the other, there is the directly scatological effect of the throne/toilet. The abject scatology points to the corrupted symbolic body such as Daumier's *Royalty in Decline*, 1834 where the king sits on a chamber pot with a clysma tube or in another print where Louis-Philippe is shown in a torn and muddied ermine robe, *Your cape's in pretty good shape!…*1834. This becomes a very popular method of satirising the king for artists (Weisberg 1993).

These modes have been utilised to discuss the work of Daumier, but if we go back to Gombrich's reading of caricatures on the threshold of modernity, *The Pear* also becomes an effigy. For example, *The Masks* (Fig. 19.3) seems to illustrate the difference between the king's effigy and a straightforward caricature, because it so readily recalls the laws of *lèse majesté*. Unable to draw the resemblance of the king, he is represented by a pear surrounded by likenesses of his cabinet. Compared to the other politicians, the king, as sovereign, was still seen as sacred, if at the very least by the courts. But *The Pear* becomes repeatedly used. The ones that are framed by insignia are meaningful in stretching the boundary Philipon set in his own court case (that it is *only* insignia, like crowns and medals that can mark the effigy as an effigy). On top of this, the pear is treated like the punishment of hanging *in effigio* in many of Daumier drawings, such as *Heave! Ho!… Heave! Ho! Heave! Ho!…* 1832.

19.7 Modernism and Censorship

The *control* of the image mirrors the shift from absolute monarchy to disciplinary society. There is no doubt that these images were powerful and were seen as a serious threat to the stability and legitimacy of the July Monarchy. Courtly art had enjoyed a quasi-monopoly on the king's image and the imaging of the State. The court maintained a phalanx of artists to image the July Monarchy, but the new autonomous art became an unwelcome disruption (Bezucha 1990). There was a huge growth in the dissemination of images through journals and posters and through the more autonomous art market (Chu and Weisberg 1994).

The birth of the author is the corollary of the birth of censorship. This tale has been read as an insistence on the modern right of freedom of speech, where Daumier becomes the freedom fighter for modern autonomy. But what Daumier was gaoled for was more political and dangerous; the actual political threat has been diminished in historical accounts. Similarly, censorship has been read within its own logic of the disciplinary society through crimes of defamation, obscenity or social corruption. In this threshold moment, it is clear that the actual rights of the author were a corollary of the need to name and control the author.

The philosophy of aesthetics and their categories of originality and individuality all feed into the legal framework of censorship. Martha Woodmansee conflated literary and legal perspectives on the notion of authorship through a sociological reading of the author in eighteenth-century Germany (Woodmansee 1984). Carla Hess has shown that in France, the idea of the individualistic 'author' as bearer of literary property rights was introduced as an instrument of monarchist repression, 'a legal instrument for the regulation of knowledge' (Hesse 1990). The French revolutionaries later sought to 'dethrone the absolute author… and recast him, not as a *private* individual (the absolute bourgeois), but rather as a *public* servant, as the model citizen' (Hesse 1990, 109). Jonathan Gilmore writing about mid-nineteenth-century France also saw a relationship between copyright protection and censorship; with copyright protection of lithographs in 1820, censorship laws were also instigated in tandem. The lithograph was seen as particularly dangerous in that 'working class' society could easily digest the satirical content of the lithograph (Gilmore 2002). Until French censorship laws were abolished in 1881, the government censored drawings in advance of publication, but not the printed word. High art was on the other hand seen as opaque and non-threatening. It was not as yet covered by copyright protection or censorship.

I suggest that this special control of middle class art responded to the threat and monopoly of ideological control offered by and through the image. Philipon's journals were the perfect bourgeois art. Indeed part of the appeal of Philipon's journals, to connoisseurs who collected the prints, was the banal fact that paper was especially suitable for collecting (Childs 1999, 48). This popularity threatened the stability of government, which up until this point had had a monopoly on image making, particularly the image of the king. High art still was largely State sanctioned through the academic control of commissions and the State control of the Salons.

The image was, unlike text, censored *before* the image was published. If the image was treated as knowledge, fact or satirical comment, like satirical novels, it would not have had this special treatment. The caricature was controlled, even here at the birth of censorship and disciplinary statutory control, due to a fear of its *magical* power as much as any satirical knowledge that it produced. As a response to the modern power of images, Terdiman notes that the government countered with increased administration. The journalistic image was a successful subversive technique and difficult to control, and the French government started its own journal, *La Charg*e.

A primary reason for the fear of the image was an irrational notion that drawing directly affected the world as in an act, not as comment or rhetoric. When the French government requested the reimposition of prior censorship of drawings in 1835, the Minister of Justice, Jean-Charles Persil, argued that this request was constitutional, despite Article 7 of the *Charter of 1830*, which guaranteed the 'right to publish' and declared that 'censorship can never be re-established'. The argument that Persil made directly connects with the shift from effigy to image as outlined above. Persil argued that the *Charter* provision applied only to the 'free manifestation of opinion' but not to 'opinions *converted into actions* [my emphasis]'. He suggested that although opinions could be expressed in words, because they addressed 'only the mind', drawings however were 'when opinions were converted into acts'. As Persil continued, '[drawing] speaks to the eyes. That is more than the expression of an opinion, that is a deed, an action, a behaviour, with which Article 7 of the Charter is not concerned' (quoted in Goldstein 1989, 2). Supporting Persil's argument, the chairman of the legislative committee, Paul Jean Pierre Sauzet, considered the government's proposal of pre-emptive censorship of images through reference to the king's body as sacrosanct. In reference to Philipon's depiction of Louis-Philippe as a pear he wrote: 'No measure is more needed by the situation and desired by public opinion [than] putting an end to these outrages that corrupt the spirit of the population in degrading with impunity the royal majesty'.

At the birth of censorship, we witness a residual reliance on the laws of *lèse majesté*. Published in *La Caricature* (November 24, 1831) at the time when Philipon was first sentenced to a gaol term in 1831, he writes:

> Men of power, you want to hide your hideous nakedness under the royal mantle. You demand, shivering, *an asylum in the inviolability of the monarch* [my emphasis]. Well, you will be chased from the temple that momentarily serves you as a place of refuge and you will find us always at the door armed with a whip to lacerate you.

There is something in Daumier and Philipon's caricatures that still recognises the magic and exception of the king and his effigy. The king is the inviolable sovereign who must be imaged either as a pear or not at all, who stands at the limit of what can be transgressed or questioned. In the next part of the chapter, I expand on this revelation. Daumier is not the transgressive modernist who hysterically calls out to the king; rather, Daumier approaches this subject via another mode of resistance. Only the king, following the logic of *lèse majesté*, can image himself. The State has a monopoly on the effigy. The effigy's job is to act as a visual master signifier, which interpellates the

subject and assigns a symbolic order. Louis-Philippe attempted to use his body as a point in which monarchical and republican claims meshed. What Daumier and Philipon were able to do was break Louis-Philippe's ability to unify these claims to his body as the master signifier. They managed to keep the republican master signifier separated and distanced from Louis-Philippe, stymieing the strategy of the State.

19.8 The State, Art and the Middle Way

Louis-Philippe, born into a family of regicides, was seen as a great hope. Delacroix's famous image, *28th of July: Liberty Leading the People* 1830, suggests how liberty overthrew Charles X in the three glorious days of the July Revolution. But the violent hope of the July Revolution soon reified into the July Monarchy of Louis-Philippe. Even Delacroix's work, exhibited with great pride and solemnity in the 1831 Salon (and bought by the French Interior Ministry for the Musée du Luxembourg), was secreted out of sight by 1832 due to a fear that it would incite sedition. In its stead, images that showed how the two warring parties could be brought together under the middle way were created. An exemplary piece is F.E. Picot's *July 1830: France Defends the Charter* (1835) (for image see Ribner 1993, 73). The Charter, which Louis-Philippe – the self-styled Citizen King – agreed to, sits between the two opposing parties: the masked republic (a phoney sovereign face) and the blind absolute monarch. Orléanist constitutionalism was the answer. It is the stellar work of the late Albert Boime that has most explored this notion of an art of the *juste milieu* (Boime 1993). Paintings and sculpture were severely circumscribed by the policies and preferences of the French Academy and the regime of Louis-Philippe. Seeking to discourage the creation of large-scaled, politically tendentious subjects taken from Greek and Roman antiquity, the State and the Academy encouraged the exhibition of easel-sized pictures representing nationalistic, patriotic and familial themes from past and present history. This style would be called *genre historique* by the Academy. For some writers *genre historique* predates the larger paintings of the worker and genre scenes in Realism. Sandra Petrey sees this style in the literature of the day as well. It is a 'hybrid style' of 'allegory and reality', which ushers in the birth of Realism (2005). Similarly, Michael Marrinan has made a very detailed study of the ideological control and money spent by the July Monarchy on commissioning works that fit within *genre historique*, or what Marrinan calls the 'history painting of the *juste milieu*' (Marrinan 1988). Artists such as Ary Scheffer and Antoine-Louis Barye, for example, sought to achieve a reconciliation of the 1789 Revolution with restoration through freedom and order, democracy and stability, science and faith, progress and 'business as usual'. This meant that such cogent bourgeois businessmen as Louis-François Bertin, or Madame Moitessier (married to the wealthy banker Sigisbert Moitessier), could be painted by Ingres alongside the achievements of the First Republic and the victories of Napoleon. According to Boime, the art and politics of the July Monarchy endeavoured to blend the irreconcilables of French society.

In terms of the king's body, there is a complexity that we have up to now glossed over. In the *juste milieu*, the king's body did not represent the monarchy. The Citizen King was trying to represent both political interests, republican and monarchical. The alliance with Lafayette was meant to smooth this transition and to give the king more republican legitimacy. In any case the king was chosen because his father was one of the few nobles who had voted for the execution of Louis XVI. The official imagery of the king followed this logic. Boime, for example, spends some time with Vernet's royal portrait, *Portrait du Roi* (1847) (1993, 303). He quite literally has on both shoulders the tricoleur of Louis XIV, with his sculpture in the background. Louis-Philippe's body embodies their fusion. What Boime suggests is that Louis-Philippe intends to legitimise his rule so as not to be seen as a usurper and to link his family to the bourbons. At the same time, he rides confidently out of the picture plane and into the future of France (Boime 1993, 303–304).

Todd Porterfield has also done some work linking the *juste milieu* strategy to the early rise of Orientalism. He sees the shift to Orientalism occurring as a way of having a common pride in France regardless of political persuasion (Porterfield 1998). Louis-Philippe commissioned many paintings based on the Napoleonic campaigns. Porterfield summarises the strategy:

> Together they forged an official culture that provided a rationale for imperialism – based on images of France's moral and technological superiority – and an enduring project for Frenchmen of all political persuasions during an era of domestic instability. The allure of empire derived in part from its function as an alternative, surrogate, mask, and displacement of the Revolution. (Porterfield 1998, 32)

So that it was an effort to sublimate the revolutionary violence and again to quilt the empire behind the king and a unified France, in relation to its proud empire and against the Oriental Other. Louis-Philippe raised the Obelisk of Luxor, in the Place de la Concorde, very early in his reign. Desperately Louis-Philippe tried to stitch the regime to a greater notion of French Imperial might. Boime also sees this process in action. Again in Vernet's *Capture of Smalah of Abd el Kader*, Boime sees exactly the same process that Barthes discusses in the famous Paris Match cover of *Mythologies*; the Oriental *too* is willing to fight bravely for France, for everyone is bound together under the imperialist banner (Boime 1993, 351).

Patricia Mainardi also reads the politics of the Salon as a whole as a response to *juste milieu* politics. As the century progressed towards a modern autonomous art and away from the courtly art of the academy, there was tension between monarchist and the republican interests. In the Second Republic, the compromise became a bifurcated system of annually opened free shows, as called for by republican interests, and the less regular shows of historical monarchical academic painting (Mainardi 1993). Mainardi writes, 'By the 1820s it was assumed that liberals would support Romanticism, Constitutional Monarchists might or might not, and only Legitimists would continue to be as committed to classicism as they were to the *ancien régime*' (1993, 11). While attention has already been paid to the impact of the *juste milieu* on art history, the argument to follow is an extension of this scholarship.

19.9 The Juste Milieu and the Strategy of Unquilting

From the caricaturists' point of view, the *juste milieu* was a travesty. There were during the period of 1830–1835 two major parties on the left: the *resistance* party and the more radical *mouvement* party. The caricaturists, including notably Charles Philipon, were of the *mouvement* party (Kerr 2000, 70–73). What was at the heart of the tension between the two opposing parties was that the Orléanists, the resistance party, was for reasserting authority under *juste milieu*. The *mouvement* party wanted to reassert the position of revolutionary ideals of liberty and the republic. The *juste milieu* was caricatured in many ways in relation to this tension. The Orléanist king pear was pitted against the republican virtues. The pear itself has been seen as a marker of the liquid, unstable shifting of the Orléanist position; the pear is like a water drop before the splash. Similarly it was seen to be a soft, impotent skinned penis. Jules David's *L'escamoteur* (*La Caricature,* 13 May 1831) shows the king as an illusionist who, with a slight of hand called '*juste milieu*', is able to make the revolution and liberty disappear. Or in a scatological piece of Travies, *Juste Milieu se Crotte (The Juste Milieu Dirties Itself*, July 1832), the king pear is seen as a faeces pot carried by the poor (represented by Harlequin and Pierrot). In Daumier's *juste milieu*, the king pear hides the politicians under his robe, concealing their sins under the royal cloak. Similarly Philipon in his *Le juste milieu* (1830) has a pear with the tricoleur hat, unsuccessfully hiding a Bourbon white cravat and *ancien régime* royal garb: the 'oxymoronic Citizen King'.

The major point is that what the caricaturists were able to do, and here Daumier and Philipon were at the forefront, was to keep the two master signifiers separate. They did not allow the king to quilt the terms of the republican movement onto the body of the king. First, the king was always represented as the enemy of these virtues, whether plastering over it, bursting bubbles or shitting on them. On one level, this is a hysterical response. For Daumier and the others, the king was not castrated enough and was too corrupt. More boldly they were calling for the complete overthrow of monarchical government. As a member of the *mouvement* party, Philipon wanted a reassertion of the republican ideals. They stopped the conflation of values seen in the *juste milieu*. Beyond this understanding of the bifurcated politics of the *juste milieu*, there was a more active strategy. Many cartoons insistently kept the king's body apart from those virtues of the republic he wished to accept. The effigy of the republic or liberty, as seen in Delacroix's rousing image, was kept very much apart from Louis-Philippe. The number of these images in Daumier's oeuvre is impressive, but it will suffice to focus on a few. Starting in reverse *The Main Actor in a Tragicomic Imbroglio* (29 March 1835, *La Charivari*) shows the bourgeois king gradually turning again into a king. All the trappings of the bourgeois king are falling away to reveal an absolute monarch: the umbrella becomes a sceptre, the top hat with cockade becomes a crown and the coat becomes an ermine cape. So although there is a doubling of the *juste milieu*, the king is unable to reconcile the two positions. It was this period in the king's reign that the press laws became harsher after the assassination attempt under the September Laws. The image can be seen as imaging the failure of the regime to adequately create consensus between the republican

Fig. 19.4 Honoré Daumier, *A Modern Galileo, And Yet it Continues Its Journey*, 1834, 23 cm × 27 cm, lithograph

and monarchical positions. Another late work during this period was *Posthumous Sentencing* (*Le Charivari* 1 March 1835), where the two master signifiers are placed on a scale; The Pear is outweighed by the republican Phrygian hat. The two master signifiers – monarchy and republic – are shown as two images that must be balanced but are not.

In other images, the two are shown as outright enemies. For example in 'Barbe bleue, blanche et rouge' (Blue, White and Red Beard), (*La Caricature*, April 11, 1833; design by Grandville (J.-I.-I. Gérard) and Bernard-Romain Julien, lithograph by Becquet) the scene is made obvious by a prosaic caption. The commentary explained: "'It's Louis-Philippe about to slaughter Constitution…" The Press leans out of her tower holding two republican papers, *La tribune* and *Le national*. Constitution calls to her: "Press, my sister, don't you see anyone coming?" – "I see two knights riding at a gallop carrying a banner; it's the banner of the Republic."' Louis-Philippe is seen as the enemy of the press but more importantly the enemy of the republic.

An example of how the republic is an alternative and heroic master signifier that may come 'to the rescue' at any moment is fantastically suggested by Daumier in *A modern Galileo, And Yet it Continues Its Journey* (*La Caricature*, 6 November 1834) (Fig. 19.4). A republican prisoner sits chained but alert in a prison facing a grave judge (who resembles Persil). Between the two figures, a sceptre of freedom flies onwards unabated and into the future, on it are the dates 1832, 1833, the present, 1835 and 1836. It seems to emanate from the prisoner to attack the present legal position. So where, for example, Daumier's *Rue Transnonain, le 15 Avril* (1834), shows the horror of repression and gives the viewer information regarding State violence, this image works on the level of the master signifier. The master signifier represents either liberty, freedom or the republic. *France at Rest* (La Caricature 28 August 1834) makes this connection clearer. Behind a sleeping

Louis-Philippe, the republic is visible with her hands tied. There is the totemic cockerel without its feathers. Everything is in a state of hiatus. The king does not rule, but the republic is downcast and shackled. This image has almost a pendant in 'Where are we going? What's going to happen? There's a volcano in our path… the abyss of revolution is about to open at our feet… The ship of state has gone dead in the water because of this surfeit bad feelings'. Two men are in front of Aubert's shop, among the images is Philipon's four pears. Finally the republic is separated out in one Daumier's final political cartoons, *Looks like it was a lot of bother to have us killed!* (*La Caricature* 27 Aug 1835). This should be read in relation to Delacroix's liberty as its antithesis. The three heroes of July 1830 survey the scene, watching innocent civilians killed, with irony and sadness. So the images I have chosen to focus upon all present the republic as separated from the king, or the present regime. The way to read these images is through the master signifier. Daumier refuses to let the two meet, to let the king quilt the ideas to his own effigy. It is this action that gives Daumier's work its importance and strength. The work becomes not an act in Persil's sense but connects to what Žižek has called an Act. Žižek suggests, 'This is the key point: an act is neither a strategic intervention *into* the existing order, nor its "crazy" destructive *negation*; an act is an "excessive", trans-strategic, intervention which redefines the rules and contours of the existing order' (Butler 2005, 145). What Daumier and the other caricaturists were able to do between 1830 and 1835 is to keep the political field open so that Louis-Philippe was unable to take the authority of the republican position to his side. By keeping the republic separated, it always kept the option open for the republic 'to come'. The republic was the little fairy that was not obvious, but nevertheless there in the prison, it was shackled behind the king but waiting. It is for this reason that finally in 1835 the crackdown was so severe. The act of Daumier and the others was so successful at keeping the revolutionary field going.

In light of the images discussed above, it is worth looking back again on the *Gargantua* as a revolutionary act. It seems hysterical (in a Lacanian sense), producing information and knowledge that 'The king is selling titles and favours' and that the 'government is corrupt'. It is also hysterical in that it finds the king's body repulsive and 'not castrated enough' (i.e. not purely symbolic as a king should be). Perhaps it is the government of Louis-Philippe who understood the image best by seeing it as treasonous libel or in French terms *lèse majesté.* What is disguised in the image is the little fairy of the republic and indeed just near the bucket on the ground, among the common people, a small woman looks away, wearing a Phrygian white cap. In the political circumstances of the time, merely a year or two after the new regime began, even Delacroix's liberty was seen as seditious. The mistake has been to look at Daumier through the caricature of our own time. In this image, it is not the same as merely saying, 'President Bush is nepotistic'; it would be the equivalent of suggesting that democratic capitalism, as an ideology, is wrong and illegitimate and should be overthrown. The art historians also discuss the effect of the censor, in contemporary terms such as the freedom of the press. The issue of Daumier's early work is not one of free speech, as a modern right, but of regime change and revolution; the censor is the regime (in a state of emergency). I am reminded of Frantz Fanon

discussing the ability of the storytellers in Algeria to raise a unified revolutionary body: 'The epic, with its typified categories, reappeared; it became an authentic form of entertainment which took on once more a cultural value. Colonialism made no mistake when from 1955 on it proceeded to arrest these storytellers systematically'. Similarly, Louis-Philippe made no mistake in his strict censorship. In the end, the caricaturists were proved correct, and the regime did end because the consensus was never quite reached between these two broad factions. 1848 marked the end of the monarchy.

19.10 The Repressed Rises Again

In 1848, when the July Monarchy ends, Daumier shows through his work that it is the republic that has been repressed the whole time and in whose name he was gaoled (not for some mere artistic autonomy). The work *Dernier Conseil des Ex-ministres* was drawn as soon as the regime was changed. The republic bursts through the door with a bright light behind her. At the table of State with papers and pen still on the table, the ministers of Louis-Philippe's regime scramble to retreat, like moths uncovered behind a curtain. Although Baudelaire (and later modern teleology) preferred the 'modern' satirical works of lawyers, peasants and the bourgeois drawn from life, it was the gaoling for *lèse majesté* that made him a hero of the Third Republic. In his 1878 retrospective, his effigy of the republic hanging on the wall, Daumier was able to say that he had been gaoled for destabilising the monarchy, for opening the field in some way for the Third Republic to come into being almost 50 years later. So in Daumier's work, the two effigies of both the monarch and the republic battled out briefly between 1830 and 1835. The field was successfully closed in 1835 through censorship backed up by intense violence. But for 5 years, Daumier's works were the equivalent of the Lacanian Act. They showed the possibility against the running order of the Orléanist monarchy. Not in a hysterical voice but as a revolutionary calling for the republic. In 1848, when the revolution finally did come and the republic again stopped *becoming*, Daumier again imaged the republic as the Marianne of the Second Republic. *Lèse majesté* or treason actually marks you as the emancipatory outlaw. Their crime was the imagining of overthrow.

Indeed, in 1848, when the regime finally came to an end and in the first months of the Second Republic, the provisional government organised a competition to image 'the republic'. Daumier entered with *Sketch for 'The Republic': The Republic Feeding her Children and Instructing them* (1848). Courbet and François Bonvin's encouragement for Daumier to compete proved worthwhile, and this effigy was State sanctioned. In 1878 this was the only effigy Daumier exhibited at his retrospective and was well received at that time as a reassertion of republican values in the Third Republic; the exhibition of this work was a visualised version of the revolutionaries' demand, lead by Léon Gambetta, that the 1848 Republic be restored. Although there was a Royalist majority, they could not restore a monarch to the

throne. The republican constitutional laws were passed in 1875 that proclaimed France would from then on be a permanent republic. The birth of the assured republic coincides with Daumier's retrospective (and Courbet's death) in 1877. Both artists had lived their artistic lives through both republican and monarchical governments and through many revolutions and political tensions in France. The feeling at this period is well summed up in the *Punch* Cartoon, 27 October 1877, *A Decided Preference*, where a Marianne finally puts on her republican garb for good. This image illustrates the end to an oscillation between the monarchical and the republican master signifiers where France finally settles on the republican democratic master signifier.

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Chapter 20
Law, Code, and Governance in Prophetic Painting: Notes on the Emergence of Early, High, and Late Modern Forms of Life and Governance

Ronnie Lippens

Abstract This contribution aims to demonstrate how forms of governance are inextricably intertwined with the forms of life that give rise to them and how such forms of life/governance tend to emerge, historically, in the sensory sphere – on canvas in particular – before they do so symbolically, or conceptually, in the spoken or written word. In other words, emerging forms of life/governance leave traces first in 'prophetic' painting before they do so in tracts, books, texts, film scripts, installation art, and so on. This is demonstrated with regard to three historical periods that, each, saw the birth of a particular form of life/governance, that is, early modernity (roughly from 1470 to 1520), high modernity (1750–1800), and late modernity (1940–1990). This contribution includes discussions of 'prophetic paintings' by early modern painters such as Jean Fouquet, Gerard David, Domenico Ghirlandaio, Antonello da Messina, and Quentin Metsys; high modern painters such as William Hogarth, Joseph Wright of Derby, and Henry Fuseli; and, finally, late modern painters such as Jackson Pollock and Mark Rothko.

20.1 Introduction

The basic question this chapter addresses is whether paintings are the vehicle *par excellence* for new or emerging forms of life and the forms of governance that are inextricably part of them. In other words, do forms of life and governance appear as art before they do so in the sphere of the conceptual? To ask this question is to inquire whether forms of life/governance express themselves in the sensory sphere (e.g. the domain of the visual) before they do so in the domain of abstract symbols and concepts.

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The late art historian Francis Haskell asked himself a similar question in his essay on 'Art as Prophecy' (1993: 389–430). A close analysis of Jacques-Louis David's pre-revolutionary painting *The Oath of the Horatii* [1784] led Haskell to surmise that the painting, in its depiction of solemn, stringent, virile, and merciless patriotism, might have foreshadowed the events of 1789. Ultimately, however, Haskell remained undecided on the issue of the possibility of prophetic painting. If there is such a thing as prophecy in art, he notes, the capacity on which it rests is unevenly distributed among artists and has less to do with the reasoned divination of things to come than with particular sensibilities accumulated in the individual painter.

Prophetic painting is not about an artist first picturing, in his mind's eye, a scene in the future, or a vision of the future, which he then proceeds to compose and arrange on his canvas or panel. Prophetic painting is not – or at least, not necessarily – about painting events or scenes that are *deliberately* divined, imagined, and prophesied. There is another way of looking at prophecy in painting that holds that *all* painting, to an extent, is prophetic. This is because all painting somehow expresses at least to some extent *emerging* forms of life. By 'emerging' is meant here a transition from the realm of the virtual, from the not-yet-actualised, from sheer *intensity* to the actual and the *extensive* (Deleuze 2003; but see also, e.g. Murray 2006, 2007). This transition takes place, or so it could be argued, first and foremost through the senses. Painting in this sense might be regarded as the location *par excellence* of the actualisation, in matter, of emerging forms of life.

Haskell himself hinted at this when he fleetingly remarked that if there is anything like 'prophetic power' in art, it should reside in 'sensitivity', that is, in a certain non-reflective, nondeliberate, and nonconceptual emergence, through the bones and the flesh of the artist into actual matter. To be sure, much in painting *is* the result of symbolic or conceptual reflection, of reason and deliberation. But something in painting – in *all* painting, potentially – involves the sensory expression of the new, of that which is continuously becoming. In this sense, to the extent that painting expresses something of a newly emerging reality, it is prophetic. Perhaps art historian Michael Baxandall described it best in his *Patterns of Intention* (1985) when he spoke of the *charge* of the work (i.e. the will to find a new solution to an existing problem), its *brief* (i.e. the work's historical, cultural, and technological context), and the nature of the *resources* which the painter perceives to be available and is able to marshal (i.e. painterly skill and biography). It is in this sense that we will consider prophetic painting here.

Emergent forms of life, or elements of it, are likely to leave traces first on panels and on canvases, before they do so in the symbolic or conceptual sphere. I hope to demonstrate this by taking a closer look at a number of paintings spanning five centuries. The main focus will be on the emergence of *modern* forms of life/governance, that is, in early (1470–1520), high (1750–1800), and late modernity (1940–1990). One might be able to detect, in modern life and governance, a certain preoccupation with the complexities of inner selves. That which is to govern, and which is to be governed, in modernity, is the complex inner self. That which lurks secretly underneath the surface of mass and mere organism – a complex of boiling potential, deliberations, aspirations, intentions, imaginary tactical manoeuvres, and so on – is what

governance (i.e. the governing self as well as the governed self) is to divine, reflect upon, work with, and put to productive use.

In what follows, I will focus first on the early modern emergence, on panels, of a form of life/governance that flows from the sudden discovery of the contemplative nature of the complex inner modern self. I will then move on to the emergence, on high modern canvases, of a new form of life/governance. This is one whereby the complex inner self gradually territorialises and codifies. The emergence of the final, late modern form of life/governance announces the actualisation of a process whereby the complex inner self, governed and governing, begins to engage in unrelenting de-territorialisation and de-codification.

20.2 Complex Inner Selves: Their Emergence and Discovery

The work of a fifteenth-century Dutch-Flemish painter, Gerard David, is a good place to start. His diptych *The Justice of Cambyses* [1498], for example, captures, in our view at least, an emerging, indeed actualising early modern form of life/governance well (see Figs. 20.1 and 20.2). I have elsewhere analysed this painting in some depth (Lippens 2009). Briefly, both panels rehearse the story (first told by Herodotus) of the arrest, and subsequent execution, during the rule of the Persian king Cambyses III,

Fig. 20.1 Gerard David, The Justice of Cambyses (1498). Panel 1: The arrest of Sisamnes. Groeninge Museum, Bruges

Fig. 20.2 Gerard David, The Justice of Cambyses (1498). Panel 2: The flaying of Sisamnes. Groeninge Museum, Bruges

of a corrupt judge Sisamnes. The first panel depicts the arrest of the judge. His crime (accepting a bribe) is pictured in the backdrop (the past).

The second panel shows Sisamnes, in utter agony, being flayed alive. His son, Otanes, in his capacity as the newly appointed judge, is depicted in the backdrop (the future). He is seated on this father's throne which is draped with the latter's flayed skin. The first panel shows us events in a very static, indeed almost frozen, manner. The public square is barely visible in the background, and nothing worth of note seems to be happening there. The main events take place within the strict enclosure of the courthouse. The static, unchanging nature of royal authority and order dominates the scene.

On the second panel though, there is much more dynamism to be noted. All events take place in the open, in the public square. The seat of authority is placed at the fringes, at the margins of public life. The seat of authority, or the courthouse, is an open house. People move in and out freely, casually even. However, ambiguity seems to reign in the public square, particularly in the furtive, somewhat aloof glances which those who participate in public life seem to be throwing hither and thither. The new judge – new authority – allows himself or allows itself to be watched and scrutinised. But does he, and do we? He himself seems to be watching us, furtively, askance. But is he? It's not all that clear. There is a lot of ambiguity around. It's as if everybody in the square is wondering about something, wondering, perhaps, about what others might be wondering about.

Law is only skin-deep in an age when wonder, contemplation, and divination are beginning to take centre stage in life/governance. Law could never be more than a practical instrument in the hands of those who, whether governed or governing, are growing ever more tactile and tactical. This newly emerging, actualising form of life/governance is a *tactile* one: burghers and governors, in public squares, have just discovered, with something of a daze-inducing shock, the complexity of *their* inner self and are beginning to wonder about the complexity of the inner self of *others*. They are beginning to wonder about that which lurks – or which might be lurking – behind or underneath surfaces, skins in particular (do have another look at David's second panel). Their wonder is tactile: it tries to feel its way, in divination, behind the appearance of skin. This form of life/governance is also a *tactical* one. In the realm of possibility that has opened up in public life and in public squares, and in the complexity, or at least the potential for complexity, that has emerged in its wake, the issue for complex inner selves becomes to divine and contemplate the tactical opportunities (as well as the dangers) that could be hiding in them.

The newly emerged complex inner self is tactical also in the sense that it becomes important – whether one is governed or governing – not to betray one's tactical contemplations prematurely. In public squares, it is beginning to pay to project a seemingly indifferent, furtive, aloof, in short, ambiguous look. Such projections of course only fuel further divinations and contemplations. All this might be visible, at least to some extent, on the panels of David's diptych. Bret Rothstein recently (2008) claimed that *The Justice of Cambyses* stirs 'ruminative viewing' in spectators. Such ruminative viewing is quite normal before what Harry Berger calls early modern 'optical' and 'textural' paintings (rather than mere 'decorative' and 'graphic' ones), that is, paintings where the artist felt free to add his own optical perspective, or his own textural creativity, to the painting process. Such paintings tend to activate what Berger has termed an 'observer shuttle' (1998: 43) whereby the viewer moves back and forth between the painting and his or her imagination. But the point that is made here in the contribution at hand is that there is a lot of ruminative, indeed existential viewing going on in the very scenery of David's painting itself.

The way in which David painted the public square on his second panel was quite novel. A new form emerged there on that panel, in 1498; a new form of life/governance, one might say. If one compares David's panel with the painting, by an unknown master, of *The Execution of Savonarola* (painted also in 1498), the contrast immediately becomes clear. Whereas the former suggests movement, mobility, porous boundaries (e.g. between the open square and the courthouse), and deep ambiguity, the latter shows the Florentine square as a vast desert-like space where small groups of static, neatly delineated, separated groups or factions remain immobile around the scene of Savonarola's execution.

The close of the fifteenth century has often been read as a defining, existential moment in Western history. Some point to the impact of the catalyst year 1492 which will have prompted contemplative self-reflection on a massive scale. Others read Giovanni Pico della Mirandola's *Oratio de Hominis Dignitate* (published originally in 1486) as the event when existential, self-reflective, contemplative modern man – that is, man who contemplates options in order to choose and build his own

life – was born. That existential moment of self-awakening, it could be argued in passing, was probably first captured on Jean Fouquet's first panel of his Etienne Chevalier diptych, that is, *Portrait of Etienne Chevalier Commended by St. Stephen* [1450]. That panel depicts the rich courtier, painted against a backdrop in perspective (the emerging modern future), as he seems to be praying to and looking at the whitish immobility of *The Virgin and Child* [1453–1454] on the other panel, looking back, as it were, on a past of static, unchanging order whence he has just managed to wrestle himself from.

There is no point in discarding or rejecting these views on the birth of early modern 'existential man'. Here, we merely wish to add that David's diptych could be read as the visual harbinger of an emerging form of life/governance – the burgher form of life/governance – whereby complex inner selves suddenly, and slightly dazed still of the effects of their self-awakening discovery, had to come to terms with the existence of the complex inner selves of others as well and with the opportunities, risk, and dangers therein. The burgher, by the end of the fifteenth century, has come to realise that life is about opportunities and risks, about tactical manoeuvres, and about the uses of ambiguity in the tactics of social mobility. Those that govern are, they too, fully immersed in this emerging form of life/governance. They suddenly experience the need, indeed the practical necessity (as Machiavelli would a few decades later argue, in his *Discourses on Livy*), to read or divine that which lurks or hides behind the ambiguities in the body politic, in order to tactically mobilise it. They too are beginning to wonder about that which, in all its complexity, moves behind ambiguous surfaces.

The issue, in other words, in early modern life and governance is to contemplate ways to take account of or deal with others' likely *perspectives* in the ongoing construction of one's own (compare with Berger 1998, 32–33 in particular). What tactical ponderings are going on behind furtive glances, behind skins, behind the slightly ambiguous posture of those who walk past in public squares? David's diptych captures all this. But the preoccupation with surfaces and skins, and, more importantly, with that which might possibly dwell underneath or behind them, had already emerged on panels well before 1498.

Let's consider this early modern preoccupation with surfaces and skins, and with what those might be hiding. Domenico Ghirlandaio's well-known *Old Man and his Grandson* [1490] shows a grandfather who looks with a tender smile to his grandchild who, sitting on the man's lap, in turn looks him in the eye. The old man's face and nose are seriously disfigured by boils and warts. But that seems not to be an issue in this painting. What is important is the tender exchange of gazes between a loving grandfather and a grandson. It is as if their eyes are feeling their way through or behind the surface of skin. On Ghirlandaio's painting, a diseased and disfigured skin is no longer expressive of sin or moral depravity. It's only a surface. What is important is that which is hidden behind it, for example, motives, sentiments, and deliberations.

Now let us have a closer look at the early modern interest in the glance. Another Italian painter, Antonello da Messina, was, like Ghirlandaio, influenced by Flemish painting. He painted a series of portraits (during the 1460s and 1470s mostly) which

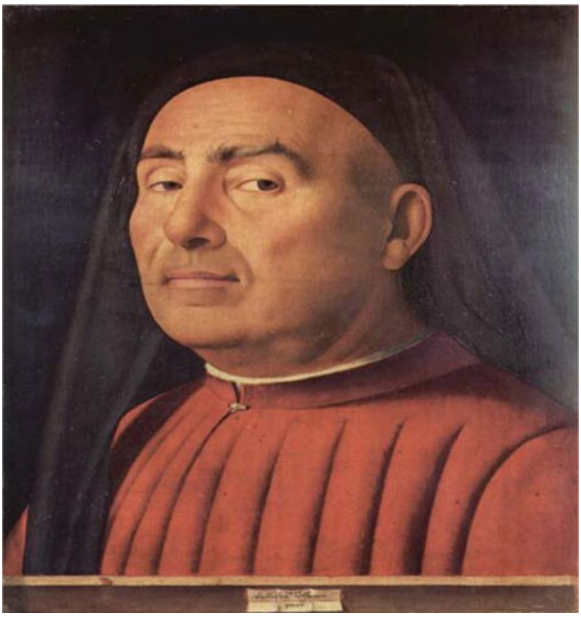

Fig. 20.3 Antonello da Messina, Portrait of a Man (1476). Museo Civico d'Arte Antica, Turin

strike us as quite modern. The look in the eyes of da Messina's models, as they appear on his panels, goes way beyond what had hitherto been painted by his Flemish inspirers. There is a certain inquisitiveness to be noted in da Messina's painted glances which moderns will recognise. Do have a look at one of his many portraits, that is, his *Portrait of a Man* [1476] (see Fig. 20.3). The spectator is bound to wonder about what might possibly be going on behind this man's slightly aloof, slightly inquisitive look. One answer to that question might not be too far-fetched: the man is probably wondering about what is going on behind our own wondering eyes. This really is a qualitative leap from, for example, the Van Eyck brothers (1440s and 1450s mostly). Antonello da Messina even went so far as to endow the Holy Virgin, in his *Mary's Annunciation* [1475], with a similarly inquisitive, slightly enigmatic look in her eyes.

Da Messina's portraits, and the spectators who view them, seem to be caught up in a web of mutually shared wonder. They are bound to ask questions such as the following: What is going on behind the eyes? What is going on behind surfaces? What are others – complex inner selves just like me – thinking about? What plans are they contemplating? Which move are they likely to make next? The early modern *tactile* preoccupation with surfaces, skins, and glances – and, to be more precise, with the possible *tactical* contemplations that lurk behind them – would, in painting, find its ultimate culmination, or so it could be argued, in Flemish painter Quentin Metsys' work *Suppliant Peasants in the Office of Two Tax Collectors* [1515]. That painting shows two tax collectors and two peasants, all with grotesquely contorted faces and blemished skins, eying each other up with bewildered,

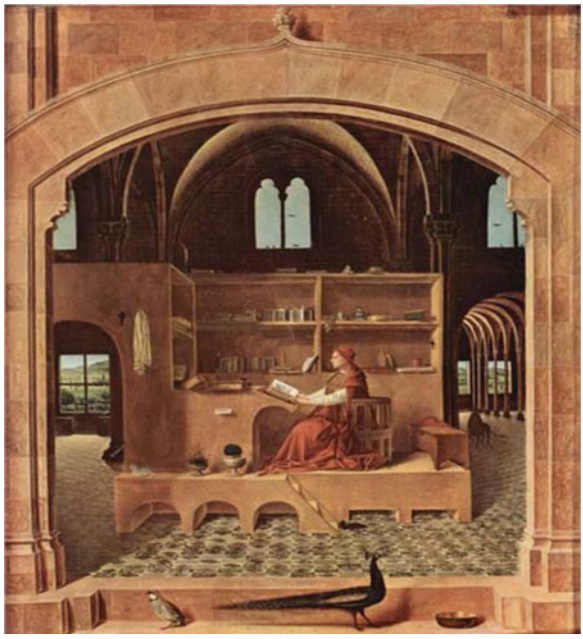

Fig. 20.4 Antonello da Messina, St Jerome in his Study (1474). National Gallery, London

inquisitive, and suggestive gazes. Each of the characters in the painting seems to be trying to second-guess the motives, intentions, tactics, ponderings, and future moves of the others.

But let us return to Antonello da Messina. Before he embarked upon his series of portraits, he had already completed his *St Jerome in his Study* [1474] (see Fig. 20.4). The painting shows St Jerome translating the Gospel in his study. The painting is full of symbolism, but that is not what interests us here (on this symbolism, see Jolly 1983). St Jerome, the translator, and therefore also the bringer of new and as yet unknown, enigmatic tidings, is sat in a building which da Messina has broken open (not unlike Gerard David, on his second panel) in a Matruschka sort of way.

The spectator is able to look through the different layers of the building into its very heart. There, we find St Jerome. We may now wonder about what could possibly be going on behind the layers of the saint's flesh and blood, in the deep recesses of his mind. What is going on in St Jerome's mind? What is going on behind surfaces?

The small selection of paintings we have been discussing so far may go some way to showing how emerging modern complex inner selves, still stunned by their self-awakening, as well as by the very discovery of this self-awakening itself, produced a form of life and a form of governance (both inextricably intertwined) which materialised, from quite early on, on painted panels. On these panels, we are able to recognise typically modern preoccupations with the complexity of the self, with tactical manoeuvres, with the practical necessity to take the complexities of selves

into account, with the contingencies of opportunity and risk, with self-presentation, with the sheer indeterminacy of choice, and so on. All this happens quite a while before corresponding ideas emerge, conceptually, in print (e.g. in Machiavelli's *Discourses on Livy*). On such panels, one might indeed be able to witness the birth of modern, indeterminate, indeed existential man. Let us now move on to the emergence of a high modern form of life/governance.

20.3 Complex Inner Selves: Territorialising and Codifying

In his recently translated *The Eye of the Law* (2009), Michael Stolleis traces the symbolic deployment of the figure of the eye (usually depicted within the frame of a triangular shape) in successive regimes of authority and governance since the seventeenth century. First, it represented God's 'watchful eye', then the eye of the absolute Sovereign, later still the eye of the law (and the constitution), or the nation, *Volk*, 'the people', and so on. It is worth noting that the 'watchful' eye here stands, symbolically, not just for 'surveillance' or for 'warning' and 'punishment', but also, at least potentially, for 'protection', 'providence', or indeed 'formative' and 'productive'. During the eighteenth century, it is the law and the nation – or the constitution – that become the location of the watchful eye. The emphasis in its symbolic connotations gradually moves towards the formative and productive properties of the eye and the gaze (even though their other properties never completely disappear). It is this transition which will form the backdrop of this section here. The formative and productive dimension of the gaze forms part of what we call the high modern form of life/governance.

William Hogarth was one of the great diagnosticians of the eighteenth century. The word is used here in a Nietzschean sense (but see also Deleuze 1994). His works have great diagnostic force. Firmly embedded in a 'post-Newtonian universe' (Asfour 1999), Hogarth diagnoses what he believes to be a very serious problem in mid-eighteenth century (British) society, that is, the lack of a stable and stabilising centre or the lack of 'civilisation' amidst rampant 'savagery' (Dabydeen 1981). Let us consider his *An Election Entertainment* [1755] (Fig. 20.5). Again, I am not interested in the symbolic dimension of this painting. I do note, however, that the theme of the painting is politics or the political. The centre of this canvas is almost completely taken up by the white expanse of the empty table. The table is empty since one of the women has managed, in all her fleshy desire, to rake all foodstuffs and cakes to her side. The empty, blank centre is left vacated. All around the empty centre, the buzz of frenetic, uncontrolled activity – sheer disorder – reigns. The centre doesn't hold anything. Nothing seems to be keeping sheer bodily desire in check (see also Krysmanski 1998a, b). If there are any complex, inner selves present, they have decided to allow desire to play out.

The centre does not seem to structure, produce, or harness any of the available energies. This is a recurring theme in many of Hogarth's diagnostic works (his ironically named *Progresses* in particular; see, e.g. Momberger 1999): if left unchecked,

Fig. 20.5 William Hogarth, An Election Entertainment (1755). Sir John Soane's Museum, London

desire shall, step by step, lead to sheer chaos. The early modern, self-aware, and reflective pondering self has all but disappeared. It could be that more than two centuries of absolutist rule had made tactile and tactical games with, within, and between complex inner selves rather obsolete and had installed forms of life/governance that were geared more towards the mere physical control and management of pure bodily desire. The Italian jurist Cesare Beccaria would, about a decade after *An Election Entertainment*, publish his *Dei Delitti e Delle Pene* [1764] in which he made a plea to replace the regime of fleshy desire and its control with a quantitative *mechanics* of calculation which, he hoped, would ultimately, and indeed *naturally*, bring about stability and order.

But it was not long before a newly emerging form of life/governance crystallised on canvases, for example, on those of Joseph Wright of Derby. His *An Iron Forge* [1772] is worth a closer look (see Fig. 20.6). Wright has often been dubbed the painter of the Industrial Revolution par excellence (e.g. Cieszkowski 1983). But there is more to his work than that. The very centre of the painting is, here too, taken up by whiteness. But unlike Hogarth's empty whiteness, this one here is of a productive kind. The light from the white-hot ingot radiates outwards, and as it travels to the corners of the forge, it not only throws light on objects and on those who are present, it actually *forms*, indeed produces, them. This is a light that, in the words of Bille and Sørensen (2007), has 'agency'. It produces pride in the blacksmith who owns the forge (have another close look at the smith's facial expression). It produces well-being in him and in his family. It produces a sense of security in them. It forms their selves. The radiating light is productive. The forge is productive. It not only produces objects. It also produces selves. Out of nature's raw materials, out of the chaos of nature, out of sheer desire, it produces stability and order (see also Solkin 2003). The selves that are forged out of nature's sheer chaos have something stable, orderly about them. The stability and order that are forged out of sheer natural

Fig. 20.6 Joseph Wright of Derby, An Iron Forge (1772). Tate Britain, London

desire are, in turn, indistinguishable from the features of the selves that emerge from the productive process, the former depending on the latter, and vice versa.

It is possible to retrace a gradual build-up in Wright's work up to *An Iron Forge* [1772]. Wright had been painting similar chiaroscuro works which, all of them, have a bright light at their centre. This is a light that, in the poetics of Gaston Bachelard, 'takes its time to light the whole room progressively'. A light whose productive 'wings and hands (…) move slowly as they brush the walls' (1988: 68; see also Bille and Sørensen 2007: 279). At a time when Beccaria was writing his *Dei Delitti*, Wright was making preparations for his *A Philosopher Giving that Lecture on the Orrery* [1764–1766]. The light in this painting emanates from a mere mechanical clockwork, that is, an orrery. The clockwork merely mimics the natural law of physics (the orbits of the planets, to be precise). Around the orrery are gathered a number of people whose faces are partially illuminated – in chiaroscuro style – by the light that 'brushes' past them. Here, we are still in a natural mechanics. That which is produced by the light is produced by clockwork that merely mimics nature. That which is thus produced – the selves of spectators, for example, can therefore be nothing but the effects of the mimicry of those very natural mechanics.

However, a few years later, in his *An Experiment on a Bird in the Air Pump* [1768], Wright has the radiating light flowing from a lamp placed under a device (a vacuum air pump) used for scientific experiments. Again, the light illuminates a multitude of faces. The air pump seems to represent a station somewhere halfway between a mere natural mechanics and a mechanics of production. An air pump is, after all, a productive machine. It mobilises certain laws of physics to produce certain *willed* effects. That which is thus produced is then not the mere effect of a

mere natural mechanics. It is *also* the result of a certain productive will. A few more years later, Wright paints *A Blacksmith's Shop* [1771]. As is the case in *An Iron Forge* [1772], the whiteness of the light, again placed at the centre, comes from a glowing hot ingot. It illuminates the faces of the workers who – unlike the blacksmith's family in *An Iron Forge* – are still absorbed in their productive work (see also Solkin 2003: 179–180 on precisely this point). The faces (and the selves) of the workers are completely focused, full of concentrated, stable, ordered *will*. That which they are about to produce will be too.

Some have called Wright a painter of the sublime (e.g. Paulson 1969: 291; Solkin 2003). One could argue though that on Wright's canvases, a new form of life/governance is emerging. This form of life/governance is not just about laboriousness and about transforming brute nature into civilisation; indeed, authors such as Locke and Hume had already written on these issues well before Wright (on this, see Solkin 2003, *partim*). This is a form of life/governance that is, once again, based on an interest in inner selves. The inner self here has to be produced. It has to be kneaded into shape. Governance here is about the willed production of stable, ordered, indeed *centred*, inner selves. Those who govern, and those who are governed, in this form of life/governance, have an interest in kneading and shaping their (and others') inner self. They have an interest in stabilising it, centring it, and ordering it. The very aim of all this production is to make the inner self in turn *productive*. Indeed, neither fleshy desire, nor a mere mechanics of nature could ever be productive. Desire and natural mechanics don't need an inner self at all. Where they reign, the inner self is absent. For there to be production or better *productivity*, there needs to be an inner self that, willingly, takes part in the productive process. And for there to be willing inner selves, they, in turn, need to be kneaded, indeed *forged,* into shape.

This emerging form of life/governance, then, crystallises around a certain will to *produce* inner selves – one's own and those of others – into *productive* shape. The inner self then, in this very process of production, is to become less complex, more stable, ordered, and centred. In other words, the potentially limitless complexity of the inner self, for it the self to acquire any productive capacity at all, will have to lose some of its complexity. This may come about by organising it, or by allowing it to self-organise, around a centre. The productive light radiating outwards from this centre should then stabilise the potentially restless complexity of contemplating, ruminating selves, ordering them and preparing them for productivity as the 'wings and hands' of the light 'brush' past them – remedying, as it were, the lack so vividly diagnosed by Hogarth (see again Paulson 1969: 292).

Wright's paintings seem to have captured some of this emerging form of life/governance. This happened two decades or so before Jeremy Bentham published his *Panopticon* [1787]. It may be a bridge too far to point to Wright's paintings as the immediate preconceptual precursors of Bentham's tract. Indeed, there are many differences to be noted here. One of the distinctive features of Bentham's *Panopticon*, that is, its centrally located tower that houses the eye of power, is darkened. No light radiates from it. However, there *is* light in the *Panopticon*. It 'brushes' past the concentrically positioned cells where it performs its kneading, shaping work. It produces subjects, as Michel Foucault (1977) argued. It produces fitting, *productive*

subjects. With its 'wings and hands', it tries to reach the farthest capillaries, nooks, and crannies with an *eye* on doing its productive work. The 'eye' indeed…It is the 'eye', the organ of light, the eye at the centre that guides the light on its productive travels. It is the eye at the centre that, within the inner self, at its centre, installs a productive will or, to be more precise, a will to production.

All this could of course also be related to what Michael Stolleis (see above) has described as the move, during the closing decades of the eighteenth century and during the early nineteenth, towards a political imaginary whereby the 'watchful eye' of governance is gradually situated at the centre of the law of the nation – the constitution, if you wish – from where it is then supposed or even expected to perform more productively, that is, to *produce* fitting citizens. The constitution of a society is a work of intense labour; it is a *productive* process. The constitution of a nation does not come naturally. Desire – and the mere management of it – won't suffice. Natural laws of physics – or the attempt to mimic them – will simply not do. The eye of governance, says Foucault, would move into the centre of the many, mushrooming institutions of society, where it was to perform its most important task, that is, the productive constitution of upright, dependable citizens and disciplined, normalised workers. And that task, as we have argued, is about organising and centring the inner self of 'citizens' and 'workers'. The form of life/governance which we have seen emerging on Wright's canvases is one that needs inner selves to be focused on or centred upon the productive will to production. For the constitution to be able to productively organise its territory – for it to be able to territorialise – it needs inner selves that are themselves territorialised (to borrow from Deleuze and Guattari 1984), that is, organised, structured, or arranged according to particular codes. For the constitution to be able to perform its productive task appropriately, it needs inner selves that are codified and that are willing to codify.

The constitution of societies, nations, and inner selves is a never-ending story. That which is repressed is bound to return in some way or other, at some point in time. The *return of the repressed* is inevitable. Henry Fuseli's well-known painting *The Nightmare* [1781] is probably one of the first to depict this. The painting materialised on canvas some 6 years before de Sade started work on his *Justine* (another repressed returning). At the centre of Fuseli's *Nightmare*, we find, again, an expanse of whiteness. This whiteness is impotent, non-productive whiteness (it's the whiteness of a dress of a woman who is either asleep, having nightmares, in a coma, or experiencing sexual ecstasy; Moffitt 2002). The inner self has disappeared. The whiteness in the painting, once again, stands for emptiness. The centre of the painting is once again a vacated space. The animal-like incubi (rampant, uncontrolled desire; disorderly nature) have taken over. Some romantics who came after the 'gothic' Fuseli would focus, it should be noted, on nature in a more positive light.

Let us now shift our attention to the emergence, in the latter half of the twentieth century, of the late modern form of life/governance. Whereas the high modern form of life/governance was about the territorialisation and codification of nations and of inner selves, the late modern form of life/governance is about de-territorialisation and de-codification.

20.4 Complex Inner Selves: De-territorialising and De-codifying

Jackson Pollock, one of the so-called abstract expressionists, achieved his signature style a few years after the Second World War. His *Autumn Rhythm: Number 30* (Fig. 20.7) was completed in 1950. Pollock never made a sustained effort to write (or even talk) about his work. Much of what we know about his own thoughts derives from a few scattered statements of which the following string of words is perhaps the most telling: 'technic is the result of a need…new needs demand new technics… total control…denial of the accident…States of order…organic intensity…energy and motion…made visible…memories arrested in space…human needs and motives…acceptance' (published posthumously, cited, e.g. in Emmerling 2007: 69 and in Varnedoe and Karmel 1998: 56).

Pollock used the then quite novel 'dripping' technique ('new needs demand new technics') to paint his massive canvases which were placed on the floor when the artist was working on them. He allowed, in other words, the laws of physics – sheer and utter nature – to do much of the work. But that does not mean that he relinquishes control (Cernuschi and Herczynski 2008). On the contrary, Pollock's work is all about achieving and maintaining 'total control'. Nothing in his painting is mere accident ('denial of the accident') or chaos. Pollock wants to achieve total control in and through his very engagement with sheer, physical nature. Such engagement should allow one to acquire some level of mastery, not just over nature but also over oneself.

Explorations in sheer 'organic intensity', and the immersion of oneself in the sheer physical laws of 'energy and motion', should provide one with the capacity and with the abilities to exercise control over one's life conditions. In immersing

Fig. 20.7 Jackson Pollock, Autumn Rhythm: Number 30 (1950) (266.7×525.8 cm) (Courtesy of the Metropolitan Museum of Art, New York, ©The Pollock-Krasner Foundation ARS, NY and DACS, London 2009)

himself in the physics of nature (the sheer size of his canvases allowed for such 'immersion'), Pollock however still maintains or attempts to maintain 'total control' over the painting process. He wants to decide and choose himself where and how the dripping paint is going to fall and how it will leave traces of trajectories on the canvas. It is Pollock, and not physics or nature, who is to make the choices and the decisions. 'Total control' here is about having the capacity and ability to choose, to decide in the sheer, naked presence of the raw physics of nature. This capacity and this ability can be acquired, and trained even, if one is prepared to venture into this naked physics of nature (e.g. in the sheer *Rhythm* of *Autumn*), that is, if one is prepared to abandon all human law and code. In order to be able to acquire and maintain the capacity and ability to choose and decide in 'total control', one must first relinquish *all* law and code.

'Total control' cannot be achieved or exercised if one is still in the realm of human law and human codes. Control here is not about subscribing to or adopting particular forms of human organisation. Control is not about territorialising and codifying a particular space. It is not about mobilising the force of particular laws and codes in particular territories. Control is, on the contrary, about giving up all belief in, and all dependency on, coded territories. One does not just abandon law and code with a measure of control. Control, or at least the potential for control, resides *precisely in* this very move away from all coded territory. It is, in other words, about achieving and exercising utter and complete *responsiveness*. Responsiveness can only be achieved if one is prepared to abandon all rigid code and law. One should even give up or flee from one's inner self. The inner self, insofar as it is organised, or coded, or territorialised, diminishes one's capacity and ability for responsive control. In other words, it diminishes one's *sovereignty* (see on this in more detail, Lippens 2011a, b). One should even give up one's gender or indeed biological code (e.g. in transgender choice).

It is worth noting that Pollock used to start his paintings by drawing the outline of human figures on the canvas. The figures would then be washed away under the unrelenting, energetic dripping of the painter's natural, physical but 'totally controlled' choices and decisions (see, e.g. in Varnedoe and Karmel 1998: 87–137). Only in the 'total' relinquishment of *all* law, of *all* code, of *all* territorialisation (and that includes the territorialised self itself), away from all that is not sheer nature, can one hope to find 'control', that is, the capacity and ability to choose and decide properly, responsively, in utter sovereignty. Only there can one find, 'accept', and deal with real 'human needs and motives'.

Pollock's painting technique betrays his will to 'subvert' even the laws of physics. It suggests 'a defiant refusal to conform, a stubborn resolve to "outwit" the very natural order with which his own abstractions were meant to be consonant' (Cernuschi and Herczynski 2008: 635). 'Total control', that is, absolute choice and decision, requires utter and complete de-territorialisation and de-codification. Pollock's paintings, then, are the actual, physical representation of such explorations in the free, un-coded zone of nature; 'memories' of what happened and of what was chosen and decided 'arrested in space'.

This should not come as too much of a surprise to late moderns. Authors such as Stephen Lyng (e.g. Lyng 2004) have been able to show how much in what we now know as 'edgework' (i.e. risk-seeking behaviour such as base jumping), particularly since about the 1970s, is precisely about the search for a completely de-territorialised, code-free natural zone where the edgeworker then hopes to be able to build up his or her capacity, ability, and skills of responsive control. But Pollock's and edgeworkers' exploits are indicative of a broader late modern form of life/governance to which we will now turn our attention.

This form of life/governance implies a turn away from all law and all code and, indeed, from the self (a coded territory in its own right) itself. Life and governance are no longer about producing, fashioning, steering, or guiding inner contemplative selves. They are, instead, about allowing and stimulating the free circulation of desire and choice. In this form of life/governance, those who govern and those who are governed are no longer interested in the construction of coherent (i.e. coded and territorialised) selves. Selves no longer need to have a coded core. They have, in fact, already turned into collections of mere trajectories of choices. They have de-territorialised. They have been de-codified. Their trajectories resemble Pollock's paintings. In consumer societies (which thrive on unrelenting, indeed relentless choice), there is little point in re-codifying or in re-territorialising selves, least of all one's own. Echoing existentialism, one could say that selves *are* their choices. They are what they have chosen and what they continue to choose.

To be in control means to circulate freely, away from all law and code, and to exercise sovereign choice. To be in control means to have the capacity, and to be able to keep de-territorialising, and to keep de-codifying. It is to have the capacity and the ability to keep choosing *otherwise*. That goes as much for those who govern as for those who are governed. Seen in this perspective, Pollock's *Autumn Rhythm* does not so much represent the *unconscious* (whether repressed, or disciplined, or set free) as, rather, natural, responsive, total control. That requires abstract 'flatness' in subjectivity (Joselit 2000), that is, a flatness that no longer hides and no longer has any use for interior depth and complexity, for ambiguity, or for centred inner selves. It is in that sense that Pollock's work might perhaps be said to 'address the non-human' (Moses 2004).

But if the late modern form of life/governance has emerged around the potential for sovereign, totally *responsive* free circulation, indeed the quasi-permanent de-territorialisation of natural choice and control, then it has also produced quite paradoxical effects. If coded territories are to be avoided, fled even, in attempts to achieve natural responsive control, then the potential for de-territorialisation and de-codification must not just be stimulated and maintained but also safeguarded or protected. That which is to be kept at bay, neutralised, or, if necessary, destroyed is nonresponsive rigidity (more precisely, that which is *perceived* to be nonresponsive rigidity). And that can only happen, paradoxically, through coding and territorialisation. Two years after *Autumn Rhythm*, Pollock completed his *Blue Poles: Number II* (Fig. 20.8). Here, suddenly, the natural rhythm of choice and control seems to gradually territorialise. Admittedly, it is unclear whether the 'blue poles' represent older forms of coded social organisation that are disappearing under or

Fig. 20.8 *Jackson Pollock,* Blue Poles: Number II (1952) (210×486.8 cm) (Courtesy of National Gallery of Australia, Canberra, ©The Pollock-Krasner Foundation ARS, NY and DACS, London 2009)

washed over by an emerging new, late modern way of life or whether it is this new way of life that, quite naturally or organically, produces newly emerging protective 'poles'. The fact that this painting was completed only after a series of 'signature Pollock' drip paintings could lend support to the second hypothesis.

In what Guy Debord once called a *Society of the Spectacle* (1967), governance tends to take place by means of twin strategies which sociologists such as Zygmunt Bauman (e.g. 1993: 139) have recognised as *seduction* and r*epression*. The basic strategy is one whereby one allows oneself to be seduced by circulating commodity/image. Those who fail to choose *responsively* (and responsibly) will be met with repression. One might add that repression takes two forms, that is, 'hot' repression whereby 'offenders', that is, nonresponsive organisms and their rigid desires, are made to *feel* and 'cold', detached repression whereby offenders, deemed to be nonresponsive, rigidly coded physical mass, are dealt with accordingly. Both strategies however share one feature: neither is based on an interest in the inner complex self.

Those who govern and those who are governed, those who seduce and those who are seduced, those who repress and those who are repressed all share a lack of interest in the complex deliberations of inner selves. There is no need to read the complex inner self. There is no longer any need to harness its energies. There is no longer any need to *productively* knead the inner self into shape. There is no longer any need for a contemplative inner self at all – or so script writers and directors of zombie movies have caricaturised from about the late 1960s or early 1970s onwards. Moreover, in late modernity, there is nothing to produce, build, or construct. There is nothing to work *towards*. Having arrived 'beyond history' (in Fukuyama's 1989, words), there are no longer any projects to orientate selves towards.

The age 'beyond history' is a thoroughly post-constructive age. The smooth circulation of responsive, sovereign choice is not just the terminus of history, it has also become second nature; indeed, it *is* now sheer nature. 'Beyond history', the complex

inner self has turned natural. The form of life/governance in the post-constructive age, 'beyond history', is about natural, responsive interventions in natural, freely circulating flows. Like 'edgework', life and governance are *natural* life and governance. That which has to be kept at bay, controlled, destroyed, or otherwise dealt with is unresponsive, rigidly coded or 'unnatural' organism or mass.

This *natural* form of life/governance often leads to quite paradoxical outcomes. That which is deemed to be *potentially* unresponsive or rigid tends to be prohibited, or blocked off, out of precaution.

The 'precautionary principle' (Pieterman and Hanekamp 2002; Pieterman 2008) in governance has made quite some headway in our post-constructive age. Whereas in an earlier age one might have been prepared to calculate possible risks in order to deal with them in a number of ways, all with an eye on the construction or completion of overarching projects and end goals, 'beyond history' such calculations are now in the process of being abandoned. That which, in all its potential rigidity, might (just might) pose a threat to the free and responsive circulation of choice and sovereign control, should, indeed *must* be blocked off and nipped in the bud before it emerges, however paradoxical such precautionary measures may be. There is no need to calculate and manage risks. We have already arrived 'beyond history', into sheer nature. Calculations of risk serve little purpose in sheer post-constructive (second) nature.

The late modern form of life/governance may be one that thrives on de-territorialising and de-codifying choice and control; it cannot, of course, escape its own territorialisation and codification. It has itself territorialised and codified around its own perceptions of rigid, unresponsive, 'unnatural' organism and mass. However, such perceptions tend to modulate according to the fluctuations of circulating flows. In his 'Postscript on Control Societies' (1995: 177–182) – a reflection on Foucault's work – Gilles Deleuze phrased it most succinctly when he claimed that a now bygone, disciplinary era which was coded and territorialised according to 'order words' has now been superseded by an age where circulations and flows are merely controlled by the modulated application of mere 'passwords' (see also Dillon and Lobo-Guerrero 2009). Passwords regulate circulation and flows according to perceived local or localised necessities. Their goal is not to order or structure populations at their very core (i.e. at the level of the complex inner self). They merely regulate mass and organism according to specific, local circulatory exigencies.

Much in what we have described so far in this section seems to have been captured by, if not prefigured on, Pollock's signature canvases. But he was not the only painter who, in those immediate post-war years, allowed some of the late modern form of life/governance to emerge in paint (see Lippens 2010). Like Pollock, Mark Rothko had, until the Second World War, explored mythological themes in a bid to express something of the universal in human experience. Auschwitz made such attempts look very problematic and prompted artists such as Rothko to move towards abstraction as the format in which the tension between on the one hand the *tragic* particularity of each and every singular responsive *choice* and the ineradicable expanse of unfulfilled potentiality on the other, or, in other words, the tension *within* the will to utter sovereignty, could be expressed (see also Zucker 2001; Pappas 2007).

Fig. 20.9 *Mark Rothko, No. 24* (Untitled) (1951) (236.9 × 120.7 cm) (Courtesy of Tel Aviv Museum of Art, Gift of the Mark Rothko Foundation, Inc., New York, 1986, ©1998 Kate Rothko Prizel and Christopher Rothko ARS, NY and DACS, London 2009)

After the war, Rothko moved to painting his so-called *multiforms*. In those paintings, Rothko had irregular shapes of different colours move and flow and sometimes coagulate on canvas. In a way, those multiforms somehow express the *tragedy* of life (Rothko had read Nietzsche). The movement of the flows suggests, on the one hand, creative potential and, on the other, eternal disruption. But the coagulations of the flows too suggest both creative potential and blockage simultaneously. It would not take long though for Rothko to develop his signature style. Let us have a closer look at his *No. 24 (Untitled)* which he completed in 1951 (Fig. 20.9).

On this painting, the irregular shapes and flows have crystallised into distinguishable shapes that float seemingly peacefully in each other's immediate vicinity. But that doesn't mean that the tragic tension within human experience has now gone. The shapes in this and similar paintings, according to Rothko himself, are entities that go 'without shame and embarrassment'. They are 'actors who are able to move dramatically without embarrassment and execute gestures without shame'. They do so 'with internal freedom, and without need to conform with or to violate what is probable in the familiar world' (Rothko 2006: 58–59). They don't allow themselves to be coded or territorialised. And they won't recognise any code or territory either. They just go 'without shame and embarrassment', not unlike Nietzsche's Zarathustra. They are unafraid to explore in all assumed sovereignty.

Note how canvases such as *No. 24* showed here have open borders. And the boundaries between the entities are irregular and porous. The tone of the colour

within each of the entities is unevenly distributed, suggesting, perhaps, internal heterogeneity or boiling tension.

The entities look the tragedy of life in the eye and abandon all code or law or even coherence. They may explore or perhaps only dream about exploring the outside (hence the open borders and porous boundaries). Internally heterogeneous and diverse, they float 'without shame and embarrassment'. Like Nietzsche's Zarathustra, they know that every move, every decision, and every choice made is one made in eternity and for all eternity. This is why they assume full sovereignty and refuse to submit to law and code. But this is also why they waver, hover, and float in a sea of sheer, yet-to-access potential, in the midst of what they perceive to be other, fearless sovereigns. *Other, fearless sovereigns…*: just so many sources of rigidity, just so many hindrances, so many quanta of mass and organism whose circulation must be controlled by mere 'passwords'.

As with Pollock, in Rothko too, there is a tension between on the one hand the will to complete and utter sovereignty, that is, fearless, un-coded, responsive, 'natural' circulation and control, and, on the other, the perceived necessity for security, that is, for protection against any form of rigidity that threatens to undermine their very sovereignty. In other words, here, we see control playing out as the eternally recurring flight from all law, code, and territory, on the one hand, and as the very paradoxical institution of law, code, and territory, on the other. This tension, it should by now go without saying, is present – and *boiling* – within late modern selves, whether governed or governing. Rothko would later (e.g. already in his 1953 painting *No. 61: Rust and Blue*) produce canvases with shapes, or entities, that have less irregular, more pronounced boundaries. The borders of the painting would still remain open though, and the boiling internal heterogeneity of the entities would even increase (suggesting even more boiling tension and pressure). But the boundaries between entities would tighten.

20.5 Conclusion

The focus in this chapter has been on the emergence, in modern painting, of forms of life/governance (i.e. in early (1470–1520), high (1750–1800), and late modernity (1940–1990)). The aim was to detect the emergence, in 'prophetic painting', of forms of life/governance, before they did so in the symbolic or conceptual sphere. I have thus compared conceptual work on governance dating back to 1500–1520, to 1780–1800, and to 1970–1990, with a number of paintings from, respectively, 1470–1500, 1750–1780, and 1940–1970. I hope to have been able to contribute new insights, however small, to governance studies. Indeed, it may be fair to argue that efforts, within socio-legal studies and governance studies, to focus on painting as a source of information about law, justice, and governance, have been few and far between. Studies that focus on painting as the medium that *announces* (rather than illustrates) the *emergence* (rather than the mere existence) of *forms of life/governance* (rather than views on and practices of justice and punishment) are very rare

indeed. It is precisely this lack in current socio-legal studies that this contribution set out to address.

One might be able to detect, in modern life and governance, a certain preoccupation with the complexities of inner selves. That which is to govern, and which is to be governed, in modernity, is the inner self. That which lurks secretly underneath the surface of mass and mere organism – a complex of boiling potential, deliberations, aspirations, intentions, imaginary tactical manoeuvres, and so on – is what governance (the governing self as well as the governed self) is to divine, access, reflect upon, work with, and put to productive use. One could argue that the first traces of this mode of governance, as well as the form of life of which it is a part, appeared on panels sometime between 1470 and 1500, decades before conceptual works such as Machiavelli's appeared on the scene.

Later, in high modernity, paintings such as those by, for example, Joseph Wright of Derby (and others who painted between 1750 and 1780) seem to have been the harbinger of a form of life and governance whereby the self (again, the governing self as well as the governed self) sheds a mechanistic and calculative habitus to gradually emerge as that which is to be productive and that which is to be produced (i.e. kneaded or forged into normalised shape). Jeremy Bentham's 'Panopticon', some 20 years after Wright, would subsequently express this emerging form of life/governance conceptually.

Late modernity saw works from a variety of post-war (1940–1970) painters visually announcing a form of life/governance whereby any interest in the inner self (whether it be the governing self or the governed self) gradually faded away. Life and governance here emerge as mere control of circulation and flow. Late modern control encompasses all attempts, however paradoxical, to institute and protect natural, sovereign responsiveness through the mere management, destruction, or precautionary prevention of what is deemed to be rigid, inflexible law, code, and territory.

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Part IV
Visualizing Law in Indigenous or Folk Loric Culture

Chapter 21
Signs at Odds? The Semiotics of Law, Legitimacy, and Authenticity in Tribal Contexts

Renee Ann Cramer

Abstract Tribal sovereignty in the United States is consolidated and enacted in a plethora of physical spaces, within which tribes must establish both legitimacy and legality for their governance. In tension with this need, at times, is the need to simultaneously establish authenticity of tribal practices, perceptions of which may rest in an unreflecting view of these practices as premodern, prelegal, and historical – rather than mobile, adaptable, and contemporary engagements with contemporary life. However, the supposed binaries of modernity and tradition are much more complexly constructed and understood by tribal practitioners, than they have been by non-Indian observers. This essay examines the creative ways that tribal buildings and signs reflect and resolve the tensions perceived between modernity and indigeneity. Tribal semiotic practices construct legitimacy in ways that creatively avoid the false dichotomy between authenticity and modernity, and deploy multiple visual components to reassure a number of constituencies of their authentic claims to western legality and legitimacy, as well as distinctive tribal authority.

21.1 Authenticity and Legitimacy

Tribal sovereignty in the United States is consolidated and enacted in a plethora of physical spaces. From the geographic boundaries of reservations to the demarcations of "checkerboarding" within those lands, Indian territories require signs to enforce jurisdiction, alert newcomers to customary practices, and establish homelands. In addition to these boundary signs, tribally owned public buildings offer spaces in which outsiders and tribal members meet, form relationships, enjoy leisure,

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govern, and engage in business practices. Tribal casinos, bingo halls, governance buildings, and tribal courts are important arenas for these interactions.

Within these physical spaces, tribes must establish both legitimacy and legality for their governance. In tension with this need, at times, is the need to simultaneously establish authenticity of tribal practices. The tension arises, in particular, when authentic practices are construed as premodern, prelegal, and historical – rather than mobile, adaptable, and contemporary engagements with modernity. Indian commentators and non-tribal peoples alike have noted the apparent tensions between representations of modernity and authenticity.

Yet recent scholarship has demonstrated that the supposed binaries of modernity and tradition are much more complexly constructed and understood by tribal practitioners. This essay examines the creative ways that tribal buildings and signs reflect and resolve the tensions perceived between modernity and indigeneity.

Drawing on Justin Richland's (2008) ethnographic study of Hopi tribal courts, Jessica Cattelino's (2008) ethnography of Seminole bingo and attitudes toward money, Renee Cramer's (2005) examination of casinos in relation to federal acknowledgment law, and Steven Feld and Keith Basso's (1996) classic work on the significance of "place" for tribal peoples, I argue that tribal semiotic practices construct legitimacy in a way that creatively avoids the false dichotomy between authenticity and modernity. Tribal practices in relation to land and buildings deploy multiple visual components to reassure a number of constituencies of their authentic claims to both western legality and legitimacy, and distinctive tribal authority.

This chapter comparatively examines actual spaces of tribal governance and commerce, examining several types of space and the semiotics working in and through them. Road signs demarcating reservation land and landmarks and tribal commercial sites marked as smoke shops, bingo halls and casinos, and spaces of tribal governance, including tribal court offices, all offer sites within which to understand tribal negotiations of the false dichotomies of modernity and authenticity.

For many observers, the semiotics of these spaces and the signs that represent them seem "at odds" with each other. It makes little cognitive sense, to some, when they see a reservation boundary marked by history and alluding to genocide, nearly adjacent to modern and shiny tribal court and governance buildings. Markers of premodern authenticity, such as teepees and feathers, seem at odds on signs for tribally owned gas stations and casinos. And the glamorous physical environs of some of the nation's largest casino can call into question the claim to tribal identity by those who operate them.

The average non-Indian American, stepping foot on a reservation, would expect – if not teepees – at least the reservation landscape popularized in some contemporary film treatments. Fans of *Dances with Wolves* would expect horses, no doubt, and a flat and arid landscape, and those who have ventured into contemporary American Indian cinema, viewing, perhaps, *Smoke Signals*, would look for a sparsely populated land, driveways littered with clunker "rez cars," and little industry. The reservation lands, then, of tribes like the Agua Caliente in California or the Mohegan in Connecticut, both tribes with exceedingly successful gaming operations, whose reservations feature large and well-appointed homes, with Jaguars and Porsche

Cayennes parked in driveways, might create dissonance in the unreflecting visitor. Such a visitor might wonder how it is that Indians can participate successfully in modern culture without diminishing their indigeneity or how other tribes, with less cash but just as much interest in survival, can square signs for tribally run casinos and gas stations with small shops selling baskets or beadwork.

In fact, the US Supreme Court doctrine has reified these oddities, as signifying moments and spaces within which tribal claims to legitimacy are indeed called into question. In cases spanning the history of federal Indian law and running a gamut of issues from sovereign immunity to boundary drawing, from tribal court jurisdiction to hunting, fishing, and whaling rights, Supreme Court language and decisions often rely upon a vision of tribal life that is primitive and impoverished, rather than contemporary and thriving. Chillingly, exercise of tribal power and access to tribal rights are often based upon how well tribal culture fits the premodern stereotype held by the Court.

In their recent study of the myths and realities in law and economics associated with exercises of tribal sovereignty, Kalt and Singer (2004) note, "Despite – or perhaps because of – the economic, social, and political success of Native self-rule, tribal sovereignty is now under increasingly vigorous and effective attack. Over the last decade, in particular, the Supreme Court has moved repeatedly to limit tribal powers over nonmembers. Lower courts," they continue, "have fed this process with decisions that increasingly rein in the ability of tribal governments to govern commerce and social affairs on their reservations. Congress, too, has seen increasing numbers of bills introduced to abolish the tribes' sovereign immunity, limit their taxation powers, and regulate their commerce" (Kalt and Singer, 2–3). Part of the basis for these incursions on the effective policy of tribal sovereignty is a misreading of economic progress as somehow anti-Indian.

The dominant American imagination and its recapitulation in the US law are not the only places where indigenous identity is particularly marked as primitive and premodern. Scholarship on Indian issues has also seen "Indianness" as holding a particular type of legitimacy and has tied tribal authority and legitimacy to so-called traditional practices. As Justin Richland has noted about the anthropological literature surrounding American Indian culture, there is perpetuated in such literature a "naturalizing dialectic of authority and legitimacy" (119).

Richland's powerful work, as I have noted elsewhere, makes "an epistemological claim about the need to attend to interactions and details [in tribal life], instead of fixed and essentialized notions found in commonly deployed metanarratives." Richland makes a further epistemological claim to avoid dualities and false dichotomies in favor of examining nuance, interstitiality, and processes of constructing meaning. He proposes a way of investigating claims to authenticity and legitimacy that understands what is being said, why, how, and by whom – and, more importantly, in what context. As Richland writes:

> [A]nthropological theories that treat claims to cultural distinctiveness as binaries of resistance/hegemony – as either libratory or reifying, sincerely autochthonous *or* "merely" other-determined – tell only part of the story of culture's political and juridical significance … I suggest that an analysis of cultural difference that hews more closely to the sociopolitical realities and

> life experiences of American Indian peoples (and other groups invoking their own cultural politics) requires that we not reduce the claims of distinctiveness as either *always* constitutive of sincere modes of native cultural identity or *always* complicit in the elite hegemonies that marginalize them. Instead we should view these contradictions of cultural politics together as forming a site of potentiality that can and does unfold in complex iterations of native culture that constitute the emergent edge of indigenous governance practices. (92)

My examination, here, of tribal signs and buildings is meant to move toward that understanding of tribes' complex interactions with a wider American culture and the practices they employ in surviving and thriving in such a society. Where Richland attends to language and discursive practices, though, I turn to visual self-representation in the form of tribal signs on various enterprises and demarcations. I turn to everyday experiences as they are lived in a built environment in an exploration of how law is constitutive of and constituted by these visual semiotics.

21.2 Materiality of Law

The everyday is an important concept for anthropologist Jessica Cattelino, in her examination of Seminole culture generated in lived experiences on contemporary reservations. Importantly, the everyday practices that Cattelino focuses on are intimately tied to questions of legitimacy, authenticity, authority, and indigeneity. They construct, as she puts it, "materiality of sovereignty" in Seminole life (Cattelino, 3). Cattelino nicely links efforts at maintaining authority and legitimacy to the problematic dichotomous discourse of tradition vs. modernity. She argues that Seminole efforts to retain cultural and political distinctiveness to maintain internal and external legitimacy, autonomy, and authority through indigenous approaches are everyday efforts which are "materialized in moments of public display and intercultural contact, in market economics, tribal fairs and festivals, charitable giving, and overt politico-legal struggle" (Cattelino, 10). These contemporary day-to-day practices constitute authentic indigenous practice.

While I agree with Cattelino on the significance of everyday practices for cultural production, I want to emphasize, here, the relationship of material law to exercises of material sovereignty. Yes, everyday practice constitutes the political economy and legal power at play in tribal life. Those practices, though, take place in an environment – and the environment is variously marked by law and history – just as it is marked and (re)marked by contemporary day-to-day practices.

As they are affected by so-called black letter law, tribal peoples are impacted by the material texts outlining legal relationship of Indians to land, government, and power that are often found in federal legislation and Supreme Court cases. It makes sense then that much work on tribal law has focused on either Supreme Court decisions affecting tribes, legislative histories of federal law and policy making affecting tribes, or (more recently) on tribal court decisions or talk.

The material experiences of the relationships of Indians to land, government, and power *are manifested, found, and constituted on the lands themselves*, *within the*

built and natural environments. Frank Pommersheim's newest excursion into federal Indian law makes this clear, in the reverse – he calls federal Indian law a "broken landscape" (Pommersheim 2009). As a broken landscape indeed, federal Indian law is made manifest in the landscape itself and in the built environment managing that landscape. Federal law in Indian country can be seen in the signs showing reservation boundaries, in historical markers, in the names assigned to spaces, and in commercial buildings and gaming establishments – as well as in tribal council offices and tribal court complexes. A tribal boundary is, perhaps, a visible acknowledgement of a treaty relationship and a reminder of forced relocation. A casino sign on the highway is a marker of federal legislation as well as tribal economic practices leading toward sovereignty. And tribal court offices are spaces of contested jurisdiction governed by a plethora of intersecting laws.

Few scholars have attended closely to the materiality of reservation environments in this way.[1] In doing so, I follow the significant insights developed by Keith Basso and Steven Feld in their collaborative work (Feld and Basso 1996), as well as Basso's independent and profoundly important work *Wisdom Sits in Places* (Basso 1996). An essay by Edward Casey lays the groundwork for the theoretical frame taken by authors to the edited volume. Casey notes, "perception [of place] remains as *constitutive* as it is constituted" (Casey 1996). Constitutive sociolegal theory posits that law constitutes lived experience and lived experience constitutes law, in a continuous dialectic; similarly, Casey argues that place constitutes day-to-day life, which in turn reconstitutes place, as well as perceptions and experiences of it. When those places are particularly marked by and established by law, the constitutive force of both law and place coincide in powerful ways. In these sites, a constitutive sociolegal theory can benefit from a similarly constitutive understanding of the implications of environment, space, and material life.

Like Basso and Feld, I am interested in the symbolic relationships of place, law, and people, and in understanding the "semiotic dimensions of human environments" (66). However, I am less interested in and equipped to analyze the cultural significance of tribal naming of the natural world. As Cattelino aptly notes, Basso's work on place doesn't deal with the built environment (243, note 28). The built environment – signs, casinos, tribal offices, housing developments, etc. – is an obvious marker of tribal life. This environment signifies not only to tribal members but also to nonmember visitors to reservation and Indian establishments. I cannot know how these buildings and signs affect daily life for tribal peoples, but a close reading of their semiotic messaging, with attention to the loaded and important ideas of authority legitimacy, tradition, indigeneity, and tribal distinctiveness, is possible. Such an endeavor is useful for understanding the complex mediating work of the built environment on tribal life. Such a study lays bare not only the materiality of law in tribal life and culture but the materiality of sovereignty as seen through self-representation of tribal governments.

[1] See, however, Richard Warren Perry's 2006 work on differential spatial criminalization and gaming.

21.3 Boundary Demarcation

Within Indian law and politics, territoriality is of key concern. N. Bruce Duthu's comprehensive treatment of American Indian law makes this point in several ways. Notably, his doctrinal analysis focuses on territoriality and homelands as key sites for locating sovereignty and tribal governance. Rather than placing sovereignty as the groundwork upon which tribal governments are built, Duthu places territory and territorial integrity as the groundwork upon which sovereignty (and, thus, tribal governance) rests. This is an extremely important reversal that serves to literally *ground* sovereignty within material practices carried out in the built and demarcated environment.

The overwhelming importance of territory to tribes does not make territorial issues easy. In fact, as Duthu notes, "Few areas of federal Indian law rival the controversy surrounding the nature and scope of tribal sovereignty and jurisdiction" (Duthu 2008, 5). Early case law in the form of the so-called Marshall Trilogy, or the *Cherokee Cases,* established tribal sovereignty as in fact, "grounded within and extending throughout the tribe's territory" (Duthu 2008, 11). In 1832s *Worcester v. Georgia* (31 U. S. [6 Pet.] 515), Chief Justice Marshall defined the tribes as domestic dependent nations with territorial integrity and sovereign authority over their territory (at least vis-à-vis the states and potential state interference). Duthu notes

> [T]he bright line ruling was unenforceable, but it constituted a strong statement as to the power of tribal governments over their own lands. In the opinion, Marshall wrote, "[federal laws] manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." (ibid.)

Lack of enforcement, coupled with federal political will to remove the Southeastern tribes, negated much of the rhetorical impact of Marshall's statement. Subsequent case law, stemming from a variety of challenges, rendered the ruling even less powerful as a potentially protective precedent.

Beginning with *Lone Wolf v. Hitchcock* (187 U.S. 553) in 1903 and continuing to this day, the Supreme Court has allowed substantial state and federal intervention into tribal sovereign practices on tribal territory. *Oliphant v. Suquamish* (435 U. S. 191 [1978]) in Duthu's words, "gutted the notion of full territorial sovereignty as it applies to Indian tribes" (Duthu 21). And with the line of cases following it – *Montana v. United States* (450 U.S. 544 [1981]) and *Plains Commerce Bank v. Long Family Land and Cattle Co* (554 U.S. ___ [2008]) – the Supreme Court has, in the words of Indian law scholar Frank Pommersheim, "taken upon itself to unilaterally abrogate tribal authority, especially in regard to non-Indians" (Pommersheim 142). This line of cases has depended, variously, on *who* tribal authorities are attempting to have authority over (i.e., tribal members, nonmember Indians, outsider non-Indians) and *where* the tribe is attempting such control (i.e., tribally owned on-reservation enterprises, tribally owned non-reservation enterprises, non-tribally owned on-reservation enterprises or land).

Importantly, Supreme Court jurisprudence in this area has not been limited to state, federal, and tribal contestations over jurisdiction and control of land. The Court's land, water, and treaty rights decisions have often both rested on and served to reinforce notions of indigeneity that perpetuate an essentialized image of Indians as backward, impoverished, ecological, and naturalized. Pommersheim's treatment of the fishing rights claim in Montana makes this clear, "the Court's analysis in the fishing context was bolstered by its finding that fishing was not a central treaty activity of the Crow people and that the Crow Tribe had accommodated itself to pervasive state regulation and stocking of the river. Not surprisingly, the Court ultimately found that its own newly minted presumption in favor of state jurisdiction on fee lands within the reservation was not overcome…" (Pommersheim 221). Resting, in part, on the understanding that the Crow tribe didn't traditionally fish these waters, the Court rejected contemporary Crow attempts to exert tribal authority over them. In this and other cases, Supreme Court jurisprudence has clearly tied the contours of tribal territory and control over what is contained within them, to the contours of a reified and assigned identity. Image and land are thus clearly tied together in both the public imaginary and Supreme Court decision-making. Duthu writes, "Court opinions also 'construct' images of Indians that comport with popular conceptions or views of Indian people, whether those images reflect reality or not. The significant difference, of course, is that judicial opinions have the force of law with the potential to unleash both productive and destructive effects in the lives of individuals and communities" (Duthu 84).

Though the Court often focuses its gaze on falsely constructed and misunderstood notions of indigenous culture, reservation lands and tribal territories are, indeed, incredibly important aspects of tribal cultural and legal life. Tribal homelands, "the legally protected spaces within which [tribal governments] exercise their governmental authority" (ibid.), are absolutely the key to the survival and renewal of Indian culture and government. As Duthu notes

> Tribal ancestral homelands historically have served as the cultural and political spaces within which tribalism is sustained and nurtured. Threats to the integrity of Indian tribal homelands, like threats to tribal sovereign authority, date back to this nation's founding and reveal the same patterns of indigenous cultural tenacity and persistence in trying to secure the promises contained in ancient treaties and other legal agreements. The legal conflicts that emerged in the late nineteenth and early twentieth centuries involving Indian tribes were largely related to struggles over territory and the natural resources contained therein. Many of those struggles continue today, often in the form of conflicts over governmental control lf certain territories or resources. (Duthu 62)

One does not need to read doctrine to find symbols of these struggles for control over territory and government; one might only look at reservation boundary demarcations and signs of entrance into Indian Country for proof.

Quoting Alan Hunt's constitutive theory of law in his own work on maps, territoriality, and the materiality of law, John Brigham (2009) notes that boundary demarcations of territories are legally constitutive. Tribal boundary demarcations do the important work of letting people know they are entering, or are already in, Indian Country. The "official" signs provided by the state, by the departments of transportations and federal highway funds, by the bureau of Indian Affairs, are often placed

Fig. 21.1 Royal River Casino sign near Flandreau, South Dakota

side-by-side "tribal" and "Indian" signs. The official signs are often a subtle variation on the same theme. They are rectangular road signs and often contain direction and mileage information meant to get a car off the highway and onto the reservation. They are BIA-provided school signs and informational placards. A bit more distinctive are the historical markers commemorating a massacre or an agreement. In almost all cases they are recognizably formal in their composition and rely primarily on text for their information.

The "Indian" signs vary. On the highway, sometimes right next to the mileage markers, we see signs for casinos that can only be on reservation land (see Fig. 21.1). Once in Indian Country we see a built environment that distinguishes the landscape – perhaps "rez cars" in driveways or the presence of brick buildings on the reservation, in distinction to off-reservation, undeveloped lands. At Pine Ridge, in adjunct to the historical marker, we might see, perhaps, a rough painting of a single feather with the words "still strong," on the bricks surrounding the official demarcation of the site of the Massacre at Wounded Knee (see Fig. 21.2), and the presence of tobacco and sage smudge sticks and prayer strings, at the base of the monument (see Fig. 21.3) – a unique melding of indigenous signs with formal, western markers.

A particularly important part of tribal demarcation and boundary drawing is the presence (after long absence) of modern housing on reservation lands. The presence of these houses can be variously read as welcome modern amenities, extension of colonial governmental power, or a simple fact of change in rural life. As Cattelino points out, in a chapter aptly titled "Rebuilding Sovereignty," housing is incredibly

Fig. 21.2 "Still Strong" adjacent Wounded Knee Memorial

important as a signifier of modernity and tribal on reservation lands. She writes, "Driving past the strip malls and residential developments of Hollywood, Florida, visitors know they have entered the Seminole Reservation when they approach blocks of modest houses punctuated by the thatched roofs of backyard chickees" (127).

In a section of that chapter headed "From Chickees to Concrete Block Structures" (140–144), Cattelino details how Seminole people experienced these block houses as an aspect of governmental control, as part of a modernizing project. For many with whom she spoke, these block structures constituted visual evidence of federal programs "in the pursuit of a distinctly modern spatial and civil order" (Cattelino, 147).

In fieldwork I conducted from 1999 to 2001, I saw a similar modern landscape on the reservation lands of the state recognized Mowa Choctaw, located in rural Alabama. As I have noted on a previous occasion,

> In the 1980s, the Mowa began in earnest to develop their reservation, which consisted of tarpaper shacks, many without indoor plumbing. A grant from HUD, received shortly after their [1980] state recognition, helped the Mowa erect brick houses with modern conveniences, pave the driveways in the small housing development (the road off the highway to the reservation remains a narrow, red dirt lane), and build a tribal office complex. (Cramer, 121–122)

Fig. 21.3 Wounded Knee Memorial, Pine Ridge Reservation, South Dakota

A Mowa tribal leader, Chief Taylor, told me in 2000 that he had great pride in the brick buildings in which they had demarcated a different type of reservation space than had previously been visible. He continued to say that this new reservation space was proof of the modernity of the tribe, proof of the safety outsiders could enjoy when entering Indian Country, and proof of the state government's recognition of Mowa claims to indigeneity. A subtext of our conversation, though, was that the federal government continued to reject claims of Mowa tribal status and indigeneity, in part, the tribe perceived, because of its assimilation to modernity precisely as evidenced in those brick structures so "at odds" with western understandings of tribal life.

21.4 Bingo Halls, Casino Complexes, and Commercial Establishments

In a similar manner, sites of successful commercial establishments in Indian Country – in particular bingo halls, casinos, and the commercial establishments operated by tribes to take advantage of state tax exemptions on sale of cigarettes and gasoline – have

been controversial and read by outsiders as "at odds" with indigenous legitimacy and tribal cultural distinctiveness. In Supreme Court jurisprudence, as well, there is an obvious tension between tribal economic development and legal outsiders' perceptions of tribal legitimacy and authority to exercise sovereignty. In fact, a 1998 decision, *Kiowa Tribe v. Oklahoma Manufacturing Technologies, Inc*. (118 S. Ct. 1700 [1998]), though pro-sovereignty in its rendering, "singled out," according to Wilkins and Lomaiwama (2002), "indigenous economic enterprise as incompatible with sovereignty."[2] And Cattelino notes that "recent Supreme Court rulings suggest that indigenous commercial success threatens to undermine the basic tenets of tribal sovereign immunity in the eyes of the court" (Cattelino, 101).

Simply put, court opinions and public perceptions reify an essentialized image of American Indian identity as rooted in poverty and primitivism. As I have noted elsewhere, "much of the primitivism attributed to Indians simply assumes their poverty" (Cramer 2006, 333). As a former chairperson of the Mashantucket Pequot told a reporter in 1998, "Maybe if we were still getting water from an open well and going outside to two-hole outhouses and using human manure to fertilize our gardens, nobody would be paying attention to us" (Skip Hayward, quoted in Cramer at 332).

Successful business ventures run by American Indians and American Indian tribes confound common sense expectations of identity and have the potential to be read as delegitimizing tribal authority and practices. Most often, Indian businesses that do not reflect cultural specificity or embody what outsiders see as indigenous values are flashpoints of citizen and state activism. This has especially been the case for those enterprises that are operated specifically as a result of tribal sovereignty: smoke shops and gas stations where the sales tax revenue goes to the tribe and casinos, which operate under the Indian Gaming Regulatory Act.

21.5 Smoke Shops and Gas Stations

Tribal authority to tax sale of cigarettes and gasoline is rooted in tribal sovereignty as well as the "Indians not taxed" provision of Article 1, Section 2 of the United States Constitution. Such authority is not uncontroversial. At times, states have attempted to shut down tribal smoke shops; at others, the state has attempted to tax sales made to non-Indians and nonmember tribal peoples. In *Washington v. Confederated Tribes of the Colville Indian Reservation* (447 U.S. 134 [1980]), the Court held that such taxes were permissible, even if they constituted a double tax – where both the tribe and the state collected sales tax on the purchase.

Apart from doctrinal challenges, there is simply considerable public unease with the smoke shop as a model for economic development. Often, this outcry focuses on the "special rights" and "special interests" of tribes (see Pommersheim for a nice critique), and, as Cattelino argues, there is a merging of "criticism of indigenous

[2] Cattelino 234, note 12; citing Wilkins and Lomaiwaima.

instrumentality and alienability …. Non-Indian competitors complained about 'uneven playing fields' and 'special rights,' and public officials decried reductions in tax revenues" (Cattelino, 57). Such criticism turned violent in Rhode Island, when state agents shut down Narragansett tribal smoke shops by force in 2003. As Duthu writes, "In a scene reminiscent of the violent clashes over civil rights, state police equipped with full riot gear and German shepherds arrested several tribal members, including the tribal chairman, for acting in violation of state law" (Duthu, 125). The reservation scene became legible as a scene of civil rights struggle by virtue of both tribal enterprise and state action.

Seminole tribal enterprises have long been at the cutting edge of practices of sovereignty and economic development among tribes in the United States, and their operation of smoke shops is one example of such innovation. In the late 1960s the Seminole opened a number of tribal smoke shops – where they could collect taxes on nontribal members while selling tobacco – and achieved great profits: more than half a million in 1968, and as high as 4.5 million dollars in 1977 (Kersey 1996, 121; Cattelino, 54). Cattelino reports that these smoke shops remain an important part of the tribal economy, but that the shops themselves are not distinctively "tribal" in their outward appearance. She writes, "located near casinos and busy intersections, the small and rather drab smoke shops – mostly customized mobile homes with drive-up windows – attract customers day and night" (Cattelino, 54). The drabness and lack of distinctively tribal markings are in distinction to Seminole cultural tourism on the reservation, which features Billie Swamp Safari and the Okalee Indian Village. Cattelino continues, "the absence of cultural specificity in Seminoles' talk about, labor in, and adornment of smoke shops is further evidence of their instrumental status" (56). Certainly, it is not only that these shops lack cultural specificity or that tribal enterprises like smoke shops and gas stations may fail to conform to white western imaginaries of Indianness, but in non-Seminole contexts, this instrumentality is one of the rationales behind non-Indian interference in their operation. The same is true of tribal casinos, and depending in part upon their consolidation of regional power, tribes go to varying lengths to provide comforting, legibly Indian, gaming experiences for their primarily non-Indian patrons.

21.5.1 Gaming

Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988, partially in response to a Supreme Court case that rejected state attempts to limit tribal gaming in California.[3] The act provides that states that allow nonnative gaming (e.g., lotteries, church bingos, jai alai, and dog racing) cannot prohibit the same types of gaming on reservation lands and lands held in trust by the BIA for tribes. Currently, more than 200 tribes operate over 400 gaming establishments in 28 states. These establishments

[3] Indian Gaming Regulatory Act, Public Law 100-497 Sections 2701-2721; *California v. Cabazon Band of Mission Indians* 480 U.S. 202 (1987).

range in size and scope from roadside "travel stops" featuring a small number of video lottery games, to bingo halls, or "palaces" on reservation lands, to mega-casinos operated by tribes on both coasts and in the Gulf. Some are wildly successful; some are not – but Indian gaming comprises a billion dollar industry in the United States and a significant percentage of gaming revenue nationwide.[4]

Just as there are variable rates of success in the operation of gaming enterprises, there is also tremendous variation in the cultural representations made by tribes in these public spaces. Yet the significance of their modes of representation is undeniable and is part of the constitution of tribal sovereignty.

Sovereignty is constitutive of and constituted by economic enterprise. As Duthu notes, the foundation of economic practices and spaces is tribal sovereignty, as the practices within these spaces reinforce and enable sovereignty (Duthu 130). Gaming, more than any economic enterprise so far, has enabled a significant number of tribes to lift their members out of poverty and a smaller though still important number of tribes to achieve great wealth. Gaming both enables and is enabled by tribal sovereignty; gaming complexes – be they roadside or resort – are physical manifestations of both aspects of sovereign practice.

Gaming enterprises are primarily instrumental. They are meant to achieve financial strength necessary to enact tribal sovereignty, rather than to denote tribal culture in and of themselves. However, as Cattelino helpfully notes, "indigenous people … aim to pursue economic gain with money while also remaining distinctively indigenous" (Cattelino, 12). Casino landscapes must take into account this desire while also addressing commonly shared concerns. These landscapes must communicate rules and laws regarding gaming; they all, therefore, have clearly marked age limits and requirements of play. They must also reinforce the legitimacy of tribal bodies to establish and maintain gaming facilities, so emphasis is placed on the nationhood and tribal status of the governing authorities of these casinos. And, to some degree, tribal casinos must speak to and make statements about the authenticity of the tribes' claims to indigeneity. These concerns play out differently in different spaces and in particular in the semiotics of environmentalism and tribal tradition as markers of indigenous legitimacy, as they are found (and not found) in tribal gaming spaces. Some tribal casinos carry overtly indigenous representations; others do not. Examination of both types of spaces is useful to further deconstructing the dichotomous relationship of tradition and modernity.

21.6 Overtly Indigenous Representations

Cattelino notes, "some casinos incorporate indigenous themes and iconography, from the Mystic Lake (Shakopee Mdewakanton) casino illuminating the sky with beams in the shape of a giant teepee to the Rainmaker sculpture at the Mashantucket Pequot

[4] See the website for then National Indian Gaming Commission (www.nigc.gov) and the National Indian Gaming Association (www.niga.org); see also Light and Rand (2005), Mason (2000).

Fig. 21.4 Rainmaker Statue, Foxwoods Casino

Foxwoods casino" (30). Mashantucket Pequot representations are increasingly focused on the cachet of being a world-class resort and casino in close proximity to New York City, with internationally recognized attractions and accommodations and an increasing East Asian semiotic referencing their original Malaysian backers. However, Foxwoods, described variously as looking like a "small, space-aged country surrounded by trees" (Cramer, 75); "Hyatt on Steroids" (Fromson); and "Wampum Wonderland" (Kroft) retains several overt nods to the indigeneity of the tribe that runs it.

Covering almost 350,000 square feet of gaming space within 4.7 million square feet of total accommodation and resort space, the Foxwoods complex is set in the Connecticut woods and hosts a PGA golf course, a state of the art museum and cultural center, and bridle paths that snake around the properties. Many of these individual pieces of the Foxwoods complex reference Mashantucket Pequot heritage and identity, none more so than the Rainmaker Statue located in the heart of the casino (see Fig. 21.4). Bill Anthes describes the statue this way:

> The Rainmaker is a twelve-foot-tall, forty-five-hundred-pound, cast translucent-polyurethane sculpture of a well-muscled and formidable Native American hunter, bow drawn and aimed heavenward. The hunter crouches on one knee, shirtless and dressed in breechcloth and moccasins, on a rocky outcropping that rises from a shallow pool amid a grove of artificial trees in a sky-lit atrium at the center of Foxwoods. … the Rainmaker comes to life in an hourly fog and light show. A recorded narration relates the saga of the Pequots, on whose land the Rainmaker kneels. Over the din of slot machines and table games and the

> clatter of the nearby all-you-can-eat buffet, a solemn voice recounts the story of the glaciers that once covered the region, their gradual thaw, the coming of flora and fauna, and the arrival of the "Ancient Ones," the ancestors of the Pequots — nomadic hunters and gatherers who settled in what is now Long Island Sound and founded a civilization. At the end of the story a laser beam shoots from the tip of the Rainmaker's arrow, causing a momentary downpour that cascades through the branches of the surrounding trees and into the fountain below, full of coins and tokens. (Anthes 2008)

John Bodinger de Uriarte explains his reaction to the statue, "Obviously, my 'instant recognition' of the figure in the foundation as 'Indian' participates in the popular imagining of the American Indian male: highly stylized, bare-chested, and well-muscled, dressed in breechcloth and moccasins, and brandishing a bow and arrow" (de Uriarte 2003, 553). However, as he points out, "the figure's location at an intersection between gambling rooms, surrounded by a pool of money and a clockwork rainstorm, with the Connecticut landscape made clear through the glass walls of the atrium, is a central part of the vast endeavor of the Mashantucket Pequot." De Uriarte recognizes the cultural claims being made by the Pequot in this space as transcendent of the dichotomies drawn between modernity and tradition, between commerce and culture. The Rainmaker is a sculpted embodiment of the imperative to show both contemporary culture and historical representations.

A further way that this concern is manifested in casino spaces involves the use of environmental and conservationist themes. In many of these spaces, the semiotics of environmentalism and tradition come not only in the form of signs regarding stewardship initiatives; they are also apparent in the aural environment constructed with the use of birdsong, tribal drumming, and even the sound of waves, which compete with the clang of slot machines and the din of casino patrons.

The Mohegan Sun, a casino operated by the Mohegan tribe in Connecticut, is a good example of representations of indigeneity as ecological, in the built environment and soundscape of the casino. The entire complex is built around and named for the seasons and directions, featuring Casinos of the Wind, Sky, and Earth, and a property that includes several indoor waterfalls, aural environments bringing nature indoors, and a stated and evidenced commitment to recycling, solar energy, and wise use.

21.7 Less Overt Indigenous Representations

Not all tribal gaming complexes make specific reference to indigeneity, environmentalism, or cultural heritage. The multiple establishments run by the Seminole tribe in Florida are good examples of a less overt representational style.

The Florida Seminole, though stymied for years in their attempts to negotiate a class III casino compact with the state, has had a hugely successful network of bingo parlors since the late 1980s. In 2006, the Seminole signed a gaming compact with new governor Charlie Christ; it also acquired the entirety of the Hard Rock International chain – all of its casinos, hotels, and restaurants. The $965 million deal spans properties in 44 countries (Cattelino, 5). As Cattelino tells us,

> Except for patchwork vests worn by staff at the smaller casinos, the occasional chickee-evocative palm frond in casino interiors, and the recent addition of several "Seminole Pride" video bingo games at the Hollywood Hard Rock (with lucky sevens in the medicine colors – white, black, red, and yellow – and images of chickees, baskets, Osceola, and other Seminole icons), Seminole casinos do not look very distinctive. (30)

The author explains that Seminole gaming managers had a stated desire to avoid "tacky" or "cheesy" approaches to culture and that they were similarly aware of the impossibility of representing the diversity of visions of what it means to be Seminole. Instead, the semiotic representations of Seminole casinos focus on "hard rock." Hard Rock Cafes and Casinos are family-friendly, yet hard-edged; upscale, but middle class; and distant (we're not all rock stars), but accessible (You can pretend! You can run into Elvis Costello out front). (Indeed, I once ran into Elvis Costello in front of the Chicago Hard Rock.) The semiotics of United States Hard Rock properties focus on guitars, glitz, and glamour – not chickees, tribal ventures, or indigenous sovereignty.

Yet, even for the Seminole, environmentalism and conservationism are important themes. For example, an ancient oak tree important to the history of the tribe, "The Council Oak," was spared from being bulldozed in the construction of one of the tribe's gaming establishments and "still stands in the middle of the casino parking lot" (Cattelino 97). As Cattelino writes, further unpacking the significance of the Oak,

> Meanwhile, the new Hollywood Hard Rock casino across the street features a high-end steak house named the Council Oak, with menu text associating the Tribe's casino success with its history of political struggle and strength, as symbolized by the tree … a promotional video says, the tree "is a monument to the power of unwavering perseverance, and a symbol of the Tribe's innate ability to branch out into many profitable ventures" (Seminole Hard Rock Entertainment 2006a). The ceremonial signing of the Hard Rock deal was conducted beneath the Council Oak. (ibid)

She concludes her analysis this way, "the tree has 'historical and sentimental' value, as well as … considerable public relations potential" (97). Certainly, some of that public relations potential is the subconscious referencing of Indianness and indigeneity read as environmentalist and conservationist traits.

The Seminole are not alone in their use of trees as linguistic and visual proxies for connection to the natural world. Foxwoods has an "Inn at Two Trees," as well as a "Two Trees Grill," and a restaurant named "Cedars." In California, gaming tribes use the scrub oak and palm tree in their naming of dining areas. At Barona, you can eat in the Barona Oaks Steakhouse; Agua Caliente has the Grand Palms. In fact, Indian-run casinos across the nation feature steakhouses and restaurants named after trees, inns and hotel suites with arboreal monikers, and eco-opportunities based on tree experiences and tree imagery.

21.8 Cultural Confounding

Cattelino reminds her readers of the argument made by historian Paige Raibmon that "authenticity" is the terrain upon which indigenous difference is worked out and "white society continues to station authenticity as the gatekeeper of Aboriginal

people's rights to things like commercial fisheries, land, and casinos" (Raibmon 2005, 206) (cited at Cattelino, 60). Gaming establishments confound white constructions of indigenous authenticity. Indeed, Cattelino is certainly correct in noting that

> Gaming has newly disarticulated and challenged a neocolonial association of indigeneity with poverty that has long structured federal Indian law and policy, U.S. interracial politics, and the day-to-day rhythms of life on Indian reservations … casino success flies in the face of dominant American images of Indians as poor, antimaterialist, out of the space and time of modernity, and as a result "traditional." (Cattelino 10–11)

If so, then tribes may need ways to represent their legitimacy apart from references to traditional lifeways or romantic pasts, and the tribal ventures that don' overtly reference indigeneity are not as "odd" as they may seem. Some visual representations refer to ecological caretaking and conservation which can be read as references to indigeneity; others eschew representations of indigeneity in favor of focusing on luxury and glamour – the most impressive and successful of the ventures seem to do both, with small nods to tribal cultural distinctiveness.

It is equally important to note that the visual legal semiotics of tribal gaming, and their impact on political economy, as well as impressions of authenticity and legitimacy, don't end at the door of the casino hall. The presence of gaming tribes in national political life is seen not just via monetary donations but also, Cattelino reminds us, "in the landscape, from the National Museum of the American Indian on the Washington, D.C. mall [made possible by the generous financial assistance of gaming tribes] to a nearby hotel owned and operated by a partnership of four tribes" (Cattelino, 176). Visual representations of tribal sovereignty are political and politicized; they are felt, keenly, in tribal governance and court offices.

21.9 Tribal Governance and Court Offices

John Brigham notes that physical spaces construct expectations about legitimacy and authority in law. He writes, "through buildings, we learn what to expect, and how to act before the law" (Brigham, vii). This is particularly true of "legal" buildings and buildings that display or enact functions of governance. Tribal government and tribal court complexes are physical spaces where legality is particularly manifested, in that they "readily call to mind law in their genesis" (xiii).

Yet, the question is often asked, *whose* law is readily called to mind in these spaces? Is the law made manifest as an Anglo one or an Indian one? Visitors (Indian and not) to tribal council and tribal court buildings have expectations for what "law and governance" look like, which might not match their expectations for what "Indians" look like. In their daily interactions with physical spaces of tribal courts and tribal councils, people have expectations that might conflict. Such conflicts – unless skillfully managed – have the potential to undermine tribal legal authority and ability to govern.

Marusek has reminded us that the disciplinary power of physical spaces and built environments is made manifest in everyday interactions. Building from the literature,

she writes, "Nikolas Rose and Mariana Valverde (1998) tell us that the spatialisation of governable conduct directs the routines of everyday life and 'entails codes that embody specific conceptions of desirable and undesirable conduct' (1998, 549)" (Marusek 2005, 3). In a tribal governance and tribal court context, such "desirable" conduct is not only Anglo legalistic and governance conduct – such conduct must also be in keeping with tribal norms and cultural expectations.

Here is a double bind. Tribal governance and jurisprudence must be recognizable to and legible by non-tribal and non-Indian actors – such as Bureau of Indian Affairs representatives, state and local politicians, non-Indian reservation dwellers and visitors, and the like. Such legibility as "legal" and therefore legitimate often means taking forms of speech and custom that are similar to Anglo forms of government and law. Jennifer Hamilton explains, "the characterization of Indian law as being incommensurably different form mainstream US law has a long history" and that history has had the effect of rendering some tribal court judgments illegitimate in the eyes of Anglo courts of appeal (Hamilton 19). At the same time, however, tribal governance and jurisprudence must have legitimacy as both distinctly tribal, and specifically traditional to a particular tribe, in order for the people governed – the tribal members themselves – to feel that such governance is legitimate. As Richland explains, in the case of tribal courts,

> [A] concern emerges mostly (though not exclusively) among tribal legal actors and scholars who are also tribal members, regarding the extent to which tribal courts should rely on tribal notions of custom, tradition, and culture in the production of their contemporary jurisprudence (Tsosie 2002; Coffey and Tsosie 2001; Porter 1997b; Cruz 1997; Vincenti 1995). The concern is largely that to neglect the unique cultural and legal heritage of tribal communities today would be to accomplish the federal goal of assimilating tribes and hammer the final nail in the coffin of tribal sovereignty. (Richland, 15)

To some extent, tribal governance will have less authority the less tribal members feel adequately represented by it. It is not only within tribal contexts where such representation has, as an importance component, appeal to tradition and legitimacy to give it authority. However, in the tribal context, such appeals to tradition and legitimacy are appeals to tribal distinctiveness and cultural heritage.

Tribal governance and court buildings must communicate both imperatives at once: that the space is legal and governance-focused and that it is *tribal* at its core. Legitimacy, in this context, hinges on the dual message of legalistic/governance and tribal distinctiveness. These disciplining spaces are disciplined by expectations brought into the courtroom and tribal council chambers by those who enter them – visitors and workers alike.

21.10 Tribal Government

Most tribes in the United States are governed by a constitution and a Tribal Council established in the era of tribal reconstruction under the Indian Reorganization Act (IRA) of 1934. As such, most tribal governmental structures were conceived and put

into place in the period generally known as legal realism, and they evidence a realist interest in access to justice, specialization of court and governance functions, and bureaucratization. Many tribal governments were consolidated again and achieved new importance, in the 1970s, under a federal policy of self-determination, which empowered tribal governments to take on more responsibility and provide services previously administered through the federal Bureau of Indian Affairs.

Contemporary tribal governments are diverse, but a general trend has been to focus governance in a Tribal Council that is distinct from the economic enterprise arm of the tribe, with a tribal chairperson at its head, and often a Council of Elders acting as a check. On many reservations, the importance of tribal government is shown in the wide range of services such government provides as well as the sheer size of the government as an employer on the reservation. Richland notes that the Hopi tribal government is the largest employer on reservation (31). This is not unusual in Indian Country. Such governance extends into many aspects of tribal life, and tribal governments are increasingly keen to, and able to, provide services that are recognized by many as "vital" for any government.[5] Such services include policing, health care, education, fire departments, programs and services for the elderly and for children, and programs aimed at cultural reclamation. As tribes gain measures of economic success, pride in maintaining governance is evident. In my visits with Poarch Creek (Alabama) tribal leaders, I was proudly told of the Senior Assisted Living Center, the fire department that occasionally served even the non-reservation area, and the cultural center that was being renovated and expanded.

To a large degree, tribal pride in providing services to tribal populations rests in a history of Bureau of Indian Affairs control over tribal life – which was often culturally insensitive and inappropriate, and at times negligent and mismanaged. As lawsuits like the *Cobell* case evidence,[6] BIA often did an extremely poor job administering tribal lands, money, and services. As tribes have gained access to exercise of their sovereignty and self-determination, the BIA's relative power on the reservation has dwindled, and there is both a tension between BIA services and tribal services, and a palpable pride in tribal government. Cattelino notes that this shift in power relations from BIA to tribal government is made manifest in physical spaces of governance. She provides a stunning example from the Seminole nation when she writes

> Relations between the BIA and the Seminole tribe have been materialized in the changing fates of their respective governmental buildings. The BIA Seminole Agency long had occupied the nicest building on the Hollywood Reservation, but by 2001, the agency was housed in half of a somewhat run-down, moss-covered building hidden among trees near the Hard Rock construction site. By contrast, the tribal government offices, once physically contained within the BIA Seminole Agency, now occupied a four-story gleaming tower with a helipad, an emergency bunker, an auditorium, and an all-around corporate feel. (Cattelino, 134–135)

[5] See Duthu, page 52, quoting the Lummi Nation Tribal Court in *Alvarado v. Warner-Lambert Company*, 30 Indian L. Rep. 6174, 6177 (May 22, 2003), stating that the provision of health services is one such vital role.

[6] *Cobell v. Salazar* 573 F.3d 808 (D.C. Cir. 2009).

Fig. 21.5 Santee Sioux Tribal Office Sign, Flandreau, South Dakota

A photo taken by the author shows the gleaming building with a statue of Sam Jones (Abiaka), a nineteenth-century Seminole war hero, prominent in the front.

The Seminole example is a clear one. As the tribe gains powers of self-governance, in large measure due to its savvy economic development plans, it is able to build high-tech, gleaming buildings for its own governance. The nod to tradition – the statue of Warrior Sam Jones – is not to be read as a cynical move nor a visual manifestation of Seminole need to maintain legitimacy through reference to a timeless past. As Cattelino argues, Seminole have no such need. Rather, the presence of such a statute speaks to the dissonance an outsider might have when walking into the Seminole governance building. It offers outsiders a reassurance that they are entering a legitimate space – a competent and modern space, to be sure – but also one infused with tradition and history.

Though the physical space is much less dramatic and the signage nodding to tradition is much less flashy, the governance offices of the Flandreau Santee Sioux make similar reassurances. In a low-lying tan structure with a small parking lot, the tribal offices are compact, a bit rundown, and clearly marked as spaces of both governance and tradition. The sign in the parking lot is clear. This is a tribal space, as evident from the words "Flandreau Santee Sioux," written in red cursive (see Fig. 21.5). The "tribalness" of the space is also evident from the shape of the sign – it is in the form of a teepee, the traditional dwelling of Plains tribes – and from the prominent visual representation of a buffalo, which was incredibly important in the traditional economies and spiritual lives of tribal people. Buffalo have a contemporary meaning on the

Fig. 21.6 Royal River Casino sign near Flandreau, South Dakota

reservation, symbolizing tribal renaissance and tradition. So, from the words, to the shape, to the representation, this sign clearly marks "tribal space." It also clearly marks a space of governance – with the words "Tribal Office," printed below these other markers, in plan black block letters. As well, the brick sign stand is a marker of governance – though governance of a different era, when the Bureau of Indian Affairs first constructed governing buildings on reservation lands, using ubiquitous bricks and mortar, as opposed to the locally quarried quartzite, or a word frame. There is much going on in this sign – an establishment of a space of governance that takes over from Bureau of Indian Affairs governance while simultaneously establishing the tribally distinctive governance that takes place within its walls. This sign is quite distinct from the road sign advertising the tribal casino – which assures possible patrons that the casino is run by "friendly people" and interestingly does so in the native Lakota language (see Fig. 21.6).

Even more directly, though, than in governance offices, issues of legality and legitimacy are intimately tied to semiotic constructions of trial court offices.

21.11 Tribal Courts

Approximately 270 tribes have tribal courts (Richland, 12). As Richland notes, "… contemporary courts across Indian Country … exhibit a breathtaking diversity in their structure, process, scope of jurisdiction, and the kinds of norms they enact and

maintain. At one end of the spectrum is the large and well-known Navajo judicial system, in which seventeen Navajo trial judges appointed by the Tribal Council preside in trial courts scattered across the various districts of the vast Navajo reservation …" (Richland, 12). At the other end, there are small tribal courts on remote rural lands, where the docket is typical to that handled in any rural court: trespass, divorce, and petty crime.

However, the first tribal courts in Indian Country were emphatically *not* manifestations of tribal authority and power. Rather, these Courts of Indian Offenses, set up by the BIA in the late 1800s, were external and colonial impositions that "significantly diminished tribal sovereignty and suppressed tribal rights to self-determination, as well as the customs, traditions, and practices through which that self-determination was pursued" (Richland, 7).

Just as tribal self-governance had a renaissance in the 1960s and 1970s, tribal courts in the contemporary era have been "hailed as an effort to return control of tribal legal affairs to tribal nations themselves" (Richland, 7) and have been quite successful in that regard. Today, Richland notes that tribal courts are on the "edge of tribal sovereignty" (12) inhabiting an important line between tribal authority and Anglo legality.

A long line of United States Supreme Court cases have determined, amended, reinforced, and limited the power of tribal courts. From *Oliphant*, to *Montana*, to *Nevada v. Hicks* (450 U.S. 544 [1981]), the United States Supreme Court has written opinions that variously limit and constrain, enable and empower, tribal courts in a wide range of civil, regulatory, and criminal matters. The decisions all agree that tribal court proceedings and power are integral to tribal sovereignty. But there are clear tensions between tribal court authority, federal legal and administrative reach, and – most recently and increasingly important in contemporary case law – state jurisdiction and authority. As the Court stated in *Nevada v. Hicks*,

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entitles, it was "long ago" that "the Court departed from Chief Justice Marshall's view" that "the laws of [a State] can have no force" within reservation boundaries. "Ordinarily," it is now clear, "an Indian reservation is considered part of their territory of the State." (quoted in Duthu at 44)

Richland notes that the line of cases stemming from *Oliphant v. Suquamish Indian Tribe to Strate v. A-1 Contractors* (520 U.S. 438 [1997]) and *Atkinson Trading Post v. Shirley* (532 U.S. 645 [2001]) culminating in *Nevada v. Hicks* all narrow tribal court jurisdiction "primarily over non-Indians engaged in activities within Indian country" (14). There is concern in these decisions that non-Indian actors in tribal court settings would be disadvantaged by lack of federal constitutional guarantees (though most tribal courts have internalized and made explicit the same guarantees to process as found in the US constitution and case law) as well as lack of cultural knowledge and legal processes that are not translate beyond particular tribal settings.

Tribes are certainly aware of these concerns. Much work remains to be done to add to the detailed and nuanced explorations into tribal court practices, discourses, and decisions undertaken by Richland, Pommersheim (1997, 2009), Hamilton (2009), and others. The tension between the need to employ Anglo rule and legal

tradition through "adversarial rules, procedures, and personnel" (Richland 50), while simultaneously preferencing tribal "customs, traditions, and culture," (ibid) can be fruitfully read through tribal transcripts and decisions. The tension is also made manifest in the physical spaces employed in court proceedings, where the adoption of western norms for legal signs, reference to legal codes, and spatial organization of these offices is variously enhanced and troubled by tribal art, customary spatial organization, and particular color schemes and linguistic markers.

Richland's book is one of very few ethnographic accounts of a particular tribal court and one of very few extant physical descriptions of tribal court spaces written by a scholar. Consider, for example, his first person account of Hopi tribal court's physical space which begins by establishing the distinctiveness of the court in that it sits "on a plot of land leased to the Hopi Tribe by a First Mesa clan." The description moves next to an elaboration of the clear importance of tribal government, given that the court shares geographical proximity with other legal and governance buildings marking the tribal commitment to service provision: "the separate buildings of the Hopi police headquarters, the Hopi jail, the Hopi prosecutor's office, and the new Hopi radio station."

The remainder of Richland's rich description allows the reader to see and understand the reliance of Hopi courts on Anglo traditions, from the buildings to what is in them and how what is in them is arranged. As Richland puts it,

> The court consists of two buildings: a permanent structure built in the late 1970s that houses the main courtroom, a holding cell, five court clerks, two bailiffs, and one of the two associate judges, and a doublewide trailer that houses a second, smaller courtroom, the offices of the chief judge, another associate judge, the administrators, probation officers, and a receptionist. There is also a small library containing hardbound copies of case reporter series of the U.S. Supreme court, federal, and Arizona state court opinions, federal and state statutes, and various legal research guides.
>
> Upon entering either of the Hopi courtrooms, one is immediately aware of the influence that Anglo-American notions of adversarial justice have had on the space where Hopi legal proceedings transpire.… Courtroom 1, where criminal and appellate proceedings are held is organized on a northeast to southwest axis with several rows of chairs provided for an audience, separated from the main hearing space by a low wall (much like a "bar" in Anglo American courts) and a step down. Inside the main hearing space, just after the wall, long desks are located on either side of a central aisle. The one on the east side is for prosecutors, plaintiffs, and appellants (and their counsel), and the one on the west side is for defendants or respondents and their counsel. Opposite them is a raised bench behind which Hopi trial and appellate justices sit. Just below the judges bench, to the judge's left, is a witness stand and a seta and desk for the bailiff. To the judge's right are a desk, a chair, and audio-recording equipment, all manned by the court clerk. A jury box with sixteen seats for jurors is also located along the wall to the judge's right. Even the smaller courtroom 2, where all civil hearings are heard, is arranged so that its moveable furniture mirrors that of a typical Anglo-style courtroom. In both courtrooms, desks for all parties and the judges as well as the witness stands are supplied with microphones, as all court proceedings are recorded by Lanier tape decks, monitored by various court clerks. (Richland, 50)

In other words, this distinctively tribal space – a set of governance buildings on a mesa in Indian country – is also distinctively legal in its space and that legality is constructed through Anglo geographies of legal discipline. Someone entering Hopi tribal court would be aware of two important things, simultaneously. They are entering a Hopi area, and they are entering a legitimate legal area.

As I have noted elsewhere, "as a key part of practices of sovereignty, tribal courts are in a double bind. They seek legitimacy from the outside by adopting Anglo customs and process. At the same time, in order to have legitimacy and cultural power within the tribe, tribal courts must rely upon notions of tradition and authenticity" (Cramer 2009). This is a jurisprudential concern, to be sure. It is also a semiotic concern. Richland reads in the Hopi court buildings much as Cattelino reads in the Seminole governance buildings and I read in the Flandreau Santee Sioux, Mashantucket Pequot, and Poarch Creek road signs and gaming spaces – a distinctively tribal comfort with the tensions – a willingness and ability to "do both," to create separate tribal spaces that bring traditional concerns into contemporary spaces in ways that call neither tradition, nor contemporary legitimacy, into question. What becomes distinctly "tribal," then, is the ability to live in both worlds – to, indeed, survive.

21.12 Edges of Sovereignty: Signs of Survival

In matters of governance and economic development, tribes try to be Anglo in order to gain legitimacy and avoid problems – but looking more Anglo causes them problems in other realms! Success in gaming and other economic ventures, as well as growing political power, has, as Cattelino points out, exposed tribes "to new scrutiny in American law, politics, and popular culture" (Cattelino, 1). Often, that new scrutiny suggests that the use of legibly "western" or seemingly nonindigenous signs is somehow at odds with tribal tradition and in fact a bastardization of tribal identity. For American Indians, the question of culture is pressing, in part because their political status in practice often relies on maintaining cultural difference that is observable to outsiders and, more importantly, because cultural distinctiveness "establishes a meaningful presents and ensures a collective future for indigenous peoples" (Cattelino, 63). Yet clearly, Duthu is correct when he points out, "Indians did not and do not live their lives in accordance with some unwritten statute of limitations that sets an end point to 'being Indian' … tribal leaders actively and persistently (if not always successfully) resisted threats to their political and territorial rights by regularly engaging with the American political and legal systems" (61). A signifier of that engagement can be found in the literal signs posted to establish the presence and power of tribal enterprise, government, and peoples.

Quinn G. Caldwell (2010), Associate Minister of Old South Church in Boston, MA, writes, "The landscape … can tell you a lot about [people's] priorities." Certainly, in surveying the landscape and built environment of Indian nations in the United States, one can see the priorities in competition and conversation. Tribes prioritize economic development and governance while simultaneously prioritizing markers of indigeneity, references to tradition and cultural distinctiveness, and environmental markers of conservationist ethics.

The examples I have provided in this chapter, from contemporary tribal signs and structures, show the complex negotiations tribal people go through to create spaces that signify legality, authenticity, and legitimacy to a diverse range of visitors to and

inhabitants of tribal land. They exist often on the literal edges of indigenous territories and are quite literally signs of survival in Indian Country today. These "signs at odds" in Indian Country – painted feathers on brick walls next to marble grave markers, Lakota language on signs for casino gaming establishments, a Council Oak in the midst of a Hard Rock Café, and Hopi landscape surrounding an Anglo court setting – are themselves markers of indigenous survival on, and constituting, the edges of material sovereignty. The ability to walk the line between both sets of expectations in visual representation is itself, then, to be read as a sign of contemporary indigenous survival.

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Chapter 22
Emblem of Folk Legality: Semiotic Prosecution and the American Bald Eagle

Sarah Marusek

Abstract In the United States, as in many other parts of the world, legality is in a constitutive relationship with culture. This chapter will examine the revered national emblem of the bald eagle through two court cases involving economic interest and religious freedom. As a symbol of law and cultural metaphor for American identity, portrayals of the bald eagle are infused with folk qualities of cultural knowledge and national identity. Interestingly, where the image of the bald eagle represents such qualities as democracy, justice, and freedom, the image of the actual bird itself can be characterized as a pest, despite its status as an endangered animal. The amalgamation of these two aspects of law, the first as virtuous and the second as practical, renders the bald eagle to be an emblematic site saturated by the intersection of legality and culture. Therefore, by seeing the bald eagle as a legal semiotic, we are able to witness how law and culture are contested in everyday American life. Through the corpses and feathers of dead bald eagles and resulting prosecutions under the Bald and Golden Eagle Protection Act of 1940 and similar laws, the visual crafting of law onto one particular wild animal generates a rich discussion concerning the interpretation of legal example and cultural response with the bald eagle as a contested emblem of folk legality.

22.1 A Big Brown Hawk

Despite their status as the United States' national emblem, bald eagles are large predatory raptors that like to eat. Prey can include insects, small rodents, and even fish. This latter selection was the dinner of choice for the lone unfortunate bald

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eagle shot down over the Mohawk Trout Hatchery in Sunderland, Massachusetts, by owner Michael Zak in *United States v. Zak* (2007). In March 2007, following an investigation by the US Fish and Wildlife Service with assistance from the Massachusetts Environmental Police, Zak and codefendant and son-in-law Timothy Lloyd were linked to the killing of 279 great blue herons, six ospreys, one red-tailed hawk, three unidentified raptors, and one bald eagle, dead by gunshot and found at the fish hatchery.

Notwithstanding the fact that there were just under 300 dead birds accounted for, Zak's trial hinged upon that one dead bald eagle. In US District Court, US District Judge Michael Ponsor found Zak guilty of one count of shooting and killing a bald eagle in violation of the Bald and Golden Eagle Protection Act and one count of violating the Migratory Bird Treaty Act (for the killing of the bald eagle). Prior to the beginning of the 6-day bench trial in which Zak had waived his right to a jury trial, Zak pled guilty to one count of conspiring to violate the Migratory Bird Treaty Act and two counts of violating the Migratory Bird Treaty Act (for the killing of blue herons and ospreys). Lloyd also pled guilty to one count of conspiring to violate the Migratory Bird Treaty Act and two counts of violating the Migratory Bird Treaty Act (for the killing of the blue herons and an osprey).

According to the Department of Justice's release of the case, "The individuals involved with the wanton killing of migratory birds at the hatchery showed no respect for wildlife, nor the federal and state laws protecting those birds. Our laws protect this nation's natural resources to ensure their survival for future generations to enjoy" declared US Fish and Wildlife Service Special Agent in Charge Thomas Healy in the Department of Justice's summary of the case. As emphasis for the wantonness of the killing, Federal Prosecutor Assistant US Attorney Kimberly P. West played a surveillance video during the trial that showed Zak driving around his property in a golf cart, patrolling with a rifle. "At one point, Zak stopped, aimed the rifle and a flash of light came from the muzzle" (Rivals and Flynn 2007). So, not only was the killing in violation of animal rights but it was also an affront to the public interest, or cultural intentions, provided by such legislation. When asked about the specialness of the dead bald eagle that was found on his property, Zak answered that he thought that the bird was a "big brown hawk'" (Department of Justice 2007). Zak's failure to recognize the big brown hawk as the national emblem did not excuse him. According to the case summary:

> As a "public welfare statute," the BGEPA does not require a specific intent; rather the language of the statute itself, the legislative history, and persuasive holdings establish that it is sufficient to show an actor knows he or she is engaging in unlawful conduct and not that he or she knows he or she is shooting an eagle. (Department of Justice)

Early on in his prosecution, Zak opined that a bald eagle doesn't warrant special protection or prosecution in his initial refusal to plead guilty to the killing of the bald eagle and to go to trial to see what the judge would say. This sentiment asserts

that all birds who were likely to feed on his livelihood, the trout, were equal in his eyes as trespasser to be hunted and shot. There was no special treatment by Zak in his killing of the bald eagle.

So, we are left with the particular focus of his prosecution that revolved around not the numerous endangered and federally protected birds that he and his son-in-law shot down but that one dead bald eagle. Therefore, Zak's prosecution is emblematic of folk legality and as the semiotic prosecution as political statement protecting national constructions of what the bald eagle represents in political imagination and the United States as community at large. As folk legality, the bald eagle is just another bird that eats trout and, according to Zak, needs to be stopped as Zak stops any and all aviary trespassers on his property. As an example of semiotic prosecution, Zak's killing of a national emblem must be stopped in order to ensure that the bald eagle as an emblem of folk legality remains a semiotic of truth, justice, and American freedom as the national bird. So what is happening here is that Zak, by shooting all the birds without respect for the politically sanctified status of the bald eagle, muddies the bald eagle as an emblem of folk legality that the folk honor and respect rather than shoot down. Politically, the bald eagle is more than just a bird according to the history of legislation that has constructed it so. Through his prosecution, Zak must not only stand trial for shooting an actual bald eagle but also must stand trial for shooting the source of cultural inspiration for Lisa Simpson and her essay on truth, justice, and the American way. In this comparison, Zak has slaughtered the folk emblem of the bald eagle as the aviary representation of what it means to be American as protected by law.

During Zak's trial, an osprey carcass was brought into the courtroom in order to illustrate Zak's ruthlessly cruel behavior in shooting down so many birds. The carcass of the dead bird was used here as a symbol of cold-hearted killing and blatant disregard for not only avian life but for what the birds represented as well. Hanna Pitkin reminds us "A symbol, though it represents by standing for something, does not resemble what it stands for" (Pitkin 1969, 12). She further states that "instead of a source of information, a symbol seems to be the recipient of actions or the object of feelings really not intended for it, but for what it symbolizes" (Pitkin 1969, 12). Here, the bald eagle represents a strong federal government and the frontier that the eagle patrols despite its real image of being a bird that likes to eat fish. Additionally, the dead eagle symbolizes the danger in shooting down the symbol of national unity. As Pitkin suggests, the bird itself, although it is protected, is not as important as what the bird stands for, which is American nationalism that flies with freedom in the skies. As Ponsor's ruling conveyed through the penalties and fines imposed upon Zak, it is argued there is a compelling governmental interest at stake in the protection of the bald eagle for purposes of federal power.

As the compelling governmental interest, the bald eagle shot in Zak's case was protected under the Endangered Species Act of 1973. The intent of the ESA was to federally protect those species and habitats that were threatened or endangered. The bald eagle was protected under this statue until its delisting by

the US Fish and Wildlife Service on August 8, 2007 (Martin 2008). As the prosecution of the killing of the bald eagle is a statement of power through the force of legislation and resultant penalty over the individual, the bald eagle's protected status during Zak's prosecution meant that Zak's actions in shooting the bald eagle were interpreted in kind with environmental regulation. The bald eagle's classification under the ESA meant that the national bird was not only protected as the national symbol having cultural relevance but environmental justifications as well.

However, the environmental justification for protecting endangered species is a mixed message. As demonstrated in Zak's case, the bald eagle takes precedence for prosecution with the dead endangered birds; not shooting bald eagles despite the reasoning of shooting the bird in both Zak and Friday's cases, the legislation written for the purposes of idealizing the bald eagle and ensuring its protected status as the national emblem remains firm and without exception. However, the legal recognition for the hundreds of other endangered birds that died is minimal. Consider these birds in congruence with the case of another endangered animal, the Eastern gray wolf, that was shot and killed after feasting on several sheep on a farm in Massachusetts (Daley 2008). Here, the wolf was shot on the grounds that, despite it being a protected endangered species, it was eating the farmer's sheep. The farmer was told by official representatives from the Massachusetts Division of Fisheries and Wildlife that he "had the legal right to kill any animal attacking his flock" (Daley 2008).

In this case as well as in Zak's case, endangered animals are more of a theoretical construct in environmental protections and less of a prosecutorial offense. Once again, Zak's prosecution was primarily focused around the death of that one bald eagle and not the hundreds of endangered birds that died. Zak was not afforded the same luxury in protecting his flock or fish and although was primarily penalized for the death of that one bald eagle. Nevertheless, there is a crucial difference one important similarity between the great number of endangered birds killed in the Zak case and the endangered gray wolf killed in Massachusetts – no animal is as important before the law as the bald eagle. Laws protecting the bald eagle are powerful, and those who violate it by shooting bald eagles are the powerless – the offenders. However, it is not just the law that is powerful. In Zak's case, it is the legal and cultural structure that protects the bald eagle to the point of ignoring the deaths of hundreds of other birds which are not protected as the United States' national emblem.

Clarissa Rile Hayward urges us to view power as not resting solely with the powerful or empowered but rather by viewing power itself according to the mechanisms of power and the boundaries of power (Hayward 2000). Hayward encourages us to "deface" power by seeing power as "a network of boundaries that delimit, for all, the field of what is socially possible" (2000, 3). She critiques those power relations that are "defined by practices and institutions that severely restrict participants' social capacities to participate in their making and re-making" (Hayward 2000, 4). In this case, boundaries of power that shut out cultural refute with the meaning and execution of the law are built into the

legislation itself, specifically in the public welfare dimension of the BGEPA which articulates the absolute protection of the bald eagle. Additionally, by holding up the carcass of the dead osprey as representative of Zak's deeds and as a symbol of the bald eagle's death as the eagle's carcass was not as intact for purposes of bringing it to display in the courtroom, the boundaries or power in which the bald eagle is involved are set up in such a way that other animals are forgotten in the face of the national emblem. Other boundaries of power are exercised in the specialized nature of Zak's prosecution, as a ruthless and cruel hunter rather than defender of his livelihood, as is the case in the justified gray wolf versus sheep shooting. As an emblem of folk legality, the dead bald eagle is the icon that demonstrates the boundaries of power that are not to be crossed when national emblems are at stake. The law wins, cultural appreciation of the bald eagle wins, and Zak, having violated those boundaries, loses.

Semiotically speaking, the dead bald eagle symbolizes an emblem of folk legality that develops the constitutive relationship between law and culture. Here, the constitutive notion of folk legality, or the ways in which law is viewed and responded to in everyday life by everyday people, will be examined through the body of the dead bald eagle as a statement about law and culture. Using a constitutive legal approach, this chapter examines the dead bald eagle as an emblem of folk legality in conjunction with the semiotic administration of justice through prosecution. Additionally, ideas about the construction of power, the political imagined community, symbolic representation, and the materiality of law will be drawn upon as theoretical frameworks that help us to think about the bald eagle as an emblem of folk legality (Hayward 2000; McBride 2005; Pitkin 1969; Brigham 2009a, b). Through a focus on the trout hatchery case of *United States v. Zak* (2007) and another dead bald eagle case, *United States v. Friday* (2006), which involved a member of the North Arapaho Native American tribe who shot and killed a bald eagle for religious purposes, this chapter will show the tension between law and culture according to the semiotic prosecution of the bald eagle as an emblem of folk legality.

22.2 Emblem of Folk Legality

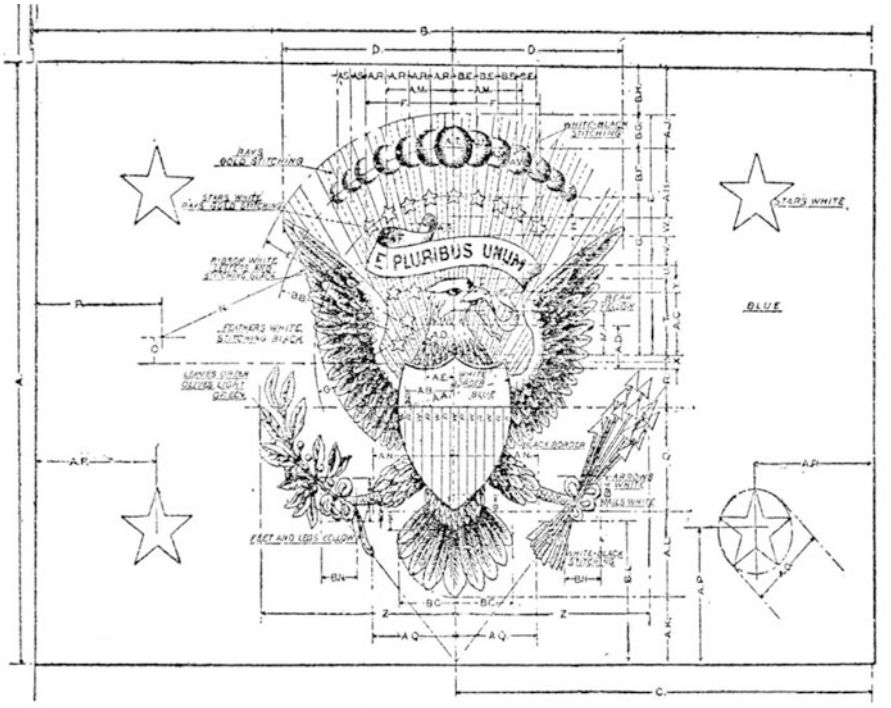
At the meeting of the Second Continental Congress in May of 1782, the white-headed bald eagle was chosen to appear on the official seal of the newly formed nation of the United States. According to its elevated position as the emblem of the young country, the bald eagle stood as a "symbol of a newly formed America in 1782 by represent[ing] honor and dignity in American society" (Iraola 2005, 273: Footnote 1). Since then, the bald eagle has officially represented the emerging young nation on legal symbols such as most visibly on the seal of the US Presidency (pictured below). This revered, yet seldom seen, wild bird is legally and culturally recognized as the semiotic of American exceptionalism and is depicted as such on the seal itself.

*Seal of the President of the United States of America***.** Resource document. Executive Office of the President of the United States used under allowance of Executive Order 11916, May 28, 1976, 41 FR 22031, 3 CFR, 1976 Comp., p. 119. http://en.wikisource.org/wiki/Executive_Order_11649. Accessed November 4, 2009

Symbolically, the seal represents American values, such as national unity, expressed by the Latin phrase *E pluribus unum*, meaning "out of many one," and the stars and stripes, also on the American flag. Umberto Eco reminds us "an iconic sign is indeed a text, for its verbal equivalent is not a word but a phrase or indeed a whole story" (Eco 1976, 215). In this way, the seal is the story of the American founding as well as its intended future. As the national bird, the bald eagle is in the center of the seal surrounded by a circle of 50 stars, with a star for each of the 50 states. On the breast of the opened bird is a protective red and white striped shield, with a stripe representing each of the original 13 colonies that formed the United States. On the surface, the intentional use of red, white, and blue is a visual approach to patriotism that serves to "color" the image of the eagle itself as patriotic and uniquely American. Additionally, the use of yellow or gold characterizes the President of the United States as a position of a royal leader in charge of the people.

However, upon closer examination, the selected colors have purpose and intention with roots in American Law. The evolution of such legal mandates enacted by several former US Presidents reveals particular attention to both color and imagery. For example, in 1912, President William H. Taft issued Executive Order 1637 (17 U.S.C. 105) stating "the color of the President's flag shall be blue." The President's flag depicts the Presidential seal. Four years later, President Woodrow Wilson issued Executive Order 2390 (17 U.S.C. 105), which further defined the proportions and

dimensions of a variety of national symbols, including the Presidential flag on which the Presidential seal is emblazoned. The job of enforcing this structural mapping according to Wilson's framework lay with the Navy Department.



SIZE	DIMENSIONS IN FEET																								
	A	B	C	D	E	F	G	H	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z
No. 1	1020	1600	800	326	1425	1165	220	.3125	1125	.3125	270	.75	300	145	240	1.75	.75	1.25	1.3125	.25	.50	.3125	.2136	.2133	375
No. 6	360	513	.2565	108	.1297	.56	.1885	.10	.375	.10	.1895	.25	1.00	.145	.80	.56	.25	.640	.411	.08	.145	.10	.0625	.0625	1.25

SIZE	DIMENSIONS IN FEET																								
	A-A	A-B	A-C	A-D	A-E	A-F	A-G	A-H	A-J	A-K	A-L	A-M	A-N	A-O	A-P	A-Q	A-R	A-S	A-T	A-U	A-V	A-W	A-X	A-Y	A-Z
No. 1	2063	.55	1.0887	.7288	.56	.2208	.2810	1.15	1.45	1.50	1.45	1.30	1.563	1.375	2.30	1.60	1.422	2.69	1.760	.6250	.500	.500	1.375	.3750	.3250
No. 6	.8875	.32	.349	.239	.18	.0721	.0940	.359	.466	.369	.468	.43	.52	1.468	.77	.54	.145	.3895	.250	.2086	.170	.170	.1450	.1250	.1040

SIZE	DIMENSIONS IN FEET												
	B-B	B-C	B-D	B-E	B-F	B-G	B-H	B-J	B-K	B-L	B-M	B-N	B-O
No. 1	3558	1.07	.2812	.40	.625	.60	.85	.5625	.2813	2.43	.75	.70	1.97
No. 6	.1479	.36	.01	.13	.208	.197	.27	.1979	.09	.765	.25	.23	.1062

(Source: Executive Order 2390 (17 U.S.C. 105)).

The color schema of the seal was also mapped in this document by Wilson announcing the following (Source: Executive Order 2390 (17 U.S.C. 105)):

The colors prescribed for the President's flag are as follows:

Field of the flag, blue.
All stars, large and small, white.
The thirteen clouds, white with black stitching.
Motto ribbon, white with black letters and stitching.
Rays, gold stitching.
Eagles beak, yellow.

Feathers, white with black stitching.
Legs and feet, yellow.
Nails, white with black stitching.
Olive branch, leaves green, olives light green.
Arrows, white with black stitching.
Shield, chief blue, strips alternate white and red, beginning with white on the outside.

Attention to official colors is further emphasized in 1945 by President Harry S. Truman. In Executive Order 9646 (17 U.S.C. 105), Truman tweaked the shading present in the color scheme of the emblem to include grays rather than blacks as well as the inscription of the motto as legible on both sides of the flag. He also altered the following from the 1916 version of the seal of President Wilson:

> SHIELD: Paleways of thirteen pieces Argent and Gules, a chief Azure; upon the breast of an American eagle displayed holding in his dexter talon an olive branch and in his sinister a bundle of thirteen arrows all Proper, and in his beak a white scroll inscribed "*E PLURIBUS UNUM*" Sable.
>
> CREST: Behind and above the eagle a radiating glory Or, on which appears an arc of thirteen cloud puffs proper, and a constellation of thirteen mullets Argent.
>
> The whole surrounded by white stars arranged in the form of an annulet with one point of each star outward on the imaginary radiating center lines, the number of stars conforming to the number of stars in the union of the Flag of the United States as established by the act of Congress approved April 4, 1818, 3 Stat. 415. (Source: Executive Order 9646 (10 FR 13391, October 30, 1945))
>
> The Color and Flag of the President of the United States shall consist of a dark blue rectangular background of sizes and proportions to conform to military and naval custom, on which shall appear the Coat of Arms of the President in proper colors. The proportions of the elements of the Coat of Arms shall be in direct relation to the hoist, and the fly shall vary according to the customs of the military and naval services.

As explicitly stated in the last aspect, Truman's justification for amending the deal was to "conform to military and naval custom." As the President of the United States is also constitutionally named the Commander in Chief of the nation's military, such a connection reveals a statement about power, particularly at the close of World War II in which the United States claimed victory against the evils of fascism. This power is represented through symbols and colors present then and now in the Presidential Coat of Arms. The eagle, a predatory bird, is depicted as holding the keys to both defense (the arrows and the shield) and peace (the olive branch). The clouds represent the nation's history of revolution and independence from colonial England in the late 1700s. The 13 stripes on the shield signify the 13 original colonies that fought the war against Britain. The stars represent each of the states in the union, with the additional two stars added in 1959 to include the newly formed states of Hawaii and Alaska by President Dwight D. Eisenhower with Executive Order 10823 (24 FR 4293, May 28, 1959).

To reiterate, the key elements of the emblem include the outstretched wings of the bald eagle which symbolize the unabashed pursuit of justice, domestic unity, and national strength through the juxtaposed olive branch in one claw of the eagle and the 13 arrows in the other claw. Where the olive branch is a symbol of peace dating back to ancient Greece, the arrows evoke a sense of might and the ability to

defend. In this way, the eagle is the marker of justice through goodwill and defense/offense if necessary. A banner in the beak of the eagle, *E pluribus unum,* verbalizes a similar message of justice, but applies to the domestic unity found in the nation's borders, specifically emphasizing the stability of 50 states originating from 13 colonies. Taking all of this into account, the representation of the eagle on the seal is a legal hermeneutic in which the bird is a metaphor for what is organically determined by past United States Presidents to be "American." We can characterize the seal and its creation reflecting military power, peace, and national stability through the lens of Legal Semiotician Roberta Kevelson, where:

> all legal hermeneutics is teleological, the term *teleological* referring to the influence of future goals on the here and now, as a kind of precedential authority totally different from that notion of precedent so strongly criticized by the great legal realist Llewellyn. Thus, modality, especially all degrees of the possible, becomes in legal hermeneutics the life of the law. (1988: 217)

22.3 Current Cultural Response to the Emblem

As the national emblem of the United States, the bald eagle represents many things. Culturally, the eagle can be viewed as a sanctified icon promoting untamed American democratic virtue and national unity. Politically, the bald eagle is the chosen symbol for the nation at large and therefore embodies a national sense of justice through a romanticized historiographical perspective illuminating conquest and truth. Environmentally, the bald eagle is construed as an endangered species in need of protection as the numbers of bald eagles were decreasing. Culturally, politically, and environmentally, the bald eagle symbolically as well as physically fosters respect for America and Americana through the perpetuated and implemented respect for the bird itself. Furthermore, this respect is legally commanded through the creation of enforcement of laws that protect bald eagles.

In 1900, the Lacey Act made the taking, possession, transportation, sale, importation, or exportation of the nests, eggs, and parts of the bald eagle in violation of any state, tribal, or US law a federal offense (United States Fish and Wildlife Service 2008). In 1940, Congress enacted the Bald Eagle Protection Act which prohibits the "taking" of a bald eagle or its nests and eggs without a permit from the Department of Interior with "to take" being to "pursue, shoot, shoot at, poison, wound, kill, capture, or molest, or disturb" (Martin 2008, 44). In 1948, the Migratory Bird Treaty Act passed as a federal law that stemmed from a shared commitment with Canada, Japan, Mexico, and Russia to protect internationally migratory birds and granted the Secretary of the Interior as the enforcer of the law in the USA. the right to authorize and regulate hunting seasons for some of these protected birds, such as ducks and geese. It provided special protections for the bald eagle in its protections for migratory birds. In 1962, the Bald Eagle Protection Act was amended to include protection for the golden eagle and was retitled the Bald and Golden Eagle Protection Act (DeMeo 1995). In 1973, the bald eagle was protected as an endangered animal under the Endangered Species Act. This latter status was revoked in 2007 when it

was determined that the number of bald eagles had increased to the extent that the bird should no longer be considered to be of endangered status (Martin 2008).

Laws such as the Bald and Golden Eagle Protection Act, Lacey Act, Migratory Bird Treaty Act, and the Endangered Species Act protect the bald eagle and shape how the bird is viewed in everyday life. As previously mentioned, this protection legally perpetuates a variety of conceptual meanings and frameworks that position the bald eagle as the symbol of Americanized values articulated as freedom, truth, and a nationalist sense of morality. Culturally, such laws make us think that the bald eagle is a special animal, as a national emblem that deserves special treatment through special laws. Politically, the legal protection of the bald eagle embodies American values of democracy and fortitude. Environmentally, such laws convey respect for the protection of wildlife such as the bald eagle and other endangered species.

However, despite such multiple frameworks, laws that elevate the bald eagle to such recognized cultural, political, and environmental levels actually challenge the intended promotion of the bald eagle as a static emblem of folk legality. This phrase emblem of folk legality is used to describe the bald eagle as an icon of American life that is socially recognized for its importance, as through such recognition, is actually challenged. In this way, the bald eagles become an icon that is distanced to such an effect that its legally protected prestige is actually ignored. The notion of folk legality is intended to describe a view of law that is advanced by everyday folks in everyday situations. Importantly, this idea of folk legality with the bald eagle as its emblem conveys a distancing to law that law itself must step into enforce and seek to un-distance when laws protecting the bald eagle are violated or basically ignored. In other words, the bald eagle is an emblem of folk legality that is both lawfully constructed and reconfigured into everyday confrontation with the bald eagle that, despite such extensive legal protectionism, actually ignore the legal framework attached to this national symbol.

As mentioned, folk legality is what happens when laws are interpreted and used in everyday life. In the satirical animated American television show, *The Simpsons*, the little girl Lisa Simpson is excited to enter an essay contest about a tribute to American democracy (Meyer 1991). Having trouble coming up with a topic, Lisa rides her bike to Springfield National Forest seeking inspiration. Sitting down at the foot of a tree, Lisa exclaims "Ok, America, inspire me!" Suddenly, a bald eagle appears and lands on a branch directly in front of her. Trumpets sound, and Lisa gasps "wow, a bald eagle!" With further fanfare, the bald eagle assumes a regal pose with outstretched wings and Lisa starts vigorously writing her essay. Yet, that interpretation may be iconic and culturally absent of actual political meaning or environmental attentions. Two cases in particular develop this contested notion of the bald eagle as national symbol and instead reveal the bird to be an emblem of folk legality. In these cases, the prosecution of two individuals who violated laws protecting the bald eagle becomes an overzealous attempt to keep the bald eagle out of reality and in semiotic symbolic territory in which conceptual meaning is replaced with actual encounter and usage of the bald eagle itself. What do these laws protect? What do they promote? As these two cases will illustrate, bald eagle legislation represents a political statement of power, community, and political imagination.

Constitutive legal theory tells us that while law impacts culture, culture also impacts law. In other words, law and culture are in a constitutive relationship with one another

and legal constructions and, along with their implementation and enforcement, depend upon and reflect the cultural response and reaction to what the law does and says. Likewise, what we do in everyday life is a statement of culture that is mutually impacted, shaped, and challenged by the law that reflects this relationship. Constitutive legal theorists interpret the banalities of everyday life from a nuanced perspective that reveals the formative dependency between law and culture in such everyday arenas as music (Lorenz 2007), the Internet (Gaitenby 1996), grocery stores (Brigham 2009a, b), riding horses (Merry 2000), casinos (Cramer 2005), coffeehouses (Manderson and Turner 2006), beaches (Mooney 2005), the pub (Valverde 2003; Johnson 2005), roadways (Wagner 2006) or parking lots (Marusek 2005, 2006).

The cultural view of the bald eagle projects a legally protected national symbol. In turn, law reflects the need to shape national culture through the creation and protection of the bald eagle as a national symbol. This socio-legal statement of national symbolism is furthermore a statement about the constitutive relationship between culture and law as there are allowed exceptions to coming into contact with the bird. The presence or absence of such exceptions contributes to the cultural perception of how the bird fits into everyday life. As is the case in the following two cases, the bird may be culturally recognized as a symbol, but in everyday life, its preeminence is ignored despite its legislative protections. In these two cases, law reasserts itself into the cultural relationship with the bald eagle as national emblem that these two cases disregard; the prosecution in these two cases semiotically reminds us of the contested relationship between legal authority and cultural practice. So, culturally and legally, the bald eagle as a symbol is shaped by images and representations of law and culturally impacted legality that happen in our everyday lives. Likewise, how we view what happens to the bald eagle in everyday life is constructed and reinterpreted by both law and practice. Therefore, the laws and culture surrounding the bald eagle constitute one another.

22.4 National Eagle and Wildlife Repository

In 2005, Winslow Friday, a member of the Northern Arapaho Indian tribe on the Wind River Indian Reservation in Wyoming, shot a bald eagle from a tree for religious purposes. Friday shot the eagle for his cousin, who needed the tail fan for the upcoming Sun Dance (Correll 2009). In *United States v. Friday* (2007), Friday was convicted under the Bald and Golden Eagle Protection Act despite the exception that the law provides for American Indians who want eagles for religious purposes obtained through permit or from the National Eagle Repository. Friday argued that the BGEPA violated his ability to freely practice his religion and was therefore in violation of the free exercise clause of the First Amendment and conflicted with the Religious Freedom Restoration Act. Friday also stated that the system of applying and receiving a permit that would allow for the taking of a bald eagle feather was "improperly restrictive, burdensome, unresponsive, or slow" (Department of Justice). Nonetheless, Friday, who was turned in to the Bureau of Indian Affairs, was prosecuted for the shooting of that one bald eagle.

Criticism of Friday included the question of why he did not apply for bald eagle feathers through the National Eagle and Wildlife Repository in Denver, Colorado. Created in 1970, this storage facility provides a "central location for the collection and distribution of dead bald or golden eagles and their parts" (Iraola 2005, 980). In this large warehouse, the United States government "collects and freezes any potentially usable dead eagles or eagle parts it encounters. Some are confiscated contraband; some are victims of electrocution on power lines; some are roadkill" (*Friday*). Applications for use are approved by the US Fish and Wildlife Service Wildlife Permit Office in the state where the applicant lives. Orders, filled on a first-come, first-serve basis, can take roughly two and half years to fill (Iraola 2005). This duration arguably is burdensome to the practice of religion that more often than not cannot be planned out years ahead of time to account for the length the system makes those who would use it wait.

The reasoning for the regulations imposed upon Friday's access to and use of the bald eagles is considered a compelling governmental interest. As the case details notes:

The government has a compelling interest in protecting bald and golden eagles. That interest is compelling as regards small as well as large impacts on the eagle population. The bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles. Even if unregulated religious taking would not be numerous enough to threaten the viability of eagle populations, the government would still have a compelling interest in ensuring that no more eagles are taken than necessary, and that takings occur in places and ways that minimize the impact (*Friday*).

So live bald eagles for religious purposes can be obtained through a permit-granting process, and dead bald eagles can be used upon the approval of a federal agency to release them. Friday argued that he did not seek such an avenue for obtaining a bald eagle as the process was cumbersome, took far too long, and not guaranteed. Additionally, his religious practice requires that the eagles be pure, which is not ensured by the repository. The government witness responsible for supervising the repository testified in this case that "[m[ost of the time [the eagles a]re very decomposed" and "sometimes 'they are full of maggots'" (*Friday*).

In everyday life, the semiotics of law can be interpreted as emblems of folk legality. Emblems of procedure, such as the permit to obtain either live or dead bald eagles, are often at odds conceptually with legal constructions of folk legality in which the legal system determines culture. In the case of Winslow Friday, the legal system was too much of a system and one that fostered a culture of playing by federal rules and regulations that hinder Friday's unfettered religious freedom and practice. In this case, the bald eagle is not only an emblem of national US identity but also a symbol of how the system creates an Americanized identity that distances the inclusion of Native Americans. Here, the bald eagle and its legal protections are images of power that foster a particular notion of American identity and a cultural metaphor that constructs political community through national imagination.

The legislation that creates the legal protection for a national emblem reflects a political imagination in which an animal, in this case a bird, stands in place for

national ideals. These ideals portray what the nation represents. Kealy McBride urges us to consider how communities are imagined in terms of "the effects of how we imagine community [rather] than how we define it" (McBride 2005, 6). McBride describes the constitutive relationship between imagination and politics in terms of two continuums with the first involving the individual and society and the second involving the ideal and materiality as possibility and actuality, theory, and practice. Friday's prosecution is similar in its construction of political imagination, as the community of the Native American who uses the bald eagle in religious ceremonies, is imagined to be under the control of those who hand out permits for the allowed shooting of the bald eagle under federal law. In this way, the Native American community is imagined to be under the jurisdiction of the federal government rather than as an independent and sovereign nation as is portrayed under the reservation governance system. Similarly, justification for the protection of the bald eagle, dead or alive, is considered in the case to be a compelling governmental interest. This consideration reveals a particular notion of political imagination in which the community being governed holds the bald eagle to be sacred in whatever form and free from religious exception. What this means is that there is a competing notion of folk legality operating in this case, one that represents America from a colonizing sense in which the community is guided by the bald eagle in its quest for truth and the American way and one that sees American community as indicative of regulation and restriction, if not simple discrimination on the basis of ethnicity and religion. In both cases, the bald eagle is emblematic of the relationship between law and culture at which the intersection of the two yields contestation over permits, patriotism, and freedom. Again, the dead carcass of the bald eagle is used as the emblem of folk legality.

22.5 Conclusion

Mariana Valverde describes the semiotics of representation and tells us about political myths insofar as "myths are often conveyed by representations" with "mythical meanings get communicated" (Valverde 2006, 25). Using Valverde's thinking about mythology, we can view the bald eagle in such a light. The mythology of the bald eagle concerns a supposed link between unfaltering democracy and the power vested in the image of a hungry bird or prey – the eagle gets what he wants within reason. Likewise, through protective legislation, regulation, and enforcement, the mythical meaning of the bald eagle is legally sustained through enforcement of laws violated as well as culturally sustained through its resistance. The prosecutions of Zak and Friday symbolize a cultural statement of everyday action meets legal guidelines. Political unity is imagined through the protected legal status and prosecution of the bald eagle, with this mythical image shattered when both Zak and Friday shoot down "American values" by shooting down the bald eagle. However, those values are themselves mythologized and interpreted differently in a cultural setting. For Zak, the bald eagle is a big brown hawk that gets in his way of the American dream

of entrepreneurship in his trout farm. For Friday, American values are represented by the protection of religious practice and not the bureaucratic systematic structure that requires permits. These two notions of what American values represent culturally rather than legally are also bound to the lesser-known existence of the Bald Eagle Repository as a place housing dead birds and parts of those dead birds. This image of a large warehouse of dead animals is at best contradictory to the image of a free-flying bald eagle over the vast forest frontier of the United States. Rather, the symbolic meaning that the repository carries is one of ownership by the federal government over the remains of a wild animal as well as one of bureaucratic restriction all in the name of law. The prosecution of each of these men communicates the preservation of American values represented by the bird that cannot be killed even when its dead, unless of course its status as the national emblem is downgraded with regard to the reasons Zak and Friday give for its usage, namely, the protection of economic interests (Zak) and for religious purposes (Friday).

Through its recently removed endangered species classification, the bald eagle is mythologized to represent an innocent, yet powerful bird of prey that soars to great heights of liberty both in actual flight and as metaphor for what these American values can accomplish. The delisting of the bald eagle may strengthen that cultural image of a majestic bird but also may lead to the questioning of its protection as a bird that is no longer so rarified. By interpreting the resistance of Zak and Friday to laws that protect the bald eagle, we can symbolically see that this resistance is representative of a culture that is not completely dictated by legislation that says the bald eagle is off limits to the public. That culture is a culture that considers laws and their enforcement to be of lower rank than what happens in everyday living.

In seeing the bald eagle as an image of law and culture, we can also see the bald eagle as just a bird. In his most recent book *Material Law: A Jurisprudence of What's Real*, John Brigham urges us to "see the material dimension of law" for "we should be able to see law altering our reality" (Brigham 2009a, b, xii). He further explains "seeing law in the nature of material things and the material in the nature of law is the challenge" (Brigham 2009a, b, xi). In this chapter, the material is the bird itself that is law or, more specifically, the dead body of the bald eagle either shot down by Zak or Friday or lying in the repository. The materiality of this creature significantly frames the bird as a revered national image protected by laws that emblematically govern its treatment. However, the material nature of the bald eagle as just a bird reinforces its delisting as an endangered species. Furthermore, materially, the bird, even though it is a legal emblem, is also a symbol of a pest, as in Zak's case, or an essential religious object out of reach through systematic structural procedures but obtainable through self-directed means.

These two cases demonstrate acts of resistance to the legislated emblematic governance by everyday actors who embody the notion of folk legality. Here, folk legality is the resistance to the rigidity of law through the materiality of dead bald eagles. The mythologized meaning of what the bald eagle represents in legal life is contested by the banality of its treatment and usage in the everyday life situations such as trout farming or religious practice presented by Zak and Friday. In this way, the material dimension of bald eagle legislation is the bird itself, alive or dead,

presented as both the resistance to the bird as a protected and revered national emblem and as here the national emblem as material law creates a culture that challenges legal presuppositions about emblems, their meaning, and the legislated protection of that meaning.

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Part V
Visualizing Law's Topography

Chapter 23
Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere

Judith Resnik, Dennis Curtis, and Allison Tait

Abstract In several countries, governments have embarked on major building expansion programs for their judiciaries. The new buildings posit the courtroom as their center and the judge as that room's pivot. These contemporary projects follow the didactic path laid out in Medieval and Renaissance town halls, which repeatedly deployed symbolism in efforts to shape norms. Dramatic depictions then reminded judges to be loyal subjects of the state. In contrast, modern buildings narrate not only the independence of judges but also the dominion of judges, insulated from the state. The significant allocation of public funds reflects the prestige accorded to courts by governments that dispatch world-renowned architects to design these icons of the state.

The investment in spectacular structures represents a tribute to the judiciary but should also serve as a reminder of courts' *dependency* on other branches of government, which authorize budgets and shape jurisdictional authority. A double narrative comes as well from the design choices. The frequent reliance on glass facades is explained as denoting the accessibility and transparency of the law. But courthouse interiors tell another story, in which segregated passageways ("les trois flux") have become the norm, devoting substantial space and cost to isolating participants from each other. Further, administrative offices consume the largest percentage of the

 We have benefitted from exchanges with and the provision of materials and images by participants in the building programs in many countries, including Marie Bels, Michael Black, Antoine Garapon, Susan Harrison, Robert Jacob, Andrea Leers, Jane Loeffler, Christine Mengin, Jean-Paul Miroglio, Christine Mengin, Linda Mulcahy, Simon Roberts, Douglas Woodlock, and Elizabeth Zoller.

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square footage, illuminating a shift away from public adjudication toward alternative dispute resolution and problematizing the emphasis on courtrooms.

The new monumentality reflects but does not frankly acknowledge the challenges to courts from democratic precepts that grant "everyone" entitlements to public hearings before independent jurists. The buildings are reminders of courts' contributions to the public sphere, while new rules reconfiguring adjudication privilege private conciliation.

23.1 Reconceptualizing Judges and Reconfiguring Courthouses

During the last decades of the twentieth century, many countries authorized new courthouse building to signify the centrality of adjudication to their identities. Like the burgomasters of Amsterdam who, in the seventeenth century, built a monumental town hall as a testament to their own prosperity and authority, contemporary governments offer law, embodied in courthouses, as "the new fulcrum around which the mechanism of self-representation in the various modern states" pivots (Muratore, 45).

Despite regional and local variation, the architecture and interiors display a good deal of commonality across borders. That homogenization is driven in part by architects, artists, judges, and expert consultants, who move from jurisdiction to jurisdiction in a globalizing market for "justice architecture."[1] They rely on transnational engineering standards and legislative mandates for energy efficiency an access for persons with disabilities. Transborder anxieties about safety and security are other powerful influences, as are the practices of courts. Attitudes about the roles of judges, litigants, lawyers, and the public audience—sometimes transmitted through cooperation and transnational conventions and other times by way of conquest and colonialism—organize courthouse space.

Many jurisdictions mandate that a small percentage of construction budgets be set aside for specially commissioned art. The resulting artistic motifs are often derived from iconographical emblems that cross borders as well. The "scales of Justice"—traceable to ancient Babylonia and Egypt and brought forward in time through the iconography of the Christian St. Michael—can be found in various locales, along with recycled Medieval and Renaissance allegories such as the personification of the Virtue Justice and the Tree of Justice (Curtis and Resnik 1987; Resnik and Curtis 2007, 2011). But modernist architecture is regularly complemented by diverse adornments, as artists employ metals, paint, clay, and fiber often shaped in abstract form.

[1] See, for example, American Institute of Architects (AIA), Academy of Architecture for Justices (AAJ), Goals, at http://network.aia.org/academyofarchitectureforjustice/home/. AAJ is one of several "knowledge communities" of the American Institute for Architects and "promotes and fosters the exchange of information and knowledge between members, professional organizations, and the public for high-quality planning, design, and delivery of justice architecture."

In short, a dazzling array of buildings and images present themselves. What then are the narratives inscribed therein? What representations are chosen, which norms revealed, and what practices lack reference? Following in the footsteps of Jeremy Bentham and Michel Foucault and therefore appreciating the centrality of architecture to power, this chapter relies on inter-jurisdictional comparisons to understand the relationship between the monumentality of recent court construction and the shifting norms of adjudication, reconfigured through democratic commitments that "all persons" have access to the public venues provided by courts.

Adjudication is an ancient form, yet it has changed significantly in the last three centuries. What were once "rites," in which spectators watched judges pronounce judgments and rulers impose punishments, are now "rights," requiring that all courts be "open and public."[2] While judges once served as loyal servants to the state, judges are now situated as independent and empowered to rule against the state and protected from executive and legislative wrath when doing so. Further, while once the individuals eligible to participate—as litigants, witnesses, staff, and judges (both professional and lay)—were limited by various markers of status (such as gender, race, and class), today "everyone" is entitled to be heard in democratic orders.

The buildings in which courts work have, therefore, changed in many ways. Courtrooms were once tucked into multipurpose town halls as various public officials shared quarters. For example, in the United States during the nineteenth century, state courthouses were commonplace, but the federal government owned very few buildings, and, until the 1850s, none were denominated "courthouses." By the end of the twentieth century, the federal government had provided its judges with "purpose-built" structures—more than 550 courthouses.

With new buildings came new instruction on the role of the judge. In multipurpose Renaissance town halls, texts and allegorical paintings warned judges to be dutiful servants of the state. Scenes of the Last Judgment invoked a higher authority, reiterated with admonitions such as "For that judgment you judge, shall redound on you" (Zapalac, 32–33). One of the oft-depicted *exemplum iustitiae* was *The Judgment of Cambyses,* referencing an account by Herodotus from around 440 BCE (Herodotus, 95,170,171). A king, Cambyses, learned that a judge, Sisamnes, was corrupt and ordered him flayed alive. Thereafter, Cambyses appointed Otanes, the judge's son, to serve as a jurist, required to sit on a seat made from his father's skin.

That narrative was prominently displayed in many venues, here exemplified by the 1498 installations in the Town Hall of Bruges. The remarkable diptych by the Flemish artist Gerard David (Figs. 23.1 and 23.2) consists of painted panels, each almost 6 ft high and 5 ft wide, one focused on the arrest of Sisamnes and the other offering excruciating details of the flaying. While classical authors identified Cambyses as a king

[2] Examples include the Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221, 228; and the International Covenant on Civil and Political Rights G.A. Res. 2200A (XXI), art. 14, U.N. Doc. 1/6316 (Dec. 16, 1966).

Fig. 23.1 *Arrest of the Corrupt Judge*, left panel of the diptych *The Justice (Judgment) of Cambyses*, Gerard David, 1498, Musea Brugge, Belgium. Copyright: Musea Brugge, Groeningemuseum. Image reproduced with the permission of the copyright holder

Fig. 23.2 *Flaying of the Corrupt Judge*, right panel of the diptych *The Justice (Judgment) of Cambyses*, Gerard David, 1498, Musea Brugge, Belgium. Copyright: Musea Brugge, Groeningemuseum. Image reproduced with the permission of the copyright holder

Fig. 23.3 (Detail) *Les Juges aux mains coupées*, Cesar Giglio, circa 1604, Town Hall of Geneva, Switzerland. Photograph reproduced courtesy of the Centre d'iconographie genevoise. Painting of the chamber of the Conseil d'Etat in the Baudet Tower

gone mad (Seneca labeled him "bloodthirsty" (Seneca, 289–297)), Renaissance literature repositioned Cambyses as wise to sanction an unjust judge.

In 1604, the Town Hall of Geneva inscribed a parallel impression of Judicial vulnerability in a long panel covering the upper third of the wall in its room reserved for the Conseil d'Etat. Called *Les Juges aux mains coupées* (*Judges with their hands cut off*) (Fig. 23.3), the depiction includes a scroll whose text, taken from *Exodus 23:8,* warns: "Thou shall not accept gifts, for a present blinds the prudent and distorts the words of the just." While that injunction is today familiar, in the sixteenth century, "gifts were everywhere" as presents were regularly given to honor officeholders (Davis, 85). The line between a "good" gift and a "bad" one (today called a bribe) was not clear then (nor always, now). Public displays of *Cambyses* and *Les Juges aux mains coupées* aimed not only to instill norms about gifts but also about fear, teaching judges to avoid incurring a ruler's wrath.

The political iconography of the Renaissance serves as a reminder of the distance between courts then and now. Historically, autocratic and patriarchal messages insisted on state power over its judges. But by the 1800s, Jeremy Bentham offered a competing ideology—that while presiding on trial, the judge was also "on trial," subject to the judgment of the populace.[3] To borrow a distinction drawn by Jonathan

[3] Jeremy Bentham, Rationale of Judicial Evidence, in 6 *The Works of Jeremy Bentham* 351.

Crary, members of the audience ceased to be passive "spectators" and assumed a role as participatory "observers" (Crary, 5–6). Bentham termed them "auditors," as he advocated that individuals be permitted in court to take notes ("minutes") to be disseminated so as to inform the "Public Opinion Tribunal" (Rosen, 26–27). Bentham sought to reshape the architecture of courts (as well as of legislatures and, infamously, of prisons through his proposed Panopticon) to be vehicles for "publicity" (Bentham, 351). Bentham's commitment to public processes was fierce. "Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account" (Bentham, 355).

Bentham's vision was materialized in the centuries thereafter in constitutions and international conventions enshrining "open and public courts" in which "everyone" was entitled to be heard. Courts became a site contributing to the public sphere, or as Nancy Fraser reminds us, sphere*s* (Fraser, 109)—as many venues are required for diverse and differently resourced "publics" to engage in the discursive exchanges envisioned by theorists of democracy like Jürgen Habermas. Because judges are obliged to function in public, to treat persons with dignity, and to enforce exchanges between radically disparate parties (private and public), they literally enact democratic precepts of equality and offer opportunities for dialogic exchanges in which popular responses affect norm creation and application (Zapalac, 32–33, 196).

Between the eighteenth and twentieth centuries, judges in many countries escaped servitude, obtaining independence guaranteed by mechanisms such as tenure in office and fixed salaries. By the late twentieth century, courts in turn had become a staple of development programs; transnational organizations (such as the UN and the World Bank) posited that independent judges were requisite to stable, successful market economies and to politically responsible states.

Courthouse design reflects these shifts. Aside from portraiture (often opaque to viewers who are unlikely to recognize individual judges amidst the thousands now occupying that role), the relationship between rulers and judges is rarely referenced directly. Courtrooms may be equipped with state emblems, fasces, coats of arms, and flags, but the state as overseer of the judge is no longer personified. Commonly, set-asides for public art have produced a variety of flora, fauna, text, and an occasional image of humans. The array takes representational or abstract shape in metal, ceramics, bronze, LCD displays, photographs, paintings, and weaving.

The absence of a didacticism explicating state authority *over* judges should be read as recognition of the new authority *of* judges, rendered impersonal. The judge is embodied by location in the place of honor, an elevated bench, in the space of honor—the courtroom. Although (as discussed below), courtrooms are a small part of the square footage in courthouses, now filled with offices and complex circulation patterns, the courtroom is (in the words of a leading US jurist) the "pearl" within (Woodlock, 158). What specifies a room as a courtroom is a layout that dedicates an isolated, esteemed space for the judge. And rather than art, the major emblematic gesture is the enclosing structure, providing visual evidence of what interactions among judges, lawyers, architects, politicians, and citizens seek to inscribe.

23.2 Parallel Projects of Political Iconography in the United States and France

Even as courthouses celebrate the independence of the judge, they also demonstrate the *dependence* of jurists, reliant on other branches of governments to support the elaboration of the "administration of justice." Below we sketch parallels between the United States and France, as both launched major building programs during the last decades of the twentieth century to renew the housing stock of their courts.

The two countries vary on several dimensions. The United States is a federation, while France operates under a centralized system. Further, the United States relies on a common law tradition and France on the civil law, producing different juridical institutions (the presence or absence of a jury) that result in somewhat different layouts for courtrooms.[4] Nevertheless, the planning, aspirations, and outcomes were similar. In both countries, court administrators, architects, and judges held conferences, drafted building guides, laid out ambitious construction plans, and garnered funds for new structures, designed by world-renowned architects and adorned with artwork specially designed for these new public spaces.

23.2.1 Monumental US Federal Courthouses: William Rehnquist Innovates to Renovate

Grand buildings suggest a history that may mislead. In the United States, the federal courthouse building program regained momentum in the late 1980s after William Rehnquist became the Chief Justice of the United States. Responsive to concerns of judges in many locales, his senior staff set out not only to expand the number of facilities but also to make statements about the centrality of the lower federal courts to the country.

A few words on the relevant government entities are in order. Because each state has an independent court system, two judiciaries operate side-by-side. Counting all the judges and cases across the 50 states, more than 30,000 judges respond to more than 40 million civil and criminal case filings a year (LaFountain, 21). Tens of thousands more proceedings occur in administrative agencies, functioning as tribunals. In contrast, the federal courts have a limited jurisdiction and deal with a tiny fraction of the filings. On average, about 360,000 criminal and civil cases are filed yearly, along with more than one million bankruptcy petitions. The number of federal judges located in courthouses runs around 2,000. And, as in the states, a great deal of adjudication takes place in administrative agencies; for example, the Social Security Administration

[4] For example, French guidelines detailed somewhat different seating arrangements for civil and criminal proceedings, while common law countries generally use the same room for both kinds of cases. See, for example, *Palais de Justice de Grenoble*, 24–26 (Ministère de la Justice, 2003).

takes evidence in some 500,000 cases a year.[5] Yet the federal courts are the dominant symbol of "courts"—better known and represented in the popular national media than are their state counterparts. That prominence comes in part from resources, as well as from the work of the United States Supreme Court, sitting in its iconic (if relatively new) temple-like building. When that building opened in 1935, the court issues many more judgments than its current average of about 80 opinions annually.

The growth of federal court administration has been key to court construction. In 1939, Congress moved support for the federal courts away from the Department of Justice and into the judiciary's own Administrative Office (AO). That office reports to the Judicial Conference of the United States, whose roots go back to the 1920s when William Howard Taft was the Chief Justice. The Judicial Conference, chaired by the Chief Justice, has become the corporate policy voice for the federal judiciary. A different government entity, the General Services Administration (GSA), was chartered by Congress in 1949 to run all the federal buildings—prompting one commentator to name the GSA the "largest landlord in the world" (Dean, 62). Yet a third federal agency, the National Endowment for the Arts (NEA), created in the 1960s to foster American artistry, has been an advocate for improving federal architecture. The leadership in Washington, DC is but one part of the fabric of political interactions among judges and members of Congress representing specific localities that have generated projects and funding.

Before the 1960s, the relatively few federal judges had modest needs. Federal judges often shared "court quarters" (their term[6]) with post offices, another of the national functions. But from the 1960s through the 1990s, Congress authorized hundreds of new causes of action—about consumer, environmental, labor, and civil rights—empowering an array of litigants to file cases in federal court. Congress also increased the number and kinds of judges working in federal courthouses. Housing became an issue.

By the late 1980s, the judiciary thought its facilities insufficient. To garner support, the AO proffered the term "Judicial Space Emergency" for its "housing crisis" in an effort to obtain attention from its landlord, the GSA (JCUS 1989, 82). The press responded with reports that courtrooms were inadequate, that staff had no place to work (Cannell, W18), and that old courthouses were "nightmares for the federal marshals in charge of security, mainly because existing circulation forced the public, judges, and defendants to traverse the same corridors and use the same restrooms" (Dean, 62).

Another prong of the building plan was to detail what needed to be built. In the late 1970s, the GSA, working with the judiciary, developed a "Design Guide" for courts. After Chief Justice Rehnquist took office in 1987, he chartered a standing subcommittee, devoted to "space and facilities" and charged with oversight of long-term planning, construction priorities, and design standards (JCUS 1987, 59). Within a few years, the federal courts had drafted its own design guide. First published

[5] *Plan to Eliminate the Hearing Backlog and Prevent its Recurrence*, 4.

[6] Annual Report of the Judicial Conference of the United States (hereinafter JCUS), Sept 24–25, 1953 at 28.

in 1991 and revised several times thereafter,[7] the *US Courts Design Guide* outlined "state-of-the-art design criteria for courthouses" (*US Courts Design Guide* 1997, Intro, 2). As the 2007 version explained:

> The architecture of federal courthouses must promote respect for the tradition and purpose of the American judicial process. To this end, a courthouse facility must express solemnity, integrity, rigor, and fairness. …
>
> Courthouses must be planned and designed to frame, facilitate, and mediate the encounter between the citizen and the justice system. All architectural elements must be proportional and arranged hierarchically to signify orderliness. The materials employed must be consistently applied, natural and regional in origin, be durable, and invoke a sense of permanence. (*US Courts Design Guide 2007, 3–11)*

The guide also detailed specified courtroom requirements and layouts. When Chief Justice Rehnquist's predecessor, Warren Burger, chaired the judiciary, the presumptions were that courtrooms were to be made "available on a case assignment basis to any judge"; no judge on multi-judge courts had "the exclusive use of any particular courtroom" (JCUS 1971, 64). In contrast, the *2007 US Court Design Guide* required that all "active judges" have a courtroom dedicated to their individual use. Constant availability was explained as

> Essential … to the fulfillment of the judge's responsibility to serve the public by disposing of criminal trials, sentencing, and civil cases in a fair and expeditious manner and presiding over the wide range of activities that take place in courtrooms requiring the presence of a judicial officer (*2007 US Courts Design Guide*, 2–8).

By 2008, when Congress reduced funding, the Judicial Conference opened up consideration of courtroom sharing for senior and magistrate judges.[8]

In the 1980s, working with the GSA, the Judicial Conference had settled on courtrooms ranging from 1,120 to 2,400 square feet (*GSA Courts Design Guide* 1979, 1984, 1–5), with ceilings generally set at 12 ft (*GSA Courts Design Guide* 1984, 1–10). In contrast, the judiciary's 2007 Guide made 2,400 square feet the standard size and raised the ceilings to 16 ft to "contribute to the order and decorum of the proceedings" (*US Courts Design Guide* 2007, 4–3). Most furnishings were to be fixed to the floor, and finishes were to "reflect the seriousness and promote the dignity of court proceedings" (*US Courts Design Guide* 2007, 12–5). As for the public space, observers were set far back in the room, with seating ranging from 40 to 80 depending on whether the room was for trial or appellate court. The cost of each courtroom and its adjacent offices spaces was estimated, on average, to be about $1.5 million.

[7] Administrative Office of the US Courts, Space and Facilities Committee, *US Courts Design Guide* (1991, 1997, 2007).

[8] Judicial Conference Adopts Courtroom Sharing Policy as Latest Cost-Saver, 40 *Third Branch* 1 (Sept., 2008).

Translating that figure (and many others for the rest of the space) into real buildings, 45 projects planned between 2002 and 2006 were budgeted to require $2.6 billion.[9]

By a variety of metrics, the judiciary's efforts were remarkably successful. By 1991, the judiciary had secured $868 million in new construction funds (History of the Administrative Office of the United States: Sixty Years of Service to the Federal Judiciary, 195). In the decade that followed, plans were made for 160 courthouse constructions or renovations, to be supported by $8 billion.[10] Federal courthouse projects represented the federal government's largest customer for buildings constructions from 1995 to 2005.[11] As a result, the federal judiciary tripled the amount of space it occupied. The photograph (Fig. 23.4) of nine courthouses built or renovated between 1998 and 2008 by world-renowned architects (such as Henry Cobb, Richard Meier, Thom Mayne, Michael Graves, and Robert Stern) captures some of the exuberance.

The judiciary's success stemmed in part from GSA efforts to improve the quality of federal buildings. Distress about federal architecture dated back to the 1960s, when President Kennedy chartered an "Ad Hoc Committee on Government Office Space." The lead staffer (and later Senator), Daniel Moynihan, is given credit for the 1962 report and its one-page set of "guiding principles."[12] The Ad Hoc Committee, like leaders of European city states and the early American republic, sought to have public architecture serve as exemplary of national identity. Drafted in the shadow of the Cold War, the 1962 goals called for federal buildings to "provide visual testimony to the dignity, enterprise, vigor, and stability of the American Government" (Id., 4).

The implicit comparison to the Soviet Union, coupled with distaste for "faceless modern style buildings" and for repetition (whether Beaux-Arts or modern), produced another premise: that no "official style" be adopted (I *Vision + Voice*, 5). Further, reflecting both a commitment to entrepreneurism and the well-orchestrated efforts of the Association of Architects (AIA), the Ad Hoc Committee embraced the private sector. "Design must flow from the architectural profession to the Government and not vice versa" (Id.).

Yet few government structures built before the 1990s met the Ad Hoc Committee's goals because (as GSA publications later described) the chief "concerns" remained

[9] General Accounting Office, GAO-02-341, *Courthouse Construction: Information on Courtroom Sharing* at 3 (2002).

[10] *Status of Courthouse Construction, Review of New Construction Request for the US Mission to the United Nations, and Comments on H.R. 2751, To Amend the Public Buildings Act of 1959 to Improve the Management and Operations of the US General Services Administration: Hearing Before the Subcomm. on Public Buildings and Economic Development of the H. Comm. on Transportation and Infrastructure*, 105th Cong. 22 (July 16, 1998) (testimony of Robert A. Peck, Commissioner, Public Buildings Service, GSA).

[11] *The Future of Federal Courthouse Construction Program: Results of a GAO Study on the Judiciary's Rental Obligations: Hearing Before the Subcomm. on Economic Development, Public Buildings, and Emergency Management of the H. Comm. on Transportation and Infrastructure*, 109th Cong. 269 (June 22, 2006) (statement of David L. Winstead, Commissioner, Public Buildings Service, GSA).

[12] "Guiding Principles for Federal Architecture" are reproduced in I *Vision + Voice* at 4–5.

Fig. 23.4 United States Courthouses built or renovated 1998-2008; US General Services Administration (2009). Provided courtesy of the US General Services Administration, Office of the Chief Architect. Photographs taken by Taylor Lednum, Thomas Grooms, and Frank Ooms.

Left to Right: Top: John Joseph Moakley US Courthouse (Boston, MA); Alfonse D'Amato US Courthouse (Central Islip, NY); US Courthouse (Tallahassee, FL);

Middle: Wayne Lyman Morse US Courthouse (Eugene, OR); William B. Bryant US Courthouse Annex (Washington, D.C.); Wilkie D. Ferguson US Courthouse (Miami, FL);

Bottom: Corpus Christi Federal Courthouse (Corpus Christi, TX); Roman L. Hruska US Courthouse (Omaha, NE); Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse (Richmond, VA)

"efficiency and economy,"[13] and architectural choices favored "safe" and "noncontroversial designs" (Id., 93). But pressed by criticism from the NEA's "Task Force on Federal Architecture" (Craig 1978) that worried about the lack of a distinctive "federal presence" and by congressional inquiries,[14] GSA retooled its processes. One model was the success of federal jurists Stephen Breyer and Douglas Woodlock, who had enlisted sophisticated consultants for planning the federal courthouse in Boston, designed by Harry Cobb and adorned with monumental monochrome panels by Ellsworth Kelly (Figs. 23.5 and 23.6).

By 1994, the GSA had developed its "Design Excellence Program" to attract prize-winning architects to federal projects. The federal courts were a major beneficiary of the new procedures. The courts' monthly newsletter described the results as a "Renaissance" for federal courthouses that had, before then, been "box-like structures" (The Renaissance of the Federal Courthouse, 1). The GSA reported that it had succeeded in providing "the American public with government office buildings and courthouses that are not only pleasing and functional, but that also enrich the cultural, social, and commercial resources of the communities where they are located. Such public statements of American culture are meaningful contributors to the vibrancy of our democracy."[15]

23.2.2 A New French Judicial Architecture

During the late 1980s, the French Ministry of Justice was similarly reviewing its 723 operating sites as it began a series of projects, defined by "a certain architectural ambition" to rationalize the services provided by courts through administrative reform and new construction.[16] The goals of modernizing justice and affirming the commitment to law and "the values of democracy" (*New French Judicial Architecture*, 3) entailed providing more space for judges,[17] improving conditions for decision making, reorganizing first-tier tribunals and courts (sometimes through consolidation into a single facility), creating efficient buildings,[18] reducing delay, coping

[13] *Growth, Efficiency and Modernism: GSA Buildings of the 1950's, 60's, and 70's* at 45.

[14] See, for example, *The Need for Architectural Improvement in the Design of Federal Buildings, Hearing Before the Subcomm. on Buildings and Grounds of the S. Comm. on Public Works*, 95th Cong. (1977).

[15] *Design Excellence: Policies and Procedures* 169 (Washington D.C.: US General Services Administration, 2008) (hereinafter 2008 *GSA Design Excellence Policies and Procedures*).

[16] *La nouvelle architecture judiciaire: Des palais de justice modernes pour une nouvelle image de la Justice* 3, 103 (*New judicial architecture: Modern Courthouses for a new image of Justice*) (hereinafter *New French Judicial Architecture*). This volume was produced in relationship to a colloquium held in Nanterre, France, in May, 2000.

[17] Between 1975 and 1995, caseloads tripled; during the 1990s, the number of magistrates increased 40%. Mengin, *Deux siècles d'architecture judiciaire aux Etats-Unis et en France (Two Centuries of Judicial Architecture in the United States and France)*, 11.

[18] L'Agence de Maîtrise d'Ouvrage des Travaux du Ministère de la Justice, 2004 *Rapport d'activité*, 29.

Fig. 23.5 John Joseph Moakley United States Courthouse, Boston, Massachusetts. Architect: Harry Cobb, 1998. Photograph Copyright: Steve Rosenthal, 1998. Photograph reproduced with the permission of the photographer

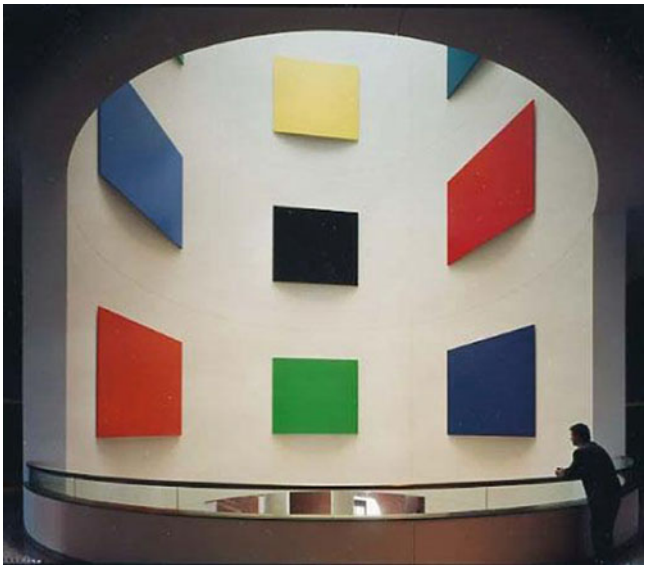

Fig. 23.6 *The Boston Panels*, Ellsworth Kelly, 1998, in the John Joseph Moakley United States Courthouse, Boston, Massachusetts. Architect: Harry Cobb, 1998. Photographer: Steve Rosenthal. Photograph Copyright: Steve Rosenthal, 1998, reproduced with the permission of the photographer and the artist

with rising filings, and providing more functional, secure, and welcoming facilities that would be readily legible to users (Id., 3, 97).

Historians, jurists, art critics, and administrators came together to ponder the shape needed to express an array of commitments—to the evolving nature of justice with its multiplication of laws and tasks, the diversifying culture, and transnational obligations of fairness.[19] As in the United States, concerns were raised that French public architecture had, during the twentieth century, become banal, producing undistinguished structures conflating justice with bureaucratic administration (Gouttes, 9–11). As one of the leading commentators, Antoine Garapon, put it: courthouses were often "indistinguishable from other public buildings"; this "architectural silence" was "dangerous" as the "erosion of legal symbolism . . . threaten[ed] the very foundations of the legal system" (Garapon, 142).

When undertaking the future planning ("imagining courts for the twenty-first century," as Garapon explained), commentators analyzed the output of earlier eras (Garapon, 1). Robert Jacob saw Medieval and Renaissance judicial architecture reflective of a fluid exchange between commerce and law (Jacob, 46–52), while, under Louis XII, courthouse space became more luxurious to denote the centralizing authority of regal power (Id., 48–51). Monumental entryways and dedicated doorways, "framed by columns" and long stairways, put law on an elevated plane that was both distant from the ordinary person and underscored the "extraordinary act" of "going to law" (Id., 39).

Similarly, Garapon saw the changing configuration of French courthouses as denoting the political shift from a sovereignty centered on the nation (and earlier, the king) to one committed to representative democracy. As Garapon schematized French traditions, under the ancien régime, courthouses were basilica-like, with courtrooms akin to chapels. Judges, priestlike, sat on high to superintend the confrontation between man and law. Thereafter, more democratic visions shaped courthouses to resemble parliaments, with judges like a chairperson overseeing exchanges that, through procedural commitments, acknowledged and valorized the autonomy of individuals in horizontal relationship to each other. One might then map successive eras of courthouse styles—those evocative of "le palais royal, le temple de Thémis et l'hôtel des droits de l'homme" (Lamanda, 69).

But what should a "Hall of the Rights of Man" look like? Jacob argued that traditions marking the isolation and grandeur of justice no longer fit contemporary commitments of the shared ownership of law's promulgation and application. Marc Moinard, secrétaire general of the Ministry of Justice, wanted viewers "to be able to identify the building as a place where justice is meted out" (Moinard, 142), a goal that Jacob ascribed to the "universal need . . . for a clearly marked place where good can be distinguished from evil" (Jacob, 43). Garapon called for architects and lawyers to "unite to find new ways to express a democratic legal process" that reflected that courts were "simultaneously a theatre, a temple and a forum" (Garapon, 142).

[19] One event, "Palais de Justice: héritage et projets" ("Courthouses: legacy and projects"), was convened in Paris in 1994. See Robert Jacob, *The Historical Development of Courthouse Architecture*, 14 *Zodiac* 31, 43, n. 2 (hereinafter Jacob, *Historical Development)*. Papers from that conference can be found in 265 *Archicrée* (1995).

Fig. 23.7 Exterior, Palais de Justice, Bordeaux, France. Architect: Richard Rogers, 1992–1998. Copyright: APIJ. Photographer: Jean-Marie Monthiers. Photograph reproduced with the permission of the APIJ and the photographer. Reproduction without written permission of the copyright holders is forbidden

In response to this mélange of goals, the Justice Ministry acquired more sites and sought accomplished architects.[20] With the goal of extending French justice properties from a footprint of about 1.7 million meters (approx. 5.8 million square feet) by another 500 million meters (approx. 1640.5 million square feet), the Ministry's administrative building arm developed detailed dossiers for each function within a courthouse, specifications on room sizes, and left general discretion to architects for the designs of entry areas and the exterior aesthetics (Bels 1995, 3). Like the leadership in the United States, French officials obtained significant funds. A budget of about 1.5 billion dollars (6 billion francs) supported the projects from 1995 to 1999 (*New French Judicial Architecture*, 103). Twenty-seven regions in France were flagged in the early 1990s for improvements to run through 2015. By the end of 2004, eighty-nine buildings (forty-seven related to prisons and forty-two for courts) were under construction or had been completed in both France and its territories abroad (Guadeloupe, Martinique, La Réunion, Mayotte, and French Polynesia) at a cost of more than 2 billion euros (about $3 billion).[21] As in the United States, the result is an impressive array of structures whose exterior shapes varied dramatically.

Commissions through competitions (the customary mode for public building in France) went to well-known architects, including Henri Ciriani for le Palais de Justice de Pontoise, Bernard Kohn for Montpellier's facility, Richard Rogers for Bordeaux's courthouse (Fig. 23.7), Henri Gaudin for the Besançon facility, Françoise Jourda and Gilles Parraudin for Melun's Palais de Justice (Fig. 23.8), and Jean Nouvel for the courthouse (Fig. 23.9) in Nantes. They produced monumental buildings, as a few details from Nantes make plain. Sited on a small Loire island accessible by a footbridge, the building is a square rectangle of almost 100,000 square feet, whose

[20] Interview with René Eladari, Director of the Ministry of Justice Long Term Planning Program, 265 *Archicrée* 79.

[21] L'Agence de Mâitrise d'Ouvrage des Travaux du Ministère de la Justice. *2004 Rapport d'activité* at 7, 28.

Fig. 23.8 Exterior, Palais de Justice, Melun, France,circa 1998. Copyright: APIJ. Photographer: Jean-Marie Monthiers. Photograph reproduced with the permission of the APIJ and the photographer. Reproduction without written permission of the copyright holders is forbidden

Fig. 23.9 Palace of Justice, Exterior View, Nantes, France. Architect: Jean Nouvel, 2000. Photographer: Olivier Wogenscky. Copyright: APIJ, April 2000, reproduced with the permission of the AMOTMJ/ Ministry of Justice, the photographer, and APIJ

dimensions (113.4 m or 372 ft by 81 m or 265.75 ft) befit the word "palais."[22] Paved in stone and clad in glass, the waiting room is said to express "the solemnity of justice through its transparent, clear, and balanced character" (Nouvel, *Commentary*, 28). The stone, the metal framing of the glass walls, and the interior walls of the open areas are all charcoal black, and the geometry relentless. The "immense lobby running the width of the building" (about 370 ft) permits entry into three boxlike contained areas, in which sit seven blood-red courtrooms as well as auxiliary offices (Gore, 71, 74).

Other facilities ranged from an "audacious" (Zulberty, 67) and novel conception in Bordeaux by Richard Rogers of cone-like modular units (Fig. 23.7)—described as looking like "wine casks, eggshells, or beehives" (Leers, 129) to a recycled parliament building in Rennes (Hanoteau, 28–34) and a renovated courthouse in Nice.[23] The courthouse in Melun (Fig. 23.8) is an imposing parallelepiped, 236 by 177 ft (78 by 54 m) with a two-story, glass-cloaked entry fronted by six treelike pillars supporting an overhang, some 80 ft or 24 m from the ground. The façade, sheltering pedestrains, references the role of trees in French justice iconography (Palais de Justice de Melun, 8–11). Inside, various tribunals are consolidated in an effort to make them visible and accessible.

Commentators found some buildings successful, "overturning customs and symbols . . . .[and] helping to bring about another kind of justice, one that is more open, more democratic" (Simon, 88), while other structures were criticized for failing to take those very concerns into account (Saboya, 75–77). As for the diversity, some thought it praiseworthy, and others argued undue fragmentation (Depambour-Tarride, 36–40), a concern also heard in the United States where the array of styles meant that none ensconced a "federal presence".

23.3 Access, Usage, and Isolation

We have argued that courthouse architecture narrates the political capital of adjudication as well as the symbiosis of the independence of the judge and the dependence of the judicial apparatus on the state for its financial wherewithal and materialization. Builders of courthouses claim that new structures make other statements—reflecting democratic courts' commitments to their citizens.

The Nantes Palais de Justice is but one of many buildings clad in glass. The German Constitutional Court, for example, has an "extensive transparent glass skin," admired for providing an "open face to the public" for courts (Bürklin, 15–42). In the United States, glass is also said to signify the "new openness and accountability of the court to its community (Greene, 63, 65)," as well as the justice system's "principles of *transparency, accessibility*, and *civic engagement*" (Id., 63). In the spring of 2008 when a new courthouse in Manchester, England, opened

[22] Commentary, Jean Nouvel, *Courthouse in Nantes* (hereinafter Nouvel, *Commentary*), 28.

[23] See *Palais de Justice de Nice* (Ministère de Justice, 2004).

("the biggest court building to be constructed in Britain since the Royal Courts of Justice in London opened in 1882"), Europe got its "largest hung glass wall."[24]

But equating glass with access to justice is simplistic, for courthouses are not the only structures for which glass is claimed to be especially appropriate. During the nineteenth century, glass was celebrated for its use in train stations, commercial arcades, and exposition sites, including the Grand Palais in Paris and the Crystal Palace in London (McKean). Technology is foundational to the "crystal metaphor" (Bletter 1981, 20–43); during the nineteenth century, steel and glass manufacturing changed. In the twentieth century, when environmental concerns became acute, coatings were developed to reduce "the cost of interior climatological systems" (Fierro, 27). Similarly, when questions of security and terrorism rendered vulnerable the glass walls of courts, embassies, libraries, and other government buildings (Loeffler 1999, 1998), "ballistic-resistant level" glass was developed, as were "gradations of clear, transparent, and opaque" glass (Greene, 66)—producing real what art critics have termed "opaque transparency" (Bletter, 115–120).

Political explanations of glass's import vary depending on a building's use. Great nineteenth-century greenhouses displayed the "nurturing" qualities of glass, providing a habitat that brought plants to life (Ersoy, 38–39). During the Cold War, glass in US embassies was equated with democracy's openness, an explanation also proffered for the "*Grand Projets* of François Mitterand" in the 1980s and 1990s (Fierro, viii–ix). In 2008, the glass in a baseball stadium in Washington, DC was attributed to baseball's special relationship to the "transparency of democracy" (Nakamura, B1). In courts, glass is evidence of law's accessibility and transparency, although one architect also noted that glass renders courts "open to public scrutiny, inclusive of public participation, and dependent on the support and protection of its community" (Greene, 66).

Yet art theorists remind us that glass can functions as a "blockage" distancing the observer (Riley, 26; Vidler, 4); a viewer may look at a mirrored reflection rather than see what lies through or beyond the glass. Moreover, glass is a mechanism for transferring voyeuristic control to a distant viewer. Indeed, complaints were leveled against the Bibliothèque Nationale de France for "putting scholarly readers on display, as if 'animals in a zoo,' exposed to scrutiny from a general public who were too distant . . . to engage reciprocally and meaningfully" (Fierro, 29). That point is reiterated in "high-security" courtrooms in which defendants sit in a glass box.

23.4 Zones of Authority

Whatever transparency may be provided by glass skins often ends at the courthouse door. Once inside, the aim is—to borrow from commentary on recent Italian courts—"to keep the various users of the building (magistrates, judges, lawyers,

[24] Rozenberg, *Civil Justice Centre Shines in Court Gloom*, Telegraph, (Apr. 19, 2008), http://www.telegraph.co.uk/news/uknews/1584453/Civil-Justice-Centre-shines-in-court-gloom.html. Rozenberg noted that the glossy new court, with six "specialist commercial judges," was hoping to "drum up more work."

public, prisoners) as separate as possible" (Aymonino, 128). Would-be entrants are screened, and those admitted sent off on separate paths. While efforts are made to convey a sense of "free movement," boundaries are everywhere (*1997 US Courts Design Guide*, 3–10, *2007 US Courts Design Guide*, 3–10).

Segregation of space inside a courtroom has a long history. While seventeenth-century buildings once permitted intermingling, courtroom layouts evolved into divided space, represented in some jurisdictions by a literal "bar" between the area reserved for the professional jurists and the public (Mulcahy, 384–385). A deeper segregation throughout the building is a twentieth-century artifact, produced as tragic shootings of judges and bombings of courthouses brought security to the forefront. The result is that three "circulation patterns" have become a common feature of courtroom construction in the United States, France ("les trois flux"[25]), and elsewhere.

Denominated "public, restricted, [and] secure" zones, the distinctions entail separate entries, elevators, and corridors for the public (including civil litigants), for judges, and for criminal defendants (*US Courts Design Guide 2007*, 3–10). Hierarchies—or stacking—are commonplace; the public enters and remains on the bottom floors, and judges and administrators occupy higher levels. Passage in and out of courthouses may also be secured so that judges enter through "a restricted parking structure within the confines of the building . . . to a restricted elevator system that transports them to their chambers and courtrooms" (*GSA Design Excellence Policies and Procedures* 2008, 168). Prisoners are likewise walled off, entering a secured sally port and held in cellblocks.

Security is predicated on perceived needs both physical and visceral, warding off what one critic called the "contamination" emanating from criminal defendants and potentially disruptive spectators (Hanson, 58). Patterns of segregation are argued as politically apt—that judges ought not have to confront those whom they must judge, and that ordinary persons ought not have to see "defendants walked, in shackles, through public corridors in the presence of other citizens who may be there merely to pay a traffic ticket" (Phillips, 204).

Because the three circulatory patterns buffer against the possibility of contact, "circulation space often accounts for 30–50% of the usable space in a building" (*2007 US Courts Design Guide*, 3–5). The multiple paths add significant expense. In 1993, estimates of cost in US courthouses were about $160 per gross square foot, "at least $44 per gross square foot more" than the costs of building "a comparably sized federal office building."[26] In short, remarkable amounts of space and funds are devoted to people not meeting each other inside courthouses.

Other problems emerge when the focus turns to hallways. One courthouse architect explained: "It is remarkable how many existing court facilities have no adequate waiting space outside the courtrooms" (Phillips, 221). While the buildings were to express that "you, your liberty and property, are important," they were not

[25] An overview of several projects is provided in *Les Nouveaux Visages de La Justice*, 1–5.

[26] *More Disciplined Approach Would Reduce Cost and Provide for Better Decision making, Testimony Before the Subcommittee on Oversight of Government Management and the District of Columbia*, GAO/T-GGD-96-19 at 3 (Testimony of William J. Gadsby).

accompanied by "clear and generous lobbies, corridors, counters, and waiting areas," nor do they denote anything of the "bond between the individual and the justice system upon which all depend" (Id., 223, 224). Below, we detail the emptying of courtrooms, but, in many jurisdictions, hallways can be crowded with people. Yet for those with resources to do so, new technologies provide "virtual" alternatives, as litigants file documents electronically, download record data, and "meet" via video or telephone (Lederer, 190, 196).

23.5 The Signification of the Courtroom

Although modern design specifications separate populations, the courtroom is offered as the "interface" among the differently routed individuals. Like the glass metaphor, however, the idealized courtroom is problematic in practice. Not only is that space internally segregated (as users enter through different doors and sit in designated areas[27]), it is often underutilized.

During the 1980s and 1990s, the practices of judging were shifting. Enthusiasm for mediation, arbitration, and other modes of dispute resolution grew into the "alternative dispute resolution" (ADR) movement. In the United States, new rules and statutes produced "managerial judges," some of whom saw trial as a "failure" of the system (Resnik 1982, 2000). In England and Wales, Lord Harry Woolf spearheaded similar reform efforts. His 1996 report, *Access to Justice*, insisted on prefiling exchanges to avoid courts entirely and then judicial case management if that route was pursued (Woolf 1996). As Professor Simon Roberts explains, "In England, this 'culture of settlement' has been advocated by the higher judiciary, adopted as government policy, enshrined in a new regime of civil procedure and increasingly realized in court practice," resulting in the replacement of rule-based adjudication with "negotiated agreement" (Roberts, 1). At the transnational level, the 2008 European Directive on Mediation calls for EU members to promote mediation and permits member states to make mediation "compulsory or subject to incentives or sanctions."[28]

Many factors contribute to these changes, as well as to the results, which is the decline of courts as venues for public dispute resolution. On both sides of the Atlantic, trial rates are down. In federal courts in the United States, fewer than two in 100 civil cases start a trial—prompting debate about whether the "vanishing trial" is a problem (Galanter 2004, 259). While the *US Court Design Guide* insisted that each judge needed a courtroom of his/her own, congressionally chartered studies investigated usage rates in several courthouses and found, in 1997, courtroom lights

[27] See *1997 US Courts Design Guide*, 4–39.

[28] Directive 2008/52/EC of the European Parliament and of the Council (on certain aspects of mediation in civil and commercial matters)(21 May 2008) at Art. 1, sec. 1 and Art. 5, sec. 2.

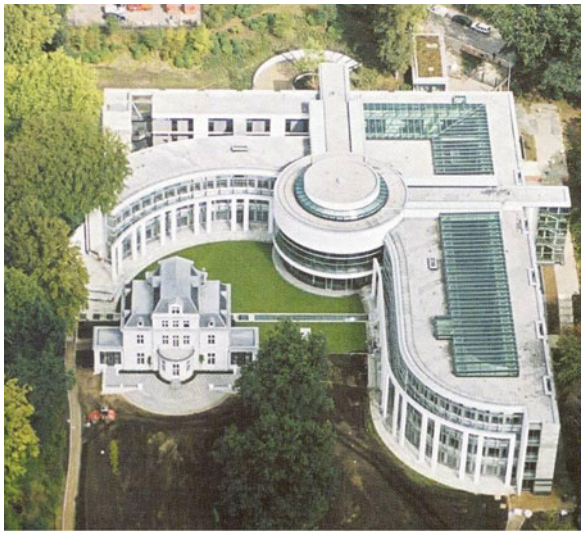

Fig. 23.10 Aerial view, International Tribunal for the Law of the Sea, Hamburg, Germany, 2005 photograph. Architects: Baron Alexander and Baroness Emanuela von Branca, 2000. Photograph copyright: YPScollection. Photograph reproduced courtesy of the International Tribunal for the Law of the Sea

were "on" about half the time.[29] Dame Hazel Genn provided data on declining trial rates in England, (Genn, 34–35) where Professor Roberts described how "often empty courtrooms" produced a growing "dislocation" between the "form" of the Gothic buildings and the "substance" of the exchanges transacted within (Robert, 23).

The unintended consequence of shifting from oral proceedings in courtrooms to an exchange of papers and discussions in chambers, as well as to outsourcing to private providers, is that some of the grandest courthouses are "lonely," if secure (O'Mahony 2004). Consider the International Tribunal for the Law of the Seas (Fig. 23.10). As of 2008, this treaty court has 160 member states. Its new courthouse, designed by Baron Alexander and Baroness Emanuela von Branca, opened in 2000. From the tribunal's inception in 1994–2008, however, 14 cases were filed. Even as courts lay claim to an architecture of openness made plain through glass, some are relatively infrequently used—seeming to be more like "fortresses," replete with both perimeter and interior surveillance (Phillips, 207), than lively sites of activity.

Thus, as a US federal judge Brock Hornby put it, the public image of a judge on a bench is outdated. He suggested that, instead, "reality T.V." ought to portray judges in "an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference)." A judge on bench was, he said, an "endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants" (Hornby, 462). Antoine Garapon proffered a

[29] See General Accounting Office, *Courtroom Construction: Better Courtrooms Use Data Could Enhance Facility Planning and Decision making* GAO/GGD-97-39 at 42–43 (1997).

parallel description of the decentralization of judicial activities in France—research and discussions often take place in offices, and interventions veering toward the therapeutic are also held in private settings (Garapon, 56). For a brief time in the United States, ADR was built into federal courthouses, as *US Court Design Guides* called for "alternative dispute resolution suites"—with roundtable layouts and several areas for consultations (JCUS 1995, 98).[30] But as conflicts with Congress about building funds have emerged, the guidelines dropped the specifications for ADR suites.

23.6 Reading Political Spaces

Are there "alternative" building designs to capture these new functions? In France, discursive courthouse planning explored questions of signification. How does a building reference judicial roles ranging from educators, interpreters, experts, conciliators, and mediators to adjudicators? Could one materialize judicial obligations for conciliation while creating courthouses, "the only institution that bears the name of a virtue" (Lamanda, 74). What ought to be the shape of courthouses, given that (in the words of a World Bank consultant on Courthouse Development) "the greater percentage of the modern courthouse is composed of general-purpose office space – perhaps 80–85%"? (Thacker, 3).

A few pragmatic responses have been proffered. For example, Garapon worried that (à la Foucault) the diffusion of power risked it being everywhere and nowhere. He commended the elimination of standard offices and the creation of an intermediary space—something between a courtroom and an office—where bureaucracy was replaced with more public spaces that enable public discourse ("circulation de la parole") (Garapon, 12–16). The South African Constitutional Court, opened in 2004, has aimed to do some of what Garapon recommended for France, by creating glass walkways that make the administrative aspects of the court visible to the public.

The building challenges reflect that the goals of instantiating national and transnational legal regimes through buildings unmistakably understood to be "courts" are burdened by the instability of the word "court," now comprehending a range of practices both public and private. In some respects, new courthouses are fair representations of the mélange of authority, privatization, and public ideology currently promoted by law. The segregated passages, quiet courtrooms, and administrative square footage document these shifts. At the same time, the built grandeur also seeks to assimilate new rightsholders to great judicial traditions and visibly expresses the idea that courts, once protective of limited classes, are today significant spaces aiming to dignify an expansive community.

[30] The *2007 US Courts Design Guide* eliminated the dedicated ADR spaces, suggesting use of conference rooms and jury rooms instead. Id. at 1–2, 11–2.

Further, some of the grand courthouses demonstrate the movement of public and private sector actors across domains. For example, Jean Nouvel's Nantes Palais de Justice resembles his design for the Cartier Foundation in Paris, also a grid-based "ethereal glass and steel building" (Gibson, 6). In addition, the allocation of funds to a few grand buildings, while a great deal of the business of judging occurs in less well-appointed administrative facilities, is reflective of maldistributions of resources throughout state infrastructures and services.

Thus, while some read new courthouses as symbolically silent (Garapon, 7), they can also be understood as symbolically apt, as class stratifications are reflected in law, as courts are entwined in economies reliant on law's centrality, and as builders wish to speak to political aspirations for state protection of all persons. The loneliness and austerity materializes some of the struggle to develop actual practices instantiating rights through public hearings and accountings. Rather than see courthouses as masking the complex interaction by which "the law court institution really operates" (Bels, 145), one can find in them revelatory maps, commemorating affection for practices of open justice amidst a transformation of legal processes that devotes the vast bulk of usable space to offices. The stratification expresses, as Marie Bels put it, "the operation of an institution that superimposes the different and contradictory work methods represented by the … 'business' side of the legal system and the technical aspects that allow the justice 'machine' to function" (Id.).

But the issue is not only whether construction expresses current trends but what law should do. Thus, deeper problems come by way of a return to Jeremy Bentham, who underscored the relationship between publicity and responsive government—entailing public access to the exchanges between jurists and disputants. As currently formatted, conciliation procedures take place in private. Even if (as Simon Roberts has argued) the trip to the massive buildings to confirm a negotiated settlement serves to legitimate parties' decisions, it offers no opportunities for third parties to engage as participatory observers.

If couched only in terms of a decline in public performance, the concern could be read as focused on theatricality and miss the democratic potential within practices of adjudication. When meeting its aspirations, courts insist on equality of disputants, oblige respect, and discipline the judge who, through the public surveillance, must render dignified treatment and fair procedures. Of course, courts may fail to do so, but, when practiced in public, the weaknesses are also revealed.[31] Moreover, public practices display the indeterminacy of fact and law. Revelations of applications of legal parameters can prompt political efforts for change. Using the United States as an example, public trials altered understandings of "domestic" violence, as well as prompted additional punishments for sexual offenders. Democratic input into adjudication can result in legal shifts styled progressive or conservative, but, whatever the direction, law's plasticity enacts the democratic promise of providing routes to alter governing norms.

[31] For example, in the United States, state and federal courts in the 1980s and 1990s commissioned more than 50 reports on problems of gender, racial, and ethnic bias in the courts (Resnik 1996).

It is not only that the means of expressing universal values recognizing dignity remains elusive in courthouse configurations. Actually doing so—dignifying humans in their contestation with each other and the state, rendering fair hearings, and struggling to be just—is challenging. Despite legal and rhetorical commitments to access, despite the economic and political utilities of public activities for legitimating authority, and despite the invocation of transparency by the deployment of glass around the world, the rising numbers of persons entitled, as a right, to public hearings have been met by procedures routing them to private resolutions and administrative dispositions. Neither contemporary courthouses nor the rule regimes they shelter make accessible many of the processes and practices of judges.

Architectural critic Paul Spencer Byard understood these difficulties when describing new courthouse building as "intensely sad"—responding to the "huge weight of a system bent toward retribution" (Byard, 145, 147). He wrote of the "bind" for courthouse architecture—that the "political emphasis on criminalization, prohibition, and retribution as proper responses" puts the architect in a position of requiring "quantities of space for courtrooms and related functions—duplicated and even trebled by requirements for segregation and security—to accommodate all the required adjudication and punishment" (Id., 142). Byard objected that the "design exercise is reduced to an effort to bury very large volumes of space in symbols that will lend them some legitimacy" (Id.). Several of the new and monumental buildings had "nothing to say" other than attempting to lend authority through recognizably important architectural forms (Id., 142–143).[32] Rather, and "[l]ike our times, contemporary court architecture is about effect, not substance; . . . about how great we have been, not how great we might become" (Id., 151).

23.7 If Performed in Open Air

Our focus has been on the monumentality of new courthouses, as well as the fragility of public adjudication. We do not yet know whether the buildings will prove to be awesome monuments to the past or retrieved and inhabited as lively vectors of public spheres. What needs, however, to be underscored is that the shift toward settlement modalities need not inevitably end public engagement with law's force. Just as courthouses can no longer be equated with public exchanges, alternatives to courts ought not to be assumed as necessarily entailing complete privatization.

Thus, in closing, we provide a glimpse of alternative semiotics by way of a trip made by the Australian Federal Court in 2005 to the Great Victoria Desert. Almost two centuries earlier, Jeremy Bentham had commented that "if performed in the *open air* . . ., the number of persons capable of taking cognizance of [judicial proceedings] would bear no fixed limits" (Bentham, 354). That proposition was put

[32] Examples included a federal courthouse designed by Richard Meier in Islip, New York, that Byard called "striking and strictly beautiful" while "literally and figuratively a monumental white void." Byard, 142–143.

Fig. 23.11 Ngaanyatjarra Land Claims Open Court, Parntirrpi Bore Outstation in the Great Victoria Desert, Australia, 2005. Photographer: Bob Sheppard, Trial Logistics Manager, Federal Court of Australia. Photograph reproduced with the permission of the photographer and courtesy of the Federal Court of Australia

into practice at the Parntirrpi Outstation of the Great Victoria Desert when the Federal Court set up a makeshift tent (Fig. 23.11), some 725 arid miles northeast of Perth, the capital of Western Australia.

The photograph shows the ceremonial pronouncement of a settlement allocating land rights claimed by the Peoples of the Ngaanyatjarra Lands over a mass three times the size of Tasmania. Solicitous of the claimants' needs and resources, the Federal Court traveled thousands of miles to hold the session. (Bentham had recommended an equal justice fund that included paying the costs of travel to and of lodging near courts [Schofield, 310]). The event did not adjudicate but recorded the conclusion of a multiparty dispute among public and private entities. The agreement recognized the preexisting rights of indigenous peoples to a vast land area, as it also enabled uses by telecommunication and mining companies, as well as by state and national governments (Stanley et al. 2005). The court's opinion praised conciliation:

> Agreement is especially desirable in native title cases due to the importance, complexity and sensitivity of the issues involved. Agreements between the parties minimises cost and distress and establishes good will between the parties for future dealings. (Id., para 17)

Yet the proceedings depicted are also an antidote to the privatization, and the story of what produced the image provides an appropriate coda to this discussion

about the function and meaning of new courthouses. The court's ritual was an effort to legitimate the settlement not only by making it legally enforceable (through the court order) but by using traditions associated with courts to acknowledge the role played by law. Indeed, the event was law-drenched—the product of courts, legislatures and the executive, responding to twentieth-century human rights movements marking new recognitions of group and individual rights.

When approving the results of an alternative dispute resolution regime and turning it into an enforceable order, the court relied on rituals of law, complete with icons of the country's authority. We know from one of the participants—Chief Justice Michael Black—that the court took pains to specify the open-air tent as a court of law. The "symbols of justice" were, as Chief Justice Black wrote, "present just as they would be in one of our courtrooms in the capital cities."[33] The Chief Justice sat in front of a canvas rendition of the Court's symbol—the Coat of Arms of the Commonwealth of Australia. The canvas, which traveled with the court for its "on-country hearings," was "designed by an aboriginal artist following the Commonwealth's written protocol permitting replication of the coat of arms" (Id.). The Justice sat at the center, wearing a ceremonial robe of Australian merino wool, faced in red silk divided into "seven equal segments" to "symbolize the elements of our federation and also equality before the law" (Id.). Yet more didacticism was sewn in, for the black robe itself was made of seven segments deliberately "unequal in size, symbolizing the diversity of our nation and the circumstances that the elements of different size make for a unified whole" (Id.).

Riding circuit has been a practice of judges over many centuries and in various countries. While the Federal Court of Australia has a new major building in Sydney (Fig. 23.12), it occasionally decamps to temporary quarters. When doing so, the High Court shifts it locus to enable assemblies that are literally open rather than encased in glass. "[M]ore than 800 people made their way" to hear Chief Justice Michael Black read the court's discussion of "Australia's largest native title application,"[34] with the substance of the "reasons for the judgment" "translated simultaneously into the Language of the Peoples of the Ngaanyatjarra Lands."[35] The reading was thus a moment of recognition of traditions that were lawful but different from the patterns of English common law. The exchange sought to encompass a "culturally diverse deliberation" (Mohr, 87–102) that (depending on the quality of the exchanges, of which we know only the court's summary) could be read to have commemorated "consensus through deliberation" (Benhabib, 142–146).

By relocating to the Great Victoria Desert, the Australian government underscored that the relevant audience constituted not only those who could travel to one of the court's home bases, in Sydney, but also those for whom such a trip would be arduous. The simultaneous languages reflected that the agreement was forged

[33] Email from Chief Justice Michael Black to Judith Resnik, March 21, 2006.

[34] 2005 *Office of Native Title Newsletter*, Ngaanyatjarra Lands, 1.

[35] Mervyn/Ngaanyatjarra Lands v. Western Australia at para. 2.

Fig. 23.12 Commonwealth Law Courts, Melbourne, Australia. Architects: Tim Shannon, Paul Katsieris of HASSELL, 1995–1998. Photographer: Martin Saunders Photography. Photograph reproduced with the permission of the photographer and courtesy of the court

between peoples coming from different political and legal systems. And, in addition to the ritual in the tent that was, momentarily, the "Federal Court of Australia," the participants had shared another ritual. As the court's opinion records:

> The evening before, there had been a dance and song, performed last night at the place where the court sits today, about the emu and the turkey, who met up at a place called Yankal-Tjungku to the north of here, and continued on.[36]

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[36] Mervyn/Ngaanyatjarra Lands v. Western Australia at para. 15.

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Chapter 24
Saying the *Saffu* and Beating the Law: The Changing Role of Sacred Sites in the Oromo Politico-Juridical System

Pekka Virtanen

Abstract This chapter presents a semiotic analysis of the role of sacred sites and other physical features and objects in key political/religious rituals of the Oromo people living in the Horn of Africa. Theoretically, it builds on Jacques Derrida's deconstruction of the concept of 'archive' as an intersection of the topological and the nomological of the place and the law. For Derrida, the place of the archive is not a locatable place, but a *topos*, the marking of a discourse. In contrast to the European tradition based primarily on archives inscribed in writing and summarised in a codified law, for the traditional Oromo society, laws were part of the oral tradition – a mixture of religion, law and social custom – inscribed in ritual practice and the landscape. This made the aspect of consignation especially crucial: due to their inherent character oral laws must be systematically re-enunciated and revised. The power of consignation was reinforced by the iterability of ritual, which turns it into a repeatable chain of marks. The fact that there is no archive without an outside has been the basis for the survival of the key institutions of the Oromo: whilst the ritual practice provided a technique of repetition, it was the landscape which provided the *topos*, the commencement and an inexhaustible repertoire of signs which would carry the normative principles and practices (*nomos*) to new times and places. This chapter is divided into four parts. A discussion of the politico-juridical system and livelihood of the Borana Oromo, who have maintained the traditional Oromo politico-juridical system in a relatively coherent form, gives the background for an analysis of topography in the politico-religious rituals. The rituals, on the other hand, form the basis for the politico-juridical system. A brief return to Derrida concludes this chapter.

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24.1 Introduction

This chapter presents a semiotic analysis of the role of sacred sites and other physical features and objects in the key political/religious rituals of the Oromo people living in the Horn of Africa. The Oromo share a common language[1] but also basic values and other cultural elements. For example, the kinship relations and marriage customs of different Oromo groups are much the same, as is their concept of man and society. And whilst the Christian and Muslim faiths have, to a large extent, replaced traditional religion, the Oromo still share various elements of the latter, such as rites, ceremonies and forms of social intercourse. This people occupy vast areas of southern, central, eastern and western Ethiopia, regions varying geographically from arid desert to lush forested mountains. With approximately 25 million native speakers, they constitute the largest linguistic group in the country. In Kenya and Somalia, different Oromo groups total about 200,000 individuals living in the arid northern plains and along the Tana River (see, e.g. Bartels 1983, 16; Bassi 2005, 3; Baxter 1994, 167).

The key institution of the Oromo sociocultural nexus is a generation system called *gada*. This consists in a system of segments of generations (*gada*-set or *luba*) that succeed each other every 8 years in assuming political, military, judicial, legislative and ritual responsibilities. Each generation comprises five segments, and its duration is thus 40 years; each boy automatically becomes a member of the *luba* five sets below his father. Beyond the first three grades, each *luba* elects its own internal leaders (*hayyu adula*) and forms its own council (*yaa'a*). Traditionally, the leaders of the *luba* became leaders of the respective Oromo nation as a whole when they came to power as a group in the middle of their life course. The class in power (also called *gada*) was headed by an officer with the title of abba gada or abba bokku, depending on the Oromo group in question (Bassi 2005, 55–66; Legesse 2006, 30–31). Recently the *gada* system has also become a symbol of an autonomous ethnic and political identity for the nationalist Oromo movements (Bassi 2005, 3–6).

Lambert Bartels has described the traditional *gada* ritual by which one of the western Oromo groups, the Sayyoo Macha, reconfirmed their society's normative basis. It took place every eighth year, when it was the turn of a new *gada*-set to take over responsibility for their people's well-being. The physical surroundings of the ritual were rich in symbolic elements: it was performed on a sacred mountain called Gara Mao, thus closer to the sky god *Waqa* under an *odaa* tree (*Ficus sycomorus*), which is a symbol of truth, truthfulness and integrity. The ritual took place preferably during the rainy season, in the mist or drizzle in which *Waqa* is believed to come down to man. It was performed during the latter part of the night when

[1] Oromo (*Afaan Oromoo*) is, after Arabic, Hausa and Swahili, one of the most widely spoken languages in Africa. Along with such languages as Afar-Saho and Somali, it belongs to the Cushitic group of languages. Other groups belonging to the same Afro-Asiatic or Hamito-Semitic language family include Semitic, Berber, Egyptian and Chadic (Ali and Zaborski 1990, ix).

A Latin alphabet and orthography (called *Qubee*) for writing Oromo was formally adopted in Ethiopia in 1991, but other orthographies are also used. In this chapter the orthography used commonly in the written sources has been maintained.

people were awaiting the first light of dawn, a symbol of the new *gada* period about to begin (Bartels 1983, 335; Triulzi and Bitima 2005, 127–37).

Whilst the *gada*-set who were about to take over the ruling of the country were seated under the *oda* tree, two men would step forward. They took their stand opposite one another, kneeling down, one in the east, the other in the west. The one standing in the east – where, according to the myth, the Macha people were born – was then invited to recite the *saffu*, the moral code given to them by *Waqa*. The law of Makko Billi, the great lawmaker of the Macha, was proclaimed in the same way, by two men facing one another, but now standing. The proclamation of every law was confirmed by a crack of a whip made from hippopotamus skin. Being the toughest material possible, the hippopotamus skin symbolised the law itself and through its association with water, it also symbolised life. It may also be noted that when beating the law of men, the orators stood, but when saying *Waqa*'s *saffu* – which is of the nature of a prayer – they knelt. Whilst both parts were considered the bases of Macha society given by *Waqa*, the difference is that the *saffu* was given by *Waqa* himself in the very beginning, whilst the law of Makko Billi came through people (their great leaders), even though ultimately from *Waqa* (Bartels 1983, 334–337; cf. Triulzi and Bitima 2005).

Theoretically, the present analysis builds on Jacques Derrida's deconstruction of the concept of 'archive' as an intersection of the topological and the nomological, of the place and the law. The first aspect refers to the archive 'in the physical, historical, or ontological sense, which is to say to the originary, the first, the principal, the primitive, in short the commencement', whilst the second refers to the 'principle according to the law, there where men and gods command, there where authority, social order are exercised, in this place from which order is given' (Derrida 1996, 1–2). The concept derives originally from ancient Greece, where the archons (those who command, the superior magistrates) possessed the right to guard the archives of law, to make the law and to interpret it. In addition to a permanent localisation and legitimate hermeneutic authority, the concept also implies the power of consignation, or coordination of a single corpus of law. Thus, every archive is at once institutive and conservative: it keeps the law, but it also makes the law and makes people respect the law (Ibid, 2–3, 7). According to Derrida, 'there is no archive without a place of consignation, without a technique of repetition, and without a certain exteriority. No archive without outside' (Ibid., 11).

Within a culture, elements of the shared experience of activities of daily subsistence and their physical surroundings are often a source of widely recognisable paradigms and metaphors. Used symbolically in a different context, they can project back new meaning to the element or the activity which originally provided the symbol (Dahl and Megerssa 1990, 21; cf. Olwig 2002, 25–27). According to Claude Sumner (1994a, 726), in this kind of figurative reasoning, the movement of exemplification is primary. The path from what is known to new knowledge does not start out from concepts or mental entities, but from a familiar activity or element that has the value of an example. The discovery of something new is made when the sameness/difference of the example is recognised in a new situation. Keeping in mind the representative character of written communication – as a picture, reproduction or imitation of its content – such figures can be used as written signs. As Derrida notes (1982, 312–17), one key characteristic of a written sign is the ability to break away from the set of contextual premises which organise the moment of

its inscription. This is made possible by the iteration of the sign, which can always be separated from the interlocking chain in which it is caught or given without depriving it of its potential value for communication. The rupture may even give rise to other such values in it by crafting it into other chains. This potential is created by the spacing that separates the written sign from the other elements of each specific contextual chain but also from all forms of a present referent.

Compared with the 'modern' Western or the Abyssinian culture dominant in Ethiopia, elements of nature and the landscape are given a much more prominent place in the Oromo culture, where they appear in their own right, as physical realities in nature (Sumner 1994b, 430–31). According to Hermann Amborn (1997, 379–85; cf. Olwig 2002, 27), landscape refers to the immediate physical environment or space in which people think and act. Following Derrida, he argues that landscape should be understood as a constructive element of culture and of processes of cultural reproduction and cultural change. Information and experience from the past are coded in the landscape. This 'archive' can thus be read both as a visible document of ordered history and as a system of reference points for lived reality. It provides a guide to cultural practices in the present, which in turn interact with the landscape. Thus, landscape should be understood as an interactive process through which it and the meanings given to it are constantly recreated. This conception is qualitatively different from the static idea of place as something which comes into existence when humans give meaning to a part of a larger, undifferentiated geographical space through perception, analysis or some technical modification operated on it. According to the alternative view, the peculiar feature of a place is not furnished by a project, a pre-given collective identity or some eternal geographical features; a place should rather be seen as 'the outcome of temporary meeting up of cultures, history, political design, geological events, economic strategies, animal populations, technological products, information produced by every organisation and so on' (Certomà 2009, 328; cf. Gatt 2009, 110–112).

This chapter is divided into four main parts, including the introduction. The Borana Oromo, including their politico-juridical system and livelihood, are then briefly discussed. The Borana are important for the argument in that among the different Oromo groups, they have maintained the traditional politico-juridical system in a relatively coherent form. In the third part, the focus is on the role of sacred sites and other physical features and objects in the politico-religious rituals of the Oromo. The rituals, on the other hand, form the basis for the politico-juridical system. This section is followed by an analysis of the different roles of pilgrimage in the politico-juridical imaginary. This chapter concludes with a brief return to Derrida.

24.2 The Borana Oromo in Ethiopia

It is generally acknowledged that the traditional politico-juridical institutions of the Oromo have been most effectively maintained among the Borana pastoralists, who occupy a territory consisting mostly of semiarid savannah in southern Ethiopia and

northern Kenya (see, e.g. Legesse 2006). This continuity can be explained by various factors such as lack of organised armed resistance to the expansion of the considerably better armed Abyssinians at the end of the nineteenth century and the general unsuitability of Borana territory for agriculture. Thus, the interest of both the Ethiopian and the Kenyan governments in the area has been limited to control of the international border and the forced collection of livestock (Bassi 2005, 7–8; Zwanenberg and King 1975, 87–108). In this context, the Borana, different from most other Oromo groups, have been able to keep the traditional politico-juridical system separate from the Ethiopian state system, seen to be in contradiction to the interests and the well-being of the Borana. This reasoning induced the two *qallus*, the highest religious leaders of the Borana moieties, to reject the position of *balabbat*, or intermediate government chief, assigned to them by the Ethiopian authorities. By rejecting the title, they ensured a division of duties and were thus able to protect the internal social processes from external domination (Bassi 2005, 16, 78). Actually, the ritual and the political offices were still maintained in the same family, as another member of the family, usually the *qallu*'s brother, took the latter. This arrangement was finally ended by the socialist *Derg* regime, which demolished the *balabbat* institution as feudal soon after it came to power in 1974 (Hultin and Shongolo 2005, 160; Knutsson 1967, 143).

Until the fall of the *Derg* regime in 1991, the relationship between the Borana and the central Ethiopian government was based on the simultaneous existence of two relatively independent politico-juridical systems.[2] The Borana refer to the politico-juridical system of the Ethiopian state as *aadaa mangiftii* (the culture of the government), which is in practice restricted to urban contexts, where the administration is located and where most interethnic contacts occur. There, judicial proceedings were carried out in the Amharic language according to the Ethiopian civil, penal and procedural codes. The traditional system, on the other hand, consists of a range of assemblies operating in rural areas. In these assemblies, all the judicial and political-decisional procedures are conducted in the Oromo language and with exclusive reference to Borana customary law. Even the *Derg* regime permitted it to function, at times even actively encouraging it to solve disputes considered to lie within the ambit of the traditional system. The Borana have thus avoided disputing the supremacy of the Ethiopian state, which has left them relatively free to pursue their pastoral life without external interference (Bassi 2005, 13–17).

Under the current Ethiopian People's Revolutionary Democratic Front (EPRDF) regime's policy of ethnic federalism, the situation has changed, as the policy of regional self-government has (at least in theory) decentralised administration to the regions where most of the political and administrative posts are occupied by local people and the local majority languages have become the official languages. This

[2] During the *Derg* period, a relatively high number of Borana occupied positions in the local administration. They were, however, individuals with some formal education who had been converted to Coptic Christianity. Their nontraditional background excluded them from seeking a traditional office, and the relationship between the two systems remained distant if not strained (Bassi 2005, 8-15; cf. Helland 2001, 64–65).

has encouraged the creation of new ethnicity-based political organisations, whilst some older organisations such as the Oromo Liberation Front (OLF) were banned after they entered into conflict with the ruling coalition in the early 1990s (see, e.g. Berisso 2009; Vaughan 2003). The new policies have brought about considerable changes in the local sociopolitical constellation, including active campaigns by different actors (the ruling coalition among others) to enlist traditional Borana authorities on their side (Interviews in Negelle Borana, May 2009).

24.3 The Borana Sociopolitical Organisation

The Borana sociopolitical organisation consists of three principal institutions, namely, the generation system (*gada*, described above), the moiety organisation (*qallu*) and the legislative organ, the general assembly (*Gumi Gayo*). There is further a subsidiary institution called *hariya*, an age organisation which operates under the authority of the *gada* assemblies. The *qallu* institution is at the head of the two exogamous moieties, which cut across the age and generation sets, and until recently, the two major *qallus* had an important role in legitimising the election of the new *gada* officers. Each of the moieties is divided into clans (*gosa*) and further into lineages (*mana*, house) and sub-lineages (*balbala*, doorway). The clans and lineages are spread geographically throughout the Borana region. The six leaders (*hayyu adula*) of each *luba* are divided equally between the moieties, and the clans have an important role in their selection. The annual clan (or sometimes actually lineage) assemblies (*kora gosa*) provide the setting where most concrete political issues and legal cases are decided. The *Gumi Gayo* is made up of representatives of all the *gada* assemblies and councils, who meet as a single body once every 8 years, when it adjudicates legal cases not resolved at lower levels, evaluates the activities of the *gada*-set in power and revises existing laws, proclaiming new ones if needed (Bassi 2005, 55–77, 217–34; Legesse 2006, 30–32, 136–138).

In this system, the *gada* institution and the clan organisation are the key governance structures constituting what the Borana designate 'administration from above' and 'administration from within', respectively. The former term refers to the role of the *gada* in organising the Gumi Gayo and both safeguarding and revising the customary laws, *aadaa seera Borana*. 'Administration from within', on the other hand, relates to the autonomy of the clans in administering their internal affairs by applying clan law (*aadaa gosa*) within the limits set by the *aadaa seera Borana* (Tache and Sjaastad 2008, 10–11). In the socio-economic sphere, a second distinction is made between patrilineal descent groups, which are territorially dispersed, and residential groups. The former are relevant to the ownership of natural resources as well as decisions concerning the composition of the livestock and its use, the latter to the use of resources and concrete decisions concerning the herding of livestock (Bassi 2005, 265).

Within the three principal institutions, juridical and political decisions are taken in the various assemblies and councils, which can be divided into two groups. In the annual *kora gosa*s and the 8-yearly *Gumi Gayo*, as well as in the permanent (but itinerant) councils or 'ritual villages' (*yaa'a*) of the different *gada*-sets and

*qallu*s, participation is based on the patrilineal kin group. Whilst the function of the *yaa'a* councils is pre-eminently ritual, it is fundamental to the ideology and symbolism of the politico-juridical sphere. The other assemblies include the various meetings for pastoral coordination, for example, meetings for wells (*kora eela*), grazing (*kora dedha*) or for horses (*kora farda*), as well as *ad hoc* meetings organised to resolve disputes. These latter mainly involve residential groups. The procedural roles are usually assigned to institutional leaders who due to their training and experience have acquired a particular knowledge of Borana ethics, norms and procedures. Only men who are fathers of families (*abba warra*) are allowed to participate fully (Bassi 2005, 170–87, 255–81).

The *Gumi Gayo* is dominated by the leaders of the *gada*-set in power and their 'retired' predecessors. Other Borana citizens can attend and voice their opinions, but they should air their grievances in the preliminary sessions – in the main assembly they must speak through their *gada* representatives (Legesse 2006, 210–12). The actual general assembly consists of two consecutive events which take place in the vicinity of two different well sites in southern Ethiopia called Gayo and El Dallo. According to Aneesa Kassam and Gemetchu Megerssa (1994, 86–87), in the assembly taking place in Gayo, the focus is on affairs concerning the political community's internal relationships, whilst the other assembly concentrates on external issues such as man's relationship with nature, or the interaction of the Borana with neighbouring ethnic groups considered outsiders.

The ritual villages, *yaa'a gada* and *yaa'a qallu*, express crucial values of Borana society such as fertility, well-being, prosperity, peace and justice. In the *qallu* institution, the association with religion is direct: the divine source of the leader's legitimacy and the hereditary character of the title make him a unifying factor who upholds the continuity of the system. Whilst the *gada* institution upholds the same values through common ritual actions, its role in the maintenance of social harmony, *nagaa Borana*, is focused more on maintaining peaceful relations between the clans. This is crucial, as force and physical coercion can be used as a political or juridical instrument within the political community only exceptionally and even then mostly in a rhetorical or symbolic form (Bassi 2005, 269–271). According to Asmarom Legesse (2006, 212), in the Borana politico-juridical system, 'there is no concept of a majority that can impose its will on the minority'. In the same way as in the ritual, the underlying purpose is to resolve social tension. But unlike rituals, judicial proceedings take place in response to infractions of norms accepted as binding by the political community: in other words, when social harmony, *nagaa Borana*, has been violated. The process thus reflects a specific event, which often involves a new situation, and whilst the procedure is standard, the discussion always brings new contents (Bassi 2005, 215).

24.4 The Nomadic Livelihood System

The dynamic character of judicial proceedings reflects the needs of nomadic pastoral livelihood. The main objective of the traditional land-use system of the Borana is to cope with rainfall variability, which is the defining characteristic of the local natural

environment. The system is based on opportunistic movements within and across geographically distributed grazing units (*dedha*), composed of those households who depend on a common permanent water source. The grazing units consist of semisedentary camps (*warra*) where the elderly, children and women stay with milking cows and calves. The surplus herd, composed of dry cows, heifers and male animals, joins the mobile herd management unit (*fora*) herded by young men. The rangelands surrounding the *warra* are used by the milking herds, whilst the mobile herds use the more remote grazing lands. Unlike the *warra* herds, the *fora* herd movements are not restricted to a particular *dedha* but can cross the *dedha* borders depending on the availability of rainwater and forage production (Oba 1998, 16–18).

Sound management of the rangeland is guided through general norms of inclusion/exclusion known as *seera marra bisaani* (the laws of grass and water). Although no Borana can be directly denied access to grazing, the law differentiates between dry season pastures and wet season pastures. It encourages maximal use of wet season pasture whenever possible, thus minimising pressure on the more intensely utilised dry season rangelands served by permanent water points. Grazing on the wet season rangelands depends on temporary water sources in natural and man-made pools, and thus the herds have to move onto the dry season pastures relying on permanent water sources before grazing resources are overused. However, whilst access to surface water used in the wet season rangelands is free for all, permanent water sources (notably the deep *tulla* wells) belong to specific clans. The excavation, maintenance and continuous operation of the wells depend, however, on the coordinated efforts of all well users, who form a *kora eela*. Controlled access to water (and other key resources such as salt craters) thus provides the key mechanism for guaranteeing sustainable use of the grazing lands (Bassi and Tache 2008, 107–09; Oba 1998, 19–21).

The need for flexibility is reflected in the way the Borana relate to geographical space. The natural environment they inhabit is characterised by complexity, high variability and uncertainty. In such a ‘nonequilibrium grazing system’, pastoralists derive little advantage from having unquestioned control over a specific stretch of territory. What is crucial is mobility and access to pastures wherever the rain has fallen, which makes it beneficial to keep territorial boundaries porous and ill defined (Behnke 1994, 8–9; Robinson 2009, 445–46). Among the Borana and neighbouring pastoral groups, the natural landscape is thus not carved up into clearly bounded territorial units belonging to distinct groups of individuals. Instead, any given area is likely to be used by various groups of variable size and composition, often with parallel claims pertaining to different categories of resources and/or derived from particular historic events or claims. For a pastoralist, the extent of the group’s ‘territory’ thus encompasses those geographical areas in which they normally live and move. Some of these places may lie in areas typically regarded as belonging to other ethnic groups, but into which members of any particular group also take their livestock (Behnke 1994, 13; Wood 2009, 235, 240).

Within the Borana political community, there is a ritual/political centre defined by the *gada* system. Traditionally the designation of a new *gada* was followed by raiding against neighbours organised by the *gada* centre in order to maintain the

political space within which the peace of the Borana (*nagaa Borana*) could operate. This ritual/normative boundary was not, however, fixed in time or spatially rigid, but reflected the political centre's need to continuously assert its influence. For ethnic identity, on the other hand, boundaries were less important than core values linked closely to ideas of normality, morality and righteousness[3] (Dahl 1996, 165). Instead of fixed territories with boundaries defining where they may go or who they are, the Borana and some of their pastoral neighbours have focal points such as wells, springs, sacred sites and ritual villages. Such focal points locate, orient and identify the pastoralists in their nomadic movements (Behnke 1994, 24; Wood 2009, 238–39). Like their immediate neighbours, the Borana society is also open to other ethnic groups, as can be observed by studying clan or family genealogies, whereas this acceptance of ethnic difference remains hidden if we focus on spatial boundaries. Perhaps we should, borrowing an idea from John Wood, rather use the nomads' own metaphors, for example, doorway (*balbala*), which 'stresses the possible – though not absolute – openness between communities, and carries with it the sense of agency involved in opening and closing the gate' (2009, 240).

24.5 The Place and the Law in Oromo History

Most recent studies support the conception that the Oromo formed a single political community until the early sixteenth century, and migrants maintained contact with the original cradleland, 'the land of the Abba Muda', through regular pilgrimages even after the dispersal. Possibly the division into two moieties (the Borana and the Bareentuma) already existed, and this may have served to structure the linkages. The place of origin is subject to dispute, but it was probably situated in the region between the Genale and Dawa rivers south of the Webi Shebelle in what is currently southern Ethiopia (Hassen 2005, 144–48; Legesse 2006, 183–85). According to Oromo myth as interpreted by Mohamed Hassen (2005, 144), the land of Abba Muda 'was the place where all the important Oromo religious and political institutions developed; it was the rich source of their historical beginnings and of their view of the universe. In short, the land of the Abba Muudaa provides the cultural templates for Oromo religious beliefs, their political philosophy, based on Gada, and their knowledge of

[3] The *Gumi Gayo* is the political forum for restating what, essentially, it means to be a Borana. In 1972, for example, the assembly is said to have made the following edicts: (1) the Rendille (a Cushitic-speaking neighbouring pastoral group, which has some characteristics of both Oromo – e.g. a modified *gada* system – and Somali culture) are brothers of the Borana and should henceforth be called Borana and be accorded the privileges a Borana enjoys; (2) all Borana and all brothers of Borana must henceforth refrain from wearing the loincloth (a typical Somali garment), and any man who is found wearing such clothing shall be treated like a Somali (Dahl 1996, 165). The political history of the region is replete with examples of changing alliances between the Borana and the neighbouring ethnic groups and/or subgroups (see, e.g. Bassi 1997; Schlee 2009; Tache and Oba 2008).

themselves and their history'. For the Oromo, it is the topological place of origin of the 'archive'.

The Oromo perceive their origin as linked to the element of water. Among various Oromo groups, there are myths which refer to Lake Wolabo as the birthplace of the nation, where *Waqa* created the first *qallu* and gave the law (Bartels 1983, 62–63; Dahl 1996, 176; Hassen 2005, 143–44). Water is also a crucial element in the myths of origin of most current Oromo political communities. For the Macha Oromo, emergence from the water after crossing the Gibe River symbolises their birth as a people.

After leaving the joint ritual centre the Macha had with the Tulama at Odaa Bisil, the great lawgiver Makko Billi has crossed the river ahead of his people but ends up as prisoner of the strangers living on the other side. Even as a prisoner, he is allowed to address the Macha at the very moment they come out of the water, and he thus proclaims their law, given to him by *Waqa*. The law, which represents their identity as a people, is also his testament to the nation as he is subsequently killed by the strangers (Bartels 1983, 60; cf. Hultin 1991, 103–06).

According to one widespread myth, the Borana originate from *Horroo*, a well or mineral spring. The myth refers to the nine well complexes (tulla sallan) situated in the Borana cradlelands, which have a special ritual and symbolic relevance due to the particular qualities of the water and the surrounding environment. They are closely associated with the history of the Borana and their concepts of identity (Dahl and Megerssa 1990, 26–27; Oba 1998, 16–18). The Borana society thus has a core, symbolised by the tulla sallan, but no clear boundaries at the periphery. As a socio-political community, it exists as an ideological construct, an imagined community which is regularly recreated in the rituals of the principal institutions taking place in selected localities but also through the quotidian activities which make possible its socio-economic reproduction (Dahl and Megerssa 1990, 37; cf. Anderson 2006).

As empathically confirmed by Derrida (1982, 324), 'ritual is not an eventuality, but, as iterability, is a structural characteristic of every mark'. In his extensive analysis of the political and juridical processes among the Oromo Borana, Marco Bassi (2005, 215) notes that 'ritual concerns the creation of symbols, whose meaning is more or less ambiguous, which condition perception of reality'. This is because every being is itself and can become a sign of something else, a symbol. Symbols – as well as other types of figurative thought – contain the idea of a code, a set of culturally selected and fixed images. The code is usually perceived to be antecedent to the discourse that appeals to it. But actually the sense of these images is not prior to the use which can be made of it, because no context or code can close it. The unity of a signifying form is constituted by its iterability, by the possibility of being repeated in the absence of its referent and even by a determined signified or current intention of signification. Figurative reasoning consists in discovering 'different types of marks or chains of iterable marks' (Derrida 1982, 326) and in passing from one to another. Therefore, it is always inventing something new, and the chains that are culturally sanctioned at any specific time are but a small number when compared to those which are used daily (Derrida 1982, 318; Sumner 1994a, 728–32).

For the Borana, nature (the outside) and culture (the inside) constitute a principle of balanced opposition. As a people who have *aadaa* (custom or tradition) and *seera*

(the law), they belong to the inside, but at the same time, their very source of life depends on the outside. According to the Borana worldview, everything has its proper place in the world, and this order must be respected. This is because everything that exists in the world has its correspondence in the form of an immaterial principle (*ayana*) which is decisive for the character and fate of that entity.[4] To respect the invisible boundary between all things, their *ayana*, a certain moral and spatial distance must be maintained. It is especially important to maintain balance and harmony (and thus interdependence) within binary sets of complementary opposition such as culture and nature (Dahl 1996, 167; Kassam and Megerssa 1994, 88–89; cf. Kelbessa 2001, 34). It is, however, precisely from the outside that the images or symbols used to reflect on the cultural institutions are most often taken. One example are the *baddaa sadeen,* three large juniper (*Juniperus procera*) forests in the Borana landscape, which have an important function as a last refuge for grazing in the case of drought and as a reserve for medicinal and ritual plants. The forests are conceived as belonging to the outside and as being close to *Waqa*. They are also a metaphor for human society, as expressed by a Borana elder when referring to a recent forest fire: 'the juniper trees are like Borana elders (jaarsa): they stand taller than the others and have a long white beard (whitish lichen). Just as there cannot be Borana society without elders, the baddaa (forest) will follow into chaos when all the junipers are cut or destroyed. I was told long ago (in an oral prophetic text) that 1 day we would have seen a big light from very far and the baddaa would disappear' (quoted with explanations in Bassi and Tache 2008, 109).

The Borana also share with the other Oromo groups' cultural beliefs associated with particular tree species, of which the most important is the *odaa* (*Ficus sycomorus,* Fig. 24.1). It is a symbol of the *qallu*, and among the western Oromo, the *gada* laws were traditionally proclaimed under a big *odaa* tree[5] on the slope of a sacred mountain (Bartels 1983, 85; Bassi and Tache 2008, 107). For ecological reasons, in the hot lowlands, its place is sometimes taken by the *dhaddacha* (*Acacia tortilis*). The procedure of the Borana *Gumi Gayo* is characterised by the joint sittings of the entire assembly in the shade of a specific tree known as *Dhaddacha Gumi* (acacia of the multitude/general assembly), whilst separate gatherings of smaller groups take place during intervals in the shade of other trees scattered around the *yaa'a* encampment (Bassi 2005, 257; Kassam and Megerssa 1994, 89–91). Most lower-level assembly meetings are also held in the shade of such trees, and *gaaddisa* (shade) has become a symbol of the assembly (Bassi 2005, 177).

Some tree species are also sacred to specific Borana clans named after them, whilst different tree species have a symbolic role in demarcating the life cycle,

[4] For Macha Oromo, *ayana* is something of *Waqa* in a person, an animal or a plant making them the way they are: a particular manifestation of the divine, of *Waqa* as creator and as source of all life (Bartels 1983, 118). Among the western Oromo, the relationship of respect is known as *saffu*, meaning respecting one another and respecting one's own *ayana* and the others' *ayana*.

[5] According to Antoine d'Abbadie, a European observer from the late nineteenth century, the Oromo custom concerning assemblies resembles the Basque tradition of holding parliament sittings under the Oak of Guernica, which also has strong ethno-political connotations (Bassi 1999, 27).

Fig. 24.1 An odaa tree (Ficus sycomorus) near Shakillo, Guji Zone, Ethiopia (Photo by the author)

accompanying rituals and consecrating sacred sites. All such holy trees, which are often situated in high places on mountains and hilltops, as well as the sites themselves, are protected from desecration. Some of these trees, for example, the *dhaddacha,* are also valued for the production of edible fruits or for their perceived ecological benefits (Bassi and Tache 2008, 107; Kassam and Megerssa 1994, 89–91; Kelbessa 2001, 43–44). Other trees are protected because their branches are used in rituals or to make staffs and other objects of high symbolic value. The symbolic relationships are however flexible, as different Oromo groups use different tree species depending on the resources available. Among the Guji Oromo, for example, the junior *gada*-set members cut their staffs from a branch of the *orooro* tree (*Ekebergia capensis*), whilst the members of the next set cut their heavier staffs from the *woddeesa* tree (*Olea europaea* var. *africana*). The ceremonial staffs or sceptres carried by the *gada*-set in power are called *bokku*.[6] They are cut from the *haroressa* tree (*Grewia mollis* var. *trichocarpa*) growing in the hot lowlands (Van de Loo 1991, 36–43).

[6] *Bokku* is a kind of knockberry, a short stick with a heavy head. It is carved from a suitable root and decorated. It is a traditional weapon but is also carried as a ritual object by the *gada* leaders. In some Oromo groups, the equivalent of the Borana abba gada is known as abba bokku (Bassi 2005, 48–49).

The *bokku* symbolises peace and social harmony created and maintained through *gada*; the whip, which is also carried by the gada leaders, symbolises domestic and social authority (Dahl and Megerssa 1990, 31; Hassen 2005, 149).

The *bokku* is also a symbol of the Warra Bokku descent group or section (which, however, is independent of the moiety system) linked to the *gada* system with certain ritual and political prescriptions, whilst the Warra Qallu is similarly linked to the *qallu* institution (Bassi 2005, 49, 242–43). On the symbolic level, these refer to the balanced opposition between *mura* (cutting, decision-making) and *ebba* (blessing) and the respective domains of politics and ritual. The Warra Qallu, representing the men with the highest ritual authority, are the men of blessing. As such, they are prohibited from bearing arms, making laws and imposing penalties (Legesse 2006, 118–21). The divine origin of the *qallu* institutions is clearly stated, for according to the myth, the two great *qallus* of the Borana either fell to earth from the sky or from a cloud (of mist) together with their ritual paraphernalia. The myth of the origin of the great *qallu* of the Guji confederation also emphasises his affinity with the *Waqa* and the sky, from which he once fell to earth (Bassi 2005, 74–76; Hultin and Shongolo 2005, 158–60; Knutsson 1967, 144–47).

The *gada* system, on the other hand, consists essentially of a set of rules regulating a complex ceremonial cycle (Bassi 2005, 245). *Gada*, like Derrida's archive, must be at once institutive and conservative. Its function is to keep the law but also to make the law and make people respect the law (Derrida 1982, 7). The aspect of consignation is especially crucial in the case of oral law. Due to their inherent character, oral laws must be systematically re-enunciated and revised in the different assemblies and in different contexts. Through this process, they inevitably become adapted to new situations and thus are modified. Consequently, oral law, which is subject to this continual process of revision, is more dynamic than statutory law (Bassi 2005, 100–04). This flexibility, however, also makes it more unstable and potentially easier to manipulate. In addition to the structure, continuity and legitimacy provided by the ritual through its iterability, the authority of the law is upheld by the assertive manner the outcome of deliberations is pronounced. This is well reflected in the concepts used by the Guji Oromo in this context, for example, *tuma* (from *tumuu* – to beat, strike), meaning legal decisions reached through exhaustive discussion and presented with a rhythmical beating of the earth with the staff of the speaker (Knutsson 1967, 131; cf. Triulzi and Bitima 2005).

At the same time, the flexibility created by the general character of the norms and their symbolic representations is crucial for the *gada* system's long-term viability. As noted by Bassi (2005, 100–04), with the general change in the economic system which characterises current Borana society, norms previously regarded as binding can in some situations be overlooked or ignored or formally changed. One example is given by changes in the rules concerning *buusaa gonofaa*, the traditional clan-based social security institution of the Borana. Under the customary rules, cattle are the only livestock species accepted as a direct medium of formal clan assistance. However, as a number of Borana households have recently acquired camels (traditionally linked to the Somalis, who are 'camel people') in order to adapt to deteriorating rangeland conditions, the rules were changed in order to

include those with large herds of camels but inadequate herds of cattle (previously considered too poor to make clan contributions) as donors. As livestock is nowadays cash convertible, even individuals with few cattle may be required to sell their camels or small stock to contribute cash, which is accepted as a symbolic representation of cattle. This new ruling was proclaimed as a *Gumi Gayo* resolution in 1972 (Tache and Sjaastad 2008, 14).

Consistent with their character as marks or signs, the symbols and rituals of the Oromo culture are, however, also open to use by other political institutions. In the context of the current political system of ethnic federalism, various political actors have attempted to graft them into their own chains of meanings. Immediately after the ceremonial inauguration of the new Borana gada in early 2009, for example, government representatives attempted to woo the newly elected *hayyu adula* to support the coalition in power (interviews, Yabello and Negelle Borana, May 2009). Both the Oromo regional state government and Oromo opposition parties have actively appropriated key Oromo cultural symbols such as the *odaa* tree in their insignia. A stylised picture of the *odaa* tree is also conspicuous in public edifices and other structures installed by the local government. Sometimes they are inscribed explicitly into a chain of symbols, as in the signpost erected in Kibre Mengist shown in Fig. 24.2. Here, hunting trophies, signs of male virility,[7] can be seen appended between stylised pictures of *odaa* trees. Among the Guji, the new *gada* class traditionally embarked on a hunt for big game after the transition ceremony was completed (Van de Loo 1991, 48).

According to Chiara Certomà (2009, 326), 'the political relevance of things is not just superimposed by human rationality but is the ongoing effect of a co-definition process among acting, thinking, repeating, projecting, speaking and interacting of different dynamic components. Politics takes place not necessarily in the place usually devoted to it: of course a parliament is a place for politics, but a local market is a place of politics, too, a scientific laboratory, a park, internet, a boiler, a compost holder, etc. Hybrid actors are the assemblies of mortals, goods, humans and non humans, science, technology, commerce, industry, popular culture, rocks…; they are both the subjects and the object of politics and define the forums where the political issues are pragmatically "discussed"'. In Certomá's understanding of politics, all signs and places are dynamic and linked to different paths marked by dislocation and migration through time; they are 'spaces of complicated and unexpected relations floating from material to virtual and back again' (Ibid, 327).

We can find the same key Oromo symbols all over the world grafted into chains which mix old and new, local and foreign elements. In a highly perceptive analysis of the Oromo diaspora in Australia, Greg Gow provides many such examples.

[7] In the Oromo ritual universe, death and vitality, killing and generation are metonymically related (Hultin 1991, 107). Traditionally, a man had to kill an enemy – or later a big-game animal such as buffalo – before he was allowed to beget children. Among the Macha Oromo, after the killer's death, the trophies were taken from the house and hung on a stand erected near the roadside (Bartels 1983, 273–74). Among the Guji, the killer of an enemy was honoured by a specific song and entitled to carry an ivory ring on his right arm. The hero himself was called *kut'na*, the killer (Van de Loo 1991, 48).

Fig. 24.2 A traffic signpost in Kibre Mengist, Guji Zone, Ethiopia (Photo by the author)

Selected elements of *gada* symbolism, for example, have been transplanted from Ethiopia to Australia, where they have been grafted into public ceremonies of a more popular kind. One example of such heterogeneous chains is a concert of a popular US-based Oromo artist in Melbourne, which culminated in the handing over to the artist of a (plastic) *bokku*, representing the traditional sceptre of abba gada, by local Oromo dignitaries following a carefully planned protocol where the key participants took the parts of traditional ritual officials in a *gada* ceremony (Gow 2002, 76–79).

The unexpected character of such links is even better illustrated by another example given by Gow (2002, 66), the cover of a music cassette by another popular

Oromo artist. The cover photograph on the cassette Laga Jaalalaa (river of love) shows the artist standing in a suit on the south bank of the Yarra River with the city of Melbourne in the background. As noted above, the river is a key cultural symbol for all the Oromo, reflecting their origin – and survival. At the same time, the cover highlights the ambiguities of the diaspora: whilst the title and the artist's ethnic identity refer to rural roots in Oromoland, his western suit and the modern metropolis behind him are foreign and urban. Between the artist and the cityscape flows the river. As noted by Gow, in the picture 'the signs are not merely translated from one setting to another; rather, they are given new meaning in their articulation with and within the urban metropolis' (Ibid, 66).

24.6 Remembering and Renewal in Oromo Pilgrimages

Pilgrimages are common in most of the different cultures of Ethiopia, to the extent that the very inclination to go on pilgrimages was declared a pan-Ethiopian trait by Donald Levine (1974, 50–51). However, whilst there are various aspects common to all pilgrimages (see, e.g. Pankhurst 1994), the Oromo pilgrimages linked to the *gada* system, which interest us here, bear an important (and explicit) political element which sets them apart from the more common, predominantly religious pilgrimages in which participation is essentially individual.

In his analysis of place and community as political phenomena, Kenneth Olwig (2002, 22–24) uses as a key figure the steps of a pilgrim's progress setting out from the homeplace, but gradually taking him/her back to the place of origin, transcending on the route the liminalities bounding the structures of daily life, whilst at the same time recreating the sense of political community. His idea of pilgrimage takes us away from the modernist idea of progress as linear development in time and space and brings us back to the places and communities from which our social existence derives substance. It brings us back to the questions of the role of origin, repetition and exteriority in law. According to Jonathan Boyarin (1994, 22–26), memory should be understood as a potential for creative collaboration between present consciousness and the experience (or expression) of the past. As such, it is not only constantly disintegrating and disappearing but also constantly created and elaborated. What we call 'collective identity' is actually the effect of such intersubjective practices of signification, neither given nor fixed but constantly recreated in a dynamic process of selection, reshaping, reinvention and reinforcement.

It is worth quoting Olwig's analysis at length here: 'when the Tudor Queen Elizabeth I (1533–1603) made her progress through England she made a customary circuit from place to place in which the local constituencies of the country were made manifest to the monarch, and the monarch to the country. She sat upon a throne, called state, and was carried in a stately procession through political landscapes shaped by different legal communities according to mutually acknowledged rights of custom. This was a ritual, seasonal process by which a larger and more abstract notion of England, as the place of a commonwealth, was generated.

The countermovement to the Queen's progress out into countryside was the movement of the members of the body of Parliament to their meeting in the capital, which also progressively reinforced the idea of a larger English society under a higher form of law. The abstract notions of justice expressed in common law were likewise generated through the circuitous progress of circuit court judges through legal realms rooted in local custom' (Olwig 2002, 24).

In the English context, the monarch's progress marked the mutual recognition of the legal status of the monarchy and the quasi-autonomous existence of the lands through which the monarch passed. The force of law was progressively renewed through this, and many other regularly repeated ritual circuits of movement on different scales. However, even though ostensibly based upon 'time out of mind' precedence, law was in fact progressively brought up to date through the reinterpretation of precedence in light of present circumstance (Olwig 2002, 25–27). In parallel with its English equivalent and contemporary from the sixteenth century, both the origin of law and its renewal are addressed in the two principal Oromo pilgrimages, notably the ritual progress of *yaa'a gada* through established ceremonial sites and the countermovement to receive the ritual blessings of the great *qallu*.

The *yaa'a gada* are the mobile ritual villages of the Borana, which every 8 years (in the context of *gada*-set promotions) perform ceremonies at the sacred sites of the Liban region, their ritual country, following a set circuit. They are typically on hills or mountains, near particular rock formations or rivers, springs and pools; frequently, they are in the shade of a sacred tree or grove. The sites are usually protected from consumptive use outside the ceremonial context, and sometimes shrines or cairns have been erected[8] (Bassi and Tache 2008, 110–11; Knutsson 1967, 165–66). Instead of one, the Guji Oromo have a set of three pilgrimages (one for each *gosa*) which make their separate ways through the region in order to converge at the ritual site of the great *qallu* of the Guji. Prayers and sacrifices are held frequently at established sites along the route, frequently in the vicinity of sacred trees such as the *odaa*. The animal sacrifices performed at such sites are meant to re-empower these places and call down *Waqa*'s blessing on the pilgrims and the local community. Most households contribute something to the pilgrimage and the ceremonies held in their location. After the main ceremony at the place of the great *qallu*, the pilgrims separate again and progress to their specific places for the final gada ceremonies (Hinnant 1978, 236–40; Van de Loo 1991, 36–62).

A similar pilgrimage is made by each of the five *gosa* of the Gabra, a neighbouring Oromo-speaking group of nomadic pastoralists. Like its Borana and Guji equivalents, it provides a strong sense of continuity as the people return to the same places where their ancestors performed these ceremonies and where the leaders themselves were initiated in their youth and subsequently moved to the higher grades. Different from the Borana and the Guji, among the Gabra, each *gosa* makes its pilgrimage

[8] These are also the typical sacred sites among other pastoral groups such as the Gabra (Ganya et al. 2004, 66–67) but also elsewhere in northern and north-eastern Africa (see, e.g. Westermarck 1926, 51–88).

separately and has its own traditional mountain site for the main ceremony, which constitutes the climax of the pilgrimage. Before the main ceremony and after it, the pilgrims pass through a series of artificial gateways (*balbala*) set in the dry savannah between extinct volcanic mountains and perform subsidiary ceremonies in various places (Schlee 1991, 45–53; Tablino 1999, 76–79; Wood 2009, 234–40).

The ritual passage through the *balbala* takes the pilgrims not so much on a journey from one space to another, as from one time or status to another (Wood 2009, 235). As observed by Stéphane Mosès, 'tradition – the transmission of a collective memory from generation to generation – most inherently implies a break from time, the fracture between eras, the gaping void separating fathers from sons' (quoted in Boyarin 1994, 11). The break from time is perhaps most explicit in the Guji ceremonial sequence. When the moment comes to initiate the transition process, the withdrawing abba gada in each *gosa* orders procreativity to cease and then visits the sacred shrines in his area and removes his blessing from them. Subsequently, the three sets of *gada* leaders visit the great qallu and then assemble to settle any remaining legal or ritual problems before they terminate 'the law of Guji' for the current *gada*-set and hand over to the successors. Each new abba gada then proclaims his law and begins a year-long trek around the sacred shrines of his *gosa*, bestowing his blessings in each area and indicating the beginning of a new period of time (Hinnant 1978, 232–40; Van de Loo 1991, 36–41).

Among the Oromo, the countermovement to the pilgrimage of the *yaa'a gada* is provided by that to the *muda* ceremony, during which the participants receive *qallu*'s blessing. *Muda* refers to both this ceremony held every 8 years to honour the *qallu*, the herald of *Waqa*'s order,[9] and the pilgrimage to his shrine. As noted above, the *qallu* does not have a political or military role. Yet, by merit of his ritual authority and prestige, he traditionally oversaw the election of the *hayyu adula*, those responsible for leading the nation. The ceremony thus represents the main encounter between the two principal institutions of the Oromo, the intersection of the topological (the *qallu* institution) and the nomological (the *gada* system) (Hassen 2005, 144–45; cf. Derrida 1996, 3).

Among the Borana, the pilgrimage is still made by members of the *yaa'a gada* according to moiety, each going to its respective *qallu* (Bassi 2005, 249). The key event is, however, that performed in honour of the *qallu* of the Odituu clan, the senior religious leader of the Borana. It draws pilgrims from all over Borana (including other clans which have their own *qallu*) but also from other Oromo groups (Legesse 2006, 186). The different structural level of the two institutions (*gada* and *qallu*) is even more apparent in the case of the Guji, who are divided into three main territorial sections (*gosa*), each with their own *gada* system, but have only one *qallu* recognised by all. The position of the *qallu* above the *gada* institution, but outside it, is further emphasised by his physical exclusion from the territories of the three *gosa* (Bassi 2005, 277–78; Hinnant 1978, 232–35).

[9] According to Guji myth, when the first qallu came to earth from *Waqa*, he brought with him the rules of the social order, including *gada* (Hinnant 1978, 232–35).

The pilgrimage to the shrine of the great *qallu* (Abba Muda) from other Oromo regions represents even more clearly the return to origins. Old records show that the pilgrimages to honour Abba Muda in the mythical cradlelands came at least from among the Macha, Tulama, Arsi, Karrayyu and Itto groups even after the original Oromo confederation had already dispersed politically. It appears that even Muslim kings from the Gibe region sent gifts to the Abba Muda and recognised his ritual authority (Hassen 1990, 7–9, 153; Knutsson 1967, 135–36). Pilgrimages from the Macha had apparently ceased by the end of the nineteenth century (Bartels 1983, 64–65), whilst the journeys from Tulama had become rare by the 1920s; in the 1960s, old Borana still recalled how Oromo from other groups came to take part in the *muda* ceremony (Knutsson 1967, 147–151).

Outside the Borana and Guji regions, the gradual decline of both the *gada* institution and pilgrimages to the shrine of the great *qallu* was reflected in the growth of local sacred sites devoted to individual spirits, often with strong syncretist elements. Whilst pilgrimages are usually formed on the basis of a specific ethnic, religious or political unit, there is a tendency to spill over and cross such boundaries, especially where the religious identity is fluid or linked to a syncretist cult (Pankhurst 1994, 937–39).[10] This was not, however, the case with traditional Oromo sacred sites. Whilst some of them, particularly the shrine of the great *qallu*, the sacred sites of the *gada* ceremonies and trees under which shrines were erected, were sometimes attributed certain qualities of *ayana* due to the sacrifices which took place there, the natural features themselves were not adored. An *ayana* is something of *Waqa*, and therefore the prayers directed to *ayana* were ultimately addressed to *Waqa* (Bartels 1983, 112–13; Van de Loo 1991, 149–150).

Among the Macha Oromo, the disintegration of the traditional politico-religious complex led to the emergence of a new, localised *qallu* institution in the late nineteenth century. The new institution is visible in the landscape in the form of the sites of the *qallus*' ritual houses, which are usually situated on a hill or a hillside, often in groves of huge trees which since 'time out of mind' have served as places of sacrifice to some *ayana*, for rainmaking ceremonies, or for the great collective ceremonies in honour of *Waqa*. There is, however, a syncretist trait which, despite the traditional background, is an important ingredient in the new institution. This is the ecstatic ritual technique, involving the possession of the *qallu* by the *ayana* at the climax of the ceremonies. The new *qallus* are thus placed outside of the traditional politico-religious system, and during traditional ceremonies when *hayyu* or other *gada* elders lead the prayers to *Waqa*, a new *qallu* has no status differentiating him from ordinary people (Knutsson 1967, 56–69, 151–54).

The Oromo elements in the new *qallu* institution come through the concept of *ayana*. Whilst the earth herself is not considered to have an *ayana*, every stretch of

[10] There are, for example, important similarities between the Oromo pilgrimages and Muslim pilgrimages to the tomb of Sheikh Hussein of Bali, these including many restrictions and signs. A corresponding intermingling of *muda* tradition with Muslim forms of pilgrimage may also have taken place among the Islamised Oromo in the former Gibe states (Hassen 2005, 150-56; Knutsson 1967, 155).

land has its own *ayana*. Such an *ayana* is called *adbar*, to which sacrifices are directed. For example, the ritual observed when opening a new field is performed for *adbar*, the *ayana* of the new plot of land. During the ceremony, a ritual leader slaughters an animal or offers libations in honour of the *adbar* under a large tree (often an *odaa*) selected for the purpose. *Adbar* trees are also selected for various other more or less similar ceremonies (Bartels 1983, 349–52; Knutsson 1967, 57–58, 86). There are several parallels between the *adbar* ritual, the new *qallu* institution and the ecstatic *zar* ritual complex, which is nowadays widespread in Ethiopia. The cult has expanded rapidly since the 1940s and appears to be particularly widespread and intense in urban areas and correspondingly weaker in rural areas. Some peripheral rural regions, for instance, Borana, were still almost untouched by the cult in the 1960s (Knutsson 1967, 66, 151–54). It seems to have been conveyed to the Guji through Islamic influence (Van de Loo 1991, 292), whilst its spread among the Macha was mainly due to Orthodox Christian influence (Aspen 1994, 160–67; Bartels 1983, 120).[11]

The 'hybrid character' (Certomà 2009, 321–27) of the emerging new rituals and their sites has contributed to some interesting politico-religious phenomena in Derra, the region currently inhabited by some of the Tulama Oromo. Whilst the spread of Islam and Orthodox Christianity in the region has segmented the local communities, the *adbar* ceremony has become the site of tripartite syncretism with traditional religious beliefs as the uniting entity. In the case of Derra, the ceremony rather paradoxically brings together adherents of monotheistic religions to worship what could be called 'land spirits'. In preparation, each religious group prepares food according to their own rituals, but the actual feast takes place under a single tree, which is often the same tree under which the Oromo settlers performed the first *adbar* ceremony (Arnesen 1996, 234–35).

24.7 Place, Path and Territory Among the Oromo

The decline of the politico-juridical role of the gada system among the so-called western Oromo (Tulama and Macha) has been relatively well documented. In the mid-nineteenth century, the traditional gada authorities wielded only very limited authority in Macha. By the 1960s, only fragments of the gada system remained, including individual membership in the principal gada-sets and the 8-year cycle marked by key

[11] Whilst the *zar* and other such cults are common throughout northern and north-eastern Africa as well as the Middle East, they are usually described as external to the sternly monotheistic 'great' religions of Semitic origin. They are syncretist, that is, combining elements of Judaism, Orthodox Christianity and Islam with different non-Semitic religions such as the Oromo religion (which is also monotheist) (see, e.g. Dafni 2007 and Westermarck 1926, 50–51). Possible links between Sufism and religious practices of Cushitic-speaking peoples in the Horn of Africa have been discussed by Ioan Lewis (1984) and Thomas Zitelman (2005), among others. For a possible Hebraic influence on the *abdari/adbar* ritual, see, for example, Aspen 1994, 151–67.

transition ceremonies. Among the Tulama, some aspects of the system were preserved more faithfully than among the Macha, at least in rural areas. However, whilst most men were still aware of their position in the two still functioning gada-sets and membership in one of the five gada descent groups, this did not affect social life outside the narrow ceremonial context. Of the traditional gada offices, only hayyu still existed (Blackhurst 1978, 248–52; Knutsson 1967, 170–83). Whilst the decline was obviously caused partly by external political factors such as increasingly frequent conflicts between different Oromo groups and the southward expansion of the Abyssinian state with related banning or manipulation of the local political and ritual institutions[12] (see, e.g. Blackhurst 1978, 260–64; Knutsson 1967, 160–61), more basic reasons for the change in the politico-juridical domain can be found inside the political community.

In most parts of the Macha region, for example, the weakening of the gada system was already manifest before the Abyssinian conquest (1885–1888) through the rise of autocratic hereditary rulers from among the Oromo themselves. Through accumulation of landed property, but also warfare and control of trade routes, some such rulers had succeeded in dominating quite extensive territories (Bartels 1983, 15).[13] The break-up of the joint gada centre at Odaa Bisil at the beginning of the seventeenth century marked the separation of the Macha and the Tulama, and subsequently, each group – branching into still smaller local subgroups – established its own gada organisation and ritual site. With time, the originally pastoral and nomadic Oromo began to settle permanently among the local agricultural population whom they incorporated through ties of fictive kinship sanctioned by ritual. These originally polyethnic and ritually constituted communities gradually developed into coherent political units delimited by physical boundaries such as rivers (Hultin 1991, 97–98). Within each territorial unit people traced decent from a common ancestor, the first Oromo settler whose local descendants – either biological or ritual – constituted an exogamous patrilineal group. In this context, various elements of the gada system were increasingly used to structure collaboration between bordering territorial groups rather than mobile clans, which lost their political role (Ibid, 100; Bassi 2005, 277–78; Knutsson 1967, 204–05).

For the western Oromo, the period of Odaa Bisil constitutes the time when they were pastoral nomads with no territorially defined segments or set territorial boundaries. Instead, they were defined with reference to a common ritual organisation centred around the odaa tree of Bisil. As for the Gabra, Borana and Rendille today, their country was where they were (Hultin 1991, 103; cf. Wood 2009). As noted by Jan Hultin (1991, 103), the way they structured their environment did not resemble the political maps we are familiar with: 'it was a symbolic map of a moral state; its boundaries were ritual not physical'. The disintegration or 'destruction' of the central

[12] The Abyssinians saw the pilgrimages and *gada* rituals as nationalist and essentially political, not religious. Hence Menelik banned the pilgrimage to the Abba Muda in 1900 and later even the more local *gada* ceremonies (Hassen 1990, 149–54; Hultin 1991, 97; Van de Loo 1991, 25–26).

[13] The political history of the so-called Gibe kingdoms has been extensively studied by Mohamed Hassen (1990).

ritual site thus symbolises the collapse of the moral order and a social catastrophe (Hultin 1991, 103; Knutsson 1967, 180–83). The exodus from Bisil (or abandonment of the nomadic pastoralist livelihood) marked the birth of named, territorial groups with fixed boundaries. Each such group, usually based on one lineage, established its own shrine under a tree when it settled in a place. Ideally it would perform a sacrifice to the adbar under the selected tree already during the first night. The first adbar tree then remained the focal point of worship and sacrifices and was left undisturbed as a living signifier of the place of origin, the old gada institution and the lost moral state (Arnesen 1996, 219; Hultin 1991, 97, 103).

The loss may, however, have been inevitable.[14] Odd Arnesen, following Tim Ingold,[15] has analysed the changing relationship between livelihood and appropriation of space among the Tulama Oromo.

According to his interpretation, tenure in nomadic pastoral societies is zero- or one-dimensional (based on sites and paths within a landscape), whilst two-dimensional tenure (based on bounded surface areas) is a consequence of agricultural production. For the ancestors of the Tulama, the ritual sites were linked with paths of ancestral travel from the cradlelands of Oromo culture in the south of Ethiopia. The sites and paths had thus a past and a meaning, which was inscribed in an external place – the landscape (Arnesen 1996, 216–17; Ingold 1986, 147–48). The pilgrimage to Abba Muda, when the living descendants made their progress down the same route, represented an integrative movement linking together the commencement, the sacred place of origin, and the commandment, the institution and place of social order (cf, Derrida 1996, 1). According to Ingold (1986, 152), 'through such movement, paths in the terrain are caught up in the continuous process of social life, projecting an ancestral past into an unborn future'. In agricultural societies such as the current Macha and Tulama, for example, with a high degree of correspondence between descent and locality in the settlement pattern, social life is structured around territorial groups with fixed boundaries (Hultin 1991, 97).

24.8 Conclusion

As noted by Cornelia Vismann (2008, 43–44), for Derrida, the place of the archive is not a locatable place, but a *topos*, the marking of a discourse. In contrast to the European tradition based primarily on archives inscribed in writing and

[14] A similar process appears to be taking place currently among the Borana, where the trust and confidence in key elements of the *gada* institution such as the community wealth redistribution system is rapidly waning among settled Borana households, especially in peri-urban areas (Berhanu and Fayissa 2009). It will be interesting to see what kind of new combinations will emerge in the new socio-economic and political context.

[15] According to Ingold (1986, 147–48), there are three logically distinct kinds of tenure/appropriation of space: zero-dimensional (of places, sites and locations), one-dimensional (of paths or tracks) and two-dimensional (of the earth or ground surface).

subsequently summarised in a codified law in late Roman antiquity, for the traditional Oromo society, laws were part of the oral tradition – a mixture of religion, law and social custom – inscribed in ritual practice and the landscape. This made the aspect of consignation especially crucial: due to their inherent character, oral laws must be systematically re-enunciated and revised in different events and spatial contexts. The power of consignation was reinforced by the iterability of ritual, which turns it into a chain of marks or even a single mark, which can be repeated in different contexts. For the Oromo, the pilgrimage to Abba Muda represented the key integrative movement linking together the commencement, the sacred place of origin, and the commandment, the institution and place of social order: it was the intersection of the topological (the *qallu* institution) and the nomological (the *gada* system).

In a nomadic society, culturally sanctioned places and paths are more important than geographical borders. Even the most sacred places and paths of pilgrimage should not, however, be seen as static and given, but rather as elements in an interactive process through which the landscape and the meanings given to it are constantly recreated. Whilst the well site called Gayo and the mountain called Gara Mao exist as geographical locations which are subject to specific protective measures, they are better understood as symbols or marks inscribed in the landscape and as such iterable in other contexts. Aside from being a locatable place, Gayo is water, the symbol of the origin, whilst as a mountain Gara Mayo is also a symbol of the sky god *Waqa*. The iterability of the elements of the landscape as markings of the legal/religious discourse is even more evident in the case of sacred trees: every sycamore is potentially an *odaa* tree, a visual symbol of the *qallu* institution, but can also be substituted by another species such as the acacia known as *dhaddacha*. This is because the unity of a signifying form is constituted by the possibility of being repeated in the absence of its original referent – or even its physical equivalent.

The dynamic character of figurative reasoning, its potential to discover different types of marks or chains of iterable marks and pass from one to another, is also evident in the new meanings some elements of the landscape have taken on in new sociocultural contexts. One example is the ecumenical function given to the *adbar* tree in the lands of the Tulama Oromo, whilst the same visual symbols and chains of symbols may be used to reinforce ethnic group solidarity among the diaspora, as in the examples cited by Greg Gow. This capacity of figurative reasoning to find different paths characterised by dislocation and migration through time – or to navigate in ‘spaces of complicated and unexpected relations floating from material to virtual and back again’ (to paraphrase Chiara Certomá 2009, 327) is crucial for cultural survival. This is especially so for politically marginalised ethnic communities struggling with the postcolonial condition. The fact that there is no archive without an outside, as noted by Derrida (1996, 11), has been the basis for the survival of the *gada* institution of the Oromo. This ritual practice provided a technique of repetition. It constituted the landscape that provided the *topos*, the commencement and inexhaustible repertoire of signs that would carry normative principles and practices (*nomos*) to new times and places.

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Chapter 25
The *Mandala* State in Pre-British Sri Lanka: The Cosmographical Terrain of Contested Sovereignty in the Theravada Buddhism Tradition

Roshan de Silva Wijeyeratne

Abstract As far as contemporary debates about devolution from the centre in Sri Lanka are concerned, the Indian Asokan (Buddhist) State model need not be as disabling of State reform as it appears in contemporary parlance. In symbolic terms, Sri Lanka's recently ended civil war was about the organisation of space between the centre and the periphery, particularly those parts of the periphery occupied by minority Tamils. The Buddhist majority Sinhalese have defended the postcolonial centralised State by recourse to a highly *modern* and *fetishised* Buddhist nationalism that projects a simplistic understanding of sovereignty back onto the precolonial and particularly pre-British past. The idea of a *unitary* sovereignty however was the result of the administrative reforms initiated by the British colonial State in the mid-nineteenth century. The argument here suggests that classical Buddhist accounts of sovereignty which revolve around the imagery of a *cakkavatti* (wheel-rolling) universal king, once materialised within a given geographical territory, reveal an account of sovereignty (or kingship), which far from *unitary* manifests extraordinary devolutionary moments. In its Sri Lankan inscription, the cosmic order of Theravada Buddhism reveals phenomena which evolved over a number of centuries, harnessing the influences of both Mahayana Buddhist and South Indian Hindu cultural forms. The cosmic order of Sinhalese Buddhism, although hierarchical in intent, legitimised a number of highly decentralised administrative structures that characterised the daily routine of the *mandala* cum *galactic* polities that emerged in Sri Lanka, including that of the Kandyan Kingdom, the last of these *galactic* polities. Sovereignty then in its Theravada Buddhist incarnation in the Sri Lankan landscape reveals both centralising and devolutionary moments, moments that are captured in the Kandyan Kingdom's architectural, administrative and ritual representation.

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25.1 Introduction

While Sri Lanka's civil war between the Sinhalese State and the Tamil separatist *Liberation Tigers of Tamil Eelam* came to an end in May 2009, the discriminatory practices of the State remain in place.[1] In symbolic terms the civil war was about the organisation of space between the centre and the periphery, particularly those parts of the periphery occupied by minority Tamils. The Sinhalese Buddhist majority continue to defend the postcolonial unitary State by recourse to a highly *modern* and *fetishised* Buddhist nationalism that projects a simplistic understanding of sovereignty back onto the precolonial and particularly pre-British past. The idea of a unitary sovereignty however was the result of the administrative reforms initiated by the British colonial State in the mid-nineteenth century and was essentially alien to the Buddhist and Hindu rulers of the island in the pre-European period.

The reforms of the mid-nineteenth century are not my concern here (Scott 1999, 23–52). What I do want to explore is the aesthetic reproduction of Buddhist sovereignty in pre-British Sri Lanka. My argument points to an inherent tension between the *virtual* sovereignty that characterises the claims that Buddhist kingship makes, and the actuality of a decentralised bureaucratic State that was a feature of the Buddhist polities that emerged in the shadow of the Asokan phase of the Mauryan Empire in the third century BCE. Our understanding of sovereignty in Theravada Buddhism owes much to the period of Emperor Asoka's rule as well as canonical texts such as the *Agganna Sutta* (*The Discourse on What is* Primary) and the *Cakkavatti Sihanada Sutta* (The Lions Roar of the Wheel-Turning Emperor), and the fourth-century BCE text on Hindu statecraft the *Arthashastra* (Collins 1993, 301–393).[2]

Both the *Agganna Sutta* and the *Cakkavatti Sihanada Sutta* are parodies on kingship and its intimate relation to the State, and yet within these parodies resides a strong kernel of truth about the nature of State power that the Buddha probably intended to convey. It is clear from the *Mahaparinibbana Sutta* that what primarily concerned the Buddha was the timeless question of a transcendent truth associated with *nirvana* (Ibid, 436–445). Here the 'triviality and ephemerality of temporal goods are contrasted with the seriousness of the monastic life: nirvana is an achievement "for all time"' (Collins 1998, 445). This idealisation of the celibate monastic community does not however suggest that for classical Buddhism the monastic community stood as a paradigm for non-monastic communities (Id, 448). The latter were after all organised on monarchical lines, and kingship was integral to the society into which the Buddha was born into. That said, the Buddha was born into a political order that was disintegrating which may account for the tone of parody that in particular is a feature of the *Agganna Sutta* (Altekar 1958; Kulke 1995).

[1] http://www.colombotelegraph.com/index.php/people-in-the-north-should-have-the-same-rights/

[2] In the Hindu-Buddhist tradition, *cakka* signifies the king's wheel of power. A systematic comparative study of the Hobbesian-Schmittian account of sovereignty and the Theravada Buddhist account of sovereignty has yet to be produced. This I hasten to add is not that account.

While the Buddha parodied and rejected the foibles of kingship, Buddhism could not afford that luxury (Collins 1996, 442). Asoka's rule instead gave rise to a set of cultural and ritual practices (the *Asokan Persona*) that informed the historical vicissitudes of Buddhist kingship in the Asokan State and the wider Theravada world thereafter. The rituals of State that were associated with the *Asokan Persona* were integral to the encompassing logic of Buddhist kingship in Sri Lanka and in Southeast Asia (Roberts 1994, 57–72). These practices were oriented by a Buddhist cosmology whose logic while revealing 'fissiparous potentialities' (Id, 62) was fundamentally hierarchical. The rituals of State were not only an intrinsic part of the symbolic glue that contrived a form of *virtual* unity to a disparate and decentralised *galactic* polity but also refracted the spatial division of the cosmic order within the order of ritual. The multilayered division of the cosmic order was also refracted in the architectural design and geographical organisation of both the Asokan State and the subsequent polities of Theravada Asia. It imbued the division of space in the here and now with cosmological import granting it a certain ontological grounding that resulted in a causal link between the cosmic and the temporal, the polity and its architectural *form* and *content* becoming a repository of cosmic energy.

In its practical consequence, the cosmology which oriented the *Asokan Persona* legitimised a highly decentralised State structure that characterised the daily routine of the Buddhist polities that emerged in Sri Lanka. James S. Duncan's hermeneutic reading of the relationship between the Kandyan landscape, the cosmic order and kingship reveals how 'the landscape masks the artifice and ideological nature of its form and content' (1990, 19). Duncan suggests that a 'structural similarity between the city of Kandy and the city of the gods was created in order that Kandy could partake of the power of its allegorical representation' (Id, 20). Intrinsic to this allegorical representation was the narrative of sovereignty in which in terms of both *form* and *content* Kandy's liminal sense of a cosmic order on earth had the capacity to be internalised by its subjects by virtue that this cosmic order, as one of the every day, constituted a form of *habitus* that mediated the relation between objective structures (the State, economy, etc.) and the practices of the every day (healing rituals, storytelling, etc.) (Duncan 1990, 22; Bourdieu 1977).

The consequence however was not a unified reading of the city's text but rather a multiple reading which refracted the diverse ontological potential of the cosmic order and its contingent signification depending on the audience, laity, kings or monks. The cosmic order also had within it a devolutionary aspect, the figure of the Buddha been in a dynamic relation with the world of the gods so that the Buddha's subordination of the Hindu gods was never settled. While the architectural form of the Kandyan kingdom becomes a metaphor for the hierarchical aspect of the Buddhist cosmic order writ large, we also witness in its architecture devolutionary moments. Consequently the story that unfolds is one of a certain tension between the claims of *virtual* cosmic sovereignty, which was actualised in the hierarchical rituals of Buddhist kingship, and the actual administrative/bureaucratic practices of the Kandyan kingdom which generated and legitimated a number of highly decentralised centre-periphery relationships. It is precisely the varied meanings proffered by the cosmology of Sinhalese Buddhism that rendered a devolved *galactic* polity

ontologically possible. Sovereignty then in its Theravada Buddhist incarnation in the Sri Lankan landscape reveals both centralising and devolutionary moments, moments that are captured in the Kandyan kingdom's architectural, administrative and ritual representation. Before I proceed, I need to first say something of the cosmic order of Sinhalese Buddhism.

25.2 The Ontological Horizon of the Buddhist Cosmos

The cosmic order of Sinhalese Buddhism is multilayered and subdivided, but its fissiparous nature is 'counteracted by the holistic framework within which it is understood, by the attributes of the Buddha, and by the principles and mechanisms which provide the pantheon with a unity of structure' (Roberts 1994, 62–63). Within this cosmological order, the Buddha is at the apex and the gods are in the middle, while the demonic forces of disintegration are at the base.[3] This cosmic order is in a continuous state of flux as it moves between its hierarchical unifying aspect (associated with the Buddha), fragmentation and reordering, with the ordering power of the Buddha ultimately encompassing the fragmenting logic of the demonic.

The *Buddhadhamma* (religion of the Buddha) stands in a relation of opposition to non-reason, which is associated with the demonic (Kapferer 1998, 11–12). As to the nature of this cosmology, its logic is not simply one of seeking to exclude the demonic. While the demonic floats between the unacknowledged boundaries of the cosmic order, its purpose is to facilitate the restructuring of the cosmos, and in this regard the demonic becomes a highly productive protagonist. The demonic potential of the cosmos is transformed by the beneficent forces of the Buddha, which have the power to encompass and hence resubordinate the demonic at the base of the hierarchical aspect of the cosmos. Within this layered cosmos, the Buddha is seen as pure, while demonic beings vary in their polluting capacity depending on their degree of orientation towards the Buddha and his teaching, the dhamma.

[3] Natha, derived from the Mahayana cult of Avalokitesvara, is the highest of the gods and in Sinhalese Buddhist tradition is the *Maitri*, the next Buddha to be (Holt 1996, Chapter 5; Tambiah 1992, 151). He is 'characterised as continually contemplating the teachings of the Buddha and as being so unattached to the matters of existence, that he is expected by the Sinhalese to be the next Buddha (*Maitri*)… Vishnu is conceived of as the protector of Buddhism on the island; Kataragama is closely linked with the ancient Sinhalese Buddhist resurgence against Hindu Tamil domination; and Saman is the god of Adam's Peak…the site of Buddha's footprint and the Buddha's first visit to Sri Lanka' (Kapferer 1991, 159). Both Vishnu and Katagarama are concerned with affairs of the human world and combine both ordering and disordering powers 'in their being' (Id, 160). These guardian deities who came to prominence in the late Kandyan (eighteenth century) period under the Tamil Nayakkar kings replaced an earlier group of guardian deities (Holt in Deegalle 2006, 39; Liyanagamage 1986, 61–77; Pathmanathan 1986, 78–112). Obeyeskere (1984: 361–75) has drawn attention to the fact that South Indian (particularly Kerala) migrants to the island brought with them their Hindu deities. These deities were often incorporated into the Buddhist cosmic order, albeit in a hierarchical relation, the Hindu gods always subordinate to the Buddha.

This orientation, in turn, is determined by their capacity to personify the disordering and ordering potential of the cosmic order (Kapferer 1991, 158–161). Consequently, the Buddha and the demonic both define the boundaries of existence, the point of entry into non-existence or extinction.[4]

The Buddha is all encompassing as the figure of ultimate authority. The 'gods and demons receive their powers by virtue of the Buddha's *varam* [warrant]' (Roberts 1994, 63). Hierarchical encompassment is the motivating dynamic that orients the logic of the cosmos, as 'authority thus branches outward from the apex of the pantheon and converges once again at the top' (Obeyesekere 1963, 145). In my argument this cosmology constitutes an ontological horizon that gives meaning to a multiplicity of Sinhalese Buddhist practices, including the discursive realms of modern Sinhalese Buddhist nationalism, as well as a defence of a highly centralised State structure that leaves little room for regional autonomy.[5]

The principle of encompassment dominates the holistic structure of this cosmic order. In this context, 'the encompassing principles defined by the Buddha and the demonic are engaged in dynamic tension throughout the realities they encompass and are present to varying degrees in all the various elements of existence and their relation' (Kapferer 1998, 11). This encompassing principle of the Buddha ensures that the gods always triumph, as the demonic is ultimately encompassed but never excluded (Kapferer 1991, 165). The logic of hierarchy is then 'one of progressive encompassment and transformation' (Kapferer 1998, 11). It is one of an 'upward movement in hierarchy… whereby the lower forms of existence are incorporated by higher forms and transformed in accordance with those principles that determine the higher form' (Id). Thus, for example, the Hindu goddess Pattini has a number of manifestations, some of which are demonic.[6]

As for the ontological potentiality of this cosmic order, I associate it with the everyday world of Sinhalese Buddhism, which draws the Sinhalese into a complex set of hierarchical relationships with Sinhalese myth and ritual. Sinhalese healing rituals, for example, not only draw on the hierarchical structure of Sinhalese Buddhist myth but also receive their ontological force from the hierarchical aspect of the cosmos (Kapferer 1991, 106–127). Healers do not necessarily seek to exclude the demonic, for the beneficent is immanent within the demonic or fragmenting aspect of the cosmos. By recentring the body of a victim of sorcery, for example, a Sinhalese ritualist not only resubordinates the demonic but also reorients the Buddha towards the apex of the cosmic order (Kapferer 1997, 61–82). The cosmos, then, is in a continual state of flux between moments of unity, fragmentation and reordering. Consistent with the principle of immanence, the dominant relation is one of

[4] The cosmic order of Buddhism is only one of many ontologies that condition the daily Sri Lankan social imaginary.

[5] Kapferer (1998, 85–117) offers an account of the ontological grounding of postcolonial Sinhalese Buddhist nationalism.

[6] The purposes of the rituals that address Pattini 'move her progressively from a low to a high possibility of being, the highest representing her most incorporative and encompassing stage' (Kapferer 1998, 11; 1991, 164–165; Obeyesekere 1984).

ambivalence in which the movement towards an exclusion of the demonic fails, the demonic instead being encompassed within the cosmic order.

Before I explore the manner in which the central metaphors of the cosmos, unity, fragmentation and reordering provide an ontological *form* to the narrative structure of the account of kingship in Sinhalese Buddhist historiography, I first trace these practices to the Asokan period. The account of Buddhist kingship that the Sri Lankan Pali chronicles present, replete as they are with the ambivalent potential for good and evil, owes its genealogy to the Asokan period. It is also this very ambivalence that generated, at an ontological depth, a devolved *galactic* polity in the pre-European period of Sri Lanka's history that provides modern post-civil-war Sri Lanka with a possible historical precedent for loosening the ties of the current overcentralised unitary State.

25.3 A Genealogy of the Galactic Polity in Sri Lanka

The pre-British history of Sri Lanka reveals regional rulers maintaining a degree of autonomy from the centre of the polity (Thapar 1961, 95).[7] The devolutionary dynamics of 'power parcelisation' (Tambiah 1992, 173) between the centre, periphery and semi-periphery in Sri Lanka's pre-British polities confirmed the *virtual* status of royal sovereignty over the whole island. Obeyesekere notes that even 'minor kings who had effective control over only a miniscule area (such as the Tamil kings of Jaffna after the fifteenth century) claimed sovereignty for all Sri Lanka' (in Deegalle 2006, 147). Obeyesekere continues that the south of the island was for much of the ancient and medieval period virtually an 'independent kingdom, an ideological replica of Anuradhapura (and later Polonnaruva)…' (Id, 137).[8] These polities had a much older genealogy, the Asokan State, which similarly revealed a dissonance between the claims of Buddhist kingship and the actualisation of a State that was *galactic* or *mandala* like in structure. [9]

Based on evidence from the *Arthashastra* and Asoka's inscriptions, this imperial State 'takes on the aspect of a vast non-federal empire…' (Tambiah 1976, 70).[10]

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[7] As Kemper notes, the *virtual* claims of Buddhist kingship cum sovereignty 'outraced reality' (1991, 50).

[8] Anuradhapura was the first of Sri Lanka's Buddhist polities, and by the tenth century CE, it had given way to the polity centred round Polonnaruva.

[9] The *Arthashastra* employs the *mandala* as a geopolitical concept to discuss the 'spatial configuration of friendly and enemy states from the point of view of a particular kingdom' (Tambiah 1976, 102, 70). Higham (1989, 239–355) provides a sustained engagement with the shifting dynamics between centralisation and devolution in the classic *mandala* polities of Southeast Asia which reached its zenith in the Angkorian *mandala*. A *mandala* is 'composed of two elements – a core (*manda*) and a container or enclosing element (*-la*)' (Tambiah 1976, 102).

[10] Tambiah (1976, 26–3; 1985, 252). In relation to the Asokan State, it seems that the disparate placing of the inscriptions and Pillar Edicts connives 'as evidence of actual direct control of a far-flung empire' (Tambiah 1976, 70).

However, it was 'divided into four provinces with their four capitals, surrounded only at the borders by autonomous states and capped by the Emperor in his capital Pataliputra whose hosts of officials appointed by and directly responsible to him held the enterprise on a tight reign' (Id, 70).[11] It was through the *galactic* polity that the religio-cosmological aura of kingship was actualised. In their structure, *galactic* polities 'modelled on mandala-type patterning had central royal domains surrounded by satellite principalities and provinces replicating the center on a smaller scale', while at the margin, there were 'even more autonomous tributary principalities' (Tambiah 1992, 173).

At the apex of the Asokan State stood the 'king of kings subsuming in superior ritual and even fiscal relation a vast collection' of subordinate polities (Tambiah 1976, 70).[12] However, this vast territorial enterprise far from being a centralised monarchy was more likely to have been a 'galaxy-type structure with lesser political replicas revolving around the central entity and in perpetual motion of fission or incorporation' (Id, 70). This model is consistent with the Buddhist *cakkavatti* monarch who as a 'wheel rolling world ruler by definition required lesser kings under him who in turn encompassed still lesser rulers' (Id). It is likely that the 'raja of the raja was more a presiding… ordinator rather than a totalitarian authority between whom and the people nothing intervened except his own agencies and agents of control' (Id).[13]

Just as the cosmic order was in a state of flux, so too were the relations between the centre, the periphery and the outer periphery of these *galactic* polities. Refracting the cosmological order, 'center-oriented space [was] fundamental to the geometrical design underlying the galactic state' (Id, 112: my interpolation). The result was that both the semi-periphery and the periphery were in 'tributary relationships' with the centre (Id, 123).[14] In its actualisation, the logic of the *cakkavatti* king gave way

[11] The *Arthashastra* and some *Jatakas* (stories of the Buddha's earlier incarnations) suggest that the ideal shape of an Indian city 'was a square or rectangle which was divided by two main streets into quarters, symbolizing the four quarters of the universe' (Duncan 1990, 50). The palace of the king was 'either located in the center or in the eastern quarter of the city and faced either east or north' (Id, 50).

[12] The *Cakkavatti Sihanada Sutta* provides canonical authority for this kind of relationship between superiors and subordinates. It tells us that 'enemy kings become client kings' (Collins 1996: 429). This is likely to be a reference to the situation concerning taxation (ibid: 429–30). The *cakkavatti* does not interfere in the tax raising power of his new client kings, instead proceeding to extol the virtues of rule by dhamma.

[13] Sections of the Pali Vinaya 'suggest[s] that the political systems of at least eastern India [which incorporated its capital Pataliputra] during the time of early Buddhism were constituted on galactic lines' (Tambiah 1976, 70–71, my interpolation).

[14] This pattern of State organisation extended all the way to the Indonesian archipelago. Moertono characterises the Javanese polity of Mataram between the sixteenth and nineteenth centuries as one in which 'territorial jurisdiction could not be strictly defined by permanent boundaries, but was characterised by a fluidity or flexibility of boundary development dependent on the diminishing or increasing power of the center' (1968, 112).

to 'the decentralized locational disposition of the traditional polity and its replication of like entities on a decreasing scale – which constitute a galactic constellation rather than a bureaucratic hierarchy…' (Id, 114). Consequently 'their domains of control expanded or shrank according to the fortunes of warfare, and satellites changed affiliation frequently and the capitals themselves shifted or declined, they are best viewed as pulsating galactic polities' (Tambiah 1986, 96).

Returning to Sri Lanka, even after the restoration of Buddhist kingship to Anuradhapura by Dutthagamani, the rulers of the semi-periphery and periphery were rarely under the control of the centre.[15] That these regional rulers 'called themselves *raja* suggests their ambitions, and regional capitals seem not so much to have complemented the royal center as duplicated it' (Kemper 1991, 65) very much in the style of a *galactic* polity.[16] In the Polonnaruva period under Parakramabahu II despite his claims to sovereignty over the whole island, the Pandyan inscriptions indicate 'there were at least two Sri Lankan kings at this time' (Id, 50).[17] While as far as the Pali chronicles of Sri Lanka are concerned, the ideal king is the one who unifies the island under righteous Buddhist rule as a *dhammiko dhammaraja*, irrespective of the violence deployed to achieve such unity, the telos of this ideal functioned at the level of the *virtual* as the historical archive suggests (Obeyesekere 2006, 137; Kemper 1991, 68). Reinforcing the significance of the *virtual*, Donald K. Swearer has commented that the 'legend that Asoka redistributed the Buddha's relics in 84,000 *stupas* throughout India, each located in a political division of his domain, suggests that Asoka governed his realm through a ritual hegemony rather than actual political control' (1995, 72).[18] Asoka thus governed through a model of sovereignty that conveyed power through an elaborate display of ritual, ritual often

[15] H.W. Tambiah (1963, 291–311) provides a detailed account of not just the authority of kingship during the Anuradhapura period but also the manner in which the power of kingship in this period was far from absolute and rather mediated by a number of administrative and judicial officials.

[16] I do not necessarily regard these *galactic* polities as corresponding to a European medieval feudal State structure at either the ideational or the material level (Leach 1958, 17–20; Gunawardana 1971, 22–25; 1978, 267; Roberts 1994, 79–81). In sharp contrast to European medieval political theories which argued for a differentiation between the spiritual and temporal domains, even if that separation was divinely ordained, the Buddhist civilisation of the *rajarata* was characterised by a literati who emphasised 'the complementarity of the Sangha and the monarchy' (Roberts 1994, 81; Gunawardena 1979, 207–10). Vassalage and chivalry entailed a 'personal bond between two men and lasted only during their lifetime' (Roberts 1994, 82; Bloch 1962, 145–62). In contrast rituals integral to the *Asokan Persona* such as *dakum* (where social inferiors paid homage to social superiors) entailed wholesale subordination to the *cakkavatti*. That said in terms of *content*, there may be similarities in the devolutionary dynamics of the European medieval State that emerged in the tenth century (Maddicott and Palisser 2000) and the Buddhist *galactic* polity, although more scholarship needs to be done in order to substantiate potential similarities.

[17] The kingdom of Jaffna was to remain outside the jurisdiction of Parakramabahu II (Kemper 1991, 66).

[18] Mahavamsa (5. 78). The *Asokavadana* (*Exemplary Gifts of Asoka*) tells us that Asoka instead 'built 84,000 relic mounds known as *dharmarajikas* (monuments of the King of Righteousness)' (Kemper 1991, 169, fn 20; Strong 1983). The *Mahavamsa* (5. 78) gives voice to this legend by suggesting that he built 84,000 viharas in honour of the 84,000 divisions in the dhamma.

masking the absence of authority over the periphery and semi-periphery, a performative mode mimicked by the kings of Kandy.

The claim to Buddhist sovereignty over the whole island was consistent with the logic of the *cakkavatti*. It was in the shadow of the period of Hindu influence in the Polonnaruva period that the imprimatur of the *cakkavatti* came to exercise a greater influence on the practices of Buddhist kingship in Sri Lanka (Roberts 2004, 56–59). The ideational heritage of the *cakkavatti* who in his journey refracts the hierarchical ontological potential of the cosmic order was followed by the kings of Kotte as well as the monarchs of Sitavaka and finally by the Kandyan monarchs (Id, 59–60). In a *sannasa* (copper-plated inscription) from Madapitiye, Kirti Sri Rajasinha (1747–1782), the second Nayakkar ruler, is described as 'the divine lord King Kirti Sri, the chief of the whole of Lanka' (Holt 1996, 35). Similarly Roberts recent work has established that the war poems of the seventeenth and eighteenth centuries present monarchs as '*sakviti* (universal emperors) and at times explicitly claim that they ruled the whole island' (2004, 59; 1996, 35).

However, the claims of a *cakkavatti* to Buddhist sovereignty over the entirety of the territory were a legal *fiction*, a *fiction* generated by the ontological ground of a cosmic order that masked the inherent centrifugal motion of the relations of power in a *galactic* polity such as Kandy. Like the Asokan State, sovereignty in the Kandyan kingdom revealed its public face through forms of tributary overlordship that were highly ritualised in structure (Roberts 2004, 60; de Silva 1995, 11). The public face of Buddhist sovereignty was embodied by the *cakkavatti* who as a wheel-rolling monarch encompassed all before him the rituals of State, refracting the hierarchical dynamic of the cosmic order. The ontological energy of the cosmic order was also actualised in the 'architectural symbolism' (Duncan 1990, 20) of the Kandyan kingdom, an aesthetics that visualised the performative dimension of sovereignty in a polity in which the contested relation between the centre and the periphery was key to the daily life of both rulers and the governed (Roberts 2004, 63; Duncan 1990, 87–153). I now elaborate on how the narrative of Buddhist sovereignty was inscribed in the Kandyan landscape.

25.4 Landscape, Cosmography and the City of the Gods

By the time the Nayakkars took the throne in Kandy, Buddhist kingship in the polity was under the influence of a Hindu-Buddhist textual tradition, which included the *Jatakas* and the *Arthashastra*. The Kandyan kings both imagined themselves and were imagined as the descendants of *Mahasammata* and guardians of the *Mānava-Dharmaśāstra*.[19] In practice kings were also bound to follow 'the *nitiya* (laws or

[19] Sir William Jones had misguidedly translated this as the 'Laws of Manu' in the late eighteenth century. Sinhalese kings were duty bound to study and interpret 'Laws of Manu' (Gunasekara 1978, 132; Griswold and Nagara 1975, 29–92; Olivelle 2005).

customs) ordained by the ancient kings' (Duncan 1990, 170) which as a form of common law 'regulated his relations with the people' (Id 170; LeMesurier and Panabboke 1880, 2). The absolute power of kingship was also further restricted by '*sirit* (the customs of the country)' (Duncan 1990, 170), the failure to observe them having the capacity to generate negative public opinion. The latter was of greater concern to the internal politics of the Nayakkar dynasty given their Tamil origins and became pertinent in the circumstances that led to their overthrow.

The legal cum customary obligation of Kandyan kings was of course subsumed within the cosmic order of Buddhist kingship which in its Asokan guise generated a *Persona* that was hierarchical. This *Persona*, which, following the Cola occupation of Anuradhapura, increasingly incorporated Mahayana Buddhist and Sakran (Hindu) ideas of divine kingship, legitimized the rule of the Nayakkars in the Sinhalese Buddhist imaginary. In both the Asokan and Sakran accounts of kingship, the king was expected to embody classical Buddhist virtues, the principles of dhamma suffusing all the monarch's actions. The *cakkavatti* in his Asokan incarnation built *stupas* and patronised the Sangha in memory of the Buddha. In both his practices and in the *Persona* that Asokan kingship generated, the king was wholly subordinate to the dhamma. In the Sakran model, the *cakravarti* in his divine status ruled 'over his people and other kings just as the king of the gods, Sakra, rules over the thirty-two gods in the Tavatimsa heaven' (Duncan 1990, 40), on top of Mount Meru.[20]

The Kandyan landscape like previous Buddhist polities, in both Sri Lanka and the wider Theravada world, 'had always encoded the narratives of kingship' (Duncan 1990, 58). Mount Meru lies at the centre of the Buddhist cosmic order. On top of it sits Sakra, the king of the 32 gods. Duncan continues:

> [b]elow Meru on Trikuta is the world of the *asuras* (demons), and outside Trikuta is the world of the *nagas* (serpents). Mount Meru is surrounded by seven annular seas which are in turn separated from each other by seven mountain ranges… or alternatively seven Kula Rocks…. Beyond the last of these ranges lies an ocean containing the four continents, one at each of the cardinal directions. The continent known as Jambudvipa, which contains India and Lanka, is located to the south of Meru. The cosmic Himalaya rises out of Jambudvipa, and on top of Himalaya sits Lake Anotatta, the sacred lake of the Buddhists…. Around the ocean marking the edge of the universe lies a great mountain wall known as the Cakravala rocks. This whole world system perishes at the end of a *kapla* only to be recreated again during the succeeding *kalpa*. (1990, 43–44)[21]

[20] The ideals of the *cakravarti* and *rajadhiraja* (supreme sovereign) are associated with Hindu ideals of kingship. The mode of the *cakravarti* stands in contrast with the Buddhist ideal of the *cakkavatti* who ruled according to the dhamma, the *cakravarti* rulers of the South Indian polities ruling instead with the force of *danda* (the stick) in the manner of a divine supreme overlord (Holt in Deegalle 2006, 46; Pathmanathan 1982, 120–45).

[21] The Buddhist account is a variation on the Hindu account (Duncan 1990, 44–45, 197, fn. 4; Dimmitt and Van Buitenen 1978).

From within this cosmic account, elements were drawn to 'construct a narrative of the landscape of the gods' (Id, 44). Throughout Indic Asia, Mount Meru was imagined at 'the centre of the universe [and] thought to be the *axis mundi* joining heaven and earth' (Id, 47, my interpolation), a point of origin for the universe. Its creative energy is 'reinforced by the myth of Mount Meru rising out of the center of a lotus, itself a symbol of creation linked to water and earth' (Id). Furthermore Mount Meru is a 'central peak surrounded by four buttress mountains marking the compass points' (Id). While Meru is at the centre of the world, the city of Sakra as well as his palace 'occupies the eastern peak of Meru, Mount Mandara' (Id). Sakra is not just the guardian of Buddhism on the island but a righteous Buddhist monarch in his own right who following the Polonnaruva period provides a model for Sinhalese Buddhist kingship and was actively employed by the Kandyan monarchs (Duncan 1990, 48).

This cosmic order was highly labile, the creative and generative potency of water merely being one aspect of an order that, for example, cleansed future god-kings and guaranteed a fertile kingdom (Id, 45–46). Consistent with the cosmic order's hierarchical dynamic, the flow of water is downwards 'from the heavens down onto the cosmic mountain at the center of the earth…' (Id, 45). Further consistent with the cyclical nature of the *karmic* economy, water 'flows back into the cosmic Ocean of Milk from whence it came' (Id, 45–46), the ocean a symbolic representation of the 'endless cycle of the creation and destruction of the world' (Id, 44; 46–47). As a supplement to my argument that the cosmic order, with its metaphors of unity, fragmentation and reordering, informs at an ontological depth a variety of discursive and nondiscursive practices, Duncan also notes that the 'endless cycle of creation and destruction' (Id, 102) is a core aspect of ontological conceptions generated by Indic thought. This is a Nietzschean economy of pure *immanence* as opposed to an oppositional dialectical order.

In its physical materialisation, the myth of the cosmic mountain 'became a paradigm for the spatial organization of state, capital, and temple in much of Southeast Asia' (Id, 48). By adopting the topographical form of the *mandala*, the Kandyan kingdom morphed into a microcosm of the cosmic order, a cosmic order that had (hierarchically) domesticated a number of Hindu deities. The king's palace, being situated 'at the center of this *mandala*, occupied the centre of the universe, and the summit of Mount Meru, and hence maintained the liminal sense of a god on earth' (Id). The chosen path of kingship was that of a *cakkavatti* wheel-rolling monarch who from the centre of the cosmic polity 'could control the world through the magical power of parallelism' (Id). The *karmic* economy of decay and regeneration, with its metaphors of birth, death and rebirth, oriented not only the ideal of righteous Buddhist kingship but was also refracted in the ontological potentiality of the polity itself – the material world of the *galactic* polity oriented by the *karmic* energy of kingship.

The author of the *Mahavamsa*, Sri Lanka's principle Pali chronicle, was fully aware of the significance of the Indian Buddhist propensity to reduce the universe to the microcosm of the royal capital. Pataliputra, the capital of Asoka's Empire, was, for example, 'administered by a thirty-two member council' (Duncan 1990, 50;

Mahavamsa 1993, 28. 1–12). This suggests a form of modelling based on Sakra's 'city of the gods and his 32 lesser gods upon Mount Meru' (Duncan 1990, 50).[22] Although Sri Lanka's early polities had extensive contacts with both South India and Southeast Asia, where the Sakran account had made its presence felt in the physical environment of, for example, Sukhodaya in Thailand and Angkor Wat in Cambodia, in the Anuradhapura period, Theravada Buddhism rejected 'such models' (Id, 52, 50–52; Obevesekere 1984, 340). This signalled an Asokan-inspired scepticism towards forms of kingship that were motivated by self-aggrandisement that underpinned the logic of the Sakran model.

However, the kings of Polonnaruva and thereafter began to fashion themselves as an 'incarnation of a god – usually Sakra, the king of the gods' (Duncan 1990, 38). As a consequence, Sinhalese kings began to imagine 'themselves as *cakravartis*, universal rulers modelled upon the king of the gods' (Id 39, Obeyesekere 1984, 340). In its South Indian (Hindu) manifestation, the *cakravarti* 'connoted supreme overlord, an emperor-*avatara* who rules by *danda*' (Holt in Deegalle 2006, 46). The Sakran model rendered the king a 'type of *axis mundi cum avatar*' (Id, 48).[23] Following the reunification of the island under Parakramabahu I, the *Culavamsa*, a subsequent extension of the *Mahavamsa*, suggests that 'the king modeled his new capital [Polonnaruva] on that of Sakra' (Duncan 1990, 55: my interpolation).

Duncan deploys the interpretive tool of the *synecdoche* – the employment of a term to stand in for the whole thing or the use of the whole to denote part of it – in order to understand how the cities constructed by kings stood as a 'microcosm of a macrocosmic totality' (Hayden White cited by Duncan, Id, 20). Thus, for example, a 'wall in the shape of an undulating wave around the lake in Kandy becomes a signifier which stands for a whole complex of the churning of the mythical Ocean of Milk by the gods at the time of the world's creation' (Id, 21).[24]

Sometimes the deployment of *synecdoches* was clear. For example, the *Culavamsa* tells us that Parakramabahu I 'named his park Nandana after the park of the god Sakra in the Tavatimsa heaven' (Id, 56). The ponds that were built in and around the capital carried the names of divine creatures (Id, 56–57). According to the *Culavamsa*, the purpose of the building programme was to make Polonnaruva 'splendidly adorned as the city of the Tavatimsa gods' (*Culavamsa* cited by Duncan, Id, 57). However, Parakramabahu I was able to maintain his legitimacy among the ruled by balancing both Asokan and Sakran imperatives 'by building religious structures as well as palaces and by building irrigation facilities that served also to symbolize the Cosmic Ocean' (Id, 57). When the Sinhalese polity moved southwest

[22] The *Mahavamsa* tells us that Sakra commanded the divine architect *Visvakarma* to make 'bricks so that King Dutthagamani could build' (Duncan 1990, 53) the *Mahathupa*, the great relic chamber in Anuradhapura.

[23] The Ambagamuva inscription of Vijayabahu I (1055–1110) confirms the emergence of a discursive frame in which the king was rendered a divine *avatar* (Holt in Deegalle 2006, 47; Pathmanathan 1982, 139).

[24] Metonymy functions in a similar way such that one feature of the physical environment of these polities could stand in for the whole field of reference of the *world of the gods* (Duncan 1990, 22).

to Kotte and then Sitavaka, respectively, Sinhalese kings chose to further elaborate on the 'South Indian conception of divine kingship' (Id, 57; Obeyesekere 1984, 57; Derrett 1956, 139). Thus Kandyan kings from the fifteenth century on had a vast corpus of literature to draw on in the design of their kingdom, not just the *Mahavamsa* and *Culavamsa* but also the *Arthashastra* (Duncan 1990, 58).

In its spatial and physical configuration, Kandy 'encoded the narratives of kingship' (Id, 59).[25] It was the acquisition of the Buddha's tooth relic in the 1540s by King Viravikrama that provoked the first significant phase of building projects in Kandy.[26] He followed the precedent of the rulers of Anuradhapura and Polonnaruva by 'building the Tooth Relic adjacent to his palace' (Id, 60) in the eastern rectangle of the city. The eastern rectangle also contained the 'temples of the gods [and] was the true locus of ritual power in the kingdom' (Duncan 1993, 236: my interpolation).

Cosmic space, the magic of parallelism, through the deployment of *synecdoches* came to life in the architectural form and content of the city (Id, 69–78). For example, great symbolic value continued to be attached 'to canals or moats' (Duncan 1990, 67) by the Kadyans. The *Pujavaliya* (History of Offerings), a text from the thirteenth century, suggests that the canals constructed in Kandy 'were heavenly rivers or symbolic demarcations of the edge of the sacred cities' (Id, 67), a *synecdoche* for the annular oceans which 'demarcated the edge of the world' (Id). The greatest of the Nayakkar royal builders was Sri Vikrama Rajasinha with whom the Sakran view of kingship reached a glorious and cataclysmic climax (Id, 78–84). In 'building palaces, ornamental parks and ponds to glorify the god-king and bring upon him the powers of the gods' (Id, 78), Sri Vikrama Rajasinha also set in motion a train of events which collided with the text of Asokan kingship. The cosmic dissonance between the two models was tactically mediated by both sections of the Kandyan nobility and the British colonial authorities in the Low Country in order to eventually secure the overthrow of Sri Vikrama Rajasinha (Id, 162, 72).

It was in the eastern rectangle that the cosmic city really came to life, this part of the city refracting the ontological potential of the cosmic order (Id, 94–107). The imperatives of cosmic modelling demanded that the king produce a 'reduced version of the universe within the confines of the city; to mirror both the world of the gods and the cities of the *cakravartis*' (Id, 107). The *telos* of such a political strategy was simple, one that sought to implicate the city, as a space which occupied a 'liminal position between heaven and earth' (Id, 107). Sakra's palace was on Mount Mandara to the east of Mount Meru, and to recap, the tooth relic was housed in Sakra's palace. Texts like the *Culavamsa* and the *Ingrisi Hatana*, a war poem from the early nineteenth century, describe 'the kings of Kandy as being like Sakra, and the king's palace in Kandy as like Sakra's palace descended to earth' (cited by Duncan,

[25] Duncan (Id, 58–64) provides an account of its architecture and political fortunes prior to its emergence as the centre of royal power in the sixteenth century.

[26] On the death of the Buddha, Sakra received the tooth relic of the Buddha and proceeded to worship it (Id, 48).

Id, 108). The Temple of the Tooth (*Dalada Maligava*) itself is described in the *Culavamsa* as a 'divine palace descended from the world of the gods' (cited by Duncan, Id, 108). Both the *Dalada Maligava* and the palace complex with its audience hall were positioned in the eastern rectangle.[27] The cosmic parallelism could not be starker – 'the palace of Sakra containing a tooth relic on Mount Mandara and the palace/temple complex with its Tooth Relic in the eastern corner of the sacred square' (Id, 109).[28]

Throughout the Theravada world, the cosmic axis of the polity was usually centred on a 'relic of the Buddha, or on the palace of the king, the representative of Sakra, the king of the gods' (Id, 50, 51–8).[29] Adorning the walls of the *Dalada Maligava* were symbols of Mount Meru. Inside the shrine room was the tooth relic, the 'palladium which legitimated kingship in Lanka' (Id, 111). The paintings on the walls of the shrine room repeatedly allude to the 'world of the gods' (Id, 112) particularly Tavatimsa heaven, the place where Sakra took the tooth relic to (Duncan 1990, 112–13; Moertono 1968). From the perspective of the kings, the palace/temple complex was an 'earthly version of Mount Mandara where Sakra and the Tooth Relic of the Buddha dwell' (Duncan 1990, 113). To the extent that the ontological horizon of the cosmic order oriented the Kandyan landscape, 'its architects (the rulers) were seeking to partake of the power of the gods…' (Roberts 1994, 67). It was parallelism writ large.

As if to reinforce the sense of cosmological protection, three of the guardian deities of the island had shrines at the northern, southern and western points of the eastern rectangle, the Vishnu *devale* in the north, the Natha *devale* to the south and the Pattini *devale* in the west (Duncan 1990, 114–16). Duncan notes that these 'shrines were thought of as the actual abode of the gods in the capital' (Duncan 1993, 236). The fourth *devale*, the shrine to Kataragama, was located in the western rectangle, the centre of profane power. Kataragama the son of Siva was expelled 'by his father from the heavens to the world of mortals' (Duncan 1990, 116). Following his expulsion from heaven, in a mimetic vein, 'his *devale* was barred from the sacred eastern rectangle, the heaven on earth' (Id, 116). At the centre of the eastern rectangle is a sacred bo tree 'which is said to come from a shoot of the great Bo tree under which the Buddha was enlightened' (Duncan 1993, 237). Adjacent to the bo tree in the centre of the rectangle 'sits a dagoba which contains the begging bowl of the Buddha' (Id, 237). Here the construction of relic shrines, an iconographic aspect of Asokan kingship, is 'linked to the Sakran in that Sakra' (Id, 237) we are told builds a relic shrine for the Buddha's tooth relic housed on Mount Mandara. Inevitably the Kandyan landscape served as an apt setting 'upon which a god-king

[27] *Dalada* means 'tooth' and *maligava* means 'palace'.

[28] Duncan (1990, 109–18) elaborates on the way in which *synedoches* signifying Mount Mandara were represented in the architecture of the palace/temple complex in the eastern rectangle. We will see that the palace/temple complex was marked by 'hierarchical practices, by ritual acts, and the statutory, executive and judicial powers vested in its offices' (Roberts 2004, 63).

[29] The allusion to the city as a microcosm of the cosmic centre was common in Hindu-Buddhist Southeast Asia (Geertz 1980).

who was also a Buddhist monarch could display both his benevolence and ritual power to his nobles and commoners' (Id, 237).

Below I expand on these rituals and the manner in which they too refracted the ontological potentiality of the landscape of the gods. I focus on the process by which South Indians, in this case Tamil kings, became Sinhalised and *sasanised*. Such processes or rituals of transformation also brought the landscape to life for 'their communicative power depended upon the location of rituals within a symbolically charged landscape' (Duncan 1990, 6–7). These rituals of transformation were but one aspect of the wider corpus of rituals by which the god-king came into being and sovereignty realised its presence (Id, 119–153). It was through these rituals that Buddhist kingship made public its persona of sovereignty. The symbolic order of Buddhist sovereignty, however, while centralising in intent lent itself to a *galactic* polity that was administratively/bureaucratically devolved. Such a dynamic did not necessarily run counter to the ontological potential of the cosmic order. My tentative argument is that this dynamic was rather ontologically conditioned by the fragmenting cum devolutionary aspect of the cosmic order.

25.5 Galactic Devolution, Virtual Sovereignty and the Rituals of State

The myriad forms of hierarchical (moral) ordering that characterised the spatial organisation of the Sinhalese Buddhist polities were analogous to the various forms of obsequiousness that marked the Sinhalese Buddhist social order. Social obsequiousness, in the form of ceremonies of *dakum* which involved paying respect/homage to social superiors, also informed 'ideas of kingly authority' (Roberts 2004, 64).[30] Before I elaborate on the cosmological ordering of the rituals of royal legitimisation, I first consider their genealogy in the everyday practices of social hierarchy.

While the royal claims to Buddhist sovereignty were more *virtual* than real Sinhalese Buddhist rites of social hierarchy were thoroughly redolent with wide-ranging performative import, even right up to the present day. Obeyesekere has noted that '[p]ower, prestige and authority were (and are) typically perceived in traditional Sinhalese society in these terms; an unequal relationship between landlord and tenant governed by rights, duties and the performance of ceremonial' (1967, 216). The practice of *dakum* was intrinsic to the relationship between regional rulers and the kings of Anuradhapura, Polonnaruva and Kandy. The *Rajavaliya* (Lineage of Kings), for example, records that 'Kavan Tissa, a sub-king in the south

[30] *Dakum*, also known as *penum (penuma)*, is a term 'that can be rendered as "appearance"', (Roberts 2004, 60) whereby on a number of times 'each year the tenants are expected to visit the lord, bringing him certain specified gifts and pay him formal obeisance by presenting forty leaves of betel (*bulat*) and falling on the ground in worship' (Seneviratne 1978b, 152).

of Lanka, gave tribute to the Tamil king Elara' (Roberts 2004, 61) in Anuradhapura.[31] The patterns of paying tribute and homage hence characterised the relationship between the *cakkavatti* and the lesser rulers in the subregions of Sri Lanka's pre-British *galactic* polities. Ceremonies of *dakum* were integral to the authority of kingship and what in a variation on tributary overlordship I classify as *galactic sovereignty*.[32] It was also a practice that characterised local and intimate family relationships (Roberts 2004, 61). Thus the cosmography of the Kandyan kingdom was replete with the geography of hierarchy.

Before I advance my discussion of *galactic sovereignty* by elaborating on the rituals of State, I need to say a few words about the spatial organisation of the western rectangle of the Kandyan polity. The city as a whole refracted the variable ontological potential (both hierarchical and devolutionary) of the cosmic order. In both its architectural form and content, Kandy 'represented the cosmos in miniature with the profane western rectangle inhabited by the citizens, symbolizing the earth and the eastern rectangle inhabited by the Buddha, the gods and the king, symbolizing heaven' (Duncan 1990, 116). While the polity as a whole communicated the ontological conditioning of the heavenly landscape of the gods, I argue that the western half of the city refracted the energy of the fragmenting aspect of the cosmic order.

What of the western rectangle or the temporal domain of the city? By the late eighteenth century, the 'Kandyan kingdom was composed of twenty-one administrative units' (Id, 93). In its structure these too seem to have echoed that of a cosmopolis, a city that mirrors a world, here that of the gods (Id, 93). In the fashion of a *galactic* polity, the administrative units were organised in the shape of a '*mandala* around the capital' (Id, 93). The *mandala* structure of the polity encompassed the kingdom's primary territorial division into two halves, the northern and the southern, 'each placed in the charge of one of two, first and second, *adigars* [chief ministers]' (Tambiah 1992, 174, my interpolation).[33]

The role of the *adigars* was central to the administrative devolution of the kingdom which was concomitant with the inability of the king to enforce his will in a manner that was consistent with the classical claims of Buddhist kingship. The responsibilities of the *adigars* were extensive, acting as both military leaders and judicial figures. Both *adigars* exercised general jurisdiction throughout the Kandyan provinces, the first *adigar* responsible for the north and east of the kingdom and the second *adigar* responsible for the south and west of the kingdom. In their judicial capacity, they heard 'appeals from their respective parts of the kingdom except in

[31] Other sources, the Brahmi inscriptions dotted around the island as well as information contained in texts such as the *Dhatuvamsa*, the *Sihalavatthuppakarana* and the *Sahassavatthuppakarana*, indicate that the early settlements were 'disparate and that petty rulers held sway over various parts of the island' (Tambiah 1992, 132, 133–37).

[32] C.R. de Silva has referred to 'ritual sovereignty' (1995, 11).

[33] The *adigars* were drawn from the *radala* caste, the upper reaches of the *goyigama* (cultivators) caste and each was responsible for the administration of the provinces in their half.

cases which the king chose to reserve for his own hearing and decision' (Dewaraja, Arasaratnam, & Kotelawele in K.M. de Silva 1995, Vol. II, 325). The city of Kandy constituted a 'separate administrative unit for which both *adigars* were responsible' (Id, 326). The *adigars* were charged with extensive powers within the city. Critically they controlled the use of corvee labour (*rajakariya*) who would attend to building projects initiated by the king (Roberts 1994, 74–75; Gunasekara 1978, 120–143). They occupied a pivotal position as sounding boards for the view on the ground. They were the medium of 'communication between the king and the general public for the king's orders to the chiefs, headmen and people were' (Dewaraja et al. 1995, Vol. II, 326) transmitted through the *adigars*. Furthermore it was not the king's signature that validated State documents but rather that of the *adigars*. With respect to honours due to the *adigar*, they 'were second only to those due to the king' (Id, 327). As a consequence of this division of power, a system of constitutional checks and balances ensued. Kandyan kings like Buddhist kings before them stressed their unlimited *virtual* power. However, the capacity of the monarch to act independently of the advice of the *adigars* and the King's Council (*amatya mandalaya*) that consisted of the two *adigars*, the *disavas* (governors), the chief secretary and other officers was very limited.[34]

The devolution of power between the king and the *adigars* was mirrored in the territorial division of the kingdom as well. The inner 'royal domain surrounding the capital city of Kandy was made up of some nine small districts (*rata*)' (Tambiah 1992, 173), each under the charge of a *raterala*.[35] Around the central domain there were 12 provinces (*disavanies*), 'an inner circle of smaller provinces, and an outer circle of larger and remoter provinces' (Id, 174). The provinces were governed by a *disava* who in turn had an administrative staff under them.[36] There were 'four major and eight minor *disavas*, mirroring in the bureaucracy the four and eight points of the compass' (Duncan 1990, 93). Consistent with the account of cosmic modelling, the *disavas* 'were the lords of the compass points' (Id, 93).

The further one went out from the centre, there was also 'a diminishing replication of the central domain in the satellite units' (Tambiah 1992, 174), echoing the classical structure of a *mandala*. Conditioned by the ontological terrain of the cosmic order, vis-a-vis the ordering authority of the Buddha on the margins of the cosmic order, the king's authority similarly 'waned as the provinces stretched further

[34] (Dewaraja et al. 1995, Vol. II: 322–23). In practice the king's power was limited by the economically weak nature of the polity, by the nobility who controlled much of the corvee labour in the polity, as well as by a practical desire not to alienate the peasantry whose labour was vital for Sakran-inspired building projects. The pattern of dual replication was repeated for a number of prominent office holders in the royal court. It was also a feature of the office holders of the *Dalada Maligava* which was 'divided into the "outer" (general administration) and "inner" (the ritual work) groups' (Tambiah 1992: 174; Dewaraja et al. 1995, Vol. II: 328–332).

[35] The duty of these offices was generally limited to revenue collection and account keeping.

[36] *Disa* is the 'Pali term for a direction point of the compass. The term for governor is *disava* – [*disa* + *va* (thing)]' (Duncan 1990, 93).

away from the capital' (Id, 174).[37] This allowed for the *disava* of a province on the Kandyan periphery and semi-periphery to assert a degree of autonomy from the centre (Seneviratne 1978b, 114; Tambiah 1992, 175). The ostensible material cause of the king's waning authority was poor communication networks. Hence some of the outer *disavanies* such as Uva, Sabaragamuva and the Seven Korales exercised even greater autonomy from the centre.

Poor communication networks also worked against the *disavas* of the outer provinces so that the further one went out from the centre, the authority of the *disavas* became increasingly reliant on their principal headmen who were domiciled in the capital (Dewaraja et al. 1995, Vol. II, 333). One of these principal headmen the *disava mohottala* transmitted the orders of the *disava* to the lesser headmen. Just as the authorial figure of the Buddha struggled to encompass the disordering potential of demonic forces at the base of the cosmic order, in the remote parts of Uva, Sabaragamuva and the Seven Korales, the *disava mohottala* exercised 'almost arbitrary power' (Id, 333).[38] I am not suggesting that the *disava mohottala* possessed demonic potential to disrupt the order of the State, but rather that the devolutionary logic of his responsibilities refracted the non-bounded devolutionary aspect of the cosmic order, an order that was contested.

This devolutionary impact extended to land management 'and the manpower settled on them (finely graded by caste and tenurial rights) in terms of monastic (*viharagam*) and temple (*devalegam*) endowments, estates attached to offices held by the nobility (*nindagam*) and the royal estates (*gabadagam*)' (Tambiah 1992, 174).[39] Such a devolutionary dynamic extended to the use of non-Kandyans (Muslims and Sinhalese from the Low Country) in specialist roles within the Kandyan administration.[40] It was the very *galactic* cum *mandala* structure of the Kandyan polity that enabled the 'Sinhalization and Buddhicization of south Indian' (Id, 175) migrant groups as well as facilitating their incorporation into the politico-administrative structure of the polity.[41] In terms of land management (an area that modern Sinhalese

[37] Duncan (1990, 95–96) notes an important distinction in relation to the frequency with which the synecdoches of the *world of the gods* and the *world of the cakkavatti* were reproduced in the western and eastern rectangles, the western rectangle containing only a fraction of the number that the eastern rectangle possessed. This was reflective of the fact that the 'western rectangle was the profane portion of the city which, in relation to the eastern rectangle of the city, stood as does the earth to the heavens' (Id, 94).

[38] A detailed account of the responsibilities of the various principal headmen is provided in Dewaraja et al. 1995, Vol. II, 334.

[39] The caste structure in Kandyan society was organised around endogamous occupational groups such that 'each caste was economically privileged in the sense that it alone had the right o supply a particular kind of labour' (Id, 336).

[40] While Sinhalese rulers applied their customary law to Muslims, they recognised Muslim personal law, a policy that was partially followed by the Portuguese.

[41] Tambiah relying on Sir John D'Oyly's early nineteenth century, *A Sketch of the Kandyan Kingdom* notes: 'Demala (Tamil) Pattu, also called Halpattuwe Rata, was that part of the Puttalam region that came under the jurisdiction of the Kandyan Kingdom in the early nineteenth century. D'Oyly's listing includes villages granted to those of the "Moor Religion" and to "Malabar people," some of whom had recently landed' (1992, 175, fn. 50).

Buddhist nationalists are loathe to concede jurisdiction on to any putative devolved/federal unit), the *adigars* exercised considerable oversight such that all 'grants of land by the king's order were signed by one of the *adigars*' (Dewaraja et al. 1995, Vol. II, 325).

A strict functional division of responsibility also existed at the bottom of the Kandyan administrative system. The king's powers were delegated 'to a number of officers, the base of the pyramid being formed by a number of headmen, each of whom had a distinct area of territory, over which he exercised the functions of government' (Dewaraja et al. 1995, Vol. II, 335). This existed in tandem with a 'system of departments known as *baddas* which cut vertically across the territorial system dividing the population into functional groups' (Id, 335) based on caste for 'purposes of revenue and services to the state' (T.B.H. Abeyasinghe cited by Dewaraja et al. 1995, Vol. II, 335). Each caste group had its own headman, and consistent with the patron-clientelism that underpinned all superior-subordinate relationships in the Kandyan kingdom, all occupational groups 'held land in return for the services they rendered' (Id, 336).[42] In what amounted to a further enhancement of the power of the *disava*, the *baddas* which in the early eighteenth century had come 'under separate departmental heads' (Id, 335–36) had by the end of the nineteenth century come under their control. Given the occupational nature of caste in Sinhalese Buddhist society in the Kandyan polity, it was a 'dynamic force driving the cog wheels of the administrative machinery' (Id, 336). Consequently the 'authority of each *badda* over the caste group and its services was all embracing and penetrated into the *disavanies* stopping short only at the boundaries of the kingdom' (Id, 335).

This was a highly bureaucratised system of administrative devolution that had evolved over many centuries. I suggest that what we really encounter with this model of *galactic* decentralisation, the dissemination of royal authority to the periphery and semi-periphery, is the paradox of centralisation in the periphery. This dynamic of provincial centralisation reaches its culmination in the Nayakkar period, when the last of the Nayakkar rulers Sri Vikrama Rajasinha was initially installed on the throne as a puppet of the first *adigar* Pilima Talavve. Symbolic of the overwhelming power of the nobles who controlled the administrative bureaucracy of the kingdom, in 1798 Pilima Talavve 'combined in himself sixteen offices' (Id, 337) of State.[43] The king was the *galactic sovereign* par excellence himself encompassed by the provincial bureaucracy, the *galactic* centre turning into the *galactic* margin. Such was the multicentric nature of the Kandyan polity that it was the king who in the absence of a developed monetary economy remained dependent on the 'loyalty of the *disavas*' (Id, 338).

[42] For example, there were the potters department (*badahalabadda*), washerman's department (*radabadda*), weaver's department (*handabadda*) and the elephant department (*kuruve badda*) (Dewaraja et al. 1995, Vol. II, 336).

[43] In the language of political economy, this was a patron-client enterprise, and in the period following the introduction of open market reforms in 1977, it has not been uncommon to find a small group of entrepreneurs monopolising government contracts.

In recognition of the subordinate status of the western rectangle, the powers of the *adigars* did not extend to the eastern domain of the city, the zone of the palace/temple complex. The *adigars*' authority was encompassed by the cosmic aura of the palace/temple complex which stood in an elevated relation to matters temporal in the western rectangle. As Duncan aptly summarises, the Kandyan polity was marked by a 'hierarchy of declining purity moving from the heart of the city to the extremities of the kingdom' (Duncan 1990, 117). The western rectangle which stood lower than the eastern was the location of all things secular, and it stood encompassed by the aura of the Buddha and his cosmic order that saturated the eastern rectangle. On the one hand, just as the cosmic order fluctuated between moments of unity, fragmentation and reordering, the dynamic relation between the centre, periphery and semi-periphery of the Kandyan kingdom similarly refracted the dynamic relations of the cosmic order ontologically conditioning the movements of the *galactic* polity. On the other hand, concomitant with the Asoka's imperial State, the ontological status of the cosmic order was such that the 'city as a whole…was as a heaven to the kingdom as a whole' (Id, 117) and in its overall geographical organisation refracted the hierarchical aspect of the cosmic order.

It was the rituals of State that functioned as the symbolic capital which not only held the centre, periphery and semi-periphery of the Kandyan polity together but also provided the *virtual* nature of *galactic sovereignty* with its performative structure. The rituals of royal legitimisation were subject to constant expansion (Seneviratne 1978b, 90–114). Many of these revolved around relic worship and a symbolic expansion of their ontological status so that by the 'twelfth century the tooth and bowl relics [of the Buddha] were being treated as the symbols of legitimate kingship' (Roberts 1994, 67: my interpolation). By the twelfth century a festival in honour of the tooth relic had developed, and by the fourteenth century this had developed into the *Asala Perahera* (procession), a festival of renewal (Roberts 1994, 67). The *perehera*, having its genealogy as a fertility rite, was one of many rituals in which the guardian deities of the island were carried around the new capital in Kandy. It was a powerful 'ritual of protection that was understood to be a recharging of [the] cosmic power' of kingship (Roberts 2004, 66: my interpolation) which in its very performance drew on the ontological status of the Buddha as a 'sovereign regulator' (Tambiah 1976, 52; Seneviratne 1978b, 98–108, Duncan 1990, 128–39).

The function of the *Perahera* 'consisted primarily in the reaffirmation and re-legitimisation of royal power' (Seneviratne 1978b, 111). By the time of the Nayakkars, it was 'an instrument of political power' (Seneviratne 1978a, 179) which in its processional order was a 'pre-eminent representation of the caste system' (Seneviratne 1978b, 112). Participation in the *Perahera* was premised on 'caste status and caste-based land tenure' (Id, 112), but all caste groups were represented albeit in a radically hierarchical manner.[44] The very form of the *perehara* with its

[44] The caste structure in Kandyan society was organised around endogamous occupational groups such that 'each caste was economically privileged in the sense that it alone had the right to supply a particular kind of labour' (Dewaraja et al. 1995, Vol. II, 336).

strict hierarchical gradation of caste, occupation and religious functionary conveyed a very clear message to all those who witnessed it. It was a powerful spectacle and 'dramatiser of state power' (Id, 114) with profound ontological import.[45] In legitimising kingship the *Perahera* also reinforced hierarchy as *natural*, as a dynamic ordained by the cosmic order so that hierarchy was imagined as the 'basis of social harmony' (Id, 114).

The Nayakkars sought to reinforce this hierarchy. Drawing on reforms initiated by the first Nayakkar king, under Kirti Sri Rajasinha, the second of the Nayakkar rulers, the carrying of the tooth relic in a gold casket on an elephant became the centrepiece of the *Perahera* (Tambiah 1992, 161–62). He placed the section carrying the relic 'at the head of the pageant, thereby giving it primacy over the sections that carried the insignia of the gods' (Seneviratne 1978a, 179). This change in the order of ritual was a 'dramatic representation of the place the king accorded Buddhism in relation to the worship of the [Hindu] gods' (Tambiah 1992, 179: my interpolation). As Roberts notes the 'immanent energy of the Buddha now added lustre to the king and guardian deities in their work of world renewal – and thus enhanced the Kandyan state and its central seat' (2004, 66).[46]

Through the *Perahera*, for example, the king as an immanent representation of the Buddha was able to exercise a cosmologically determined form of power over the hinterland of the kingdom. Rituals such as the *Perahera* reinforced the centrality of the capital through its centripetal dynamic. At the head of the procession was the *peramune rala*, a State officer who carried the *lekam miti*, the register of land title in the kingdom. While signalling the centricity of the land tenure system in Kandy and of the *goyigama* caste, the presence of the representative of this group at the front of the procession functioned to mask over the historic decline in the economic power of landed interests in the kingdom.[47] To continue, 'sections 2, 3, and 23–8 [of the procession] represented the central government' (Seneviratne 1978b, 111, my interpolation). These sections represented the officers of the central government such as the elephant department as well as the military departments. Sections '4–15 and 22' (Id, 111) represented the provinces, both inner and outer.[48] Sections 16–21 were composed of the religious functionaries of the State such as the office holders

[45] The pomp and circumstance of the *Perahera* echo Foucault's (1982) account of the politics of the *spectacle* in *Discipline and Punish* in which sovereign power in the West in the premodern period is inscribed on the body of the subject through the aesthetics of public execution, for example. This contrasts with modern power (governmentality), which is much more diffuse in its application (Foucault 1982).

[46] The *Mahavamsa* records that when Dutthagamani marches into battle against Elara, he does so having had a relic of the Buddha 'put into his spear' (cited by Seneviratne 1978b, 96).

[47] By the time the Kandyan kingdom had ceded control of all the island's coastline to the Dutch in 1766, the transition from what had been a 'surplus-generating agricultural system' (Duncan 1990, 34) in the earlier dry zone polities in Anuradhapura and Polannuruva to a Kandyan polity which generated production at subsistence level was complete. Economic decline would pursue apace in the highlands until the British colonial State developed a plantation economy (Id, 30–34).

[48] Seneviratne (1978b, 108–10) provides a detailed account of the various sections of the Kandyan polity and social order that participated in the *Perahera*.

of the *Dalada Maligava* and the representatives of the principle *devala* in the kingdom (Id, 111–12).

Apart from its allusions to fertility, the *Perahera* had the air of a grand military procession (Id, 111; Duncan 1990, 133–34). The various sections of the *Perahera* all proceeded past the king. At the very end of the procession were the carriages carrying the consorts of the gods with the *cakkavatti* king, either riding a white horse 'in imitation of Sakra emerging from the Ocean of Milk' (Roberts 2004, 66) or on a 'golden chariot drawn by eight horses' (Davy 182, 130 cited by Duncan 1990, 134). Having circumambulated the city, the *perehara* 'returned to the sacred rectangle and circled it three times before disbanding' (Duncan 1990, 134). In drawing the *perehara* to a close by the act of circumambulating the city, the king 'reaffirmed his control over the city, but also, through the power of parallelism, reaffirmed his control over his whole kingdom' (Id, 134).

As I pointed out above, *disavas* in the periphery and beyond were relatively autonomous of the king's authority. However, no *disava* would risk the mystical repercussions of not attending the *Perahera* in which homage was paid to the Buddha's tooth relic 'in the presence of the king in his own fortress' (Seneviratne 1978b, 114). Other rituals captured the centrality of the capital through the diffusion of sacral power from the centre to the provinces. For example, the festival of *Karti* saw holy oil 'annually sent from the Natha Devale in Kandy to all of the *devala* and *vihara* in the kingdom' (Duncan 1990, 37; Seneviratne 1978a, 180–81). As a consequence the Natha *devale* in Kandy functioned as an '*axis mundi* through which divine power needed for the maintenance of order, health, and prosperity [was] radiated…to other sacred places throughout the Kandyan cultural region' (Holt 1991, 177 cited by Roberts 2004, 67). In addition to these annual acts that amounted to a dispersal of the aura of the Buddha by the *cakkavatti,* the *cakkavatti* also engaged in 'occasional measures that saw the god-like king reaching out to specific sites in person to bestow good deeds' (Roberts 2004, 67), acts which had *karmic* consequences (Walters 2003, 2–39; Seneviratne 1978b, 62–63). This leads me to that most significant of ceremonies, the consecration ritual by which the king became godlike.

Kingship refracted the aura of the Buddha. It was a dynamic that was reinforced in consecration cum coronation ceremonies known as *abhiseka*, which were sometimes performed annually. These ceremonies at which nobles and others paid homage to the king turned kings into gods and were essentially 'rituals of integration' (Roberts 1994, 68) by which the king would be accorded the status of a *bodhisattva*, a Buddha to be (Roberts 2004, 48; Duncan 1990, 123). As with the *Perahera*, consecration ceremonies precipitated a 'considerable mobilization of the people…. with almsgiving and processions in all directions of the kingdom' (Roberts 1994, 46) over a 2-month period (Goonewardena 1977, 1–32). Relying on evidence from John Davy, Duncan notes that on the day of the consecration, 'the king and his train emerged from the gate of the palace/temple complex' (Duncan 1990, 122) initially marching northwards to the Vishnu *devale*.[49] Having received the blessings

[49] North was the direction in which a *cakkavatti* must initially march at the commencement of his reign (Duncan 1990, 122).

of Vishnu, the guardian deity of Buddhism on the island, the 'king marched south to the Natha Devale' (Id, 122).

Following a series of purification rituals which refracted the cosmic order, the *abhiseka* ritual confirmed the king's geographical reach as a ruler of the whole island, taking the form of a *dipa cakravarti* (Roberts 2004, 46). The renewal of sacral power was then simultaneous to the renewal of profane power in the here and now world of the sociopolitical domain (Id, 69). The *abhiseka* ritual concluded by addressing the king as a 'god who would be king' (Seneviratne 1978b, 2). In its transformative capacity the rituals held at the Natha *devale* transformed the human aspect of the king into 'an embryo Buddha, a *Bodhisattva*, who would one day be a Buddha' (Id, 2; Duncan 1990, 124). While this confirmed in the Sinhalese Buddhist imagination the king's status as a *cakkavatti* a universal ruler of the world, such a status remained at the level of the *virtual*, as did much of the rhetoric of Buddhist sovereignty.[50]

25.6 Conclusion

So what of the present? The model of the *cakkavatti* king gave rise to a *galactic* polity that revealed the ontological potentiality of a cosmic order that refused closure. The consciousness of the *galactic* polity, as revealed in the administrative practices of the Kandyan kingdom, was lost in the governmental logic of the modern Ceylonese State shaped by the British from the mid-nineteenth century. This was a unitary State driven by the interests of British mercantile capital, and as such it could not be legitimated by recourse to the hierarchical intent of the Kandyan kingdom, for example, as is common in contemporary Sinhalese Buddhist nationalist rhetoric. Ironically, the British recognised the relative autonomy that the Kandyan kingdom had in relation to the rest of the island, with the result that between 1815 and the late 1830s the *Kandyan Department* administered Kandy.

Notwithstanding the hierarchical intent of Sinhalese Buddhist kingship in the pre-British period, the precolonial polities gave rise to highly devolved administrative practices that implicitly were ontologically grounded in the non-bounded nature of the cosmic order. In contemporary terms it is possible to draw an analogy between the set of checks and balances that characterised relations between the centre, the semi-periphery and the periphery and a federal State structure with a rigorous delineation between legislative, executive and judicial functions. By drawing on the pre-British past, Sri Lanka may be able to devise a form of federal State structure that accommodates the ethnocultural diversity of the island. In doing so, Sri Lanka would rediscover the consciousness of the *galactic* polity.

[50] I am reminded of Claude Lefort's (1986, 211) characterisation of sovereignty in its Anglo-European incarnation as 'that which is sought but cannot be attained…' (1986, 211).

The model of the *galactic* polity eschewed bureaucratic hierarchy, the sine qua non of the unitary State. It did so in favour of a '*replication of like entities on a decreasing scale*' (Tambiah 1976, 114, emphasis in the original), the contemporary form of which would be a strict demarcation between the responsibilities of the centre and the units of a federation. Far from being alien, devolved administration was very much the norm in pre-British Sri Lanka, and it is a past that Sri Lanka needs to resurrect if it is to break out of the endless cycle of ethnic fratricide. The administrative past of the island stands in sharp contrast to the retrospective Sinhalese Buddhist nationalist reimagination of that past which is fundamentally refracted through the modern bureaucratic capitalist State established in the nineteenth century. It is clearly not the case that 'in Sri Lanka, we never had separate states—we only have had Sri Lanka. Therefore, the state has to be unitary' (Frydenlund 2005, 21).

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Chapter 26
Linguistic Landscape, Law and Reflexive Modernity

Christopher Mark Hutton

Abstract This chapter links the linguistic landscape, that is, the visible texts in the modern urban environment, to the evolution of law within what has been termed 'reflexive modernity'. A major symptom of reflexive modernity is the rise of 'managerial' modes of governances. Law and regulation are blurred within juridification, and the citizen is positioned simultaneously as subject to rules and as the consumer of state services under a civic contract. Signage in the cityscape merges legal warnings, regulatory advice and exhortatory appeals. Law, regulation and civic responsibility are not clearly—semiotically—distinguished. These processes are illustrated using examples from Hong Kong and mainland China. In Hong Kong, the cityscape shows increasing density of regulatory signs, safety warnings and appeals to citizens to adopt appropriate modes of behaviour. In mainland China, the linguistic landscape has been semiotically softened, with similar exhortatory appeals and cartoon-like figures representing the police. The citizen is situated in this process as a consumer-partner rather than merely the subject of law's disciplinary control. Managerial modes of governance are visible at immigration checkpoints, with the 'traveller-consumer' invited to evaluate the 'service'. It is argued that there is a degree of convergence in the linguistic landscape of these two very different jurisdictions (both within the People's Republic of China) which reflects the rise of reflexive modernity and managerial modes of governance.

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26.1 Introduction

Public spaces as textual spaces, including institutional and commercial spaces to which the public is allowed access, reflect a mixture of legal, moral, commercial and aesthetic considerations. No space is entirely beyond the reach of law, but some spaces are more explicitly monitored and signposted than others. This chapter addresses the nature of the 'textscape' or 'linguistic landscape' of the modern city. It seeks to relate aspects of the everyday experience of the city to debates about the juridification of modern societies within so-called 'reflexive modernity', examining public signs in Hong Kong and mainland China. The study of the linguistic landscape takes as its main object of inquiry the signage, billboards, notices, advertisements and graffiti of the modern city. It understands signs as integral to the urban landscape and looks at linguistic and sociolinguistic issues (multilingualism, metaphor, naming) in the context of design or 'styling' of public written language (Shohamy and Gorter 2008).

The citizen of a modern society moves through a landscape which marks boundaries, advises, exhorts, warns, threatens and seduces. This landscape reflects an underlying economic order, for example, the relationship of commercial premises to commercial signage, a cultural order (e.g. the use of typeface in commercial signs to connote tradition, modernity and exotic foreignness) and also a political-civic order, in that names of parks, streets, districts and towns to varying degrees connote social, political or national values. The linguistic landscape is oriented towards a range of addressee roles, including tourist, driver, pedestrian, shopper, citizen and consumer, and is embodied in media with varying degrees of permanence (compare a street sign with a notice stuck with sticking tape onto a wall), marking differing levels of authority and relevance. The textscape of a city reflects aspects of the legal order prevailing in a given jurisdiction, and it enacts a complex set of legal relationships, responsibilities and duties. It defines boundaries between different kinds of public space and between private and private, warns its addressees of potential or characteristic offences, and in some cases gives notice to offenders of the penalty they may expect. Notices may actually cite legislation verbatim (e.g. in signs outside prisons) or may offer concise summaries. By-laws and other regulations frame the entrance to parks and other public spaces, often in both textual and iconic form, as in the familiar circular sign with a red line through the image of the forbidden or undesirable behaviour. Citizens and visitors are also the target of a civilising discourse, with or without the threat of legal sanction, for example, signs about personal conduct, dress codes, smoking and littering.

26.2 Reflexive Modernity

Terms like 'reflexive modernity', 'remodernisation', 'second modernity' or (in some usages) 'postmodernity' reflect an understanding that modernity at a certain point turns on itself and begins to modernise and radicalise itself (Beck et al. 2003, 1): 'It begins

to transform, for a second time, not only the key institutions but also the very principles of society. But this time the principles and institutions being transformed are those of modern society'. Shields (2006, 234 fn 2): 'It posits a normative and homeostatic modernity which is now changing or being "updated" or "re-modernised" in ways which utilise the same processes that produced "first modernity" but are now reflexively leading to a qualitatively distinct "second modernity"'. This has been termed 'liquid modernity', a stage of development characterised by highly mobile nomadic and extraterritorial elites, increased spatial differentiation as commercial spaces like shopping malls dominate the public experience of space and gated communities or 'voluntary ghettoes'(Bauman 2000, 1–33). The citizen is reconceptualised as consumer, as part of a social order which is fundamentally at odds with the ideology of the welfare state (Abrahamson 2004, 171–179). Reflexive modernity in this chapter is understood primarily in terms of the dominance of the consumerist-contractual understandings of citizens and the public sphere, managerialism and juridification.

Reflexive modernity retains the commitment of modernity to procedural and substantive rights, equality and transparency. However, these concepts and the associated discourse are co-opted within a managerialist reform as part of a wider 'audit culture'. Following the 'managerial turn', public institutions and corporations create explicit statements of their goals in the form of 'vision' and 'mission' statements, undertake branding and market-positioning exercises, codify internal policy and develop meta-mechanisms (or feedback loops) for monitoring their own compliance with stakeholder, societal and institutional aims. Institutional energy is then strongly focused on achieving a coordinated mobilisation of resources in the pursuit of a set of articulated goals or outcomes. That these goals are set out in an explicit manner is fundamental to this process, since without precise formulations of goals, there can be no transparent accountability to them. The managerial turn is a revolt against the informal, the intuitively understood and unstated, following the maxim 'what can be measured can be managed'. Belief in effability and the transparency of reasons is one important component of the managerial state in which 'all of us move through a social space that becomes more saturated with rules' (Campos 1998, 5).

Managerialism is driven by a profound distrust of the taken-for-granted, seeing this as a cover for inefficiency and obfuscation. It seeks to break institutional consensus by setting in motion a set of reflexive practices and processes that ensure continual review. Institutions are perceived to have been run unreflexively through the unthinking appeal to established practices, language and habits. These are habits of language, of mind or procedure and of spatial organisation that must be subject to perpetual scrutiny. One symptom of demands for transparency, accessibility and openness is the use of the present participle in logos, slogans, tags and mission and vision statements ('bringing you increasing levels of excellence', 'passionate about the south-west'), which positions the addressor and the addressee as involved in an open-ended reciprocal, if ill-defined, relationship in which engagement of the 'service provider' to excellence is unbounded. Discourse boundaries between domains become blurred as buzzwords ('excellence', 'value added'), management techniques

and modes of assessment spread from the private to the public sector, from commercial to educational institutions and so on.

The Citizen's Charter promulgated by John Major as prime minister of the United Kingdom in 1991 was an important stage in this global process. Among its aims was 'to replace bureaucratic public sector structures with marketised ones' (Barron and Scott 1992, 526), as a stage in the managerial revolution that had been in progress since the early 1980s with the rise of new model management. It was followed in Hong Kong by a series of performance pledges introduced by the incoming governor Christopher Patten in 1992. The labour government's 'service first' initiative in 1998 recast the original Citizen's Charter, an illustration of the need for constant reflexive reform as old policies and buzzwords begin to appear stale and routine. India's Citizen's Charters define 'citizen' as 'the clients or customers whose interests and values are addressed by the Citizen's Charter and, therefore, includes not only the citizens but also all the stakeholders, i.e., citizens, customers, clients, users, beneficiaries, other Ministries/ Departments/ Organisations, State Governments, UT [Union Territory] Administrations etc.'[1] A recent British reform in this open-ended series of initiatives involves 'customer service excellence', a benchmarking process which is intended 'to bring professional, high level customer service concepts into common currency with customer-facing public services by providing a unique improvement tool.'[2]

These managerial reforms have had a clear impact on the linguistic landscape worldwide, with conscious attempts to brand public services as a product and with mission statements appearing in railway stations, hospitals (which in the UK have their own patients charter, see Stocking 1991) and municipal offices, along with performances pledges and related statistics.

26.3 Juridification

Juridification refers to the increasing encroachment of legal modes of thought upon institutions, public spaces and social practices. The contractual elements of modern civic culture lead to a shift towards explicitness, transparency of purpose, market-oriented commercial phrasing and therefore new forms of public language. Two related features of reflexive modernity come together here, namely the blurring of the boundary between law and regulation (see Morgan and Yeung 2007, 223–237) and the encroachment of legal ways of thinking, legal language and the legal mindset on the everyday public world. Given that the rule of law is a mark of modernity, juridification within reflexive modernity reflects law's elaboration of its most modern features, including its proliferation of procedural rights, scrutiny of the reasoned

[1] http://goicharters.nic.in/chartermain.htm

[2] http://www.cabinetoffice.gov.uk/chartermark.aspx, http://www.cse.cabinetoffice.gov.uk/about-TheStandardCSE.do

basis of administrative action and its diversification into regulation, administrative control, arbitration, voluntary codes of practice and civil exhortation. The rise of judicial review of administrative action reflects this reign of reasons: even if an administrative body is not required to give reasons for its decision, the system at some level must nevertheless explain the reason for not giving reasons, for example, a court will have to justify its decision not to require a public body to give reasons (see Loughlin 1978, 215–241). There is no way to calculate the overall cost-benefit to society of aggressive juridification through judicial review (Sunstein 1989, 522–537); as with tort, there is also no clear 'bright-line' outer limit to the expansion of this domain.

If liquidity is a diagnostic of this unsettled reflexive modernity, then questions of 'boundaries and border making' are at its heart (Shields 2006, 224). The boundary between law and non-law is itself unsettled and indeterminate, as law extends into and formalises social practices in different domains and is also hybridised by its interaction with institutional codes, quasi-juridical discourses and 'hallucinatory law' (fantasies about what the law is, does and can do, media images and so on, see Haltom and McCann 2004). This brings the assumption 'that whatever the domain of its intervention, the further incursion of legal regulation is necessarily a social and political good', introducing 'a form of reasoning that subjects the plural disciplines and identities of social life to the homogeneous and hierarchical norms of a self-defining and increasingly asocial discourse of law' (Goodrich 2000, 148).

The domain of law expands as domains of social activity orient themselves towards law as the ultimate off-stage arbiter. Nonlegal forms of social control 'acquire legalistic characteristics' (Hunt and Wickham 1994, 48). As Campos argues, whereas before it was common to speak of 'going to law', now law 'comes to us': 'Legal modes of vocabulary and behaviour pervade even the most quotidian social interactions; the work-place, the school, and even the home mimic the language of the law, and as a consequence replicate its conceptual schemes' (Campos 1998, 5). One of its many reference points is Jürgen Habermas's concern with the colonisation of the life-world and public discourse by law (Habermas 1987). In this, law comes to represent both 'a normalisation and a confinement or depoliticisation of social relationships, a colonisation of everyday life that brings the psychic malaise of law into ever-further aspects of cultural life' (Goodrich 2000, 148).

26.4 The 'Neighbour Principle' and Juridification

Key historical moments in the juridification of public spaces can be found in the early twentieth century, with decisions like *MacPherson v Buick Motor Co*. (1916) and the House of Lords decision in *Donoghue v Stevenson* (1932). These decisions can be understood in a variety of ways, as widening the duty of care by liberating it from privity of contract, as obviating the need for the use of concepts of fraud and misrepresentation or as moral statements of interpersonal responsibility constrained by a desire to draw a practical legal limit when faced with a 'floodgates' argument,

as inaugurating new standards of protection. In *Donoghue v Stevenson*, Lord Atkin recognised a general moral obligation to others, but one circumscribed by law (at 580):

> The liability for negligence whether you style it such or treat it as in other systems as a species of 'culpa' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

But this leads nonetheless to a very general statement of potential liability (at 580):

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Discussions of reflexive modernity draw on intellectual frameworks from systems theory and Foucauldian discourse analysis and employ the dramatic language of invasion, colonisation and metaphors of mental disorder ('psychic malaise', 'madness'). But there is also a recursive moral logic to juridification where the law is widened because it is understood—taken for granted—that it is the law's role to grant justifiable and necessary legal protection in all possible circumstances. Once the duty of care was conceptually and jurisprudentially segregated from considerations of privity of contract and given a framing in a universalizing Christian morality, there was no clear outer boundary to the application and reapplication of the basic reasoning in *Donoghue v Stevenson*. This process has been fed by analogies between domains such as product liability, safety in public spaces, interpersonal conduct in institutional contexts or assertions of the moral equivalence of acts and omissions. A British legal academic writing in the late 1980s described a 'dramatic increase in the variety of circumstances in which courts are willing to hold that one party owes a duty of care in tort to another' and could dismiss as 'quaint' a statement by Viscount Dilhorne in *Dorset Yacht Co Ltd. v Home Office* (1970) to the effect that the categories of relationship for which a duty of care could be invoked had been fixed by the common law and precedent (Logie 1989, 115).

In addition to this rise of tort law for regulating the public sphere, one can find within reflexive modernity a radicalisation of the fundamental evolutionary process identified by Sir Henry Maine, namely the shift from 'status to contract' (Maine 1861). The redefinition of citizen as consumer of state services, or of the university as a service provider to students with contractual and quasi-contractual obligations, represents a further shift away from the status regime where the citizen is primarily the subject of the state, just as the notion of the inherent authority of the status of a professor and of a student as supplicating to the university for a degree are now archaic when set against a contractual and consumer understanding of higher education

(see Delucchi and Smith 1997, 322–327; Valey 2001, 1–8). Contract law, with its ideal of explicitness and transparency to both parties (the *consensus ad idem*), agreed performance criteria for measuring success, and suggestion of partnership and consent, in conjunction with the post-WWII expansion in consumer law in jurisdictions like the United Kingdom which made the state an increasingly important party to every commercial contract, is fundamental juridification in its impact on the language of the public sphere within reflexive modernity.

Juridification responds to the morality of the individual case and generalises the equitable principle that there should be no wrong without a remedy, at the same time as widening without horizon the notion of wrong, a process which has as its corollary the identification of new classes of wrongdoers or tortfeasors with liability. This gives rise to an increasingly defensive posture from public bodies in the face of potential risk and liability, with pre-emptive notice given of a wide range of potential hazards, at the same time as public spaces are controlled for activities that might conceivably produce hazards. Thus, a 'no-skateboarding' sign and a 'wet floor' sign are two faces of the same process, even though the one is cast as a prohibition and the other as a warning.

26.5 Signs in the Hong Kong Cityscape

The Hong Kong Special Administrative Region, until 1997, the British colony of Hong Kong, has retained its common law legal system under the 'one country two systems' doctrine' and the basic law and is in effect a common law enclave within the civil law jurisdiction of the People's Republic of China. The cityscape of Hong Kong has a high degree of commercial signage, as well as official signs of various genres, including tourist and heritage information, warning signs, prohibition signs and exhortatory signs about good or advisable conduct. The visible signage forms the urban 'frontstage', with signage not merely affixed to, but actually constituting the cityscape, especially in areas where small businesses and trading companies dominate or where there are large numbers of restaurants and retail and wholesale outlets. The amount of signage escalates as vendors, official agencies and private citizens compete within an 'economy of attention'. The signage bombards the user with messages (Cookson Smith 2006, 41). While this creates its own aesthetic of activity and vibrancy, it also means that signs which have legal force may be absorbed and lost into an overall visual experience of pleasurable disorder or semiotic 'buzz'. This has become an issue in arguments to the effect that the density of signage regulating traffic actually detracts from road safety, both by overloading the driver, particularly more elderly motorists, with information and instructions, and by externalising too much of the authority over decision making and safety (Ho et al. 2001, 194–207; Staddon 2008).

To begin with a simple example, there is a sign outside my office in the University of Hong Kong which reads 'wet floor 小心地滑'. The Chinese could be translated as: 'take care, slippery floor'. It is a permanent sign and appears frequently around

the building, often accompanied by its regulatory partner ‘no smoking 不准吸烟’. The Chinese could be translated as: ‘smoking is prohibited’. The ‘no smoking’ sign asserts a prohibition which is valid at all times, whereas the wet floor sign warns about a condition which is in fact rarely present. The prohibition against smoking is not merely an institutional rule; it has the force of law, namely the Smoking (Public Health) Ordinance (2006), which in schedule 2, part 1 lists locations where it applies, including ‘any specified educational establishment’. The ‘wet floor’ sign is on its face a simple safety warning and could be read literally as stating that the floor is wet and that passers-by should take care. However, the floor is rarely wet, making this sign, if understood, as referring to a state of affairs, much less accurate than a stopped clock which refers to the correct time twice a day. To impose a coherent message upon it, the sign has to be read as a generalised warning that on occasion the floor may be wet and that in those circumstances one should take care.

The university has a general duty under the Occupational Safety and Health Ordinance, section 6, Part II (1) to the effect that: ‘Every employer must, so far as reasonably practicable, ensure the safety and health at work of all the employer’s employees.’ In addition to its employees, the university also must ensure the safety of students, contractors and visitors, and its responsibilities in this area are set out in an institutional Statement of Safety and Health Policy which in section 1.2 commits the university to take ‘all reasonably practicable steps within its power’ in respect of ‘(a) compliance with all relevant legal requirements; (b) identifying hazards, assessing risks and managing those risks; (c) ensuring that employees, students, visitors and contractors are adequately informed of those risks and, where appropriate, receive instruction, training, and supervision’.[3] But the ubiquity of these ‘wet floor’ warning signs means that they become part of the design and textscape of the building, and they arguably can scarcely function as ‘notice’ in the legal sense of drawing attention to a hazard as means of meeting one’s legal responsibilities under the ‘neighbour principle’ and avoiding legal liability in the case of an accident.

Neither the ‘no smoking’ nor the ‘wet floor’ sign invokes directly any legal authority, and both are semiotically analogous. They are mass-produced standard signs available in Hong Kong, sharing the use of red, black and grey and bilingual in English and Chinese with an image or icon accompanying the text. Both are found in the publicly accessible areas of the building and its classrooms, but not in the individual or departmental offices. The individual office is marked as a quasi-private space, even though smoking similarly no longer permitted there. In semiotic terms, there is no distinction between the regulation which comes with legal sanctions and the warning which meets the institutional requirement to enhance safety. In fact, smoking bans are also understood in terms of environmental safety and concern for the impact of specific states or actions on the health of others, so there is at a deeper level an underlying shared logic. The ‘no smoking’ sign has legal force, but it also

[3] http://www.hku.hk/safety/pdf/HKUSHP.pdf

represents a moral principle of concern for others; the 'wet floor' sign on its face suggests concern for the well-being of those in the building, but it also references law, albeit at one remove. More recently, signs have appeared in the university toilets with the instruction: 'To reduce the spread of germs/Please put down the toilet lid before flushing'. Law, responsibility, public hygiene and morality are not clearly—semiotically—distinguished.

A further new class of sign in the university operates an index of community, transparency of purpose and an indication of a service relationship between the institutions and its clients, primarily the students. For example, the University Library since 2008 has designated itself at the entrance as 'your learning place'. This evocation of community has its counterpart in Hong Kong government discourse, including the slogans 'keep Hong Kong clean' and 'don't rubbish your home' (香港是我家清潔齊參加). The first wave of this exhortatory advertising has its origins in the 1970s, as the colonial government sought to create a civic-minded, albeit apolitical, identity out of the largely immigrant society of Hong Kong.

There is a longstanding and more traditional genre of signs which indicate the source of their authority. Outside the decommissioned Victoria prison in Central, Hong Kong, there are obsolete signs such as: 'In accordance with prison rule 22 payment of fines will only be accepted on a weekday between the hours of 9 and 12 in the morning and 2 and 4 in the afternoon' or announcements with the phrase 'superintendant, Victoria prison' underneath. 'By order of' or 'by authority' are familiar phrases in this genre. Signs may also cite the actual legal text of which they are an index. At the other extreme, we can see reflexive modernity as involving a blurring of voices and discourse positions, in which authority hides its ultimate regulatory or disciplinary voice, and for example, inanimate objects acquire anthropomorphically first-person identities. This was pioneered in commercial advertising discourse ('I speak your weight') but is now a feature of official announcements. A Hong Kong government advertisement depicts an anthropomorphic tooth pleading 'take good care of me! Please cut down on snacks and beverages!'

In public spaces administered by the city authorities, there are restrictions on commercial signage, but there are similar debates about density of signage and individual (and group) responsibility. Smoking is banned in almost all publicly managed spaces in urban areas in Hong Kong, that is, almost everywhere except the street itself and limited designated smoking areas in urban parks and 'sitting-out areas'. However, the placing of large yellow banners at the entrance to the often very small urban parks, in conjunction with the large number of prohibition and warning signs, has let to complaints both about the aesthetic effect and the overregulation of activities within the park. One response to this has been the 'freedom ball/自由波' campaign, with the slogan 'say no to no fun/向規條說 [不]'. This campaign 'questions whether the Hong Kong government controls the use of public space for the benefit of Hong Kong people'. The campaign involves a creative form of civil disobedience in which large red inflatable balls are released in parks where ball games are banned, so as to create spontaneous game activities: 'The principles of our interventions are that they challenge the rules in a way that is positive and

engaging and encourage the public to join in actively'.[4] On Sunday November 22, 2009, a 1,000 freedom balls were released in Shatin Park in the New Territories.

In reflexive modernity complaints about the 'nanny state', form-filling and juridification of personal safety, public spaces and institutional conduct can themselves be ironically co-opted as just one more consumerist voice demanding better value and service from the state and the legal system. The authorities are required to 'square the circle' by dramatically widening protection of various forms of rights and of public safety without encroaching on individual autonomy, indicating clearly and transparently the rules and regulations and expectations that govern daily life without appearing to control and colonise its informal and spontaneous forms.

26.6 Mainland China, Juridification and Reflexive Modernity

In mainland China (i.e. the current jurisdiction of the People's Republic of China, excluding Hong Kong), one can find symptoms of reflexive modernity which relate to discourse features of public spaces. For example, today, one can find signs exhorting citizens to acknowledge the city or location 'as their home'. Consumerism is now a framework within which state operations are being redefined. In 1990, I observed an immigration official at the Shenzhen border (the land border from then British colony of Hong Kong) who after inspecting and stamping the passports would lean back and toss them with a slight spin back across to the traveller. Today, one is met with modern blue uniforms, professional demeanour, sometimes a greeting in English and ultrarapid processing. In airports, a recent innovation is a system for recording customer satisfaction. The traveller is invited to provide feedback on the immigration official's performance (whose police ID number is shown) by pressing one of a row of three or sometimes four buttons. The categories in the four-button model are greatly satisfied (非常满意), satisfied (满意), checking time too long (时间太长), and poor customer service (态度不好), each with an abstract face icon depicting the relevant emotion. The device bears the caption 'you're welcome to comment on my work' (欢迎对我的工作进行评价).

Anyone (citizen or not) passing through the immigration is thus positioned as consumer of the state's services, and the immigration official becomes a front-line provider of those services, answerable to the consumer via the accumulation of data which the consumer provides to backstage authorities and which can be amalgamated and aggregated at different levels of abstraction for a variety of audit purposes. The performance indicator inevitably creates hierarchies of achievement with the strong visual appeal of objectivity and easily reviewable at a distance when represented in statistical tables.

This reform can be read as a reflection of the increasingly competitive job market, in private- and state-owned companies and in official agencies, and can be set

[4] See http://freedomball.blogspot.com, accessed December 17, 2009.

against both communist-bureaucratic inertia and traditional Chinese *guanxi* (the use of relationship networks) and identified as a symptom of new transparency and openness (Faure and Fang 2008, 197). The feedback process certainly reflects marketisation and managerial reforms which redefine and integrate practices and linguistic habits across public-private boundaries, in so doing redefining and reframing the roles of state actors and private citizens. The optional possibility of providing feedback on those services complicates semiotically what was previously a more straightforward encounter between an individual traveller (whether citizen or not) and the state, with the traveller positioned as supplicating an individual official for the state's permission to pass the border. Now the traveller has in some sense a controlling gaze over the official, while at the same time, both traveller and official are submitted in different ways to the ultimate authority of the state. The traveller may take the chance to record their opinion, wondering at the effect either on their own progress through immigration or the career progress of the official (of their supervisors at various levels) of negative feedback.

One suspects that as in many other grading schemes, anything less than a perfect score is potentially problematic. The possibility of a foreign visitor being invited to offer direct criticism (or praise) of an official of the People's Republic of China is itself highly disorienting, especially given that in the PRC, border security falls under the Ministry of Public Security. One can diagnose this sue of consumer feedback as indicating the increasing power of the nomadic elites in liquid modernity or just simply as the repackaging of state power within a consumerist frame for more effective 'soft' control. The traveller may decide to ignore the audit system as oppressive of the officials, but it is perfectly possible to audit the percentage of responses for travellers processed and compare this across different officials, shifts, airports, etc. In that sense, the traveller cannot opt out, a symptom of the all-embracing grip of managerialism. The authority filters its interaction with the consumer of its services through predetermining the mode, timing and format of the interaction and commodifying and formalising the terms of the relationship as an exchange of pre-packaged information.

A further indicator of this reframing of state-citizen relations is exhortatory signs urging good behaviour, rather than threatening sanctions. Signs in Shanghai and Guangdong, regions with the strong regional speech varieties of Shanghainese and Cantonese, urge politely the use of the national standard (Putonghua): 'Please speak Putonghua. Please use standard characters' (请讲普通话请用规范字), and framing the public use of the national standard as an act of good manners, cultivation or hospitality. A police sign in a Beijing side-street sign headed in Chinese only reads 人人义务城管员,处处靓丽风景线 ('If we all take responsibility as guardians of the city, we can enjoy a beautiful landscape here'). The sign urges underneath, in both Chinese and English: 'May we remind you: For a better and comfortable life, please cherish the environment of our community' (为了大家都能拥有舒适的生活,请爱护我们社区环境), and depicts various undesirable activities, with a request (请 'please') to refrain from them, rather than a threat to punish offenders. The text is accompanied by a cartoon of a uniformed member of the urban management forces (城管队员, variously translated as 'auxiliary police', 'parapolice', 'city patrol', 'municipal police'),

depicted with hyper-large round eyes in a style familiar from Japanese popular and *manga* culture. The sign also directs the reader to an official website,[5] where the senior officials of the city are pictured, different departmental mission statements are given, and one of the links proclaims: 'At your service'. Similar round-eyed cartoon figures appear in police posters warning about the variety of scams being worked by con artists in the city and urging residents to prevent fires. In the Beijing cityscape (e.g. along Fucheng Road), there are multiple permanent pillars set into the pavement, with slogans in white on blue insets, urging respect for the rules of good conduct on the roads (崇尚文明交通) and promoting the idea of social harmony as offering a better future for all (和谐让大家享受明天). A sign at the street corner in the Haidian district in white and blue proclaims 'new Beijing, new Haidian, new development' (新北京, 新海淀, 新发展). A municipal sign in the Special Economic Zone of Zhuhai adjacent to Macao proclaims: 珠海是我家/清洁靠大家 ('Zhuhai is my home/to keep it clean is everyone's responsibility').

One way to understand this consumerist turn is that the state co-opts are both in its rhetoric and practice the subjectivity of those under its authority and law and in so doing mimics the orientation of service industries with their claims of 'putting you first'. A tourist map in the centre of Beijing even tells those who consult it not 'you are here' but 'I am here' (我在这). Signs of juridification include stands with prohibitions and warnings in the form of the familiar red circle with a line through it over white icons framing escalators in high-end shopping malls. Under each picture of the dishes, the menu in a Thai restaurant in central Beijing offers this legalistically phrased disclaimer: 'Picture only for reference. Please refer to the real object' (图片仅供参考, 请以实物为准).

However, citizens are not merely the passive recipients of the redefinition of their relation to the state. Law is also now available, to some at least, as public and political theatre, even where the actual lawsuit has little chance of being heard, much less succeeding. In 2007, a law student, Dong Yanbin, angered by the censorship of Ang Lee's film *Lust Caution* (2007), filed a lawsuit again the State Administration of Radio, Film and Television (SARFT), as well as against UME Huaxing International Cineplex in Beijing, for infringing his rights as a consumer and for failing to develop a ratings system which would allow adults to view sexually explicit material. It is important to note that this lawsuit was not itself grounded in an objection to censorship *per se*—it was not a classic civil libertarian intervention. Rather, it involved a demand for transparent and explicit standards and criteria, classic features of reflexive modernisation, as well as for an apology and RMB 500 in 'psychological damages'. This subjectivist take on the question of rights is again arguably symptomatic of reflexive modernity, in that it takes the form of a statement to the effect that: 'I have been hurt and you are responsible so you owe me an apology and compensation'.[6]

[5] http://www.ebeijing.gov.cn

[6] See internet sources, for example: http://globalvoicesonline.org/2007/11/16/china-doctoral-student-accuses-sarft-of-movie-censorship/, http://www.cbc.ca/news/story/2007/11/14/lustcaution-lawsuit-censor.html, accessed December 17, 2009.

Consumerist protest from the urban middle class is just one strand in legal activism in contemporary China, itself one element in an increasingly complex and diversified landscape of social activism. This activism involves sporadically violent rural confrontations over land, workers' protests over unpaid wages, petitioners who travel to Beijing to appeal to the central government, urban resistance to relocation, a rowdy 'netizen' sphere, feminist pressure groups and much else (see the essays in Hsing and Ching 2010). Much of this involves the struggle for the basic rights of modernity and the rule of law, but the speed and complexity of social developments in contemporary China is indicated by the symptoms of reflexive modernity clearly visible in the prosperous urban centres.

26.7 Conclusion

To sum up, the symptoms of reflexive modernity and juridification in urban textscape include orientation to the subjectivity of the citizen/traveller/tourist, greater transparency and explicitness of the cityspace in terms of directions, usage of bilingual or trilingual signs, warnings of prohibitions, hazards and exhortations as to the moral and social roles that good citizens and visitors should adopt and the use of branding as an instrument of governance. The corollary of this more engaged and engaging public sphere is the masking of law enforcement power behind a civilising discourse that appeals to ideals of community, home, family, etc. The citizen and the visitor are positioned as consumers with an entitlement to good service, and the authorities present themselves as service providers, with quasi-contractual sets of aims and objectives, and as moral cheerleaders for community mindedness and a better shared future. Visual indicators of this process include the use of familiar international icons and cartoon figures representing authority and greater use of colour, texture and design features characteristic of commercial advertising, rather than simple monochrome list of rules and regulations.

This should not be taken as implying a profound convergence of political systems. A full analysis of the juridical-ideological nature of the textscape of the People's Republic of China is beyond the scope of this chapter and would be required to analyse the reduced but still important role of traditional ideological slogans as a public frame for social life and the responses in the linguistic landscape to major anniversaries and international events such as the 60th anniversary of the founding of the PRC, the 2008 Beijing Olympics and the National Congresses of the Communist Party held every 5 years. It would also need to take in the extremely uneven advance of consumer modernity in China. What is quite striking however is that at the most modern points of development, public signage in China displays clear symptoms of reflexive modernity, marketisation of public discourse, the rise of audit culture, branding, juridification and an incipient managerialist revolution.

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Chapter 27
Visual Art in American Courthouses

James R. Fox

Abstract The Beaux Arts architecture of late nineteenth century, a style that embodied the idea that a building should represent its function in all aspects of its design, incorporated murals as an integral part of this message. Courthouses built in this style were filled with visual images containing messages about law and the ideals of the society that the courthouse served. Much of the visual art in courthouses was meant to instruct the populace in history and civic virtue. The most common image in the courthouse, after the ubiquitous judicial portraits, is Justice, but she is accompanied by an array of other allegorical figures (Prudence, Temperance, Rectitude, and Prosperity, among others) that few of us recognize without a helpful label. One is struck today by the frequency of depictions of the Native Americans, a subject that has faded almost completely from our popular culture though it was pervasive at the time the works were created. These murals provide us with a compelling narrative of the community's collective memory of the indigenous peoples as they disappeared from the land and pass the land to the current inhabitants (with little of the unpleasantness that accompanied that transfer). The visual art in the courthouse contains multiple messages about the place of law in the community and the place of community in the law.

27.1 Conclusion

Visual art inside the courthouse contains multiple messages about the place of law in the community and the place of community in the law. Of the roughly 4,000 courthouses in the United States, more than 3,000 are county courthouses, and most of the remainder are Federal courthouses.[1] For much of the nation's history,

[1] In the course of this study, I have visited more than 250 courthouses in 30 states.

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its citizenry has viewed the county courthouse as the principal representation of the presence of government. Courthouses have been the object of civic pride, housing the offices of local officials and the justice system and serving as gathering place for community events. Numerous books have been produced about the architecture of these buildings,[2] but the visual art decorating them has been mostly neglected. Much of the provenance of this art and even the identity of many of the artists are unknown today. This chapter will sketch a brief history of and describe recurring subjects and themes in the visual art American courthouses.

Our justice system takes great pains to appear impartial, and we believe this to be a central political value (Cross 2001, 129–144). The courts are the neutral arbiter. The artifacts in a courtroom, however, can easily distort this perception. For example, in Austria, a predominately Roman Catholic country, a crucifix is mounted on the bench in front of each judge. Most Austrians think nothing of this, but a large number of the people brought before these courts on criminal charges are poor Muslims from southeastern Europe. It is difficult to imagine that they are comfortable with the neutrality of their judge. This is an extreme example of the decor giving a message of bias, but pictures of Native Americans in some United States courts might have similar effect. In *The Democratic Muse*, Edward Banfield asks, "… [t]he public interest clearly requires a courthouse. But does it also require that there be a statue in front of the courthouse?" (Banfield 1984, 11). In the past, the people in control of such decisions often thought a statue in front of the courthouse was a fitting expenditure. Many courthouses from the last half of the nineteenth century have Civil War monuments in front. Center County Pennsylvania so honors it most famous native son, Andrew Curtain, Pennsylvania's Civil War Governor. One imagines that there was little controversy in Bellefonte, Pennsylvania, when this statute was erected.[3] The status of the Confederate General on the southern courthouse lawn is no longer so benign. Statues were followed by a contest among some county seats to hire most renowned muralist to decorate their courthouses.[4]

Colonial era courthouses in America were decorated with a seal or coat of arms above the bench, and soon portraits of the King were added reminding those present of the source of the court's authority. Courthouses in the United States in Colonial times and the early years of the Republic were, for the most part, simple structures

[2] Richard Pare (1978), *Court House: A Photographic Document*. For more than half the states, there is a book detailing the history and architecture of the courthouses of its counties, e.g., L. Roger Turner and Marv Balousek (1998), Wisconsin's Historic Courthouses, Ray Graves (2002), *Washington's Historic Courthouses*, and Susan W. Thrane (2000), *County Courthouses of Ohio*.

[3] Placing art in front of the courthouse today is almost certain to invite discord. In Minneapolis, Minnesota, Martha Schwartz installed tear-shaped earth mounds planted with native species to suggest a field of glacial drumlins in the plaza in front of the new US Courthouse. Critics claimed they were too lumpy and looked like Indian burial mounds. Silver-stained log benches meant to evoke the heritage of the state's lumber industry were unpopular as well.

[4] For example, Luzerne County, Pennsylvania, commissioned works for its four courtrooms by the most famous muralist of the time: *Edwin H. Blashfield, Will H. Low, Kenyon Cox, and William I. Smedley. See* http://www.luzernecounty.org/living/history_of_luzerne_county/luzerne_county_courthouse_history.

with little artistic adornment. Indeed, the early courthouses in New England, relatively small clapboard structures, are easily mistaken for private homes. When any decoration was present, it was a royal coat of arms or a governmental seal and the occasional portrait of a judge.[5]

The reconstruction of the Courthouse of 1770, in Colonial Williamsburg, has the coat of arms of George II high above the judge's bench, a reproduction of (with some license) similar coats of arms that were commissioned for colonial courthouses. In 1702, the Virginia Government requested that Queen Anne send her portrait to replace that of King William in their Council Chambers and her coat of arms for the courtroom of the Supreme Court. Records show that in 1739, Charles Bridges painted the King's Arms on the courthouse wall in Caroline County for a payment of 1,600 lb of tobacco. It was acclaimed the "the finest of its kind in British America."[6] Bridges was a successful portrait painter in England with many commissions from colonial Virginia and became the first artist to immigrate to Williamsburg in 1735 (Wright 1957, 210). Queen Anne's coat of arms was also ordered for the courtroom in Salem, Massachusetts.

By the second half of the nineteenth century as the country prospered, more decoration was added to the courthouse, particularly statuary on the lawn and murals on the interior. The Civil War was continued by proxy with a statue of war veterans (Union soldiers in the Northern states and Confederates in the South) on almost every courthouse lawn. It became common to have a picture of Justice with her sword and scales behind the bench replacing the seal of the state with an allegorical ideal.

The Beaux Arts architecture of late nineteenth century, a style that embodied the idea that a building should represent its function in all aspects of its design, incorporated murals as an integral part of this message (Van Hook 2001, 114–118). Courthouses built in this style were filled with visual images containing messages about law and the ideals of the society that the courthouse served. The courthouse "looked" like a courthouse. The architect of the present day would question such an intent saying that buildings are identified with a function over time. Yet, when you drive through a town with a 100-year-old courthouse, we all recognize it as a courthouse, white columns, a dome, and Lady Justice with her scales somewhere about. At the dedication of the Pennsylvania Supreme Court Murals by Violet Oakley, the Hon. George Wharton Pepper said, "Without mural paintings a building such as this would be merely a finely featured face devoid of expression. The paintings give character to the face. In the domain of art they correspond to those changing expressions of the human countenance which are indications of what is passing in the mind. These paintings make this Capitol a silent but convincing witness to those things without which we build in vain" (Oakley 1950, 105). The late nineteenth and early

[5] The old courthouse in Cumberland County, Pennsylvania, has two judicial portraits from Colonial times hanging in the courtroom balcony. They are probably the first two county judges, Thomas Smith and James Hamilton.

[6] Reference Chart: Virginia County Courthouse Interiors. Colonial Williamsburg Foundation Library Research Reports Series – 241 (1990).

twentieth century marked the high point in the decoration of courthouses with visual art filling the building with messages of purpose, history, and civic responsibility.

After the Beaux Arts courthouses built between about 1890 and 1910 and the Art Deco buildings of the following two decades, the visual arts became, in many instances, both less related to the ideas associated with a courthouse and less important in the message of the building and more varied in content. The meaning, message, and relevance of much of the visual art in these newer courthouses are often unrelated to ideas associated with "courthouse," and much of the visual art in the older courthouses has become a curiosity to us today.

The visual art in courthouses is often directed at instructing the populace in history and civic virtue. The most common image in the courthouse, after the ubiquitous judicial portraits, is Justice (Warner 1985, 73). This allegorical figure works to inspire our contemplation of fairness, what do we want to see in our justice system. Justice is usually pictured holding a sword (or, occasionally, a spear) indicative of her power to punish, and scales, which reminds us of her task of weighing the case made by each side in the dispute. She may also hold a scroll, representing written law. Occasionally, she carries a fasces, the bundle of sticks with a protruding axe, the symbol of authority in Rome. Sometimes these symbols are entrusted to members of her retinue who stand ready to supply them when Justice requires. Her usual garb is a classic floor-length robe. The robe is most often white, signifying purity, but red, green, and purple are not uncommon. Frequently, Justice is accompanied by an entourage of other allegorical figures, including Prudence, Temperance, Rectitude, and Prosperity, among others. A 100 years ago, most educated people would have recognized these allegorical figures based on their accompanying symbols. Temperance carried a bridle symbolizing restraint. Rectitude held a carpenter's square, Prosperity held a horn of plenty, and Law will hold a book with the word law or the Roman numerals "I thru X" for the Ten Commandments. The presence of two figures, Law and Justice, reminds us that they are not necessarily the same. And Mercy (in white) may stand between the penitent and Lady Justice's sword. Today, the only allegorical figure that is widely recognized is Justice with her sword, scales, and blindfold.[7]

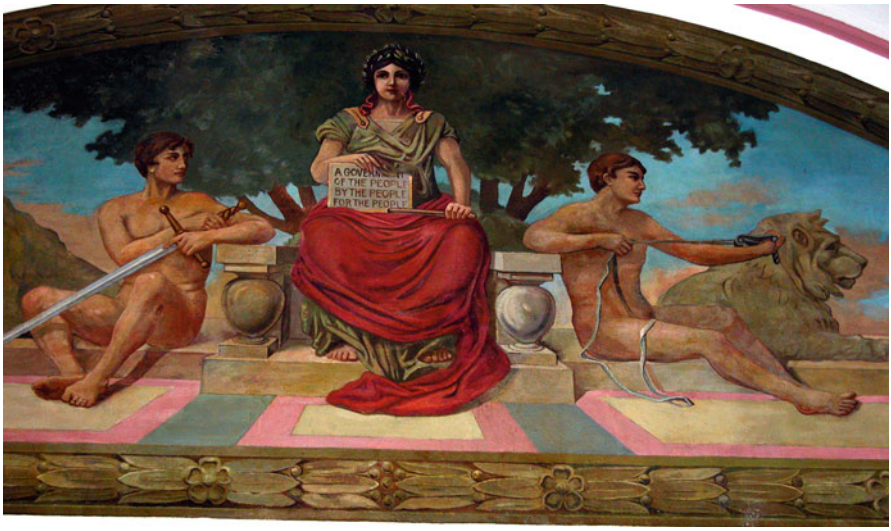
These allegorical figures are often arranged in a tableau: Mercy beseeching Justice to show such to the young or poor. For example, in Courtroom 2 of the Mercer County, Pennsylvania, Courthouse, in a mural by A.E. Foringer titled Civil Law (Picture 27.1), Justice stands before her white throne in her white robe looking rather disdainfully at the British barrister in his red robe and wig pleading the case of a boy while his parents watch. Members of the community, businessmen, farmers, and laborers witness the trial. Her left hand rests on a sheathed sword, and her right holds a scale the pan of which is tipped and empty. The county's pamphlet for jurors says that "[T]he mural symbolizes the impartial administration of justice in the Courts." If it were the moment of judgment that might be the message, but here the barrister is pleading. Unblindfolded Justice looks unimpressed. Her scales are already tipped—in verdict or, perhaps, they are not being adequately filled by the barrister.

[7] For a poetic take on this, see Billy Collins (1999, 13), *Questions About Angels,* "The Death of Allegory," (University of Pittsburgh Press).

Picture 27.1 Civil Law by A.E. Foringer. Mercer County Courthouse, Mercer Pennsylvania

A white-robed Justice in a Mahoning County Ohio Courtroom listens to a supplicant with earnest concern while her retainers stand stone-faced at her side holding sword, law book, and a palm branch. In the Greene County Courthouse in Xenia, Ohio, Justice is robed, but her male retainers are nude (and posed discretely) holding sword and the bridle of restraint. Justice's robes are rich red and green, giving her a commanding presence in the outdoor setting of the mural. A lion sits in the background reminding of the strength and courage required for Justice. In an unusual pose as instructress, she points to a tablet with a pointer. The tablet reads, "A government of the People, By the People and For the People." It is a curious choice for Justice whose principal role is the protection of the individual (Picture 27.2).

Justice behind the bench in Washington Courthouse, Ohio, sits to the right of Law in the picture's center. She has her sword and scales, and though blindfolded, she looks toward Law. Law holds a book of law and a scepter. Prudence, with her back to Law, looks to the viewer who is invited to peer into her mirror. Stained-glass windows in the Putnam County Courthouse in Ottawa, Ohio, portray Justice blindfolded and looking to the side. She is flanked by profiles of Presidents Lincoln and Washington held aloft by cherubs with butterfly wings, a touch that one might call Monty Pythonisque. The Cuyahoga County Courthouse in Cleveland, Ohio, has a



Picture 27.2 Justice. Greene County Courthouse, Xenia, Ohio

beautiful art deco stained-glass window portraying Justice in a rather unusual way. She wears a royal crown of a Central European style (similar to the Crown of St. Stephen) which announced her authority to the immigrants who came to work in Cleveland's factories. She holds a book of written law, and her sword lies across it. The mural behind the bench in the Fulton County Courthouse in Wauseon, Ohio, is the centerpiece of an elaborately decorated courtroom. Angels are bringing her sword and scales down from heaven. She rests an arm on the pillar of the law while Prudence and Temperance sit on her right. She stares off into the distance ignoring the lawyer arguing at her feet.

In "Trial and Justice" (Picture 27.3) by Axel Edward Soderberg in the Cottonwood County, Minnesota, Lady Justice appears in a mysterious, perhaps religious, Art Nouveau setting with a golden halo and sword in the crook of her arm. A woman with short hair and outstretched arms pleads to the stern, dark-eyed, frowning woman on the throne for justice. Lady Justice is attended by counselors in priestly robes; they hold books labeled "Common Law" and "Civil Law." A Roman soldier stands behind them. A woman at her side with gold stole holds a book with a gold cross on its cover. The courtroom audience may ponder the sternness of justice or the religious and secular sources of the law.

Of Justice's attributes, her blindfold arouses the most interest and controversy. By some accounts, she gained the blindfold in the Middle Age as a comment not on her impartiality but her foolishness and uninformed decisions. Others trace the blindfold to Roman myth that she donned a blindfold to settle a dispute among the gods (Curtis and Resnik 1987, 1727–1772). In representations in American courthouses, the blindfold is sometimes employed, but there are many of a seeing Justice. In the 1990s, Diana K. Moore sculpted three versions of Justice for US Federal

Picture 27.3 Trial and Justice by Axel Edward Soderberg. Cottonwood County Courthouse, Windom, Minnesota

Courthouses. Her statue for the Warren B. Rudman Federal Courthouse in Concord, New Hampshire, Justice is tying on her own blindfold, but her eyes are visible. She is placing the blindfold on herself, assuming a position of impartiality. This commission was controversial. Ms. Moore's original proposal was for a nude justice which was rejected by the local Judges, including one David Souter. The revised proposal was for a Justice in tank top and hip-hugger jeans, which was also rejected. The accepted version is wearing a very plain gown.[8]

For the Martin Luther King, Jr. Federal Courthouse in Newark, New Jersey, Moore created an 11-ft high head of Justice for the plaza in front of the building. The proportions of the bust place Justice's eyes at eye level of the approaching pedestrian. In this case, Justice's eyes are visibly closed behind the blindfold. The General Services Administration calls it, "a curious and engaging piece of urbane surrealism with heroic but also humane implication." For the Federal Courthouse in Lafayette, Louisiana, Moore created large urns (Picture 27.4) in the shape of Justice's head. Moore's Justices have no sword or shield, but the blindfold and location make her identity plain.

Justice may be absent from the allegorical tableaux in a courtroom. In Tuscola, Illinois, the figure behind the judge's bench is not Justice but Rectitude (Picture 27.5) holding a carpenter's square and gazing directly at the courtroom. This beautiful

[8] Legal Affairs, http://www.legalaffairs.org/issues/July-August-2003/exhibit_julaug03.msp

Picture 27.4 Justice Urn by Diana K. Moore. Federal Courthouse, Lafayette, Louisiana

Picture 27.5 Rectitude by E. Martin Hemmings. Douglas County Courthouse, Tuscola, Illinois

mural was painted on canvas by E. Martin Hemmings in Chicago (1911–1913) for the Douglas County Courthouse. At her feet, two children hold signs saying "FAIT IVSTITIA" "RVAT COELVM" ("Do Justice though the heavens be destroyed."). To her right, the figure of Law holds a book and looks at Prudence who holds a mirror of self-reflection, for guidance. To Rectitude's left, Temperance with her bridle looks out into the audience entreatingly. A Roman soldier representing power and

authority awaits the directions of the others. Though the figures are classic, the faces and hairstyles are contemporary. Hemmings painted a second mural which is displayed in the lobby outside the courtroom. A beautiful woman reaches out to a farmer and a miner both dressed in their Sunday best for the picture. Two children hold the rewards of their labor: a sheaf of wheat and a cornucopia. The classic garden setting proclaims the cultural sensitivity of the community.

The decoration in the open space at the center of a courthouse (often capped by a dome) may include biblical scenes, figures representing virtues or aspects of community life, and more elaborate scenes. In the courthouse in Red Wing, Minnesota, three large murals under the dome simply portray agriculture, industry, and manufacturing. In contrast in Fairmont, Minnesota, Franz Rohrbeck painted figures representing peace, war, inspiration, genius, sentence, and execution.

Pictures of the "old" courthouse abound in the new courthouse. The desire for continuity is very strong. The Wyandot County Courthouse in Upper Sandusky, Ohio, built in 1900, has a mural of its predecessor in a wide frieze in the entrance foyer. Opposite the "Old Court House" (of 1849) is pictured the "Old Sycamore" where first the Indians, then the early settlers, met to conduct public business. Images and references to Native Americans abound in the art in American Courthouses.

The profusion of Native Americans in American courthouse art may seem curious today. What made Native Americans a compelling subject for courthouse decoration? Throughout the nineteenth century, books about Indians, images of Indians in advertising, and Indians in the entertainments of the day were ubiquitous, so it is not at all surprising that Indians appear in courthouse decoration (Conn 2004). These murals provide us with a compelling narrative of the community's collective memory of the indigenous peoples as they disappeared from the land.

The most ironic and woebegone piece of art in an American courthouse is the giant art deco Indian, "Vision of Peace," in the Ramsey County Courthouse in St. Paul, Minnesota. The figure was dedicated in 1936 to the Ramsey County War Veterans. The 36-ft tall statue rises from a base where five Indians sit around a campfire smoking peace pipes. The creator of the piece, Carl Milles, a Swedish pacifist, was inspired by Indian ceremonies he had witnessed in Oklahoma. Milles said, "Out of that smoke of tobacco and fire arises in their imaginations, their vision of peace, talking to them and the World." This is an ironic message given that the county is named for Alexander Ramsey, territorial and state Governor of Minnesota, who made his political career and fortune leading the genocide of Minnesota's Indian population (Brown 1970, 50–59).

By the late 1800s, when all the land that was deemed worth taking was safely in the hands of the European settlers, the "Indian Wars" were romanticized and then memorialized in courthouse decoration and other forms of art and entertainment. Particularly in the states of the Northwest Territory where the native population had completely disappeared (with a few scattered reservations in the far north), many courthouses were decorated with pictures of the departed Indians. Indian maidens took part in allegorical tableaux, noble chief signed treaties, and the vanquished were portrayed putting up a brave fight against the heroes of the settlers. And Indians often play a passive role as in the patriotic tableaux as in the Brown County Courthouse in Green Bay, Wisconsin. The painting depicts the God-given right to

Picture 27.6 Treaty at Cosmopolis by Franz Rohrbeck. Gray's Harbor County Courthouse, Elma, Washington

the land as a winged figure descends in a cloud wrapped in the American flag. A Christian cross stands tall behind the figure and flag. To the right in the cloud, a standing figure holds a palm fond and releasing a dove while on her left, a woman sits with an arm full of flowers. To the left on the ground stand four figures representing the Europeans presence, a priest, a trapper, a colonial man in tricornered hat, and a Union soldier while on the right stands a Wisconsin settler. In the center, kneeling on the ground is an Indian in buckskins and war bonnet spreading out a beaver skin welcome mat. The heavens have blessed America, and the Indian has accepted the inevitability of history.

In many cases, the Indians that populate courthouses are incongruous. The artists placed the Indians of the Plains, for example, in places they never were found, fighting battles they never fought, and signing treaties giving away land that was far from the prairie. Writing about Indians in the movies, Rennard Strictland asks, "Who is that Seminole in the Sioux war bonnet?" In Gray's Harbor County, Elma, Washington, on the Pacific Coast, the courthouse contains several murals including one by Franz Rohrbeck of Gov. Isaac Stevens negotiating a treaty with Indians at Cosmopolis, Washington (Picture 27.6). He is pictured talking with a group of Plains Indians in war bonnets and buffalo skins who live in the teepees standing in the background. There is no sign of the local indigenous people wearing shells and living in longhouses. Pages of the Treaty seem to be on the ground by the Governor's feet.

Rohrbeck did a little better job of dressing his characters in the mural of the "Landing of Jean Nicolet" in the Brown County Courthouse in Green Bay, Wisconsin. This scene probably comes closest to portraying the reality of the relationship between Europeans and the natives. Ho-chunk (Winnebago) people watched Nicolet's approach from the eastern shore, high on the wooded slopes of Red Banks, north of present Green Bay. Nicolet stepped ashore, raised his arms, and discharged two pistols into the air. The *History of Northern Wisconsin* describes the event as such: The squaws and children fled, screaming that it was a manito or spirit, armed with thunder and lightning, but the chiefs and warriors regaled him with such a bountiful hospitality that 120 beavers were devoured at a single feast (Western Historical Company 1881, 35).

The Supreme Court of Wisconsin's Courtroom contains four large murals by Albert Herter. Over the bench is the Signing of the United States Constitution with George Washington presiding in an unusually reflective pose. Thomas Jefferson is standing to Washington's left though he was the ambassador in France at the time of the Constitutional Convention (this historical mistake is made in several other courthouses contributing to the "creation myth" of the Constitution). Herter's signing is a very dignified event except for the papers which have fallen on the floor in front of the desk. "The Signing of the Magna Carta" illustrates the origin of the Anglo-American Legal System, the beginning of law as a restraint on the exercise of governmental power. The Roman roots of our legal system are represented by "Appeal of the Legionary to Caesar Augustus," and "The Trial of Chief Oshkosh by Judge Doty" ties the European legal system to Wisconsin and its indigenous people. Violet Oakley painted the Convention in a difficult space, a wide arch over a door in the Cuyahoga County Courthouse in Cleveland, Ohio. Muralists were often tasked with putting scenes into odd-shaped spaces. Again, Washington presides listening intently on the one side of the door that divides the picture, while fellow Pennsylvania delegate, James Wilson, reads the speech of Benjamin Franklin who was too frail to make it. In this picture, however, Franklin is able to stand during the reading.

The standard for incorporating a program of murals into the architecture was set by Cass Gilbert in the building of the Minnesota State Capitol, a project which he dominated from 1895 until its completion in 1905. Artists were commissioned to decorate all the public spaces. Kenyon Cox and John La Farge were chosen to do murals for the Supreme Court Chamber.

Cox, a conservative traditionalist, painted the lunette over the entrance with the Contemplative Spirit of the East, a classic allegorical scene with central figures, the Spirit, with figures representing Law and Temperance to the sides. For the Minnesota Supreme Court Courtroom, John LaFarge "…chose to depict figures from four different civilizations, of both East and West, whose activities illustrated key turning points in the law: Moses, Socrates, Count Raymond of Toulouse, and Confucius. He represented law not as fixed but evolving, and not as limited to one culture, but gleaned from the tradition and knowledge of all peoples. His figures exemplify not a process of coercion, but a process of inquiry, dialogue, and accommodation" (Adams 1879, 66). In his depiction of Moses, the law is not yet given, and Moses seeks it as Joshua stands watch and Aaron kneels in reverence and fear. La Farge says that, "the forces of nature and of the human conscience are meant to be typified" (La Farge 1905).

In the second panel by La Farge, Socrates is engaged in a dialogue with Polemarchus and guests at the house of Piraeus as recounted by Plato in the first book of the Republic. Cloaked in red, the Sophist, Thrasymachus, listens and prepares to interrupt. La Farge says of this work, "we are at the furthest distance from the meaning of the medieval subject [Count Raymond of Toulouse, where strict law, not ethical justice are the theme]; the Greek subject representing an absolutely free discussion of the interdependence of men" (La Farge 1905). And of the style of the painting he says, "In this painting there has been no strict intention of giving an adequate and, therefore, impossible historical representation of something which may never have happened. But there has been a wish to convey the serenity and good nature of which is the note of the famous book and of Greek thought and philosophy. Hence, the choice of open air and sunlight and a manner of representation that will exclude the mistake of Academic formality" (La Farge 1905).

Count Raymond of Toulouse appears in the third lunette. The count takes an oath at the altar to respect the ancient liberties of the city in the presence of the bishop and representatives of the religious orders and magistrates of the city. La Farge's fourth lunette shows Confucius and his pupils in a garden copying legal texts. His intention was to convey a sense of "serenity and purpose, somewhat similar to the Greek [Socrates], but more in the manner of instruction and less of argument" (La Farge 1905).

One of the most ambitious programs of courtroom decoration is in Pennsylvania State Capitol Building, a building resplendent with art in the courtroom used by the Pennsylvania Supreme and Superior Courts when sitting in Harrisburg. Violet Oakley undertook to paint 16 large murals for the courtroom depicting the development of law. In a complex vision relating law to the musical scale and to her Quaker ideals for world peace and order, she created a masterpiece of mural art. Oakley was the first woman to be given a major commission in the male-dominated world of murals. She brought to her work a combination of mysticism and idealism along with great talent and excellent training. The murals take the form of a giant illuminated manuscript with the title panel, Divine Law, above the entrance. As Oakley described it, "A great monogram is made of the letters L A W. Subsidiary letters forming the words 'Love and Wisdom' are put in place by winged figures of a Seraphim and a Cherubim, symbolically garbed in red and blue. Above the green globe of the earth is the ethereal sea, stars and planets, and the face of Truth looms in the background, half-concealed, half-revealed" (Oakley 1950, 110).

At the right side of Divine Law is the Octave, a manuscript page reciting the scale of the law and its harmonies. The scale begins with Divine Law and proceeds through the Law of Nature, Revealed Law, Law of Reason, Common Law, Law of Nations, and International Law and returns to Divine Law.

Following Oakley's Scale, the murals trace the evolution of Law clockwise around the chamber beginning with the Law of Nature. Each picture has an associated text. For example, the text for the Law of Nature reads:

> The chief object of the following pages is to indicate some of the cruelest ideas of Mankind as they are reflected in Ancient Law and to point out their relation to Modern Thought showing an essential Unity of Substance beneath a startling difference of Form. The Natural

> Law of the Juris-consults was conceived by them as a System which ought traditionally to absorb Civil Laws — Keeping before the Vision a type of Perfect Law. Some writers contend that the Code of Nature exists in the Future and is the Goal toward all Civil Laws are moving — By the Ancients it finds poetical expression in the Fancy of A GOLDEN AGE. (La Farge 1905)

The visual art in the courthouse contains multiple messages about the place of law in the community and the nation and the place of community in the unfolding of our legal history. Historic images are often inaccurate, depicting events in ways that shape a righteous vision of the community and support the nation's myths of creation and destiny. The art is full of signs and symbols, just as the art itself is oftentimes a sign and symbol of our ambiguous attitudes about, and aspirations for the institution of law.

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Part VI
Visual Technologies of Law

Chapter 28
Mediating Disputes with Digital Media

Maurizio Gotti and Larissa D'Angelo

Abstract In the present-day globalisation of trade and commerce, alternative dispute resolution (ADR) – in the forms of arbitration, conciliation and mediation – has been increasingly seen as an efficient, economical and effective alternative to litigation for settling commercial and other disputes. The advent of computer technologies, and of Internet in particular, has promoted procedures to resolve disputes totally, or partly, online. This new phenomenon is known under the acronym of 'ODR' (online dispute resolution). In particular, ODR instruments have proved to respond positively to the needs of medium-small disputes, such as those in B2B (business to business) and B2C (business to consumer) transactions over the Internet. Besides being the easiest and most innovative way of resolving problems deriving from transactions generated on the World Wide Web, ODR is also becoming popular in the resolution of off-line disputes. The reason is that the online dispute resolution service is simple and easy to carry out as it allows users to cancel time and space barriers, offering them the possibility to communicate easily.

In the context of this situation, this chapter analyses two mediation procedures taking place entirely online in order to understand how communication evolves with the aid of digital media and how it differs from the traditional mediating interaction where participants are all physically present in the same place. In particular, the negotiation techniques employed by the mediators are investigated so as to identify any possible influence or conditioning on the part of the new environment and technology made use of. The various phases of a typical procedure are analysed so as to highlight the potentialities of this new tool.

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28.1 Online Dispute Resolution

A recent innovation in the legal field is represented by online dispute resolution (ODR). This procedure has proved to respond positively to the needs of medium-small disputes, such as those in B2B (business to business) and B2C (business to consumer) transactions over the Internet. As e-commerce transactions are spreading quickly, with each of them potentially triggering a dispute (Hart 1999), its growth greatly depends on the possibility to provide consumers with easy access to justice also taking advantage of the opportunities provided by the online environment (Bordone 1998).

In the present-day globalisation of trade and commerce, ODR has been increasingly seen as an efficient, economical and effective alternative to litigation for settling commercial and other disputes (Davis and Benjamin 2006). The complexity of the judicial system is particularly harmful in small-medium patrimonial controversies (Sali 2003), where single consumers are involved; the average time needed for a case to be tried and the costs of a lawyer often do not compensate for the benefits deriving from a favourable verdict. Small/medium firms and single consumers therefore often prefer to renounce their own rights. Negative consequences also derive from litigation between parties belonging to the same partnership or involved in a positive economic relationship; recurring to a judge might lead to a breakdown in the economic relationship, something that is less likely to happen in an extrajudicial resolution of the controversy.

The main functions performed by ODR are the following:

(a) *Assisted negotiation* – Two parties exchange monetary proposals, following an automatic system offered by a provider of ODR services. In this case, no neutral party, meant to help the participants solve the controversy, is present.
(b) *Online conciliation or mediation* – The participants communicate by e-mail or on a chatline, with the presence of a third party, the mediator, who helps them reach an agreement. This model is the one which most faithfully resembles the traditional form of face-to-face mediation.
(c) *Online arbitration* – The participants rely on the decisions of an arbitrator, who not only helps them reach an agreement but also produces an award. This procedure is carried out exchanging all the relative documents over the Internet. In essence, if online mediation is based on the dialogue between the participants, in online arbitration, the parties mainly exchange documents online.

The latest versions of online mediation enable the mediator and all other mediation parties to use a computer, audio and visual communication means and a broadband Internet connection to request and participate seamlessly in live, synchronous audio/visual online mediation proceedings. These proceedings occur before professional mediators who are 'on duty' during normal business hours. Integrated video and audio connections enable all participants to view synchronously any evidentiary materials, documents and audio-video presentations online. The use of several semiotic modes in the mediating event is meant to increase its effectiveness,

thanks to the combination of their multimodal potentialities (Kress and van Leeuwen 2001, 2006).

A person desiring to commence synchronous online mediation must connect his/her computer and monitor equipped with a webcam to the ODR service provider and then access the online mediation request form. After agreeing to terms and conditions of the service, the applicant authorises payment by a major credit card for mediation fees and then inputs detailed information about the mediation requested. Upon approval of the request, the service provider notifies the 'on duty' mediator, who promptly informs the mediation parties of the imminent synchronous audio/visual online session. On the date and time arranged, the parties and the mediator connect themselves to the online mediation provider website and insert the code number of the mediation case, as well as their passwords and usernames. At the start of the session, the mediator introduces himself/herself and asks the parties to do the same; afterwards, each party will be asked to give his/her own version of the facts. The mediator may then ask for further explanations and subsequently will identify the controversial matters and draft a resolution proposal. All participants can see and hear each other synchronously and take part in simultaneous audio communication. This method thus uses a main virtual 'conference room', as well as multiple, additional, separate virtual 'caucus rooms' where the mediator may meet separately with any participant to facilitate negotiations. This shuttling to 'caucus rooms' and rejoining in the 'conference room' can be done as many times as necessary without interrupting the synchronous audio/visual online mediation connection. As happens in traditional mediation, the virtual system guarantees confidentiality in the procedure, assuring privacy in the negotiation and inaccessibility of all communications by third parties.

If an agreement is reached, the mediator sends a draft of the mediation agreement online. This can be examined on the spot by the parties, who can thus edit it live. Thus, a final mediation agreement is stipulated and signed. Thanks to electronic signatures, there is no need to print and exchange documents by fax. This last operation is necessary to make the online agreement binding, thus conferring on it the nature of a real contract enforceable by law.

The ODR system offers several advantages: it allows participants who are not able or do not want to meet in person to communicate rapidly without incurring excessive costs. As lawyers' fees are perhaps the greatest expense in traditional litigation and even sometimes in traditional mediation, in cyber-mediation, parties are instead able to save a large amount of money, as hiring a lawyer is often unnecessary (Lan 2001). Moreover, taking part in cyber-mediation is very convenient, as parties are able to engage in the negotiation when they are available. The mediator can also contact either or both of the parties privately, without affecting the flow of the mediation. The idle time that disputants experience is similarly reduced because, in contrast to traditional mediation, the mediator can devote time to one party without wasting the time of the other party. In addition, many of the cyber-mediation providers have fully automated websites, available all-day long, every day of the year. Parties can therefore proceed to negotiate the settlement of disputes immediately, rather than waiting for a long time to go to trial. The cost of the service is also proportional

to the value of the controversy. Although a payment is necessary to start the mediating process, in case the counterpart refuses to participate, the sum will be refunded entirely.

28.2 Mediation Strategies at Work

The aim of this chapter is to analyse two mediation procedures taking place entirely online in order to understand how communication evolves with the aid of digital media and how it differs from the traditional mediating interaction where participants are all physically present in the same place. In particular, the negotiation techniques employed by the mediators will be investigated so as to identify any possible influence or conditioning on the part of the new environment and technology made use of. The various phases of a typical procedure will be analysed so as to highlight the potentialities of this new tool.

The online mediation sessions analysed here took place during a self-running simulation of the CAN-WINSM conferencing system and are used by Resolution Forum Inc. (http://www.resolutionforum.org/) as part of the training materials employed in the courses required for qualification as an impartial third party in the state of Texas. The mediators involved were Hon. Frank G. Evans (South Texas College of Law) and Janet Rifkin (University of Massachusetts). A synopsis of the two cases is presented in the Appendix.

The events analysed took place in offices or private rooms, a setting completely different from a courtroom trial. This difference has a significant semiotic implication: indeed, in a courtroom, the physical setting conveys an idea of hierarchical power. As Maley rightly asserts:

> Semiotically, the strongest meanings communicated by the physical setting of [a courtroom] and behaviour of those in it are those of hierarchical power. The physical layout of the room expresses, as it is intended to, a 'symbolic representation of the authority of the court' (Goodrich 1988, 143). The judge or magistrate(s) occupies a dominant, focal position, usually (in England or Australia) sitting under an insignia-topped canopy which marks their position as a representative of sovereign justice. The opposing parties, each represented by counsel face the judge or magistrate (the 'bench'), each occupying a delimited area and space of table. Of the chief participants, only the counsel move freely in the inner space […] of the court. (Maley 1994, 32)

An office or private room, instead, conveys an atmosphere of minor formality and greater cooperation. This difference is confirmed by the established convention of standing up and sitting down in a courtroom, while in an online mediation session, participants remain seated. Another difference is seen in certain conversational conventions, such as greetings or inquiries about well-being, which are omitted in court (Jackson 1995, 413), while they are used in a mediation hearing, though they are kept very brief.

Although the setting and atmosphere of the mediation proceedings are more friendly than in court, they however remain formal, as the mediator fears that an informal attitude might reduce the degree of detachment which is required by the situation and thus hinder his/her willingness to show great independence and impartiality.

28.2.1 The Opening Rite

Negotiations with the aid of a mediator are quite different from unassisted one-to-one negotiations, as someone neutral and uninvolved,[1] by whom the parties have agreed to be guided, is appointed to help the parties reach an agreement. However, in order to be successful in his/her task, this person has to gain the parties' respect and trust. The mediator, having the benefit of knowing each party's private and business interests, eventually enjoys a unique position that permits him/her to perceive shared interests, thus resolution options, to which each party is initially blind. Possessed of a uniquely complete understanding of the context of the dispute, the mediator can then, without violating confidence, steer the parties to a resolution that they recognise as addressing their own long-term interests. The use of a trusted neutral person in whom confidence may be shared, and who is looked to in order to add value to the terms of a settlement, is the essence of any mediation procedure. Indeed in this procedure, agreement is reached by the parties through the work of a neutral party, the mediator, who helps them analyse the true interests involved in the dispute. He/she also identifies the differences implied in the parties' respective positions, leading them towards a resolution of the dispute, without imposing any decision (Berger 2006).

This need for trust and confidence explains why the first phase of the mediation session is always devoted to the introduction of the mediator and a clear presentation of the role that he/she is to perform, highlighting in particular his/her neutrality and his/her task as a settlement facilitator, not as a judge/decision-maker. This simple introductory rite achieves a number of goals because in laying out these points, the mediator:

1. Starts building a trusting relationship with each of the parties by being balanced, non-positional, open, honest, competent and positive.
2. Educates by explaining mediation goals and procedures and prepares the parties, who may be unfamiliar with the process, for what will occur in order to avoid surprises.
3. Demonstrates competence by showing command of the process and neutrality regarding its outcome; this helps in developing the parties' trust in the mediator's abilities.

In online mediation, there is a further important aspect to be covered: the mediator is most of all concerned whether all the participants are logged on and ready to start and therefore checks the identity of the participants with a series of questions-answers. Although security codes are given and access is controlled, this identity check represents a crucial issue of online mediation:

(1) M[2]: Welcome everyone. I understand that we have representatives from both sides at the table. Is that correct?

[1] In spite of the fact that neutrality is commonly considered a key component of mediation, the issue of strict neutrality has been called into question by several scholars (e.g. Bernard et al. 1984; Cobb and Rifkin 1991; Rifkin et al. 1991; Kolb and Kressel 1994; Dyck 2000).

[2] M: mediator/T: Texas Department of Transportation/R: Roadbuilder.

T: Good evening. The representatives of the Texas Department of Transportation are here and ready to proceed.
M: Fine, T. Do I understand that your key decision-makers are with you?
T: We who are here have decision-making authority.
R: Hello, we are looking forward to reaching a mutually beneficial agreement at the end of our discussions today.
M: Good, R. Now, do we have key decision-makers from R present with us? (16:30:05-16:36:29)

As in traditional mediation, although participants have previously exchanged working papers and are probably familiar with the mediation process, the mediators make sure that the parties are aware of their role and then ask the participants to confirm their appointment to the case:

(2) M: All right, I believe we now have everyone present. Since you are familiar with our experience and qualifications, I will not go through those items with you again. Also, Janet and I understand you are both satisfied that we have no conflicts of interest that would diminish our neutrality as co-mediators in this matter. Is that correct?
T: Yes, we accept you as mediators.
R: We have present the President from R and Billy Bob Gibbs an expert engineer in land slides. We also have R lead counsel and co-counsel.
M: We assume from your quick responses that you are both agreeable to our serving as your mediators today. We also assume you have both read, agreed to, and signed the mediation agreement and that you have made the commitments of good faith negotiation, confidentiality, and willingness to stay with us that are set forth in that writing. Is that correct?
T: Yes
R: Your assumptions are correct. Signed, sealed and delivered.
M: Thank you. Mediation is a voluntary process through which people can tell their stories and talk about the issues with which they are concerned. We don't take sides or make decisions for you. Our role is to help you tell your story and explore ways to work out this situation. (16:39:42-16:46:02)

As can be seen, besides using a self-labelling move (Heisterkamp 2006) by means of which they define themselves as an unbiased party, the mediators then strengthen this opening move by providing their own description of the mediation process, emphasising the high degree of neutrality required on their part.

28.2.2 Presenting the Case

In the next phase, the traditional mediator usually asks each side (or their lawyers) to briefly present their positions. In online mediation, however, this account is kept very brief as the legal positions of both parties are already summarised and laid out in print so as to avoid any misunderstandings or waste of time:

(3) M: Since we have received your written position papers, we are generally familiar with your respective legal positions in this matter. Therefore, we do not believe it would be productive to ask you to repeat all the facts you have given us in those papers. However, it would probably be helpful if you could summarize the issues as you see them. Because R's expert, Billy Bob Gibbs, is present, perhaps he would be willing to list R's main contentions?

R: We recognize that there have been some oversights made by both parties in this unfortunate situation. We believe that there were many problems some of which were the following:

1. The terms of the contract were construed as being very liberal and lacking in specificity.
2. The condition of the worksite was different from that specified in the contract.
3. The slope and drainage design that R was to follow was defective. We recognized this problem and requested solutions to no avail.
4. Irregular weather conditions.

These are the most pressing issues we feel need to be addressed.

M: Thank you, R. Now, I wonder if T would give us a very brief idea of their main position?

T: Thank you for your comments. Please allow us to respond to them in order. First, we agree the contract was liberally enforced; we do not agree the terms were not specific. Second, the worksite condition was different because of the change in season that occurred while R was delaying the start of the project. Third, the slope and drainage problem was a seasonal problem, not a design defect. Fourth, the irregular weather conditions would not have been a problem if construction had begun in the time specified in the contract. (16:48:27-17:08:07)

By asking the parties to speak first, the mediator accomplishes several objectives at once:

- The parties feel active in handling their own interests.
- The business leader on each side gets to focus on the other side's legal position.
- The legal issues are explained and put on the table early rather than being left unexpressed for possible interference later.

This has the effect of simultaneously forcing everyone to focus not only on their own position but also on the other side's case so that everyone feels that they have been heard and understood. In doing so also, other objectives are accomplished:

- The parties can reflect on the positions of the other side, thereby also instinctively evaluating their own positions from another angle.
- By focusing on the other side's legal position, both parties realise that there is some credible argument on both sides.

In summarising their position, the parties can address their interests and point out their expectations. In this way, the mediator tries to get the case onto the commercial path and away from strict legal rights and interpretations of the dispute. The mediator times this invitation to follow the opening case summaries, while the process is still in the preliminary phase of getting the parties' respective positions into the open. To favour this process of 'clearing the ground', the mediator summarises the legal positions of the parties and asks them to confirm the plain facts as they have been reported. To stress his/her neutral position, the mediator frequently uses tentative verbs and hedging expressions ('*we understand that*,' '*it also appears*,' '*may depend*,' '*it seems*') when reporting the facts. Although his/her report is totally neutral, it does not avoid mentioning the controversial points still open; the fact that

these points are presented in a very objective way, however, represents a useful starting point for the following phase of the mediation process:

(4) M: Summarizing your respective views, we understand that T feels that R's delay in getting started was the primary cause of the many problems experienced, and that R attributes the cause to the design problems and to the different worksite conditions. It also appears from your position papers that clarification of the facts may depend upon the testimony of a person who is not currently available. So, it seems, we have some difference in our recollections and some uncertainty about the facts? (17:08:44)

In this way, the mediator strictly focuses on concrete evidence and prevents any venting up of emotions. He repeatedly and specifically asks for solutions, ideas and suggestions to force the two parties to work together towards a common ground. He underlines any cooperative behaviour of the parties with appreciative expressions such as '*Good for both of you*!' and '*Now we are getting well down the road*':

(5) M: R, do you have any specific suggestions about how the people of Texas could have their new road at no extra cost to the taxpayers?
R: Is T amenable to discussing completion of the contract with R?
T: On behalf of the taxpayers of Texas, we are willing to entertain any consideration of compromise.
M: Good for both of you! Now we are getting well down the road, thanks to your mutual cooperative attitudes. Perhaps we are ready for some specific ideas to resolve the matter. R, do you have any ideas to share?
M: While we await R's reply, let me ask T if it has any ideas how this matter might be resolved?
(17:20:14-17:28:41)

One further strategy employed by the mediator to get the parties to reach an agreement is making them aware of the costs of a possible legal action:

(6) M: Let's discuss for a minute what is likely to happen if you decide that legal action is your best alternative at this point. R, could you give us an estimate of your trial and appellate costs if you proceed with legal action? (17:14:18)

This move is probably made to lead the parties to consider very early in the process whether they intend to collaborate in the mediation or not and how economically favourable a mediated solution is. An online mediator, in fact, does not have as much time as a traditional one to gradually guide the participants towards common grounds: in cyberspace, everything needs to move at a higher speed, and a mediation case cannot be carried on for too long. This also explains why questions and answers are shorter and participants are required to get directly to the point. This economy of language, however, may not favour the typical arts and crafts of a mediator, who instead needs appropriate time to help parties to listen and understand concerns, empathise with each other, vent feelings and confront emotions.

28.2.3 Dealing with Emotional Outbursts

Emotional outbursts can occur for a number of reasons. They are commonly related to the parties' frustration for not being heard or understood and their having a belief

that there is not just a legal but a moral basis for their own convictions. Negotiations are certainly more effective when participants are able to communicate freely, listening to and understanding concerns, empathising with each other, venting feelings and confronting emotions. These emotional moments are considered a fundamental aspect of mediation proceedings:

For many participants, mediation is about the 'venting' of feelings and emotions that they would be unable to express in a more formal setting such as a courtroom. The opportunity to tell one's version of the case directly to the opposing party and to express accompanying emotions can be cathartic for mediation participants (Eisen and Joel 1998, 1323).

In the traditional model of nonvirtual mediation, to overcome the mistrust and the disagreements of the parties, the mediator applies several psychological techniques that allow him to interpret the nonverbal language of the participants as well as their attitudes, their emotions and their immediate reactions. However, the reproduction of this model online may meet some difficulties, owing to the present state of computer techniques. Indeed, the online mediation systems inspired by this open model are strongly limited by the scarce 'communicativeness' of the software now available. One way to improve things might consist in more thoughtful, better-crafted contributions resulting from the ability of the parties to edit messages before sending them. Indeed, '[a]synchronous Internet communication has the advantage of being edited in contrast to impulsive responses that often take place in real time face-to-face mediation discussions' (Melamed 2002). It could be remarked nonetheless that emotions, whenever they appear online, have a stronger impact on the participants and are much more difficult to manage. Indeed, the second online mediation case analysed here shows a few instances of discussions becoming very heated, with the two parties quarrelling bitterly with each other and the arbitrator clearly encountering great difficulties in calming down the participants:

(7) M[3]: Tom, it sounds like you felt that you were clear about what the apartment had to offer. Can you tell us what your concerns are now?
B: Well, she's trying to hold us responsible for other people's actions. No one's happy a bout what happened, but she wants us to pay for a shrink. That's ridiculous. Half this neighborhood needs a shrink. But it's really not possible to discuss this, she just starts screaming at me whenever I try.
M: Tom, can you tell us more about what you mean about Rhonda holding you responsible for others' actions.
B: The guy who jumped her in the garage. This is a high crime area, and those things happen. It's happened to me.
M: Tom, sounds like you had been willing to discuss these matters. Could you talk about what you'd like to communicate about this?
D: First, it is a blatant falsehood that I was NEVER told that there was security in this building. His exact words to me were: 'the apartment management retains a 24-hour security guard and the apartments would soon be fitted with deadbolt locks'. And the issue concerning the psychiatrist was something that was on advice of my private doctor. I don't need a shrink. I need a little more security personally since the apartments have failed to provide it physically.

[3] M: mediator/B: Tom Benson/D: Rhonda McDonald.

B: We're trying to make things safer for all our tenants, but it's really a money issue. The rents here are pretty low, and it's not cheap.
(17:35:38-17:43:07)

The parties' angry feelings often lead them to ignore the rules of regular turn-taking and to respond immediately, instead of waiting for their turn. Moreover, their emotional urge makes them forget about the basic convention of mediation, which requires that each speaker should address the mediator and not the other party directly:

(8) B: Every time I try to talk to her about what happened she gets hysterical and tries to blame me for all her problems.
D: About three months now.
M: Rhonda, sounds like you are mostly concerned with issues of safety and how Tom has communicated with you when your concerns have not been addressed. Is this right?
D: What attempts have you made to talk to me? That's a very sexist statement to claim that I get 'hysterical'!
B: I thought we were supposed to talk to the mediator. (17:20:51-17:23:31)

The mounting feeling of frustration experienced by the parties and the growing dissatisfaction about the outcome of the mediation case are clearly expressed by one of the participants:

(9) B: This keeps getting into an argument which I can do at home so how is this mediation any different? (17:44:06)

To put an end to this highly aggressive situation, the mediator uses two different techniques: he gives one of the parties an 'assignment' (to write a possible solution to the dispute); in the meanwhile, he negotiates with the other party:

(10) M: Rhonda, we are going to hear a little more from Tom and then we want to hear more from you. In the meantime, can you begin to write to us (just don't send it yet) about what it is that you want from Tom at this point. (17:50:22)

This decision of moving on to private sessions proves successful, as the mediator is able on the one hand to talk privately to the first participant about a possible consensual outcome while effectively blocking the possibility of interruption by the other who is kept busy writing her message to be posted later on. This resorting to private sessions is greatly appreciated by the parties themselves:

(11) M: Tom, we think private sessions may help now. We will be back with you in several minutes. This is now a private session with Rhonda.
[…]
B: Private sessions are fine. (18:25:03-18:27:26)

During the private session, the mediator can thus continue his negotiating activity, further uncovering the parties' interests and helping them determine their real priorities. As interests, concerns and priorities are sought, mediators may need to seek clarification or more details of the information offered to assure full understanding. In private sessions, in fact, mediators can question the parties directly to discover further information that may be useful for the achievement of a potential solution designed to satisfy as many interests of both parties as possible. Indeed, through the

use of appropriate questions, the mediator can guide the parties to observe their contradictions and reformulate their views according to those perceptions:

(12) M: Rhonda, it's pretty clear that it doesn't matter to Tom if you leave or not and he is willing to let you out of the lease and give you security and last month's rent back. He has acknowledged that you have legitimate safety concerns. But he has indicated being unwilling to give you other compensation, pay for counseling, or get other security measures in place before three months from now. What options do you realistically have? Would you prefer to move out? If you stay, do you have any creative ideas to help Tom change his mind?

D: I need my expenses paid! I've sacrificed so much! My school work, my job, I have no alternatives. I am lucky to be alive, and people want to quibble over money. If I stay, I will pay for my own security and not pay two months' rent. Or if I move, I want all my money back. He lied, he put me at risk, and I have to suffer the consequences forever! If I don't get this help, I'll never get on with my life! His attempts are not clear enough, and not good enough essentially. (18:29:02-18:32:52)

These inquiries go well beyond legal positions, such as liability, damage and remedies, and extend to personal or emotional interests, such as face saving:

(13) M: Rhonda, you clearly want more compensation for your experiences which he contributed to and you want more understanding from him. We are happy to talk with him about these things and see what is possible. While we speak with him, can you think a little bit about what your choices are IF he doesn't end up agreeing to more. (18:36:53)

As can be seen in this quotation, when one of the participants brings forward her demands in an angry and emotional way, the mediator decides to report the request focusing on matters instead of emotions. In this way, he is able to reframe disputant face-threats by restating disputant criticisms of another into expression of possible solution. As has been shown, this technique of restating and summarising what a disputant advocates is an important strategy used by mediators, which turns out to be not at all neutral as in this way 'they can manipulate the substantive character of a discussion and push disputants towards settlements they might not ordinarily accept' (Jacobs 2002, 1414).

28.2.4 Working Towards a Solution

In private sessions, the mediator takes pains, through questioning and through demonstrations of empathy, to ensure that all participants feel that they have been heard and understood. This technique helps develop the crucial sense of trust that participants must place in the mediator if mediation is to be successful. This is the reason why the mediator often punctuates his remarks with sympathetic phrases such as '*Yes… I understand… I know… I see…'* Since parties may be reluctant to disclose information that weakens their own insistence on positions, the mediator often must dig for such information and will typically start such inquiry with open-ended questions. These questions elicit maximum response from the speaker without any

narrowing of the topic by the questioner. Open-ended questions typically used by mediators include the following: '*What do I need to know to understand this matter?'* and '*What do you hope to get out of this course of action?'* and '*What is your goal in this mediation?'*

During the discussion, mediators and participants are seen proposing possible solutions for consideration. These proposals generally aim to satisfy both sides to some degree. They are an amalgam of creative solutions, information and party interests. Mediators may convey proposals, whether party-generated or mediator-generated, as hypothetical suggestions (phrased by the mediator as '*What if*…?' or '*Suppose*…?'). For example, in the first online mediation analysed here as well as formulating many proposals and hypothetical suggestions, the mediator constantly asks for suggestions and ideas from the parties to solve the conflict:

(14) M: T, would you consider splitting the cost of the consultant if you were able to otherwise resolve this without litigation and possible insolvency? (17:50:08)

(15) M: I wonder if might be helpful to have the consultant concentrate on the extra cost R would incur by reason of the site conditions. As you may recall, that was to be the focal point of the mini-trial we were to consider if an agreement could not be negotiated. Perhaps, if you both had faith in the neutral consultant, that would give you a common point for deciding how much is due R at this point. T, would that be an appropriate function for the consultant? (17:59:12)

The various proposals formulated in private sessions are then reported to the other party to see if they meet with his/her approval. For example, in the second online mediations analysed here, when the plaintiff expresses her final requests, the mediator acknowledges them and offers to deliver the message to the counterpart during a private session with him. Only when the mediator feels that an agreement is close at hand does he decide to bring the participants back to a joint session:

(16) M: Tom, thanks for waiting. We asked you a while ago about how you would like to be approached in the future by Rhonda. A second question for you then is given both of your concerns about how the safety issue is resolved, what is your response to the following suggestion from Rhonda. She offers to put in her own security system in lieu of paying two months' rent.

B: A little while ago she said that she wants a $9.95 lock from Walmart, so two months seems too much. We'll agree to one month's rent plus $20. And if she wants to use it for a lock, that's fine. She can consider the month's rent as us saying we're sorry about what happened to you, even though it wasn't our fault.

M: Tom, sounds like we are getting close to building an agreement and have some offers on the table to work with. Why don't we bring you both together. (18:39:29-18:45:58)

When common consent had been reached, the mediator ensures that the parties are well aware of the agreement terms before the participants are asked to sign the final form. Rather than listing all commitments by one party and then those of the other, the mediator prefers to phrase the components of the agreement in a balanced fashion with one concession offset by the other side's concession. This balancing

helps underscore the mutual advantages in the agreement and allows mutual face saving by showing concessions on both sides:

(17) M: Good. Thanks, once again, for your cooperative attitudes in this matter. It appears to me that you should be able to get this resolved this evening. As I understand your respective wishes, you would like the consultant to make an inspection of the jobsite and give you his estimates regarding R's additional costs for completing the work within the time specifications of T, and once that cost has been determined, R will receive periodic payments during the work, which will prevent its pending bankruptcy. This way, Texas gets its highway at less cost than it would take for a new contractor to come in and complete the work. Is this about what you have so far agreed? (18:06:44)

28.3 Technical Problems and Constraints

When analysing the two online mediation cases, a number of snags have been noted, mainly deriving from technical problems. For example, messages are often sent twice by mistake or are not well synchronised, causing one person's answer to overlap with someone else's thus making the flow of the interaction very difficult. Here are a couple of examples:

(18) R: Mediator, sorry we are losing sinch with your messages. We will respond in a minute with suggestions for resolution. (17:19:56)
(19) R: Sorry, again, we seem to be staying one message behind you again. (17:22:59)

Also recurrent are problems due to sudden loss of communication or difficulties in establishing contact:

(20) M: R, are you reading us? (17:27:11)
(21) M: We are not reading a response. Is anyone there? (16:32:10)

All these snags make the progress of the mediation difficult and, at times, puzzling. Moreover, apart from these technical problems, the virtual environment at times seems to constrain the natural flow of negotiations. Indeed, communication online does not always express the variable tone, pitch and volume of the participants and does not seem to convey personality traits or physical cues as well as the traditional way. Indeed, mediators have sometimes found it more difficult to evaluate the flexibility of a particular party or the strength of a party's feelings or confidence on a particular issue. Consequently, some authors have argued that the lack of personal presence in cyber-mediation can make it more difficult for the mediator to maintain effective control over the negotiating parties:

The online medium, at least the e-mail environment, makes it difficult for the mediator to manage or temper the tone of the interactions without sounding controlling and judgmental. The mediator, at least in the beginning, is a disembodied voice and cannot use her own physical 'personhood' to set the parties at ease and create an environment for sustained problem-solving. Similarly, absent the physical presence of the disputants, the mediator has difficulty using the intuitive cues of

body language, facial expression, and verbal tonality that are part of face-to-face mediation processes (Katsh et al. 2000, 714).

Unlike in traditional mediation, where participants are physically present and the mediator coordinates turn-taking, in the transcripts analysed here, turn-taking is not always respected faithfully because of technical delays and the parties' emotional urge to respond immediately, instead of waiting for their turn. In order to communicate effectively in a chat room, it is in fact essential for participants to wait politely and patiently for their turn, following the mediator's guidance – something extremely hard to achieve when strong emotions are involved. Also the absence of physical contact may penalise the outcome of the mediation process. As Katsh et al. aptly remark:

When the parties, shake hands, sign an agreement, and get congratulated personally by the mediator, there is both symbolic as well as substantive closure to a mediation. E-mail does not lend itself to these ceremonial moments. As a consequence, it may be harder for the mediator to facilitate a sense of satisfaction among the participants (Katsh et al. 2000, 716).

On the other hand, mediating in cyberspace also has advantages: it is faster and immediate and can take place anywhere at any time of the day. The scheduling difficulties that can arise in traditional mediation do not appear in ODR; parties are able to engage in the negotiation when they are ready and at convenient times. The mediator can contact either or both of the parties privately, without affecting the flow of the mediation. The idle time that disputants experience is similarly reduced because, in contrast to traditional mediation, the mediator can devote time to one party without wasting the time of the other party. As Melamed (2002) explains:

Experienced mediators are well aware of the benefits of asynchrony. This is a big part of the reason that many mediators 'caucus' (meet separately) with participants. Mediators want to slow the process down and assist participants to craft more capable contributions. This concept of slowing the process down and allowing participants to safely craft their contributions is at the heart of caucusing. Surely, the Internet works capably as an extension of individual party caucus and is remarkably convenient and affordable. Internet communications take less time to read and clients do not hear a professional fee metre clicking. When the Internet is utilised for caucus, the 'non-caucusing participant' does not need to sit in the waiting room or library reading *Time* magazine or growing resentful at being ignored.

28.4 Conclusion

The analysis carried in out in this chapter has shown that the ODR system offers several advantages: it allows participants who are not able or do not want to meet in person to communicate rapidly without incurring excessive costs. The system also allows the supplier of the service to name experienced and prepared mediators

without worrying about travel distances and expenses and without having to rent a facility to conduct the mediation proceedings. International commercial relations are favoured since the solution of a controversy between international parties is not slowed down or impeded by long distances. The advantages of this instrument are clear both in terms of relationships between firms, as well as those between consumers and businesses. ODR does not merely translate traditional alternative dispute resolution (ADR) instruments to be used on the web; rather, if ADR responds to the need to facilitate access to the instruments of justice, especially from an economic point of view, ODR responds to the ever-increasing need of businesses and consumers to solve economic disputes taking advantage of the rapidity and convenience of the online instrument.

The system nevertheless has some drawbacks when compared to traditional mediation. Virtual communication – at least as it is now – is not very 'communicative' from an emotional and nonverbal point of view. Negotiations are certainly more effective when parties are able to communicate freely facing one another. For example, helping parties to listen and understand concerns, empathise with each other, vent feelings and confront emotions is considered an important art in mediation. In a virtual environment, it is therefore more difficult to evaluate the flexibility of a particular party or the strength of a party's feelings or confidence on a particular issue. Consequently, the lack of personal presence in cyber-mediation can make it more difficult for the mediator to maintain effective control over the negotiating parties. Another important issue is the concern over the protection of confidential material in ODR (Katsh 1996): while traditional mediation does not necessarily create a physical record, online mediation creates an electronic record. This could potentially enable a party to easily print out and distribute e-mail communications with their attached documentation without the knowledge of the other party. This sort of behaviour might hinder the development of open and honest exchanges in cyber-mediation. Finally, the familiarity of users with IT technologies becomes fundamental when the Internet becomes the main vehicle through which mediation takes place. To take advantage of ODR, a user must be able to manage the software and hardware necessary to chat online and use a webcam (Conley Tyler and Raines 2006; Hattotuwa 2006).

Experts in this sector therefore agree in considering the present model still inadequate and believe that new efforts to improve the level of virtual communication are necessary. Some improvement can certainly derive from a greater diffusion of video and audio communication systems (webcams) that make long-distance visual communication possible between the participants and the mediator. In this way, synchronous communication and chat room conferences would allow all mediation participants to hear and see each other live, as in a face-to-face meeting, and could thus be used to recreate, as far as possible, the typical situation of a hearing of mediation in a virtual environment. This advantage would greatly improve communication and interaction, including access to important verbal, 'body language' and emotion-related cues or observations lacking in the early forms of ODR methods.

Although cyber-mediation has been criticised because of its impersonal nature, it is likely to become more popular and better suited to resolving disputes as technology

advances. Online mediation will probably not manifest fully until videoconferencing becomes commonplace, video cameras and microphones are built into every computer, videoconferencing software is easily accessible and modems are fast enough.[4] When this becomes a common reality, ODR will reach consumers on a wider scale, and users will familiarise more with the many advantages offered by this virtual procedure.

28.5 Appendix

28.5.1 Roadbuilder vs. Transportation Department (Online Mediation 1)

The Texas Department of Transportation decided to construct a new road over a rough, mountainous area in West Texas. The work was to cover two separate stretches of roadway, the North Slope and the South Slope, located some 150 miles apart, and was to be performed under two separate $25 million fixed-price contracts. A number of highway construction firms participated in the bidding process, among them Roadbuilder, Inc. of Newark, New Jersey, which was awarded both contracts because of its lowest combined bid.

Under each of the two contracts, Roadbuilder was required to perform all excavation and grading work, which included retaining structures and reinforced concrete walls to stabilise the ground above and below the roadway. Roadbuilder also was required to instal the necessary pipes and drainways to assure adequate rainfall drainage.

Roadbuilder was delayed in commencing the work and ran into delays and additional expenses due to encountering unexpected rock outcrops and inclement weather. In February 1997, Roadbuilder notified the department of its additional expenses incurred in the work and refused to proceed further until these expenses were reimbursed. In early March 1997, the state notified Roadbuilder that it was terminating the contract because of Roadbuilder's failure to perform.

28.5.2 Rhonda McDonald vs. Easy Living Apartments (Online Mediation 2)

Rhonda McDonald is a third year law student. She works all day and takes night classes. She was looking for a place to live and looked at Easy Living Apartments

[4] The important role played by technology is strongly emphasised by Katsh and Wing, who consider it a 'fourth party' in ODR able to serve as 'a tool for the third party by aiding, assisting, and enhancing the third party's information management activities' (Katsh and Wing 2006, 113).

as a possible solution. She spoke with Mr. Benson, the unit manager, because safety was her main concern since this building is located in a high-crime and high-risk area. She was assured that the building had 24-h security guards and deadbolt locks on all the doors and only after that assurance did she move in. She had made repeated attempts to follow up on the locks and security guards, but at all times, her inquiries were dismissed.

A few weeks ago, on her way from her car to the apartment, she was grabbed by a man and threatened to keep quiet. She was barely able to escape and make it into her apartment and the neighbours called the police. Easy Living Apartments refuse to be held responsible for what happened and believe nothing was said concerning security, when Rhonda McDonald first visited the building.

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Chapter 29
The Alleged Liveness of "Live": Legal Visuality, Biometric Liveness Testing and the Metaphysics of Presence

Joseph Pugliese

Abstract In the context of contemporary societies preoccupied with questions of surveillance and identity verification, biometric systems are being increasingly deployed across a wide range of institutions and organisations in order to provide security of access. In this chapter, I examine the techniques that might be deployed by fraudsters in order to trick biometric systems into giving them illegitimate access to data and/or controlled areas. In order to counter the tactics used by fraudsters to "fool" biometric systems, biometric scientists and technologists are in-building within the technologies a number of tests designed to detect fraudsters. One of the key fraud detection methods being deployed by biometric systems is so-called liveness testing; liveness testing is being used to determine whether the person being screened by the system is actually present (and "alive") rather than a simulacrum reproducing a stolen identity. In the course of this chapter, I proceed to situate the procedures of "liveness testing" within a Derridean critique of the metaphysics of presence in order to disclose the unacknowledged philosophemes that inform legal, scientific and technological understandings of the body, the legal subject and identity. I conclude this essay by focusing on the development of a new range of biometric technologies that are attempting to preclude digital spoofing by focusing on the seemingly non-replicable depths of the inside of the body. Regardless of this descent into the depths of the body, I argue that, once again, these transductions of the "raw" organic material of the soma cannot escape either the logic of iterability or its consequent spoofable effects.

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29.1 Introduction

In the context of contemporary societies preoccupied with questions of surveillance and identity verification, biometric systems are being increasingly deployed across a wide range of institutions and organisations in order to provide security of access. Across much of the relevant literature, biometric technologies are presented as providing virtually foolproof systems of identification and/or verification of the subjects the biometric systems screen. Yet, despite these claims, the literature also acknowledges that biometric systems are open to being tricked by fraudsters. Biometric technologies, as technologies dependent on identity authentication and attendant economies of legal subjects and verifiable signatories, are haunted by the spectres of digital frauds and identity spoofs.

I situate these spectres of digital frauds and identity spoofs within Foucault's (1980, 142) theorisation of power as at once subjugating and productive of in-built resistances: "hence one should not assume a massive and primal condition of domination, a binary structure with its 'dominators' on one side and 'dominated' on the other …. [T]here are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised". Taking this theorisation of power as my point of departure, I proceed to examine a series of techniques that might be deployed by fraudsters in order to trick biometric systems into giving them illegitimate physical and/or symbolic access to data and/or controlled areas. My aim is not to endorse the exercise of biometric fraud through techniques of spoofing; rather, it is to evidence the Foucauldian thesis of power as marked by in-built resistances and productive of unintended effects.

In order to counter the tactics used by fraudsters to "fool" biometric systems, biometric scientists and technologists are in-building within the technologies a number of tests designed to detect fraudsters. One of the key fraud detection methods being deployed by biometric systems is so-called liveness testing; liveness testing is being used to determine whether the person being screened by the system is actually present (and "alive") rather than a simulacrum reproducing a stolen identity. In the course of this chapter, I proceed to situate the procedures of "liveness testing" within a Derridean critique of the metaphysics of presence in order to disclose the unacknowledged philosophemes that inform legal, scientific and technological understandings of the body, the subject and identity.

The western legal category of the subject is founded on the Enlightenment conceptualisation of identity as univocally self-same. Biometric systems of identification and verification are predicated on this Enlightenment understanding of the subject. The authorising logic of these systems is driven by the notion that, despite micro permutations, the empiricity of flesh (the iris, the face or the finger print) encodes an identity, in the form of a visual template, that is, continuous or "identical" with itself throughout the subject's existence. Yet, within biometric systems, this logic must be underpinned, simultaneously, by a dissemination and decentring of self-same identity. This other, heteronomous logic is perfectly encapsulated in the following

biometric formula: "Identification is often referred to as *1*: *N* (*one-to-N* or *one-to-many*), because a person's biometric information is compared against multiple (*N*) records" (Nanavati et al. 2002, 12). One-to-*N* or one-to-many names the manner in which the unicity of identity is invested with the law of the other (signatory citation as different in every instance), of the other that guarantees the conditions of possibility for the self-same to be constituted as an identifiably unique identity, even as it opens up the same to a movement of discontinuity and dissemination (across various institutional sites and biometric systems with every instance of re-enrolment).

"Biometric authentication", explain Woodward et al., "refers to *automated methods of identifying or verifying* the identity of a *living person in real time* based on a *physical characteristic* or *personal trait*" (2001, 11). The identificatory machining or automation of the living person in real time encapsulates the non-negotiable aporias that inscribe biometrics, in which a subject's biometric *image file* is termed the *corpus* – that is, in which the image of a subject's bio-identificatory feature becomes, indissociably, her machined/automated corpus. In other words, the very act of "live" authentication before a biometric system can only ever remain an assertion without absolute proof as it can only be performed through the process of template citation and signatory quotation, a process that irreducibly dissimulates both "life" and "authentic" identity and that structurally ensures that the category of the "live" biometric template image is always already a *visual artefact* premised on multiple mediations.

I conclude this chapter by focusing on the development of a new range of biometric technologies, such as biometric vascular pattern recognition, that are attempting to preclude digital spoofing by focusing on the seemingly non-replicable depths of the inside of the body. Regardless of this descent into the depths of the body, I argue that, once again, these transductions of the "raw" organic material of the *soma* cannot escape either the logic of iterability or its consequent spoofable effects.

29.2 Deconstructing the Metaphysics of Presence

Once a biometric technology, such as facial scan, has been set up in a particular context, the subject whose identity will be verified by this biometric system is required initially to enrol by supplying the requisite biometric data, such as a digital scan of their face, which is subsequently converted into a visual template. The template, that is, generated by the algorithmic encoding of a subject's distinctive biometric features, is stored in the system's server and is used to verify a user's identity every time they present themselves for biometric screening – in other words, the initial enrolment template is matched against the user's verification template.

When theorised in terms of their constitutive rhetoric, biometric templates reproduce the figural logic of synecdoches: that is, every biometric template functions synecdochically in terms of a part signifying the larger whole of the enrolled subject. I want to elaborate on the juridico-political dimensions of theorising biometric templates in terms of synecdoches by arguing that biometric templates must be viewed

as also synecdoches of the legal category of the subject. In particular, the biometric template must be conceptualised as juridico-political entity as it synecdochically functions to constitute and reproduce the legal category of the person-as-subject. In other words, when confronted by a biometric system, unless one is enabled to produce a template, one is directly denied the subject status of legal personhood; whether or not a subject is enabled to take up this position directly determines whether or not they may be given legal or authorised access to restricted space and/or information. In this biometric schema, not to produce a template is equivalent to having no legal ontology.

The indissociable relation between the question of visual representation and the very possibility of political agency in and through law is brought into sharp focus in Peter Goodrich's (1990, 263) naming of this relation as one that is played out in "the theatre of attachment". Through his invocation of this reflexively representational metaphor, Goodrich (1990, 263), drawing on the work of Pierre Legendre, delineates the manner in which the legal subject is predicated on the "forms of attachment to law": "The question is initially that of the theatre of attachment, an issue of the mask or role or identity that will bind the individual to law, that will tie together in legal form the unity of a lived existence and so secure the political agency of the human subject through representation". My reading of the biometric template in terms of the figure of synecdoche (as instrumental in constructing the legal category of the biometric subject) must be seen as a contemporary, *in silico* version of what Goodrich (1990, 263–4) terms an "actor's mask":

Note that one of the central constructions of civil law, that which, following Justinian's terminology, we call the *law of persons*, literally derives from *persona* – referring initially to an actor's mask – and authorises me to translate the formula *de iure personarum* by "of the law of masks". In all institutional systems the political subject is reproduced through masks. This translation contributes to the rehabilitation of the problematic of the image at the heart of the legal order.

What Legendre and Goodrich underscore, in their critical genealogies of law, is the systemic erasure of the image at the very heart of law even as it establishes the (disavowed) conditions of possibility of the legal subject as representational being, as actor and agent in the sociolegal theatre. In articulating the importance of zero in Legendre's genealogies of law, Goodrich (1990, 281) underscores its value, in law, as "a lack, an absence that is filled by entry into the symbolic": "The entry of the individual into the symbolic, the transition from zero to one, from lack to identity, is the condition of institutional existence, the capture of the subject by law. What is at stake in the order of reference and in the 'name of the law' is precisely the possibility of social speech – and there is no other speech – and so the possibility of being human, or in scholastic terms of becoming 'a speaking being'" (Goodrich 1990, 281, 282).

The capture of the subject by law, through the production of biometric templates, enables, simultaneously, the possibility for the subversion of law. In what would seem, in the first instance, to be a counter-intuitive logic, biometric "enrolment and verification templates should never be identical": "Because different templates are generated each time a user interacts with a biometric system, there is no 100 per cent

correlation between enrolment and verification templates" (Nanavati et al. 2002, 19, 21). Indeed, an exact one-to-one identical match is seen as the sign of fraud, as it signals the possibility that an impostor has stolen the initial enrolment template of someone else and is presenting it in order illegitimately to gain access to the system. This seeming counter-intuitive logic, that demands iteration of identity with difference, graphically exemplifies the deconstructive movement of iteration, as a movement always already inscribed with alterity in every new instance of repetition. Jacques Derrida discusses this paradox precisely in the context of that exemplar of unique identity: the *signature* – a term that is now a fundamental signifier in the discourse of biometrics, where it is used to name the unique identity of enrolled subjects across diverse biometric systems, including gait-signature, keystroke-signature and so on.

Derrida (1990, 20) unpacks the paradox of the signature in the context of deconstructing its representation as a privileged signifier that marks an indissociable tie to an originary figure, what he terms the "tethering to the source":

In order for the tethering to the source to occur, what must be retained is the absolute singularity of a signature-event and a signature form: the pure reproducibility of a pure event…But the conditions of possibility of those effects is simultaneously, once again, the condition of their impossibility, of the impossibility of their rigorous purity. In order to function, that is, to be readable, a signature must have a repeatable, iterable, imitable form.

The constitutively repeatable status of identity is, in fact, inscribed in the very etymological emergence of the term "identity". In his detailed tracking of the history of identity papers and passports in early modern Europe, Valentin Groebner (2007, 26) writes: "'Identity' is a medieval coinage. It was in common use in its Latin form *idemptitas* or *identitas* in medieval logic. Derived from *idem*, 'the same,' or *identidem*, 'time and again,' it denoted not uniqueness, but the features that the various elements of a group had in common". This embedded etymological meaning, Groebner (2007, 219) demonstrates, "[f]rom the mid-fifteenth century onwards", becomes the animating logic of technologies of identity verification and authentication: "It was reproduction that literally created the proofs of a person's individuality: an individual had to be doubled by an identity document plus an official internal record on the document issued".

In biometrics, this iterable and repeatable identity form can never be identical across each instance of its repetition: "As opposed to an identical string of data", Nanavati et al. (2002, 262) explain, "biometric templates vary with each finger placement, iris acquisition, and voice recording: the same finger, placed over and over again, generates a different template with each placement. This is attributable to minute variations in presentation – pressure, distance … which lead to the extraction of slightly different features for each template". In other words, the unique identity biometric of a subject is indissociably tied to iterability, as "the logic that ties repetition to alterity" (Derrida 1990, 7). It is the logic of iterability that problematises biometrics' reliance on the foundational concept of the "root identity", as "The authoritative identity [of a subject] established and maintained with high integrity by the system" (Office of the Under Secretary of Defense for Acquisition, Technology,

and Logistics 2007, 163). In the biometric literature, a subject's "root identity" is described as being predicated on the "ground truth" (Parziale and Chen 2009, 107) of their biometric attributes. A subject's biometric "root identity" is, however, in keeping with the rhetorical effects of this rhizomatic trope, always caught within a transversal movement of iterability that precludes the possibility of an authoritative self-identity not always already marked by difference.

Conceptualised in Derridean terms, then, the biometric signature of a subject can only function as the instantiation of a unique signature event that signals the "presence" of a non-fraudulent subject through an iterable movement that must be differentially marked at every "presentation" – as the "process by which a user provides biometric data to an acquisition device" (Nanavati et al. 2002, 17). I place "presence" in scare marks as there is inscribed in this aporetic movement – in which the identity of the self-same must be at once different – not only a deconstruction of the concept of a unique identity inextricably tethered to a root source but there is also inscribed a deconstruction of the metaphysics of presence that fundamentally informs the discourse of biometrics and its constitutive lexemes.

Before I proceed further in my discussion of the constitutive role of the metaphysics of presence in biometric technologies, I want to spend some time unpacking Derrida's deconstruction of the metaphysics of presence. The identity of a subject or sign is constituted, in Derridean terms, through the operations of *différance*, that is, the identity of the sign "cat", for instance, only achieves its signifying value through a system of differential relations where the letters "c", "a" and "t" differ from all the other letters of the alphabet: "every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of the systematic play of difference" (Derrida 1986, 11). This differential relation, Derrida argues, is also constituted by a complex system of deferrals, in that all the other signs of the alphabet that differ from the letters "c", "a" and "t" are at once deferred in their "appearance" even as they are constitutive, through their difference, of the signifying value of "c", "a" and "t":

It is because of *différance* that the movement of signification is possible only if each so-called "present" element, each element appearing on the scene of presence, is related to something other than itself, thereby keeping within itself the mark of the past element, and already letting itself be vitiated by the mark of its relation to the future element, this trace being related no less to what is called the future than to what is called the past, and constituting what is called the present by means of this very relation to what it is not …. An interval must separate the present from what it is not in order for the present to be itself, but this interval that constitutes it as present must, by the same token, divide the present in and of itself, thereby also dividing, along with the present, everything that is thought on the basis of the present, that is, in our metaphysical language, every being, and singularly substance or the subject (Derrida 1986, 13).

Derrida (1986, 11) here draws attention to the manner in which the present can never be fully present unto itself as it is always already divided by this play of difference and deferral: "The first consequence to be drawn from this is that the signified concept is never present in and of itself, in a sufficient presence that would

refer only to itself". Such foundational categories of western metaphysics as "being" or "the subject", then, can no longer be thought as constituted by a self-identical presence; rather, these foundational categories, premised on a metaphysics of pure and undivided presence, must be seen as the effects of this play of *différance*. This detour into Derridean deconstruction has been essential in order to begin to disclose the manner in which biometric systems are underpinned precisely by this unacknowledged metaphysics of presence; and, furthermore, the ever-present danger of spoofs and frauds is actually, I argue, a system-effect of biometrics' reliance on a metaphysics of presence. The one (a metaphysics of presence) produces the other (frauds, impostors).

29.3 Biometric Latency and Bogus Authentication

In Woodward et al.'s *Biometrics*: *Identity Assurance in the Information Age* (2003, 8), a fictional character named "Cathy" is constructed by the authors in order to illustrate how bogus identification and identity spoofing can occur within biometric systems:

The biometric authentication process begins with a biometric sensor of some kind. When Cathy tries to log in, the sensor collects a biometric reading from her and generates a biometric template from the reading, which becomes the authenticator. The verifier is based on one or more biometric readings previously collected from Cathy. The verification procedure essentially measures how closely the authenticator matches the verifier. If the system decides that the match is "close enough", the system authenticates Cathy; otherwise authentication is denied.

Woodward et al. (2003, 8) call the measured properties of Cathy's biometric trait "the base secret in a biometric system". This "base secret", however, turns out to be, through another aporetic turn, publicly available as a type of "latency":

It's important to recognize that her [Cathy's] biometric traits aren't really secrets. Cathy often leaves measurable traces of these "secrets" wherever she goes, such as fingerprints on surfaces, the recorded sound of her voice, or even video records of her face and body. This "latency" provides a way for attackers to generate a bogus authenticator and use it to trick the system into thinking that Cathy is actually present. Moreover, it may be possible to intercept a genuine authenticator collected from Cathy and replay it later. Thus, accurate authentication depends in part on whether the system can ensure that biometric authenticators are actually presented by live people (Woodward et al. 2003, 8).

The public latency of the base secret encapsulates the aporetic logic of biometrics as a *somatechnology*. Somatechnics refers to the indissociable relation between bodies (*soma*) and technologies (*technè*): bodies can only achieve their cultural intelligibility, precisely as "bodies", through their inscription by various technologies, including language (see Somatechnics Research Centre; Pugliese and Stryker 2009). The animating principle of all biometric systems is the technologisation of the body's key identifiers: the body's identificatory features must be extracted and

technologised into digital templates. Somatic features, within biometric systems, are only intelligible once they have been visually scanned, algorithmically processed and "fixed" into templates. This process enables the serialisation of biometric features as the logic of the system is predicated, as I argued above, on the iterability of unique identificatory features or, couched in Derridean terms, on the possibility of "originary reproduction" (Derrida 1976, 209), in which the unique becomes culturally intelligible as "unique" through the effaced process of its very iterability. And this dependency on the iterable logic of originary reproduction is not something exclusive to biometric technologies of identity. Rather, it is constitutive of all identification-based systems. As Groebner (2007, 252) concludes in his survey of the history of identity documents in early modern Europe, "the history of identification is at once the history of the technologies of reproduction". Although he does not draw on Derridean theory to explicate his argument, Groebner effectively articulates a deconstructive understanding of the philosophical presuppositions that underpin identity and reproduction. Remarking critically on what he terms "the fiction of authenticity", Groebner (2007, 219) underscores how the earliest identity-based documents were, unsurprisingly, already haunted by the spectres of impostors, fraud and proxies:

The history of identification I have traced from the mid-fifteenth to the end of the seventeenth century leads to an unequivocal conclusion. After two centuries of regulation, laws, and ever newer forms of official documents declared compulsory, after two centuries of bureaucratic orders – "Register everyone and everything!" – and of repeated admonitions that stricter attention be paid to recording and checking individuals, what was the outcome of all these endeavours? The rise of the con man and the impostor …. Their careers in dissimulation took place not in spite of, but through the expanding systems of bureaucratic control.

It is, then, the structural demand that unique identificatory features be reproducible/iterable, in order to be biometrically intelligible and legible, that generates the very possibility for fraud. The measurable traces of the biometric "secrets" that a subject leaves behind function to construct a public "theatre" of latent spoofs, spectres and feints. In the course of the practices of her or his everyday life, a subject leaves a trail of biometric traces (fingerprints, DNA, CCTV images) across diverse spaces and contexts. These traces are at one and the same time secrets that are publicly available to be put to use in a repertoire of feints and impostures. The aporia that I am marking here of a secret that is simultaneously public is in fact constitutive of the logic of the secret as such. This is the "enigma" of the secret that Derrida (1992, 95) draws attention to:

The enigma of which I am speaking here … is the *sharing of the secret*. Not only the sharing of the secret with the other, my partner in a sect or in a secret society, my accomplice, my witness, my ally. I refer first of all to the secret shared *within itself*, its partition "proper", which divides the essence of a secret that cannot even appear to one alone except in starting to be lost, to divulge itself, hence to dissimulate itself, as secret, in showing itself: dissimulating its dissimulation.

In order for a secret to be a secret as such, it must institute a "negation that denies itself" (Derrida 1992, 95): dividing itself ("its partition 'proper'"), the secret must

"lose" itself, and divulge itself as already other, as "dissimulating its dissimulation" in order to maintain its status as secret. The secret's status as secret is predicated on its denegated disclosure and dissimulation of itself. Graphically inscribed here is the aporetic logic that animates the possibility for all the biometric secret traces that a subject leaves behind to be dissimulated by another. One's "proper" somatic traces are – as latently legible biometric traits that are, in Woodward et al.'s (2003) words, "read" by biometric systems – only legible because they are simultaneously iterable and inscribed by alterity, that is, by the mark of the other.

I draw on the metaphor of a public "theatre" of biometric spoofs and mimics as the techniques available to subvert biometric systems are all couched in a performative lexicon of masquerade and mimicry. Woodward et al. (2003) list the following techniques of biometric fraud:

> *Masquerade*: This is the classic risk to an authentication system. If Henry's [another fictional character] goal is masquerade, he's simply trying to convince the system that he is in fact someone else, perhaps Cathy, since the system already knows how to recognize her. Henry proceeds by trying to trick the system into accepting him as being the other person. (2003, 9)
> *Replication*: In this attack, Henry produces a copy of whatever Cathy is using to authenticate herself. (2003, 13)
> *Mimics*: Mimics are when a user is able to impersonate another identity. (2003, 14)
> *Artifacts*: Artifacts are when an attacker is able to present a manufactured biometric (such as a fake finger) to the system. (2003, 14)
> *Digital Spoofing*: Also known as a *playback attack*, this attack takes advantage of the fact that all authentication data is ultimately reduced to bits on a wire. If the system expects a particular value for the authenticator, the attacker intercepts this value and replays it to masquerade as someone else. (2003, 14)

Operative in this theatre of biometric mimics and impostors is what Derrida (2002b, 57) terms, in another context, a "mediatic-techno-performativity and a logic of the phantasmata". The "authentic" and "unique" biometric signature of a subject can only be rendered legible biometrically by being mediated by the operations of digital technology. The process of biometric authentication can only be staged through a performative of mediated iterability that is at all times open to the haunting spectres of latent phantasmata: unique "bits" of the subject as so much discarded but latent traces waiting to be capitalised, "re-animated", by the fraudster-in-waiting. The logic of iterability that underpins all biometric systems establishes the conditions of possibility for both the technological encoding of the unique features of a subject's *soma* and the reproducibility of these unique traits as so much mediated techno-digital data: "The possibility of repeating", writes Derrida (1990, 8), "and thus of identifying the marks implicit in every code, making it into a network [*une grille*] that is communicable, transmittable, decipherable, iterable for a third, and hence for every possible user in general".

The key signifiers that underpin all biometric technologies and that are constitutive of their system of conceptuality are *trace*, *secret* and *iterability*. I would argue, at this

juncture, that the aporetic logics of iterability, the trace and the secret vitiate any claims that a foolproof system can ever be built that is not also always already open to frauds and impostors. The very possibility of fraud and imposture is in-built within the unacknowledged metaphysics of presence of biometric systems. In what follows, I want to elaborate on this unacknowledged metaphysics of presence by focusing on so-called liveness testing in order to preclude instances of biometric identity fraud.

29.4 Signs of Life: The Alleged "Live" of Liveness Testing

In their chapter titled "Biometric Liveness Testings", Valorie S. Valencia and Christopher Horn (2003, 10) bring into focus the unsettling spectre of spoofs that haunts biometric systems:

Recent reports have shown that biometric devices can be spoofed using a variety of methods …. The security provided by biometric devices – that is, the level of confidence in the user's identity – is diminished if the devices can be readily circumvented. Liveness detection, among other methods, has been suggested as a means to counter these types of attacks.

Biometric liveness tests are automated tests to determine if the biometric sample presented to a biometric system came from a live human being – not just any live human being, however, but the live human being who was originally enrolled in the system – the "authentic live human being", if you will.

One way to defeat a biometric system is to substitute an artificial or simulated biometric sample for the biometric sample of the "authorised live human being". As such, liveness testing is a technology used to maximise confidence that individuals are who they claim to be, and that they are alive and able to make the claim.

"The fundamental faith of the metaphysicians", Nietzsche notes (1966, 10), "is *the faith in opposite values*". Inscribed in the above-cited Valencia and Horn passage is a metaphysics founded on the faith in opposite values: authentic/fake, live/dead and present/absent. These opposite values are presented as foundational categories that can be empirically verified. This metaphysical faith in opposite values is precisely what is undone by biometrics' dependency on the logic of iterability. Animating biometrics' liveness tests is a metaphysics of presence, in which an "authentic live human being" presents herself before the technology. Undivided from herself, fully in possession of her "proper" and "authentic" traits, the subject undergoing the liveness test presents herself in the full plenitude of her self-identical "liveness".

These biometric fraud detection tests are underpinned by the metaphysics of presence and, precisely because it is a metaphysics, it fails to deliver what it promises. As I argued above, for the biometric traits of a subject to be rendered legible as a biometric template within the system, they must assume the form of an iterable mark or signature. As iterable mark, a subject's biometric signature is always already inscribed by *différance*, in which the self-same is at once deferred and different from itself (Derrida 1986, 8–9). A subject's biometric signature must

conform to a grammatological understanding of "writing" that presupposes the "death" of a subject even as they present themselves "live" before the biometric system; in other words, the subject must "go through the detour of the sign" (the enrolment template lodged in the biometric system) in order to be intelligible as identifiable subject by the biometric system:

To be what it is, all writing must, therefore, be capable of functioning in the radical absence of every empirically determined receiver in general. And this absence is not a continuous modification of presence, it is a rupture in presence, the "death" or the possibility of the "death" of the receiver inscribed in the structure of the mark …

What holds for the receiver holds also, for the same reasons, for the sender or producer. To write is to produce a mark that will constitute a sort of machine which is productive in turn, and which my future disappearance will not, in principle, hinder in its functioning, offering things and itself to be read and to be rewritten (Derrida 1990, 8).

As I demonstrated above, the authenticating and identificatory logic of biometric systems is predicated on generating a template proxy of the subject. Encoded in this process is a series of aporetic effects that problematise liberal-humanist conceptualisations of both identity and the subject. The aporetic logic of iterability and citationality, whereby the veridicity of a subject's re-enrolling template is adjudicated precisely by its failure exactly to coincide with the original enrolment template, inscribes univocal conceptualisations of identity and the subject with a heteronomous law of the self-same-as-other. Indeed, the very status of the key signifiers of biometric identification and verification – uniqueness, authenticity and veridicity – are predicated on an unacknowledged dependence on the other: the self-same subject must generate a micrological series of citations-as-differentiations that de-totalise her identity, even as these citations-as-differentiations function to affirm the seeming univocality of identity.

Biometric systems of identification and verification are predicated on an Enlightenment understanding of the subject: the authorising logic of these systems is driven by the notion that, despite micro permutations, the empiricity of flesh (the iris, the face or the fingerprint) encodes an identity that is continuous or "identical" with itself throughout the subject's existence. Yet, as I demonstrated in my critique of the Enlightenment understanding of identity, this logic must be underpinned, simultaneously, by a dissemination and decentring of self-same identity. This other, heteronomous logic is perfectly encapsulated in the following biometric formula: "Identification is often referred to as *1*:*N* (*one-to-N* or *one-to-many*), because a person's biometric information is compared against multiple (*N*) records" (Nanavati et al. 2002, 12). One-to-*N* or one-to-many names the manner in which the unicity of identity is invested with the law of the other (signatory citation as different in every instance), of the other that guarantees the conditions of possibility for the self-same to be constituted as an identifiably unique identity, even as it opens up the same to a movement of discontinuity and dissimulation (across various institutional sites and biometric systems with every instance of re-enrolment).

The identity of the subject comes into being in this very movement of dissimulation: already in its algorithmic conversion, as an array of digital numbers it is

non-identical to itself. This is the crux of the matter underpinning the constitutive effects of the metaphysics of presence in the operations of biometrics: the somatic identity of the subject cannot present itself in the purity of an "uncontaminated" *physis*, that is, in terms of a purely "natural" body not always already culturally marked and discursively inscribed as a legible *body*. An uncontaminated and irreducibly pure *physis* would remain non-iterable and thus "illegible". In talking, then, of the somatechnics of biometrics, I am drawing attention to the iterable and thus tropic (because proxy-prosthetic) status of a subject's biometric identity/signature. In articulating the aporetic hinge between the originary and the reproducible (Pugliese 2005, 362), between the natural (*physis*) and the synthetic-prosthetic (*technè*), Derrida (2002a, 244) emphasises that the relation "is not an opposition; from the very first there is instrumentalization [*dés l'origine il y a de l'instrumentalisation*] … a prosthetic strategy of repetition inhabits the very moment of life. Not only, then, is technics not in opposition to life, it also haunts it from the very beginning". If a prosthetic strategy of repetition-as-instrumentalisation inhabits the very moment of life, then liveness testing can never fully circumvent the deployment of faux body parts and synthetic-prosthetics: the possibility of the proxy already marks and constitutes the very possibility of the body proper. Indeed, no body proper as such that is not always already inscribed by instrumentalisation and its prosthetic inscription by cultural systems and techniques of signification.

In their article, "Body Check: Biometric Access Protection Devices and Their Programs Put to the Test", Lisa Thalheim, Jan Krissler and Peter-Michael Ziegler have put to the test 11 biometric systems by generating digital spoofs and proxies and, in all cases, they managed to breach the system's security screening devices. In their tests, these researchers have outfoxed biometric protective programs and devices by "deceiving the systems with the aid of obvious procedures (such as the reactivation of latent images) and obvious feature forgeries (photographs, videos, silicon fingerprints)" (Thalheim et al. 2002). As they document in their article, they obtained "astonishing results by means of this approach" (Thalheim et al. 2002). Thalheim et al. proceeded successfully to spoof the biometric systems they tested by supplying a range of relevant biometric simulations. For example, in order to breach the liveness test of a facial scan system, they:

Simply shot a short .avi video clip with the webcam in which a registered user was seen to move his head slightly to left and right. As brief movements suffice for FaceVACS to consider an object alive and as the program engages in simple 3D calculations only, we were not particularly surprised by the success of our approach: Once the appropriate display-to-ToUcam distance had been found the program did in fact detect in the video sequence played to it a moving "genuine" head with a known facial metric, whereupon it granted access to the system. In a worst case scenario this state of affairs implies that a person without a professional background to movie making who had wielded a digital camera during a public meeting and there shot visual material of authorized personnel, to log on to a protected system, need only modify the acquired material slightly and transfer it to a portable PC (Thalheim et al. 2002).

The fact that Thalheim et al. are compelled to place the term "genuine" (head) in scare marks highlights the aporetic logic that haunts and inscribes biometric systems predicated on the binary oppositions "genuine" and "fake", "live" and "dead" "body" and "machine". And I reiterate the following Derridean citation in order to elaborate my critique of the metaphysics of presence in the context of biometric systems: "What holds for the receiver holds also, for the same reasons, for the sender or producer. To write is to produce a mark that will constitute a sort of machine which is productive in turn, and which my future disappearance will not, in principle, hinder in its functioning, offering things and itself to be read and to be rewritten" (Derrida 1990, 8).

As the production of an identificatory mark/signature is dependent upon the "disappearance" of the signatory subject (in order for the signature to be able to function as proxy in-lieu of the absent subject), this structural disappearance or "death" of the signatory subject is what ensures the very production of the biometric proxy *and* the possibility to trick the system with a dissimulation of the simulation. The structural need to produce a proxy of the subject at biometric enrolment generates the "possibility of disengagement and citational graft which belongs to the structure of every mark …. Every mark can be cited, put between quotation marks" (Derrida 1990, 12). In the context of biometric systems, the act of identity theft hinges precisely on the logic of the citational graft: the thief purloins another subject's biometric signature and presents it to the system with the hope that it will fail to read the quotation marks.

"An advantage of biometric authentication technologies", write Valencia and Horn (2003, 142) in their "Biometric Liveness Testing", "is that we can do something about it – we can incorporate automated liveness tests to minimize the effectiveness of artificial or simulated biometric specimens". The sort of entanglement of contradictory terms that is evidenced in this "solution" pervades the discourse of biometrics: "automated liveness tests" signals, paradoxically, the automated machining of the live, the technologisation of the body in order to attempt to differentiate between *soma* and *technè* and the living flesh and the dead simulation or prosthesis. Yet this metaphysics of pure and unmediated presence is incessantly undone by the fact that the liveness of the "here-now does not appear as such, in experience, except by differing from itself" (Derrida 2002b, xvii). The "traits" that Derrida (1990, 9, 10) grammatologically "recognize[s] in the classical, narrowly defined concept of writing, are generalizable. They are valid not only for all orders of 'signs' and for the entire field of what philosophy would call experience, even the experience of being: the above-mentioned 'presence' … there is no experience consisting of *pure* presence but only chains of differential marks".

The concept of pure, undifferentiated and non-technologised being is what underpins biometrics' metaphysical system of conceptuality. The biometric system deploys an "automated liveness" test in order to detect "*signs* of life": in other words, the in vivo must be rendered semiotically *in silico* in order to register as a "sign of life". The "bio" of bioinformatics is only ever available, as a culturally intelligible unit of information, through the indissociable transposition or transcoding of the one (bio) into the other (informatics) – that is, through an ineluctable process of somatechnicity.

The impossibility of the experience of unmediated being is underscored by the fact that the logic of general citationality constitutes the biometric system's unacknowledged conditions of possibility. The possibility of digital spoofing, as a form of "structural parasitism" (Derrida 1990, 17), is structurally in-built in the system. And, in placing biometric security systems through their paces, Thalheim et al. (2002) deploy a range of both serious and farcical tactics of parasitism and citational grafting, including breathing over the trace of a fingerprint in order to "revivify" it, grafting a fingerprint trace onto adhesive film, reactivating a latent image with a water-filled plastic bag or balloon and deploying an inkjet print of a human eye perforated with a miniature hole in order to trick an iris-scan system.

In their discussion of biometric templates, Lila Kari and Laura Landweber (2000, 414) argue that there is an "homology" between a subject's biometric template/signature and his or her DNA signature: "The complex structure of a living organism ultimately derives from applying a set of simple operations (copying, splicing, inserting, deleting, and so on) to initial information encoded in a DNA sequence". This homology, in fact, resonates along a number of levels. Biometric traits are viewed in terms of a subject's unique genetic and/or phenotypical features: "biometrics rely on genetics as the basis of various biometrics" (Woodward et al. 2003, 29). As I have argued elsewhere, in my grammatological deconstruction of genetics, DNA is only intelligible as a scientific object of inquiry through the deployment of a series of effaced metaphors predicated on writing, including genetic letters, codes, texts, polymerase proofreaders, spelling errors, traces and so on (Pugliese 1999). This homology between genetics and biometrics holds not only because both disciplines are critically dependent upon a textual economy of writing and *différance* in order to make legible their respective objects of inquiry but also because both disciplines are foundationally dependent on a metaphysics of "life" informed by an empirico-positivist biologism. In the fields of science and technology, whenever the problematic of "life" is invoked, a metaphysics of pure and unmediated biological presence is unreflexively called into "being". As Derrida (1976, 70) observes, "in all scientific fields, notably in biology, this notion [of presence] seems currently to be dominant and irreducible". Yet, as I demonstrated above, at the very moment that life, the living organism, is encoded in biometric language (or genetic text), it becomes inscribed in the movement of *différantial* deferral of and difference from the other; at the moment of biometric presentation, "there is no experience of *pure* presence but only chains of differential marks" (Derrida 1990, 10).

"Biometric authentication", explain Woodward et al. (2001, 11), "refers to *automated methods of identifying or verifying* the identity of a *living person in real time* based on a *physical characteristic* or *personal trait*". The identificatory machining or automation of the living person in real time encapsulates the non-negotiable aporias that inscribe biometrics, in which a subject's biometric *image file* is termed the *corpus* – that is, in which the *image* of a subject's bio-identificatory feature becomes, indissociably, her machined/automated corpus. Biometrics' techno-automated mediation of the "live" and "real time" signifies, in effect, that there can only ever be "an allegation of 'live'" and of "real time". Discussing the metaphysics of presence

in the contemporary configuration of "tele-techno-mediatic modernity" and its celebration of such things as "live" satellite-televisual transmissions, Derrida (2002c, 40) sardonically remarks "we should never forget that this 'live' is not an absolute live, but only a live effect [*un effect de direct*], an allegation of 'live'". The allegation of live captures the metaphysics of presence that unreflexively inform biometrics' faith in liveness testing (as the means whereby to circumvent digital spoofs and identity frauds). It is an *allegation of live* that animates biometric liveness testing as "to allege" signifies, in legal terms, "to assert without proof" and, simultaneously, to "cite, quote" (*Shorter Oxford English Dictionary* 1978). In other words, the very act of "live" authentication before a biometric system can only ever remain an assertion without absolute proof as it can only be performed through the grammatological process of template citation and signatory quotation, a process that irreducibly dissimulates both "life" and "authentic" identity and that structurally ensures that the "absolutely real present is already a memory": "there is no purely real time because temporalization itself is structured by a play of retention or of protention and, consequently, of traces …. The real time effect is itself a particular effect of 'différance'" (Derrida 2002c, 129).

This is not to reduce the liveliness of life to the operations of a homogenising textuality or totalising techno-discursivity. Rather, the liveliness of life must be viewed as what exceeds the algorithmic delimitations and empirico-positivist frames of the biometric sciences. "The *liveliness* of life", writes Levinas (1988, 162, 178), "is an incessant bursting of identification": "Is not the liveliness of life an excession, the rupture of the container by the uncontainable?" The excession of the liveliness of life signifies the impossibility of containing a subject's life within the calculable parameters of digitised "identity" categories/templates: already non-identical to itself, the liveliness of life inscribes itself in so many citational grafts, structural parasitisms and heteronomous traces, thereby dissimulating itself and exceeding the metaphysics of presence.

29.5 'Transductions of the Body, Infrastructural Normativities and Biometrics' "Extrinsic" Information

Because of its unacknowledged dependence on a metaphysics of presence, biometrics is structurally haunted by the threat of "spoofability". The spectre of this threat is what is driving the development of new biometric technologies designed to outfox frauds and impostors. A recently developed biometric system, vascular pattern recognition or vein pattern identification, is being touted as yet another system that "is difficult to forge": "vascular patterns are difficult to recreate because they are inside the hand and, for some approaches, blood needs to flow to register the image" (National Science and Technology Council 2006, 1). Another emerging biometric technology that is being promoted as offering spoof-detection capabilities is finger skin histology, which entails the imaging, through the use of optical coherence tomography, of the "internal structure of the skin of the finger":

The skin on the palmar side of the finger tips contains dermatoglyphic patterns comprising the ridges and valleys commonly measured for fingerprint-based biometrics. Importantly, these patterns do not exist solely on the surface of the skin – many anatomical structures *below the surface* of the skin mimic the surface patterns. For example, the interface between the epidermal and dermal layers of skin is an undulating layer made of multiple protrusions of the dermis into the epidermis known as dermal papillae. These papillae follow the same shape of the surface dermatoglyphic patterns and thus represent an internal fingerprint in the same form as the external pattern (Nixon et al. 2008, 414).

Biometrics' search to create a non-spoofable identificatory system has taken the technology below the surface features of the body (and its physiognomic and behavioural attributes) and into the seemingly non-replicable depths of the *soma*. Lodged in the depths of the *soma*, beyond the realm of replicable corporeal surfaces, is what Foucault (1975, 94) terms the "visible invisible" as that master metaphor that appears to promise a corporeal "truth" that is homogeneously self-identical and non-replicable. Vascular pattern recognition operates by "Using near-infrared light, reflected or transmitted images of blood vessels of a hand or finger [or face] are derived and used for personal recognition" (National Science and Technology Council 2006, 1). Yet, a subject's vascular patterns cannot simply signify in the self-evidence of their own unique corporeality. They must be "transduced", to use the apposite biometric term, by "combining geometry with underlying physiology" (Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics 2007, 52). The transduction of the physiological into the geometric is what enables the "visibilisation" of the invisible: the tropics of transduction, as fundamentally driven by the *turn* of metaphor, enable the somatechnical transmutation of the organic material of the body into intelligible data (that can be "read" by the biometric system) through a series of instrumental mediations. These mediations include the use of algorithms to remove "noise" (such as hair or shadows) and in order to "enhance" "the clarity of vascular patterns in captured images" (Choi and Tran 2008, 264).

There is, however, a prior process of mediation that antedates the mediations that I have just identified. Critical to this process of rendering the organic articulate and intelligible is language, as that other technology that has already inscribed the body even before the process of biometric scanning and algorithmic transduction has begun. Vascular pattern recognition and finger skin histology technologies come to a body that has already been techno-linguistically mediated before the fact of infrared scanning and optical coherence tomography. Infrared and tomographic scanning of the body's "invisible visible" can only take place as a coherent and intelligible techno-scientific operation after the fact of the discursive medico-anatomical mediation of the *soma*. Before the process of biometric infrared scanning and optical coherence tomography, the internal physiology of a subject's body has already been mapped (in anatomical atlases) and identified and rendered intelligible through a series of medico-anatomical terms: vascular pattern, blood vessels, blood flow, subcutaneous blood vessel pattern, haemoglobin of the blood, capillary tufts, dermal papillae and so on. This medico-anatomical lexicon constitutes the conditions of

possibility for biometrics to embark on its infrared and tomographic "descent" into the body's interior in order to extract its unique identificatory features. And, once again, these tropical transductions of the "raw" organic material of the *soma* cannot escape either the logic of iterability or its consequent spoofable effects.

The somatechnics of life ensure that the contours of the subject's body do not terminate at the threshold of the body; rather the contours extend beyond the physical parameters of the subject into the larger sociocultural domain, inflecting the operating parameters of biopolitical technologies determining critical question of knowledge/power. At the threshold of the *soma*, that empirical point of seeming terminus dividing the corporeal from the non-corporeal, the flesh is metaphorised into its other: *technè*. Inversely, *technè* is metaphorised as *soma*: in other words, what takes place is a *somatechnics of biometrics*. Even as biometrics dreams of the development of ever-new technologies designed to differentiate between "authentic" and "fraudulent" subjects, the technology's entire system of conceptuality is haunted by the ineluctable spectre of its absolute unthought: that the *soma* has always already been technologised before the fact of biometric scanning and template creation.

This absolute unthought is brought into critical focus by the division between "primary biometric information" and "extrinsic" or "ancillary biometric information" that underpins biometrics' system of conceptuality. Primary biometric information refers to the face, fingerprint or iris that has been biometrically scanned and processed, whereas extrinsic biometric information refers to "characteristics such as gender, ethnicity, height or weight of the user (collectively known as soft biometric traits)" (Nandakumar et al. 2008, 335). Posited as "extrinsic", "ancillary" and "soft", the inscriptive categories of ethnicity and gender are positioned as structurally separable from the biometrically scanned body. As such, these categories are what can be imported from "outside" of the scanned body as "add on" or "ancillary" information to the "primary" data of somatic identifiers: iris, face or fingerprint. Yet, as I have argued in the course of this essay, there is no such thing as a body that is not always already marked by a constellation of social descriptors (including ethnicity and gender) prior to the moment of biometric processing.

These descriptors are not extrinsic to the body; on the contrary, they constitute the body's a priori conditions of social signification and cultural intelligibility and, consequently, position the subject in determinate ways in the face of particular biometric technologies.

There is, furthermore, in this lacuna or systemic unthought that inscribes biometric systems of conceptuality, a type of contradiction that results from this positing of categories such as gender and ethnicity as "extrinsic" to the biometric body in question. In their essay, "Incorporating Ancillary Information", Karthik Nandakumar et al. (2008, 348) proceed to argue that: "Soft biometric traits are available and can be extracted in a number of practical biometric applications. For example, attributes like gender, ethnicity, age and eye color can be extracted with sufficient reliability from the face images. Gender, speech accent, and perceptual age of the speaker can be inferred from the speech signal". Framed as "extrinsic" to the biometrically scanned body, gender and ethnicity are simultaneously "extracted" from both the

face and the voice of the subject as self-evident categories "lodged" in the body in question. Positioned as "ancillary" to the body, yet these categories self-evidently inscribe and identify their subjects. Thus, in the illustrations that accompany Nandakumar et al.'s (2008, 347) text, a photograph represents "A scenario where the primary biometric identifier (face) and the soft biometric attributes (gender, ethnicity, eye color and height) are automatically extracted and utilized to verify a person's identity". The photographed subject's gender is named as "male" and the ethnicity as "Asian". Underpinning the "automatic extraction" of such categories as gender and ethnicity are tacit and normative knowledges that will enable the "automatic" identification of these same categories. The self-evident or received status of these tacit knowledges is what enables the process of "automatic" identification.

In this biometric system of conceptuality, it is self-evident what a male or female "looks" like; it is self-evident what a male or female "sounds" like. In both these cases, the category of the gender variant subject, who might "sound" like a male but "look" like a female, must remain unthought, as this subject falls outside the gender-normative assumptions encoded in the biometric system. And I invoke the gender variant subject not as some sort of eccentric anomaly that is marginal to the automated operations of biometric gender identification; on the contrary, at this critical juncture of automated, computational biometric gender identification, the gender variant subject, in crossing the self-evident attributes of heteronormative gender identities, effectively works to expose the occluded assumptions and tacit knowledges that proceed to inform the normative infrastructure/software of the biometric system. In her foundational work on transgender, Susan Stryker (2006, 3) underscores the power of transgender subjects to "reveal the operations of systems and institutions that simultaneously produce various possibilities of viable personhood, [whilst] eliminating others". In queering the heteronormative gender binaries that underpin the biometric system's process of automated gender identification, the gender-nonconforming subject is biometrically positioned as a subject that "does not compute" precisely as she/he brings into crisis the disciplinary operations of a system predicated on infrastructural heteronormativity and categorical, automated gender binaries.

The deconstructive force of the gender variant subject that I have invoked in this scenario is complicated, moreover, by the lived effects generated by the ongoing reproduction of normative gender categories and the consequent gender misrepresentations and discriminations, across the broad spectrum of technologies and institutions assigned with identificatory tasks (Stryker 1994; Prosser 1998). These lived effects are documented, for example, by Toby Beauchamp in the context of the intensification, post-9/11, of surveillance of transgender bodies by the US government. Beauchamp (2009, 359) draws attention to the manner in which gender-nonconforming bodies have been caught in the dragnet of the US Social Security Administration's "'no-match' letters to employers in cases where their employee's hiring paperwork contradicts employee information on file with SSA". As Beauchamp (2009, 359) explains:

The no-match policy aims to locate undocumented immigrants (and potential terrorists) employed under false identities, yet casts a much broader net. Because

conflicting legal regulations often prevent trans people from obtaining consistent gender markers across all of their identity documents, gender-nonconforming individuals are disproportionately affected by the policy, whether they are undocumented immigrants or not.

Beauchamp's use of the "no-match" category can be productively transposed to a critique of biometric automated gender recognition systems, precisely where an effective "no-match" occurs between the normative gender assumptions of the operating software and the embodied, gender variant subject screened by the technology.

As with the question of gender, in this biometric schema of "extrinsic" or "ancillary" biometric traits, the criteriological parameters that configure specific ethnic groups remain self-evident. There is no question at all that one can "automatically" identify someone who is "Asian", simply, I assume, by relying on stock taxonomies of visible phenotypical descriptors; in other words, a tacit ontology and taxonomy of visible racial attributes self-evidently signify one's ethnicity. And it is precisely at these junctures that such "extrinsic" identificatory information as gender and ethnicity are shown to be fundamentally inscribed as a priori, infrastructural normativities "intrinsic" to the classificatory and identificatory operations of biometric technologies. Even as biometricians labour to "import" these "extrinsic" attributes from outside the primary operations of biometrics, they are simultaneously shown to be always already inscribed on the body as self-evident, normative attributes that can be "automatically" extracted.

29.6 Conclusion

I end this chapter with one more moment of iteration: the *soma* has always already been technologised before the fact of biometric visual scanning and template creation. It is the very technologisation of the *soma* that renders a subject biometrically legible as such. The technologisation of the body is instrumental in the construction of the legal category of the subject, enabling their entry into the symbolic social order. Biometrics' visual templates of enrolled subjects are constitutive of the legal subject as representational being, as actor and agent in the sociolegal theatre. Yet, precisely because biometric technologies are critically reliant on a semiotic economy of figures, images and signatures, biometric systems are permanently open to the possibility of citational grafts, structural parasitism and identity frauds. Biometrics is, as a technoscience, thoroughly dependent on a metaphysics of presence that is predicated on the onto-theology of unmediated essence; this is perfectly encapsulated in the biometric formula: "something you are, a biometric" (Woodward et al. 2001, 11). Finally, as biometrics' invocation of liveness testing remains nothing more than another animation of the metaphysics of presence, a mere allegation of "live", it can never absolutely guarantee that the figure before it is not life itself dissimulating its simulation.

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Chapter 30
Visual Legal Commentary

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Abstract Much contemporary legal commentary contains nontextual information—everything from graphs and cartoons to geometric diagrams of the relations among legal concepts. No comprehensive account of this practice exists, so that most of those participating in it today are unaware of the rich tradition from which it derives. This chapter explores that tradition, explaining the relations between visual legal commentary and a broader tradition of visual commentary, as well as the important relations between visual legal commentary and the historical consolidation of legal expertise.

30.1 Introduction

It is common to observe that in the courtroom and classroom, lawyers and law professors are using new visual aids and using old ones in new ways. Less often remarked is the similar shift occurring in those most traditional artifacts of the legal profession: texts. In the past few decades, legal casebooks and scholarly articles have included increasingly diverse forms of nontextual information—everything from graphs and cartoons to geometric diagrams of the relations among legal concepts. This phenomenon is the subject of this chapter.

No comprehensive account of this practice exists. Might this be because the use of visual material in texts is not really a distinct "practice"? A graph showing accident rates, for example, could be used on a projector screen in a courtroom or classroom or in a printed casebook with little alteration. Presumably the graph is useful in each context for similar reasons: it presents complex information more concisely

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than a verbal description could. But nontextual printed commentary is different in important ways from visual aids in the courtroom and classroom. For one thing, it involves communication to a solitary reader rather than a live audience. The situational cues to reading these images that might be present in a public context are absent when a reader confronts a book or article alone. And while casebook graphics are sometimes the subject of classroom attention, their semiotic features are never a focus. In contrast, the semantics and pragmatics of legal text often are a focus of class discussion.[1]

In addition, although some aspects of visual communication in legal commentary are innovative, many instances of the practice, perhaps most, stem from a rich tradition unknown to most of those participating in it today. In other words, it is not so much that visual commentary in texts is akin to other more basic forms of visual communication—those other forms are in fact part of a tradition that lives on most directly in visual legal commentary. Understanding this continuity can clarify aspects of both printed and displayed visual commentary that would remain obscure if we considered visual communication in law to be simply a manifestation of a new zeitgeist. This chapter seeks to contribute to that understanding by explaining how visual legal commentary is in turn a special case of a more general tradition of visual commentary, as well as its important relations to the historical consolidation of legal expertise and the forms of thought involved in the exercise of that expertise.

In Sect. 30.2 of this chapter, I outline the scope of the practices I am considering. Section 30.3 addresses their history. I consider the ancestors of the practices described in Sect. 30.2, starting in Western antiquity, as well as significant aspects of their development to the present day; I also consider the ways in which this development is bound up with the history of legal professionalization and scholarship in the United States. In Sect. 30.4, based on this historical picture, I reexamine the implications of these practices.

30.2 Scope of the Practice

What counts as "visual legal commentary"? First, it is one form of *legal commentary*, commentary on law—the kind of discourse that appears in scholarly journals but also in casebooks and treatises, explaining and analyzing the content of law or arguing for proposed alterations to it. Second, visual legal commentary is *visual* commentary—it departs in some respect from purely verbal text. Of course, textual legal commentary is visible and visual, too. But while we customarily treat text as translatable into oral commentary without alteration or loss of information, we do not treat diagrams or typographical features—or even equations—in this way. It therefore makes sense to treat any departure from the Western print

[1] See, for example Elizabeth Mertz, The Language of Law School: Learning to "Think Like a Lawyer" 21–22, 58–59, 64, 82, 95 (2007).

convention of blocks of "continuous prose"[2] as "visual" in a sense distinct from textual prose. Visual commentary in this sense includes illustrative forms such as photographs, as well as graphs and charts. But it also includes tables of textual or numerical information; marginal glosses; document reproductions, such as reproduced transcripts, receipts, and pleadings, which occupy an unusual niche between illustration and text; and mathematical or verbal equations set off from typeset prose, which have formal similarities to these other practices.[3]

While some of the uniquely visual features of legal text have been an explicit focus of scholarship,[4] as have certain forms of mimetic visual supplementation to legal commentary,[5] no comparable attention has been devoted to nonmimetic visual commentary. Yet this sort of material seems always to have been present in legal commentary. A number of deeply influential American law review articles, for example, include material of this kind.[6] And the tradition of reliance on it is remarkably continuous. Every volume of the Harvard Law Review since the first, more than 120 years ago, has devoted between around .5 and 3% of available pages to some kind of material of this form, even as the periodical itself has undergone massive format shifts.[7] But while the rate of including such material has been constant, the type of material included has not. At all times, representational illustrations have been far less common than other departures from continuous prose. The most common form of visual commentary has always been the simple table composed of figures, text, or a combination.[8] In the early

[2] This phrase is used by Michael MacDonald-Ross, Graphics in Texts, 5 Rev. of Res. in Educ. 49, 76 (1977) (noting that typographers' core expertise is in "the setting of continuous prose").

[3] On the essentially textual nature of mathematical symbols and notation systems, see, for example, Brian Rotman, Mathematics as Sign: Writing, Imagining, Counting ix, 12 (2000).

[4] See, for example, Peter Tiersma, The Textualization of Precedent, 82 Notre Dame L. Rev. 1189 (2007); Bernard Hibbitts, Last Writes? Re-assessing the Law Review in the Age of Cyberspace, 71 N.Y.U. L. Rev. 615 (1996).

[5] See especially Peter Goodrich, A Theory of the Nomogram, in Law, Text, Terror: Essays for Pierre Legendre 13 (Peter Goodrich, Lior Barshack, & Anton Schutz eds., 2006); Jennifer L. Mnookin, The Image of Truth: Photographic Evidence and the Power of Analogy, 10 Yale J.L. & Human. 1 (1998); Ana Laura Nettel, The Power of Image and the Image of Power: The Case of Law, 21 Word & Image 136 (2005).

[6] For example, Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 327 (1978) (including text in tabular form illustrating modes of participation in various forms of social ordering); Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30 (1913); Karl Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401–06 (1950); Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 87 (1923) (including photostat of manuscript version of 1789 Judiciary Act).

[7] For example, the law review has expanded from roughly 500 pages per volume in its first decade of publication to 2000 or more pages per volume in its most recent decade.

[8] Since 1949, for example, the Harvard Law Review's retrospective of the Supreme Court's previous term has included several pages of tables of data on the opinions issued that term. This practice originated in a 1925 article. Felix Frankfurter & James M. Landis, The Business of the Supreme Court of the United States—A Study in the Federal Judicial System, 38 Harv. L. Rev. 1005, 1016–17 n.35, 1053–54 (1925).

years of the journal, the second most common form of visual commentary was the document reproduction. Starting around the 1930s, graphs, equations, and geometrical diagrams started to appear. In the early 1970s, forms borrowed from other scholarly and technical discourses, particularly equations and graphs, became much more common, rivaling and sometimes exceeding tables in frequency of use.[9] These sorts of forms now appear nearly as often in articles on topics in constitutional law, jurisprudence, and procedure as in discussions of apparently more technical topics such as corporations, tax, and antitrust law.

The consistency of these practices in modern legal scholarship is just the most recent chapter in a venerable tradition. Influenced by the formatting of works by the French educator Peter Ramus, early legal commentary in English devoted significant space to devices departing from continuous prose. Abraham Fraunce's The Lawier's Logicke (1588), an early exposition of legal reasoning, included not only the ornamental capitals and glosses common in contemporary books but also bracketed outline-style trees, scores of pages long, schematizing the logical structure of exemplary cases.[10] The precursors of genealogical trees, outlines, and flowcharts and similar bracketed outlines also appeared in Coke's Institutes (1656).[11] They remained common in generation after generation of English, and then American, legal educational materials, including David Hoffman's A Course of Legal Study (1817).[12] Although their omnipresence faded when Christopher Columbus Langdell's case-focused system displaced Hoffman's at the end of the nineteenth century,[13] Ramist trees were used into the early twentieth century in jurisprudence treatises,[14] and bracketed outlines are a familiar feature of scholarship and educational materials.

Since their appearance around the same time as Langdell's new educational model and the modern American law review,[15] American casebooks in nearly every subject have included visual commentary. Visual material in early casebooks

[9] For example, the first use of economic box diagrams in the Harvard Law Review was in 1971. Laurence H. Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1387–88 (1971). In economics, box diagrams were first used in the late nineteenth century. See infra notes 75–76 and accompanying text.

[10] Abraham Fraunce, The Lawier's Logike, Exemplifying the Praecepts of Logike by the Practice of the Common Lawe 101–51 (1588).

[11] See, for example, Sir Edward Coke, I Institutes, facing fol. 1 (1656).

[12] See David Hoffman, A Course of Legal Study; Respectfully Addressed to the Students of Law in the United States 34–35, 37–38, 60, 99–101, 150–51, 188 (1817). On Hoffman's influence, see M.H. Hoeflich, Law & Geometry: Legal Science from Leibniz to Langdell, 20 Am. J. Legal Hist. 95, 112–17 (1986); Steve Sheppard, Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall, 82 Iowa L. Rev. 547, 571 (1997). Around the same time, Bentham used the same device. Jeremy Bentham, Chrestomathia, or An Analysis of Human Understanding (1816).

[13] Sheppard, supra note 12, at 588–89.

[14] See, for example, Thomas Erskine Holland, The Elements of Jurisprudence 167, 337 (12th ed., 1917); John Salmond, Jurisprudence 19, 83, 157, 164, 226–27, 251, 396, 413–15, 447–48, 497, 581, 629, 707 (J.L. Parker ed., 9th ed., 1937).

[15] See Hibbitts, supra note 4; Sheppard, supra note 12.

consisted mostly of tables[16] and reproductions of legal documents, such as pleadings.[17] But since the 1970s and 1980s, as in law reviews, visual commentary in casebooks has become increasingly common and diverse in a wide range of subject areas.[18]

Over the past 40 years or so, then, legal academics have been using new forms of visual commentary—but this practice developed gradually out of a tradition that is centuries old. What is new is not departures from blocks of continuous prose but the variety of ways in which that departure occurs. To make sense of this development, the rest of this chapter explores both the tradition of offering visual commentary and the significance of its apparent recent diversification in legal materials. Because the phenomenon involves both continuity and change, I consider it developmentally. But at least in recent history, it has also been a pervasive practice, so I examine it as one component of a system of practices controlling expertise in law, not just as a set of tools for achieving particular communicative objectives in appropriate contexts.[19]

Matters are complicated by the fact that the vocabulary suited to this exploration developed from the same intellectual and material traditions that have produced the

[16] See, for example, Gerard Brown Finch, A Selection of Cases on the English Law of Contract 10, 495 (Richard Thomas Wright & William Warwick Buckland eds., 2nd ed., 1896) (including balance sheet and transcript using brackets).

[17] See, for example, Austin Wakeman Scott, A Selection of Cases and Other Authorities on Civil Procedure in Actions at Law 15–16, 171, 199, 209, 521, 522 (1915) (reproducing pleadings); Lawrence B. Evans, Leading Cases on American Constitutional Law xxxiv–xxxv (2nd ed., 1925) (reproducing Bill of Rights, with brackets gathering signatures).

[18] See, for example, John E. Cribbett & Corwin W. Johnson, Cases and Materials on Property 607, 775, 1340–42, 1348, 1356, 1359–60, 1368–69, 1371–73, 1515–17, 1532–33, 1542–45 (5th ed. 1984) (including plat, maps, abstract diagrams, and document reproductions); Jesse Dukeminier & James E. Krier, Property passim (5th ed., 2002) (including 98 pages of visual materials); William N. Eskridge, Jr., & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 29, 48, 55–56, 63–64, 69, 104, 153, 705–07, [19]–[58] (2nd ed., 1995) (including flowchart, cartoon, text tables, preference scales, maps, document reproductions, and text and figure tables); E. Allan Farnsworth & William F. Young, Cases and Materials on Contracts 152–53, 169, 193, 235, 279, 454, 456–57, 721, (3rd ed. 1980) (including economic box diagram, document reproductions, and text and figure tables); Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law 260–61, 402, 414, 724–25, 727, 729, 833, 910 (4th ed., 1981) (including Ramist tree, figure tables, and balance sheets); Charles O. Gregory, Harry Kalven, Jr., & Richard A. Epstein, Cases and Materials on Torts 217, 639, 650, 652–53, 850, 870 (3rd ed. 1977) (including tables of text and figures, document reproductions, and equations); Charles B. Nutting & Reed Dickerson, Cases and Materials on Legislation 202, 290–91, 489, 492, 495–96, 545, 639–42 (5th ed. 1978) (including flowchart, cartoon, abstract diagrams, and text and figure tables); Jack B. Weinstein et al., Cases and Materials on Evidence 12, 62, 176–78, 337, 599, 1163, 1206 (8th ed., 1988) (including text and figure tables, document reproductions, cartoons, and ad hoc diagrams); Stephen C. Yeazell, Civil Procedure 19–20, 23–24, 57, 59, 71, 149, 175–77, 183–84, 205, 219, 222–23, 231, 236–37, 247–48, 262–65, 292, 298, 340–45, 552, 745, 760, 764–65, 769, 793, 816 (7th ed. 2008) (including Venn diagrams, charts, maps, text tables, and document reproductions).

[19] A number of commentators have treated visual commentary in this way. See, for example, James D. Gordon III, Teaching Parol Evidence, 1990 B.Y.U. L. Rev. 647 (1990); William H. Lawrence, Diagramming Commercial Paper Transactions, 52 Ohio St. L.J. 267 (1991); Laurence H. Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 959 (1974).

practices in question. In Sect. 30.3 below, I describe this complex process, beginning in antiquity and moving to the present day. In Sect. 30.4, I return to the practices discussed here, examining their implications in light of this tradition.

30.3 Histories of Visuality and Commentary

To date, discussions of visuality in law have been of two general kinds. One considers the relationship between images and law, focusing on iconic and emblematic modes of visual representation.[20] The other approach, a text-focused one, considers either how legal language refers to visibility (focusing on the referential content of legal text)[21] or the material history of legal publication (focusing on the visible form of legal prose).[22] None of this work has much to tell us about the practices described in the previous section, which are neither mimetic, like illustrations, nor verbally textual. In this section, therefore, I draw on work from several disciplines to trace two related histories—that of diagrammatic material culture, the tradition lying behind nonverbal communication in innumerable contexts, and that of professional discourse, the tradition lying behind the generation and consumption of legal commentary itself.

The history presented here has limitations. Space constraints necessitate an abbreviated account. In part for this reason, I focus on Western culture and on American culture for more recent periods. In addition, the more historically remote the practices described, the less their functions can be described with certainty. Some have argued that when we see, for example, what looks like a grid in premodern materials, we cannot assume it functioned the same way for its original users as it does for us.[23] While acknowledging this possibility, I assume that even tentative analysis of earlier practices can provide us with a richer understanding of contemporary ones; more recent practices share many formal features with earlier practices from which it is possible to show that they emerged gradually.[24]

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[20] See, for example, Hampton Dellinger, Commentary, Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions, 110 Harv. L. Rev. 1704 (1997) (discussing, inter alia, maps as well as photographs but focusing on diagrammatic representation as a misleading or degenerate form of communication); Mnookin, supra note 5; Nettel, supra note 5.

[21] See especially Anita Bernstein, The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law), 87 Cal. L. Rev. 305 (1999); Bernard J. Hibbitts, Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse, 16 Cardozo L. Rev. 229 (1994); cf. Pierre Schlag, The Aesthetics of American Law, 115 Harv. L. Rev. 1045 (2002).

[22] See, for example, Richard J. Ross, The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520–1640, 146 U. Pa. L. Rev. 323 (1998); Tiersma, supra note 4.

[23] See especially Walter J. Ong, System, Space, and Intellect in Renaissance Symbolism, Cross Currents VII 121 (1957) [hereinafter Ong, System]; Walter J. Ong, Orality and Literacy: The Technologizing of the Word (1982).

[24] See L. Bagrow, The Origin of Ptolemy's Geographia, 27 Geografiska Annaler 318 (1945).

I begin, in Sect. 30.3.1, with an account of visual explanatory practices in antiquity. Section 30.3.2 turns to the period between the twelfth and seventeenth centuries in Europe. I consider scholarly accounts of the significance of developments in visual practices and institutional structures during this period and the contributions of three major figures to the tradition of visual commentary. Section 30.3.3 addresses the eighteenth and nineteenth centuries, which witnessed two key developments: an increase in the variety of forms of diagrammatic communication and a similar proliferation in the number of sharply defined occupational and scholarly fields—the emergence of modern professions and disciplines, the market for commentary. Both of these developments are linked to the emergence of what has been described, after Michel Foucault, as a "biopolitical" perspective on human life and social organization.[25] In Sect. 30.3.4, exploring contemporary consequences of these developments, I discuss the resources offered by three academic perspectives (semiotic, historical-cultural, and psychological) for the practices described in Sect. 30.2.

30.3.1 Visual Commentary in Antiquity

Several practices from the centuries just before and after the beginning of the Common Era anticipate the practices found in modern legal commentary, including the plane geometry of Euclid; the square of opposition, which, together with Euclid-derived approaches, led ultimately to the use of diagrams in logical analysis; and the "Porphyrian tree," a figure developmentally linked to many modern diagrammatic techniques, if less familiar to us now. These devices, and others, illustrate some of the most basic semiotic functions of these practices.

Euclid's Elements, written around 300 BCE in Egypt, has been called the most influential textbook ever written.[26] Both the original Greek manuscript and later versions are full of figures, the diagrammatic circles, triangles, and quadrilaterals familiar to modern students of plane geometry. Euclid's work presented geometry as a matter of inferences from axioms and established the conceptual model of reasoning as deduction that continues to structure not only plane geometry but also, on many accounts, legal reasoning.[27] The Elements is also arguably the earliest Western example of the use of diagrams not as mere illustrations for text but as integral aspects of the proof process. Euclid's figures function as nondiscursive demonstrations of his deductive proofs.[28]

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[25] See especially Michel Foucault, The History of Sexuality: An Introduction, Volume I 139–45 (Robert Hurley ed., 1978).

[26] Carl B. Boyer, A History of Mathematics 100, 119 (2nd ed. 1991)

[27] See Hoeflich, supra note 12, at 99–102.

[28] See James Robert Brown, Illustration and Inference, in Picturing Knowledge: Historical and Philosophical Problems Concerning the Use of Art in Science 250 (Brian S. Baigrie ed., 1996); Thomas M. Humphrey, The Early History of the Box Diagram, 82 Fed. Res. Bank of Richmond Econ. Q. 37 (1996).

Inference and diagrammatic visibility are also wedded in the "square of opposition" attributed to Apuleius of Madaurus[29] and still familiar to modern semioticians.[30] This device dates at least to Apuleius's description, in the second century CE, of a method of representing Aristotle's distinctions among types of propositions in order to grasp the relationship between opposition and syllogistic reasoning.[31] Apuleius's text provided verbal instructions for constructing the figure, instead of the figure itself, a technique that continued to be used for centuries, including by Galileo in the seventeenth century.[32] (Many later users of the square of opposition, of course, have included it as a visible quadrilateral diagram in their texts.) Apuleius's descriptive approach suggests the pedagogical utility of a spatialized understanding of abstract concepts; by directing readers to engage in constructive activity, it emphasizes the effort required to grasp the concepts. In both guises, the square is a pedagogical tool that makes use of nontextual visuality.

Both Euclid's figures and Apuleius's square are methods of displaying the necessary quality of particular logical relationships. So too is the Porphyrian tree, a device originating in remarks in the introduction to Aristotle's Categories (Isagoge) written by the Neoplatonist Porphyry in the third century BCE.[33] Like Apuleius's square, Porphyry's "tree" of definition, part of his explanation of Aristotle's doctrine of substance, was initially only described; the Isagoge used spatialized terms to describe the abstract relationships among categories and genera "below" them, nesting the distinctions in a long sequence of subdivisions. Later translators of Porphyry, such as Boethius, included figural displays of the same tree and presented the figure as not just analytically but normatively significant, a proof akin to Euclid's of the natural hierarchy of the world.[34] Both the tree's form and its normative logic persist in a variety of forms, including genealogical charts[35] as well as the structure of legal doctrine and reasoning.[36]

Initially, Apuleius's square and Porphyry's tree were verbal descriptions of figures. Other antique devices making use of the relations between abstraction and spatial relations were nonverbal from the start. The ars memoriae is one example: not a visual practice but a mnemonic one, it relies upon human visual capacities to

[29] David Londey & Carmen Johanson, Apuleius and the Square of Opposition, 29 Phronesis 165, 166–67 (1984).

[30] See, for example, Algirdas Greimas, On Meaning: Selected Writings in Semiotic Theory xiv, 49 (Paul J. Perron & Frank H. Collins trans., 1987).

[31] Aristotle, On Interpretation, chs. 6–7 (J.L. Ackrill ed., 1963).

[32] See David R. Olson, The World on Paper: The Conceptual and Cognitive Implications of Writing and Reading 219–21 (1996).

[33] Porphyry's Introduction (trans. & introd. J. Barnes, 2003).

[34] Boethius, Commentaries on Isagoge (S. Brandt ed., 1906).

[35] See Linton C. Freeman, The Development of Social Network Analysis: A Study in the Sociology of Science 21 (2004) (discussing roots of social network diagrams in ninth century European lineage charts).

[36] See, for example, J.M. Balkin, The Crystalline Structure of Legal Thought, 39 Rutgers L. Rev. 1 (1986); Duncan Kennedy, A Semiotics of Legal Argument, in Legal Reasoning: Collected Essays 87 (2008); Schlag, supra note 21.

assist recall.[37] Concrete nonverbal devices were used, too; we know that Egyptian city planning and cartography (in Ptolemy's Geographia, from the first century CE) used grids to communicate about spatial relations.[38]

It is difficult to be sure of the original semiotic functions of described figures, like Apuleius's and Porphyry's. But it is also impossible to be certain that figures like those of Euclid and Ptolemy functioned for their contemporaries as they do for us. The transformation of described figures into literal ones during the period described next might or might not betoken a transformation in individuals' relationship to visible figures as well as conceptual ones.[39] We can be more confident about the implications of the specific practices discussed in Sect. 30.3.2, however, since it is during this more recent period that the discourses in which such practices were embedded, including legal and academic discourse, began to assume the forms they have today.[40]

30.3.2 The Early Modern Watershed

Scholars disagree on whether visual practices that emerged during the early modern period in Europe changed Western culture in a fundamental way. Both those who perceive radical transformation in this period[41] and those who insist that the Western passage into modernity was more gradual[42] or conflicted[43] find support for their

[37] Frances Yates traced the practice to the Egyptian Simonides of Ceos, who is said to have been able to recollect the identities of guests at a dinner party based on their positions at the dinner table, despite their being injured beyond recognition by a volcanic eruption, sometime around 500 B.C.E. Frances A. Yates, The Art of Memory 1–2, 27–30 (1966).

[38] On city planning, see H. Gray Funkhouser, Historical Development of the Graphical Representation of Statistical Data, 3 Osiris 269, 273 (1937). On the influence of Ptolemy, see Samuel Y. Edgerton, Florentine Interest in Ptolemaic Cartography as Background for Renaissance Painting, Architecture, and the Discovery of America, 33 J. Soc. Architectural Historians 275, 278 (1974); David Turnbull, Cartography and Science in Early Modern Europe: Mapping the Construction of Knowledge Spaces, 48 Imago Mundi 5, 14 (1996).

[39] Compare Ong, System, supra note 23, whose argument parallels Elizabeth Eisenstein's, with Anthony T. Grafton, The Importance of Being Printed, 11 J. Interdisc. Hist. 265 (1980) (review of Elizabeth L. Eisenstein, The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early Modern Europe (1979)).

[40] See Harold J. Berman, The Origins of Western Legal Science, 90 Harv. L. Rev. 894 (1977).

[41] In 1952, Erwin Panofsky argued that the development of linear perspective in fourteenth-century Italy made the scientific revolution possible. See Erwin Panofsky, Artist, Scientist, Genius: Notes on the Renaissance Dammerung, in The Renaissance: Six Essays 121 (Wallace K. Ferguson et al. eds., 1962). An argument for seismic change traceable to print technology is associated with Elizabeth Eisenstein, see Eisenstein, supra note 39, although Walter Ong earlier argued along similar lines, see, for example, Ong, System, supra note 23.

[42] See, for example, Grafton, supra note 39; Michael S. Mahoney, Diagrams and Dynamics: Mathematical Perspectives on Edgerton's Thesis, in Science and the Arts in the Renaissance 198 (J.W. Shirley & F.D. Hoeniger eds., 1985).

[43] See, for example, Bernstein, supra note 21 (arguing that print encouraged association of text with truth and image with illusion); Peter Goodrich, Critical Legal Studies in England: Prospective Histories, 12 Oxford J. Legal Stud. 195, 225 (1992).

positions in the history of the period. These centuries did witness the dramatic proliferation of new technologies of nonverbal representation,[44] some of which enabled (and required) new relationships between texts and readers and among readers.[45] But some diagrammatic devices used before the advent of linear perspective in the fourteenth century and movable type in the fifteenth persist, in largely unaltered form, in later periods, and the social and institutional forms within which modern legal and academic discourse is produced also began taking shape before these revolutions. This section illustrates these complexities by considering the use of nonverbal devices in the work of three influential figures from this period (including one, Ramon Lull, who worked before linear perspective), then reviewing the institutional forms that started to coalesce in the twelfth and thirteenth centuries.

The visual devices appearing in the works of the Spanish mystic and philosopher Ramon Lull (1232–1315) both recall Euclid and anticipate post-printing practices. Lull's life's work was an "art"[46] articulated in expository, allegorical, and diagrammatic form and encompassing all areas of inquiry, from cosmology to logic, medicine, and law. The purpose of the "art" was to provide certain knowledge and a tool for the persuasion of unbelievers. To this end, Lull's work brimmed with both verbal descriptions of figural illustrations[47] and literal figures.[48] Most striking were his representations of concepts in the form of abutting circles that could be rotated to generate different combinations of concepts. Offered as tools for logical argument and persuasion, these proto-computers directly inspired Gottfried Leibniz's and

[44] For accounts from the spheres of cartography, engineering, and banking, see, for example, Turnbull, supra note 38 (cartography); Brian S. Baigrie, Descartes's Scientific Illustrations and "la grande mecanique de la nature," in Picturing Knowledge: Historical and Philosophical Problems Concerning the Use of Art in Science 86 (Brian S. Baigrie ed., 1996) (engineering); Matthew J. Barrett, The SEC and Accounting, in Part Through the Eyes of Pacioli, 80 Notre Dame L. Rev. 837 (2005). Systematic visual education also dates from this period, culminating in Comenius's Orbis Sensualium Pictus (The Visible World in Pictures) (1658), an illustrated children's textbook based on principles that still animate educational theory. See James Andrew Laspina, The Visual Turn and the Transformation of the Textbook (1998).

[45] It is commonly noted that print made possible the exact reproduction of not only text but also illustrations. See, for example, Bruno Latour, Drawing Things Together, in Representation in Scientific Practice 19 (Michael Lynch & Steve Woolgar eds., 1988); Walter J. Ong, From Allegory to Diagram in the Renaissance Mind: A Study in the Significance of the Allegorical Tableau, 17 J. Aesthetics & Art Criticism 423 (1959). But this theoretical reproducibility of illustrations did not necessarily enable actual practices of precise reproduction; the expense of printing illustrations, as opposed to text, led to reuse of illustrations and sometimes "scrambled relations between text and images." Bert S. Hall, The Didactic and the Elegant: Some Thoughts on Scientific and Technical Illustrations in the Middle Ages and Renaissance, in Picturing Knowledge, supra note 44, at 3, 17.

[46] This is set out most generally in Lull's Ars Generalis Ultima or Ars Magna ("Ultimate General Art") (1305) but runs through all his works. See Frances A. Yates, The Art of Ramon Lull: An Approach to It Through Lull's Theory of the Elements, 17 J. of the Warburg & Courtauld Insts. 115 (1954).

[47] Yates, supra note 46, at 136 (describing conviction by circle drawn in sand).

[48] Id.

Leonhard Euler's proto-Venn diagrams in the seventeenth and eighteenth centuries[49] and may also have influenced Charles Peirce's "existential graphs."[50] In addition to influencing logical discourse, Lull was a legal glossator, directly participating in the European reception of Roman law that laid the foundation of modern Western understandings of law as a systematic practice.[51] With a directness unfamiliar (and perhaps unavailable) to us now, Lull sought to show the basic coherence of discourse on every topic conceivable and accorded visual devices an equal status with text in this enterprise.

A systematizing impulse similar in some ways to Lull's characterizes the work of the French educator and logician Peter Ramus (1515–1572), although Ramus channeled the impulse in more iconoclastic directions.[52] Ramus's "method," a systematic approach to learning any subject matter, swept the Western world during the sixteenth and seventeenth centuries.[53] Central to the highly visual Ramist method were horizontally oriented bracketed analytical trees of concepts. This approach blended text and nontextual space far more deeply than the Porphyrian tree, and its influence on the Anglo-American conceptualization of law is difficult to overstate. A method that is recognizably Ramist in spirit remains one of the dominant discursive models for law today.[54]

Still, it is common to regard not Ramus but Rene Descartes (1596–1650) as the key progenitor of modern Western thought, especially scholarly thought. In fact, Descartes's influence merely complements that of Ramus. Descartes's skeptical epistemology and metaphysics both enabled the notion that radical certainty was a meaningful goal for human efforts and posited a world theoretically devoid of but amenable to human agency.[55] Complementing these premises, Descartes's analytic geometry offered an abstract spatial template seemingly suited (like Ramist trees) to the analysis and solution of any problem.[56] Cartesian thinking would later be taken to have underwritten a new understanding of social organization and government, based on an expansion of the domain of individual certainty to an empirical social reality emptied of subjectivity.[57] Within a century or so of his work, discursive techniques specific

[49] Ian Spence, No Humble Pie: The Origins and Usage of a Statistical Chart, 30 J. Educ. & Behavioral Statistics 353, 358 (2005); Yates, supra note 46, at 167 [Lull]. See also Margaret E. Baron, A Note on the Historical Development of Logic Diagrams: Leibniz, Euler, and Venn, 53 Mathematical Gaz. 113 (1969).

[50] See Sun-Joo Shin, The Iconic Logic of Peirce's Graphs (2002).

[51] Cf. Berman, supra note 40.

[52] Ross, supra note 22, at 346; Yates, supra note 37 [Memory].

[53] Walter J. Ong, Ramus, Method, and the Decay of Dialogue: From the Art of Discourse to the Art of Reason (1958).

[54] Cf. Schlag, supra note 21; Kennedy, supra note 36.

[55] Rene Descartes, Discourse on Method (1632).

[56] See, for example, J.J. Gibson, The Ecological Approach to Visual Perception (1979).

[57] See, for example, Foucault, supra note 25; Charles Sanders Peirce, How to Make Our Ideas Clear, in Peirce on Signs: Writings on Semiotic by Charles Sanders Peirce 160, 161–62 (James Hoopes ed., 1991).

to this conceptualization began to take their modern form—that of graphic statistical representations, many built in a Cartesian coordinate framework.

During this period, as texts begin to take on characteristics more recognizable to us, so too did forms of interaction among people. Bruno Latour, among others, has argued that it is not just ideas and technologies but also encounters with them in social environments, and particularly the "recruitment" or persuasion of others that is enabled by the combination of technology and interpersonal contact, that make possible such features of the modern world as industry, finance, and science.[58] Environments facilitating this kind of "recruitment" include the university—whose origins lie in eleventh-century Europe[59]—and the law office and courtroom, which in England began to assume their modern form between the twelfth and sixteenth centuries.[60] Institutional developments of this sort in turn shaped the discourse used within these environments. Harold Berman has explained how the "legal science" that emerged in Europe during this period, the first conceptualization of law as subject to systematic overview (and proposals for reform) by commentators, necessarily developed contemporaneously with the university.[61] Systematic accounts of this kind, created within particular social settings, in turn made those social settings more complex, allowing them to become both more spatially dispersed and more tightly woven.[62] And these recursive effects eventually enabled the creation and discussion of new types of "facts."

30.3.3 Eighteenth and Nineteenth Centuries

Many visual forms familiar to us today, including graphs and charts, first appeared in the eighteenth century and first attained widespread use in the nineteenth. These developments coincided with an explosion in the number of social forms within which people used devices like this to "recruit" allies, as well as with increasingly elaborate systems for control of access to the spheres in which this recruitment occurred. The visual forms themselves presented new kinds of facts as a focus of professional, learned, and political attention; the communities in which they were generated and circulated were a market for these facts and were themselves instantiations of such facts. In this section, I first describe the proliferation of nonverbal forms of communication during this period and their role in generating new facts; then I explain how the multiplication of social forms enabled and exemplified these phenomena in a dynamic that continues to structure contemporary scholarship and legal practice.

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[58] Latour, supra note 45; for similar arguments, see, for example, Randall Collins, The Sociology of Philosophies: A Global Theory of Intellectual Change (1998); Ong, supra note 53 [Ramus].

[59] See, for example, Berman, supra note 40; William Clark, Academic Charisma and the Origins of the Research University (2006).

[60] J.H. Baker, The Legal Profession and the Common Law: Historical Essays 156–59 (1986).

[61] Berman, supra note 40, at 931–41.

[62] See Latour, supra note 45.

As they learn how to speak, children experience a "phase shift" in vocabulary acquisition: after a period of slowly learning to use a small number of words, they all at once attain the ability to use many, many more.[63] The vocabulary of visual commentary in the West experienced an analogous phase shift around the turn of the nineteenth century, when the tools for nonverbal representation of information diversified dramatically. Many historians give much of the credit to William Playfair (1759–1823), a Scottish polymath and entrepreneur.[64] His innovations appeared in two works, the Commercial and Political Atlas (1786) and the Statistical Breviary (1801), which, as their names suggest, compiled economic and demographic information about England and its trading partners. The Atlas included numerous line graphs and a bar graph; the Breviary added what is considered the first pie chart.[65] Although the concept of statistics was as much created by Playfair's work as operative in that work,[66] the importance of his graphics lies less in their innovation by one individual than in the historical overdetermination of his supposed breakthrough. In using graphic forms to communicate information about groups of humans and their activities, Playfair married the time-honored technique of geometrical demonstration[67] to contemporary obsessions with the abstract features of aggregated human populations.[68] Building on the eighteenth-century concern with political economy, Playfair showed how information about populations could be made both comprehensible and propositionally stable.

The link between these modern diagrammatic forms and biopolitics—probabilistic, deindividualized, instrumentalist thinking about human life—is confirmed by the work of pre-Playfair graphic pioneers. The earliest geometric display of quantity as a function of height and width appeared in a 1693 essay on actuarial science by Edmund Halley, who offered a Euclid-like quadrilateral to illustrate the chances for survival and death of two independent lives, as well as many tables of figures.[69] Joseph Priestley probably originated the use of graphic timelines, precursors of line graphs, in the mid-eighteenth century.[70] Curves illustrating the normal distribution also first appeared in the eighteenth and nineteenth centuries.[71] The proliferation of biopolitical diagramming

[63] Katherine Nelson & Lea Kessler Shaw, Developing a Socially Shared Symbolic System, in Language, Literacy, and Cognitive Development: The Development and Consequences of Symbolic Communication 27, 32 (Eric Amsel & James P. Byrnes eds., 2002).

[64] See, for example, Funkhouser, supra note 38, at 280–90; Thomas L. Hankins, Blood, Dirt, and Nomograms: A Particular History of Graphs, 90 Isis 50, 52 (1999); Spence, supra note 49, at 353–56.

[65] Cf. Michael Friendly, A Brief History of the Mosaic Display, 11 J. Computational & Graphical Statistics 90, 94 (2002) (asserting that all modern forms of statistical graphics were invented by the early 1800s).

[66] Funkhouser, supra note 38, at 280.

[67] Playfair called diagrams "the best and readiest method of conveying a distinct idea." Quoted in Spence, supra note 49, at 353.

[68] See, for example, Foucault, supra note 25.

[69] See Friendly, supra note 65, at 92 [Mosaic]; see also Funkhouser, supra note 38, at 278.

[70] Funkhouser, supra note 38, at 279–80.

[71] Pioneers of this form were Jean d'Alembert, Pierre Laplace, Augustus de Morgan, and Adolphe Quetelet. Funkhouser, supra note 38, at 296–99.

in the century after Playfair is so profuse that a concise summary is impossible. To take just a few examples, in the mid-nineteenth century, Florence Nightingale created elaborate geometric representations of the causes of soldiers' mortality to use in her campaign for public health reform.[72] In 1872, the US Secretary of the Interior first requested federal funding for diagrams to accompany the US census; illustrated census atlases were issued in 1874, 1890, and 1900.[73] The economic indifference curve, which would eventually reshape legal scholarship, was pioneered by Alfred Marshall in 1879[74] and the box diagram comparing indifference maps of two traders by Francis Edgeworth in 1881.[75] Among the most celebrated graphicists of the period was Charles Joseph Minard (1781–1870), a French civil engineer who devoted his later career to the graphic presentation of social and political data.[76]

All of these forms enabled the perception and management of depersonalized populations. As they became familiar, such forms became "transparent"; eventually, they would come to be regarded as more faithful representations of reality than pictorial images or text[77] and to function as modes of argument in their own right.[78] And toward the end of this period, diagrams become devices for communication to fellow specialists as much as to novices—tools for the management of discursive communities, not just populations.[79] One of the signal features of the intellectual history of this period is the increasing particularization of professional life and the increasing professionalization of intellectual and academic life.[80] The proliferation of increasingly specialized professional and scholarly societies

[72] See Florence Nightingale, Notes on Matters Affecting the Health, Efficiency, and Hospital Administration of the British Army (1858).

[73] See Funkhouser, supra note 38, at 338–42.

[74] See, for example, Joseph A. Schumpeter & Elizabeth B. Schumpeter, History of Economic Analysis 1031 n.10 (1994).

[75] See Humphrey, supra note 28, at 39, 40–49.

[76] Minard's "figurative map" (Carte figurative) of the 1812 march of Napoleon's army on Russia, which used line direction, width, and color to represent attributes of the march, is considered a high-water mark of information graphics. See especially Michael Friendly, Visions and Re-Visions of Charles Joseph Minard, 27 J. Educ. & Behav. Statistics 31 (2002); Funkhouser, supra note 38, at 305–10 (1937). In addition to diagrams of military and transportation information, Minard also created representations of cultural phenomena such as the spread of languages. See, for example, Friendly, supra, at 36 [Minard].

[77] See, for example, Anne Beaulieu, Images Are Not the (Only) Truth: Brain Mapping, Visual Knowledge, and Iconoclasm, 27 Sci., Tech., & Hum. Values 53 (2002); Jurgen Link, The Normalistic Subject and Its Curves: On the Symbolic Visualization of Orienteering Data, 57 Cultural Critique 47, 49 (2004) (Mirko M. Hall trans.); Michael Lynch, Discipline and the Material Form of Images: An Analysis of Scientific Visibility, 15 Soc. Studies of Sci. 37 (1985); Wolff Michael Roth & Gervase Michael Bowen, When Are Graphs Worth Ten Thousand Words? An Expert-Expert Study, 21 Cognition & Instruction 429 (2003).

[78] See Humphrey, supra note 28.

[79] Link, supra note 77.

[80] See generally Andrew Abbott, The System of Professions: An Essay on the Division of Expert Labor 86–98 (1988).

during this period mirrors the proliferation of diagrammatic forms and accelerates in the same time frame.[81]

While the reasons for these developments are debated, some of the functions of these social groupings are evident; they operate largely by credentialing experts.[82] As Andrew Abbott has put it, professional groupings come to exist through meta-discourse on the "jurisdiction" belonging to the grouping, that is, identification of the types of questions its members are equipped to answer definitively.[83] The formation of such groupings also encourages the generation of commentary decipherable only by initiates, a powerful tool for ensuring that commentary on particular matters remains scarce and authoritative.[84] It is no coincidence that these developments in social and intellectual organization occurred during the period when biopolitical diagrammatic forms were proliferating. Thinking of people as populations makes it possible to think of them (and for them to think of themselves) as members of occupational and intellectual groups. And many of the earliest groups to associate defined their jurisdictions in biopolitical terms: engineering (devoted to augmenting the physical capacities of populations),[85] anthropology (devoted to the differentiation of cultures),[86] and statistics (devoted to the description of populations).[87] In statistics and engineering, the relation of all of these developments is especially evident: practitioners' use of visual forms spurred the development of conventions of visual grammar, which in turn became part of the education of new practitioners.[88]

This trend toward specialization and exclusivity has not been entirely uniform. The creation of professional jurisdictional boundaries restricts access to discourse communities but also makes it possible to cross those boundaries deliberately (e.g., through interdisciplinary work). Such boundary crossing enables new perspectives and new types of commentary. Examples include not only the work of Peirce, discussed below, but also the modern American law school, which emerged in the interstices between professional jurisdictional claims and those of academic

[81] For an overview of the development of learned societies, see the website of the Scholarly Societies Project at the University of Waterloo, which summarizes the number of such societies founded by decade. See Scholarly Societies Project Chronology, at http://www.scholarly-societies.org/chronology_soc.html.

[82] See Abbott, supra note 80; Harry Collins & Robert Evans, Rethinking Expertise (2007).

[83] "Jurisdiction" is Abbott's term for the functional focus of professional efforts. Abbott, supra note 80, at 59–85, 98–108.

[84] See Abbott, supra note 80, at 98–108; Andrew Abbott, Chaos of Disciplines (2001).

[85] The British Institution of Civil Engineers, established in 1818, was among the earliest professional societies.

[86] Anthropological societies were among the earliest specialized learned societies. Examples include the Royal Asiatic Society of Great Britain and Ireland (1824) and the Royal Anthropological Institute of Great Britain and Ireland (1843). See also Susan Gal & Judith T. Irvine, The Boundaries of Languages and Disciplines: How Ideologies Construct Difference, 62 Soc. Res. 967, 967–69 (1995).

[87] The Royal Statistical Society, originally the Statistical Society of London, was established in 1834 and the American Statistical Association in 1839.

[88] See especially Funkhouser, supra note 38, at 273.

disciplinarity in general[89]; the fields of psychology and economics, both of which developed as hybrids of nineteenth-century natural and human sciences[90]; and more recent interdisciplinary fields such as social network theory[91] and game theory,[92] both of which, notably, involve distinctive diagrammatic forms. Such boundary-crossing social forms and discourses are possible only in an ecology in which boundaries exist, and those boundaries are in part an effect of visual forms enabling their conceptualization.

30.3.4 Twentieth-Century Perspectives on Visual Commentary

By the beginning of the twentieth century, our diagrammatic vocabulary and institutional ecology had mostly assumed their present-day forms. Instead of discussing the development of visual and social practices, this section considers the light shed on practices of visual commentary by several perspectives developed within and between academic disciplines. Section 30.3.4.1 discusses semiotic perspectives, particularly those of Peirce; Sect. 30.3.4.2 historical-cultural perspectives, which informed the discussion above; and Sect. 30.3.4.3 psychological perspectives, which illuminate the relations between sign systems and social structures from a complementary vantage point.

30.3.4.1 Semiotic Perspectives

The interdisciplinary discourse of semiotics began to take shape in the late nineteenth century and has itself relied on visual commentary from the start.[93] But in addition to being an example of the developments described above, semiotics offers a vocabulary for discussing them: semioticians' work involves the generation of commentary on other practices of commentary, including visual commentary. In this section, after explaining some resources that the Peircean tradition offers for analyzing visual commentary, I suggest where the perspective requires supplementation.

Like the other founding father of semiotics, Ferdinand de Saussure, Charles Peirce (1839–1914) included diagrams in his work, but unlike Saussure, Peirce also began

[89] See, for example, Christopher Tomlins, Framing the Field of Law's Disciplinary Encounters: A Historical Narrative, 34 Law & Soc'y Rev. 911 (2000).

[90] See, for example, Humphrey, supra note 28.

[91] See especially Freeman, supra note 35, at 39, 70.

[92] John von Neumann & Oskar Morgenstern, Theory of Games and Economic Behavior (1944).

[93] See, for example, Ferdinand de Saussure, Course in General Linguistics 65, 67, 77–78, 84 (Charles Bally & Albert Sechehaye eds., 1916); Tomas Albert Sebeok, Semiotics in the United States (1991); see also supra note 30 [Greimas].

to work out a vocabulary for analyzing their function and significance.[94] One of Peirce's most influential semiotic proposals has been his trichotomy of sign functions: icon, index, and symbol.[95] Peirce acknowledges that a single sign may serve more than one function but notes that each type of function is suited to different communicative purposes.[96] Indexical signs, based on "direct physical connection" between sign and object,[97] like the connection between smoke and fire, are valuable when we want "positive assurance of the reality and the nearness of" signified objects.[98] Iconic signs "exhibit[] a similarity or analogy to the[ir] subject[s],"[99] as a stick-figure image of a person resembles an actual person and as a drawing of a triangle resembles the concept of a triangle. Peirce considered iconic signs "specially requisite for reasoning,"[100] since they offer "assurance" that "the Form of the Icon, which is also its object, . . . must be logically possible."[101] Symbolic signs arise when "the mind associates the sign with its object"[102]; they "afford the means of thinking about thoughts in ways in which we could not otherwise,"[103] but because they "rest … on habits already . . . formed," they do not "add to our knowledge."[104]

Peirce himself applied this taxonomy to nonverbal, nonrepresentational signs, which he took to be primarily iconic.[105] For Peirce, "diagrams" and "graphs" could convey the possibility of particular abstract relations more surely than symbolic signs could.[106] From a Peircean perspective, verbal descriptions of geometric

[94] See Michael Leja, Peirce, Visuality, and Art, 72 Representations 97, 97–98 (2000). Despite Saussure's use of diagrams and acknowledgment that linguistics is only one branch of semiology, see Saussure, supra note 93, at 15, the Saussurean tradition focuses mostly on linguistic signs, Peircean symbols that appear in text as blocks of continuous prose.

[95] See, for example, Charles Sanders Peirce, "Sign," 2 Dictionary of Philosophy and Psychology 527 (James Mark Baldwin ed., 1901–05), reprinted in Peirce on Signs, supra note 57, at 239, 239.

[96] Peirce gave the following illustration of how a sign might be both indexical and symbolic: "That footprint that Robinson Crusoe found in the sand . . . was an Index to him that some creature was on the island, and at the same time, as a Symbol, called up the idea of man." Charles Sanders Peirce, "Pragmatism" Defined (ca. 1904), in Peirce on Signs, supra note 57, at 246, 252.

[97] Charles Sanders Peirce, One, Two, Three: Fundamental Categories of Thought and Nature (1885), in Peirce on Signs, supra note 57, at 180, 183.

[98] Peirce, supra note 96, at 251 [Pragmatism].

[99] Peirce, supra note 97, at 181 [One, Two].

[100] Peirce, supra note 96, at 252 [Pragmatism].

[101] Id. [Pragmatism].

[102] Peirce, supra note 97, at 183 [One, Two].

[103] Peirce, supra note 96, at 251 [Pragmatism].

[104] Id. [Pragmatism].

[105] For example, he defined a "diagram" as "mainly an Icon . . . of intelligible relations." Id. at 252 [Pragmatism].

[106] See, for example, Shin, supra note 50, at 19, 27. On Peirce's never-completed plan to generate a graphic grammar for the representation of logical relations that would bridge the Euclidean tradition and that of probabilistic thinking, see Roberta Kevelson, The Law as a System of Signs 79–101 (1988) (discussing Peirce's planned "delta" graphs as form suited to the semiotic features of judicial decisions).

figures are functionally inferior to the figures themselves—but to the extent that the verbal descriptions are recipes for construction of nonverbal figures, they are also acknowledgements of the discrepancy. The main problem with Peirce's approach for understanding the practices addressed in this chapter is his refusal to confront the symbolic function of diagrams.[107] His analyses of visual phenomena tended to abstract them from convention, the domain of the symbolic sign. But all of the practices described above have symbolic as well as iconic dimensions. In legal commentary, for example, a reproduction of a legal document, such as a pleading, functions both iconically (formally resembling the original) and symbolically (depending on an understanding of the symbols present in the original and the reproduction). Tables of text and figures contain symbols but use the page's space iconically. And although line and bar graphs and economic box diagrams have iconic aspects, they are also symbols.[108]

Following Peirce, some scholars in semiotics and related fields have acknowledged the role of convention in processes of nonverbal signification.[109] But very little work has been done on the variability in the experience of convention among individuals, the differential distribution of the ability to act as what Peirce would call an interpretant of nonverbal signs.[110] Facility with some symbols, such as the letters of the Roman alphabet and treelike schematics, is acquired by most Western individuals through ordinary socialization.[111] But facility with others is less universally distributed, requiring opportunity and effort.[112] Semiotic perspectives have not developed a vocabulary for considering these differences critically.

30.3.4.2 Historical and Cultural Perspectives

The story presented above builds on work done from historical and cultural perspectives, which, unlike semiotics, do focus on the variable environments of convention within which signification operates. By tracing the contours of particular social environments at particular times, these perspectives allow us to draw conclusions (however speculative) about changes in signification over time or from environment to environment. But these approaches have shortcomings, too. To describe signification in context, they must simplify. And as humanistic disciplinary specialization has increased, the vocabularies available for this simplification have multiplied, and the

[107] See especially Leja, supra note 94, at 113–15.

[108] See Link, supra note 77; Lynch, supra note 77.

[109] See, for example, Nelson Goodman, Languages of Art: An Approach to a Theory of Symbols 58, 69, 88 (1968); Erwin Panofsky, Studies in Iconology: Humanistic Themes in the Art of the Renaissance (1939).

[110] See Shin, supra note 50, at 170–72.

[111] See Collins & Evans, supra note 82.

[112] See, for example, Jean-Francois Rouet, Monik Favart, M. Anne Britt, & Charles A. Perfetti, Studying and Using Multiple Documents in History: Effects of Discipline Expertise, 15 Cognition & Instruction 85 (1997).

simplification itself has assumed diverse, often incompatible forms. Thus, those studying the history of visuality have based their accounts on such dichotomies as those between aural and visual, or multimodal and single-modal, ways of apprehending the world[113]; between sensible and purely cognitive experience[114]; and between linearity and recursivity as cognitive and communicative modes.[115] The multiplicity of accounts that results precludes consensus on the significance of the changes in visual communication that have undeniably occurred in Western culture over the past few millennia. More problematically, the simplification necessitated by this perspective precludes attention to the ways individual encounters with signs vary based on individual experience. Historical-cultural accounts tend to rely on intuited generalizations about perceptual and cognitive processes and sometimes resort to a biopolitical vocabulary. Psychological perspectives, which focus on the details of individual encounters with signs, can offer a useful supplement to these approaches.

30.3.4.3 Psychological Perspectives

Two areas of recent psychological research are relevant to the subject of this chapter: work on the relations between visual perception and abstract thought, which helps to clarify the questions raised by the tradition of iconic "proof" from Euclid on, and work addressing the acquisition of specialized sign-handling expertise. This work offers a critical check on the intuitions on which many semiotic and historical approaches rely.[116]

Experiments addressing language acquisition and reasoning indicate that some kind of "intrinsic" schematic geometry—physical patterns of relations among cognitive states[117]—is necessary for abstract thought and that this geometry is affected by visual and other experience.[118] But there is little agreement on the specific relationship

[113] See Ong, supra note 23 [System].

[114] See, for example, Rudolf Arnheim, Visual Thinking (1969).

[115] See, for example, Ong, supra note 53 [Ramus]; Latour, supra note 45.

[116] See, for example, Mike Scaife & Yvonne Rogers, External Cognition: How Do Graphical Representations Work?, 45 Int'l J. Human-Computer Studies 185, 200 (1996) (noting reliance on intuition in previous studies of the relation between graphics and cognition).

[117] Julie Sarama, Douglas H. Clements, Sudha Swaminathan, Sue McMillen & Rosa M. Gonzalez Gomez, Development of Mathematical Concepts of Two-Dimensional Space in Grid Environments: An Exploratory Study, 21 Cognition & Instruction 285, 288, 322 (2003).

[118] Findings about language acquisition support the "schema" theory of cognition, which regards it as based on patterns of apprehension, rather than on manipulation of language-like propositions. See, for example, Joost A. Breuker, A Theoretical Framework for Spatial Learning Strategies, in Spatial Learning Strategies: Techniques, Application, and Related Issues 21, 30–31 (Charles D. Holley & Donald F. Dansereau eds., 1984); William A. Roberts, Spatial Representation and the Use of Spatial Codes in Animals, in Spatial Schemas and Abstract Thought 15, 39 (Merideth Gattis ed., 2001). Contrary to Piaget's theory, children seem to acquire vocabulary for abstractions as early as vocabulary for concrete objects, largely based on exposure to patterns of use of such terms, rather than on internalizing information about the terms' referential meaning. Nelson & Shaw, supra note 63, at 39, 41–43, 47–53.

between the perception of diagrams and images and abstract reasoning—the link assumed by Euclid and those following in his footsteps.[119] Studying this link is difficult because, as Peirce suggested, testing the assumption that diagrammatic presentation promotes a special kind of conviction requires investigation not only of processes of abstract cognition but also of the noncognitive state of conviction, as well as the relationship between the two.[120]

On the other hand, there is little dispute that the perception of diagrams involves cognition different from that involved in comprehending text.[121] There is also little dispute that the skills needed to understand nonmimetic visual forms are learned.[122] Schoolchildren must learn, for example, how to manipulate basic features of the Cartesian grid, such as infinite extensibility and two-dimensional location conventions.[123] Moreover, scientists are not general experts in diagram reading,[124] but make the same mistakes as children when reading and explaining unfamiliar graphs.[125] Like abstract reasoning, such graphic literacy skills involve schema acquisition, which is also the basis of those specialized capacities we identify as "expertise."[126] Indeed, it seems to be the rooting of expertise in pattern acquisition that allows experts to experience diagrammatic presentations as "transparent."[127] From this perspective, we can

[119] See, for example, Merideth Gattis, Space as a Basis for Abstract Thought, in Spatial Schemas and Abstract Thought, supra note 118, at 1, 2, 5 (noting variety of models for the relation between extrinsic and intrinsic form or visual percepts and schemas); Brendan McGonigle & Margaret Chalmers, Spatial Representation as Cause and Effect: Circular Causality Comes to Cognition, in Spatial Schemas and Abstract Thought, supra note 118, at 247, 250–75; Susan N. Friel, Frances R. Curcio, & George W. Bright, Making Sense of Graphs: Critical Factors Influencing Cognition and Instructional Implications, 32 J. for Res. in Math. Educ. 124, 125 (2001); Scaife & Rogers, supra note 116, at 186–87, 209.

[120] See, for example, Rotman, supra note 3, at 28, 41; and see generally Charles Sanders Peirce, The Fixation of Belief (1877), in Peirce on Signs, supra note 57, at 144–59.

[121] Sarah Guri-Rosenblit. Effects of a Tree Diagram on Students' Comprehension of Main Ideas in an Expository Text with Multiple Themes, 23 Reading Res. Q. 236, 243–44 (1989) (finding that the use of tree diagrams assists recall of complex information in a text). For similar conclusions, see Ernest T. Goetz, The Role of Spatial Strategies in Processing and Remembering Text: A Cognitive-Information Processing Analysis, in Spatial Learning Strategies, supra note 118, at 47, 56.

[122] This work refutes the contentions of, for example, Stephen Pinker, A Theory of Graph Comprehension, in Artificial Intelligence and the Future of Seeing 73 (R. Freedle ed., 1990) (arguing that the salient elements of any graph will be evident to experts).

[123] Sarama et al., supra note 117, at 299–316.

[124] Roth & Bowen, supra note 77, at 430, 441–45, 466, 470 [Expert-Expert].

[125] Wolff Michael Roth & G. Michael Bowen, Professionals Read Graphs: A Semiotic Analysis, 32 J. for Res. in Mathematics Educ. 159, 160, 165, 168–69, 185 (2001).

[126] Gary L. Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. Legal Educ. 313, 318, 335, 342–44 (1995); Rouet et al., supra note 112, at 86, 102 (distinguishing between domain (content) expertise and discipline (method, problem-solving) expertise and noting that both involve the use of schemas but that the latter form of expertise extends to the treatment of texts); see also Beaulieu, supra note 77, at 56, 74–75 (2002) (discussing complex relationship of fMRI researchers to visual aspects of fMRI images as tokens of expertise); Lynch, supra note 77; Scaife & Rogers, supra note 116, at 199, 201, 206.

[127] Richard Lehrer & Leona Schauble, Symbolic Communication in Mathematics and Science: Co-Constituting Inscription and Thought, in Language, Literacy, and Cognitive Development, supra note 63, at 189.

understand discipline-specific diagrammatic forms, like the economic box diagram, as material records of the cognitive schemas common to experts in that domain.

Findings like these can help us to understand how the institutional developments described in previous sections took hold. Experiments involving small groups of schoolchildren have shown how the recruitment of allies prompts both increased abstraction (a basis for commentary) and a new relationship to visual forms. In one study, children developed increasingly "mathematized" graphs as they were pushed to defend to peers their claims about concrete information like the relative rates of growth of plants in the classroom.[128] This dynamic explains the contemporaneous emergence of specialized expert discourses and the proliferation of conventions for presenting biopolitical facts. Considered alongside historical-cultural accounts, psychological perspectives can thus confirm the relationships among otherwise obscurely linked phenomena.

30.4 Implications of the Contemporary Forms of Visual Legal Commentary

Without aspiring to exhaustiveness, this section considers the implications of the accounts presented above for understanding the practices described in Sect. 30.2. Leaving aside pictorial representation, which has been the subject of significant commentary,[129] the practices in question fall into four main categories: document reproductions, tables, conventional forms borrowed from other disciplines (such as the economic box diagram), and "ad hoc" diagrams, which are geometric but non-conventional. Space constraints prevent me from considering the first of these forms in detail[130]; instead, I focus on the latter three.

30.4.1 Tables

The presentation of information in table form has been a consistent component of legal commentary since that commentary assumed its modern form a little over a century ago. Many of the earliest examples used tables to compare text,[131] but from

[128] Lehrer & Schauble, supra note 127, at 168.

[129] See, for example, sources cited supra notes 5 & 20 [Dellinger et al.].

[130] Document reproductions include reproductions of letters, invoices, advertisements, contracts, and pleadings, typeset along with text or reproduced in facsimile form. This is perhaps the most widespread and long-lived visual practice in legal commentary. A good example is Warren, supra note 6, at 87 (1923) (including photostat of manuscript of 1789 Judiciary Act). There has been very little work on this practice, and I plan to address it in a separate project.

[131] See, for example, F.W. Maitland, The History of the Register of Original Writs, 3 Harv. L. Rev. 212, 221–23 (1889).

the start, tables have also been used to present figures,[132] often but by no means always in balance-sheet form.[133]

Whether they contain text, figures, or a combination of the two, tables involve the presentation of symbolic signs. But tables also have an important iconic dimension. Hovering within every table (as well as within the related form of combinatorial and game-theory matrices) is a grid, a culturally specific example of the type of visible geometric "proof" exploited since Euclid.[134] Presentation of textual or numerical material in table format demonstrates, in Peirce's sense, that the material presented is amenable to regularization. This iconic function is also key to the symbolic dimension of tabular formats, which, at least since Halley's actuarial tables, have assumed a biopolitical perspective on the world. In legal commentary, tables provide assurance that a link exists between the commenting text (together with the network of other verbal legal texts to which it refers) and the "real world" beyond this textual network, and that "real world" is often presented biopolitically, through an array of symbols referring to preexisting social facts. Even the most modest table injects into legal commentary a visual semantics that is neither textual nor imagistic, but purely biopolitical—a matter of generalizations about and abstractions from the physical details of human existence.[135]

The link to a biopolitically conceived "real world" that tables offer serves an important function. As Elizabeth Mertz has explained in her study of the linguistic socialization of US law students, legal discourse relentlessly marginalizes issues of social fact.[136] Students are trained to purge from their analysis all references to facts not expressible in legal vocabulary but also taught that they may permissibly generalize about social facts without heed to the conventions used in other disciplines, like the social sciences, to validate such generalizations.[137] The use of tables in legal commentary confirms this analysis and indicates the strength of the "linguistic ideology" that Mertz describes in legal scholarship as well as legal education as her focus.[138] Tables seem to make social facts empirically verifiable and accessible to legal professionals, but tables visually distinguish those facts from the legal text. Moreover, while critiques of both prose and mimetic illustration as susceptible to manipulation are familiar themes in Western culture, there is no comparable tradition

[132] See, for example, Notes from Professor Langdell's Report on the Law School, 2 Harv. L. Rev. 333, 333 (1888).

[133] See, for example, Samuel B. Clarke, Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice, 1 Harv. L. Rev. 265, 283 n. (1888).

[134] See discussion supra notes 26–28 and accompanying text.

[135] For example, in an article on constitutional law, a footnote including a table illustrating the average tenure of Supreme Court justices during recent presidencies makes visible the equivalency of individuals' occupation of institutional roles, turning their mortality into a political epiphenomenon. See Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633, 707 n.163 (2000).

[136] See Mertz, supra note 1, at 76–82.

[137] Id.

[138] Id. at 45–46.

of critiques of tabular representation.[139] Including biopolitical tables as support for claims made in textual legal commentary seems, then, primarily to be a device for immunizing the commentary from the valid charge that it is unconnected to lived experience.

30.4.2 Imported Conventions

Since the 1970s, legal commentary has increasingly included diagrammatic conventions imported from other disciplines, such as line and bar graphs and economic box diagrams. If tables suggest the ambivalent relationship of legal discourse to social facts, these conventions bespeak the disciplinary insecurity of legal commentary, as opposed to legal discourse.

By the time practices of this kind became widespread in legal materials, they had been used in other contexts for nearly a century. Diagrammatic conventions from other disciplines appear only sporadically in pre-1970s legal commentary.[140] Successive scholarly efforts to move legal scholarship closer to the discourse of the social sciences (by the legal realists in the 1930s and the Law and Society movement in the 1960s) may explain why most of these conventions are borrowed from social science disciplines.[141] But the use of such devices within the social sciences—and within legal commentary—is more than a matter of scholarly style. As Latour puts it, these devices function to recruit allies. Their communicative potential derives not just from their efficiency or their iconic, proof-like power but also from the fact that these devices, regardless of content, are associated with expertise.

These devices connote expertise because understanding them requires training. The devices that most strongly communicate expertise in this way, however, are comprehensible only to a subset of the audience for legal commentary.[142] Unlike in their disciplines of origin, in legal commentary these devices are not "transparent" windows onto reality, but merely a promise that a complex reality has been respected. Despite their apparently greater complexity and density, then, these devices function

[139] See, for example, Dellinger, supra note 20.

[140] The earliest equation in the Harvard Law Review appeared in an 1898 article on joinder of claims, G. Rowland Alston, Joinder of Claims Under Alternate Ambiguities, 12 Harv. L. Rev. 45, 46 (1898), and the earliest graphic diagrams in the periodical that were neither document reproductions, tables, nor Ramist trees but geographic diagrams in a 1902 article on mining law, John Maxcy Zane, A Problem in Mining Law: Walrath v. Champion Mining Company, 16 Harv. L. Rev. 94, 97, 108 (1902). The first line graph did not appear until 1963, Hans Zeisel & Thomas Callahan, Split Trials and Time Saving: A Statistical Analysis, 76 Harv. L. Rev. 1606, 1615 (1963); the first box diagram did not appear until 1971, Tribe, supra note 9, at 1387–88 [Trial].

[141] See Tomlins, supra note 89.

[142] See the parody of these forms in Kenneth Lassen, Commentary, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 Harv. L. Rev. 926, 938 n.60 (1990) (including box diagram demonstrating relationships between determinants of scholarship and tenure).

similarly to tables, linking legal commentary to reality; at the same time, and unlike most tables, many borrowed diagrammatic forms mediate that link through the "black box" of a technical discourse. Of course, many borrowed conventions, such as line graphs and game-theory matrices, borrow the authority of other disciplines without this exclusionary effect. But from any perspective, the use of graphs and specialized forms like box diagrams and regression plots suggests a felt need to increase the recruiting potential—the persuasive power and authority—of legal commentary. In addition to being symbols of expertise, these borrowed conventions seem to be indices of a disciplinary crisis of confidence. In this respect, they serve a function different from that served by the ad hoc diagrams discussed next, which bespeak not disciplinary insecurity but discursive confidence.

30.4.3 Ad Hoc Diagrams

Ad hoc diagrams present conceptual relations nonverbally but conform to no convention associated with a profession or academic discipline.[143] Examples include arrows designating property succession,[144] Venn-diagram-like schematics,[145] Ramus-derived trees,[146] and above all simple geometric representations of conceptual relationships.[147] Approaching Peirce's iconic ideal of the graph, these forms still have symbolic functions.

Ad hoc diagrams sometimes have an explicitly pedagogical function. In addition to communicating the author's expertise, they create expertise, initiating the reader into a more sophisticated fluency regarding the relationships among abstract legal concepts—much as the visual conventions of other disciplines record the cognitive schemas that underlie those forms of expertise. But in contrast to other disciplines, in law the display of this expertise, once attained, rarely involves the recreation of these visual schemas. Legal expertise involves skillful use of a specialized, highly abstract

[143] Some diagrams are difficult to classify as either purely conventional or ad hoc, particularly such basic forms as Venn diagrams and square-of-opposition quadrilaterals.

[144] See, for example, John E. Cribbett, Principles of the Law of Property 28, 115 (2d ed., 1975); Sandra H. Johnson, Timothy S. Jost, Peter W. Salsich, Jr., & Thomas L. Shaffer, Property Law: Cases, Materials, and Problems 701–02 (1992).

[145] See, for example, John Henry Wigmore, Select Cases on the Law of Torts 865 (1912).

[146] See, for example, George P. Costigan, The Classification of Trusts as Express, Resulting, and Constructive, 27 Harv. L. Rev. 437, 437, 461, 462 (1913); Roscoe Pound, Classification of Law I, 37 Harv. L. Rev. 933, 957–59, 962–67 (1924) (omitting brackets); Lea Brilmayer, Colloquy, Related Contacts and Personal Jurisdiction, 101 Harv. L. Rev. 1444, 1454 (1988); Note, The Price of Everything, the Value of Nothing: Reframing the Commodification Debate, 117 Harv. L. Rev. 689, 689 (2003).

[147] See, for example, Tribe, supra note 19, at 959 [Triangulating]; Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1921 (1994); Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621, 632, 671 (1998).

verbal language, not of particular visual communicative forms. Thus, these ad hoc forms promote the very discursive ideology analyzed by Mertz.[148] They bespeak neither disciplinary insecurity nor an impulse to link the verbal abstractions of legal discourse to extra-discursive facts. Rather, they promote legal discourse as a unique means of making sense of the world, one incompatible with other discourses, reinforcing law's claims to exclusive professional and academic jurisdiction. The implicit denial, in these forms, of any need to develop a visual grammar specific to law contributes to an ideology of accessibility that is at odds with the reality of legal expertise, a contradiction that ad hoc forms betray in spite of themselves.

30.5 Conclusion

The role of legal commentary in enculturating lawyers and legal scholars has been one of the main themes of this chapter. It is not novel to argue that the visible nature of this commentary plays a role in legal enculturation. The significant contribution of visual commentary to the process is, however, little appreciated.

Most discussions of the pedagogical use of visual commentary characterize it as increasing accessibility: nontextual materials are thought to engage at least some pupils more readily and to bypass the need for specialized vocabulary.[149] The discussion above suggests that the visual forms used in legal commentary have other effects as well. They reinforce a biopolitical point of view, deter detailed analysis of the relations between legal discourse and the "real world," and underline the need to recruit allies by any available means—including means that conflict with the claims to discursive autonomy made by law and protected by legal education and credentialing.

The implications of this discussion for legal academics are troubling. For a little over a century, the American legal academy has occupied an uneasy position between the professions and the university. Other forms of professional training bridged similar structural gaps by developing jurisdiction-specific visual grammars. Law has not. Instead, it has expanded its borrowing from other "jurisdictions." This borrowing indicates increased academic insecurity about the hold of legal discourse on those problems traditionally identified as legal, decreased consensus about the cognitive schemas appropriate to legal expertise, and, ultimately, weaker claims to professional jurisdiction. This insecurity also finds voice in other academic worries—about the moral and social justification of legal imperatives[150] and

[148] See Mertz, supra note 1, at 45–83.

[149] See, for example, J.R. Kirby, P.J. Moore, & N.J. Schofield, Visual and Verbal Learning Styles, 13 Contemp. Educ. Psych. 169 (1988); Laspina, supra note 44, at 58–65; Michael A. Toth, Figures of Thought: The Use of Diagrams in Teaching Sociology, 7 Teaching Sociology 409, 410–11 (1980).

[150] The flowering of scholarship debating the merits of "exclusive" and "inclusive" legal positivism in the late twentieth century is a dramatic example of how concerns with professional jurisdiction and institutional legitimacy can affect not just the form but also the content of academic debate. See, for example, Wilfrid J. Waluchow, Inclusive Legal Positivism (1994); The Autonomy of Law (R.G. George ed., 1996).

about control over the meaning and use of legal texts.[151] All of these verbal debates, like the use of visual commentary, suggest the increasing difficulty of reconciling law's claim to disciplinary and discursive autonomy with its undeniably social functions.

[151] Text-focused understandings of legal interpretation reproduce the tension discussed in connection with ad hoc diagrams: the emphasis on text is said to promote both populism (or access) and judicial restraint (or standardization), when in fact it does neither. See, for example, Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989).

Chapter 31
The Invisible Court: The Foreign Intelligence Surveillance Court and Its Depiction on Government Websites

Pamela Hobbs

Abstract The Foreign Intelligence Surveillance Court is a federal court of nationwide jurisdiction that was created by statute in 1978. Its function and purpose is to review applications for "warrants" for domestic surveillance of persons suspected of having connections with foreign governments and/or terrorist organizations. The court is highly unusual in that its location is secret, its proceedings are ex parte, and virtually all of its orders and opinions are classified, and may not be published or otherwise disclosed. The government justifies this secrecy on the basis of national security. Nevertheless, certain limited information about the court is available on government websites, including information that is designed to inform the public about the court and its functions. This chapter examines the content of these websites in which the government depicts an otherwise invisible court. I argue that the information provided on these government websites constructs the court as legitimate by minimizing or omitting problematic aspects of the court's operation, while framing it as a duly constituted Article III court. Through this publicly available information posted on its websites, the government thus advances a particular vision of a court whose operations and decisions remain invisible.

31.1 The Foreign Intelligence Surveillance Court

The Foreign Intelligence Surveillance Court is a federal court of nationwide jurisdiction that was created by statute in 1978. Its function and purpose is to review applications for "warrants" for domestic surveillance (by wiretapping, other forms of electronic eavesdropping, and physical searches) of persons within the United

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States who are suspected of having connections with foreign governments and/or terrorist organizations. The court itself is highly unusual. Unlike all other American courts, it has no published address, and all of its proceedings are closed. Hearings take place in secret in a locked, windowless room, with only the government's lawyers appearing before the court (Breglio 2003, 179; Sloan 2001, 1496; Bamford 1982, 369); the persons against whom surveillance orders are sought have no right to be informed of the proceedings and are thus precluded from retaining counsel to dispute the government's submissions (Sloan 2001, 1496). Moreover, virtually all of the orders and opinions of the court are classified as "national security information" that may not be published or otherwise disclosed (Ruger 2007, 245; Breglio 2003, 190), resulting in an unprecedented body of secret law (Feingold 2008). The government justifies this secrecy on the basis of national security.

Nevertheless, certain limited information about the court is available on government websites, including information that is designed to inform the public about the court and its functions. Using Huckin's (2002) model of manipulative silence, this chapter examines the content of these websites in which the government depicts an otherwise invisible court. I argue that the information provided on these government websites constructs the court as legitimate by minimizing or omitting problematic aspects of the court's operation, while framing it as a duly constituted Article III court. Through this publicly available information posted on its websites, the government thus advances a particular vision of a court whose operations and decisions remain invisible.

The Foreign Intelligence Surveillance Court was created by Congress in the Foreign Intelligence Surveillance Act of 1978 ("FISA"),[1] in order to provide judicial oversight of the government's use of electronic surveillance in the name of national security (Breglio 2003, 187).

Although the Fourth Amendment ordinarily requires the government to obtain a warrant in order to search private property, prior to FISA's enactment, the Executive Branch had historically taken the position that the warrant requirement was inapplicable to foreign intelligence surveillance, because the President's inherent constitutional authority empowered him to authorize such searches (Sloan 2001, 1492, 1494–1495). As a result, warrantless wiretapping by the Executive Branch was common as early as World War I (Cinquegrana 1989, 795) and was subsequently authorized by presidents including Franklin Roosevelt, Harry Truman, and Lyndon Johnson (Breglio 2003, 182). During this approximately 60-year period, the Supreme Court did not directly address the issue. However, in 1967, in *United States v. Katz*,[2] a criminal case involving the transmission of wagering information by telephone across state lines, the court held that the admission of warrantless electronic surveillance evidence violated the defendant's Fourth Amendment rights. Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which established standards for obtaining a warrant for the

[1] 50 U.S.C. §§ 1801–1811.

[2] 389 U.S. 347 (1967).

placement of a wiretap in criminal investigations; the act specifically stated that "[n]othing contained in this chapter… shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."

Nevertheless, in 1972, in *United States v. United States District Court*,[3] in which the defendant, an American citizen, was charged with bombing a CIA office in Michigan, the court held that, notwithstanding the language of Title III, a warrant was required for the placement of a wiretap in domestic security investigations. The court emphasized that the case did not decide the scope of the President's powers in the area of foreign intelligence surveillance, thus continuing to leave open this particular question, while making it increasingly apparent how it would eventually rule. Accordingly, when the Senate committee convened to investigate allegations published by the New York Times in December 1974 (Hersh 1974), that the Nixon administration had engaged in massive, illegal domestic intelligence operations uncovered wide-ranging infringements of the privacy interests of American citizens by both electronic surveillance and physical searches (McAdams 2007, 2; Johnson 2004, 6; Cinquegrana 1989, 806–807), the committee's recommendation that Congress enact legislation to curb such abuses presented a convenient opportunity to impose regulations in this area. This resulted in the enactment of FISA, which created a special court to review the government's applications for electronic surveillance for foreign intelligence purposes.

The Foreign Intelligence Surveillance Court ("the FISA Court") is composed of 11 judges appointed by the Chief Justice of the US Supreme Court and drawn from the pool of existing federal district court judges (Ruger 2007, 244; Cinquegrana 1989, 812). They serve nonrenewable terms of a maximum of 7 years (Ruger 2007, 244; Breglio 2003, 191), during which time they retain their full district court caseloads, but travel to Washington periodically to preside over FISA hearings (Ruger 2007, 244). The court conducts no trials and virtually no adversary proceedings; its sole purpose is to hear and decide applications for foreign intelligence surveillance, according to the standards imposed by FISA. Under these standards, the judge must grant the application if she/he finds, on the basis of the facts submitted, that there is probable cause to believe that "the target of the surveillance is a foreign power or agent of a foreign power," and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power,"[4] and that the government's application otherwise complies with the statutory requirements.

These procedures bear a strong superficial resemblance to those required for the issuance of a search warrant in a criminal investigation. However, while the Fourth

[3] 407 U.S. 297 (1972).

[4] 50 U.S.C. §1805(a)(3).

Amendment standard requires a finding of probable cause to believe that a crime has been committed and that evidence of that crime will be found in the place to be searched, FISA requires no analogous finding that the target has engaged in foreign intelligence activities or poses a danger to national security. It is thus "dramatically less stringent" than the Fourth Amendment standard (Ruger 2007, 243–244). Nevertheless, FISA permits the disclosure of information obtained by FISA orders for law enforcement purposes, that is, for use in criminal investigations and trials, if authorized by the Attorney General.[5]

Although originally limited to electronic surveillance, the court's jurisdiction was gradually expanded over the years to include physical searches and the installation and use of pen registers and trap and trace devices (see McAdams 2007, 3–4). These expansions excited no controversy, and, during the first 24 years of its existence, the court, shrouded in secrecy, was virtually unknown. However, in the aftermath of 9/11, it was catapulted into prominence when the government announced in May 2002 that a provision of the hastily enacted USA PATRIOT Act, which for the first time permitted the Department of Justice to use FISA orders specifically to obtain evidence for use in criminal prosecutions, had resulted in arrests in two high-profile criminal cases, one charging the director of an Islamic charity with perjury and the other charging a New York lawyer with providing material aid to terrorists (see Lewis 2002).

Soon afterward, the amendment brought additional attention to the court when its implementation resulted in the first-ever decision of the Foreign Intelligence Surveillance Court of Review, which had been created by FISA in 1978 to review denials of the government's applications but, until then, had never had occasion to do so. The government had presented the FISA Court with a request to void existing procedures which partitioned intelligence gathering from criminal investigations and to give criminal prosecutors broad access to information developed in FISA investigations and allow them to "consult extensively and provide advice and recommendations to intelligence officials" (Breglio 2003, 197). However, in a strongly worded opinion that was later made public, the normally acquiescent court, noting that the type of information sharing proposed had resulted in gross abuses in the past, ordered that the proposed procedures be modified to prohibit prosecutors from making recommendations to intelligence officials regarding FISA searches or surveillances or from directing or controlling the use of FISA procedures to enhance criminal prosecutions.[6] The government appealed, and the Court of Review reversed the decision, holding that the PATRIOT Act amendment "supports the government's position, and that the restrictions imposed by the FISA court are not required by FISA or the Constitution."[7]

[5] 50 U.S.C. § 1808.

[6] *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp.2d 611 (Foreign Intelligence Surveillance Ct. 2002).

[7] *In re Sealed Case*, 310 F.3d 717, 719–720 (Foreign Intelligence Surveillance Ct. Review 2002).

Yet despite the tensions evidenced by this case, both the government and the court have remained largely silent on the subject of its operations, and the court is usually described by the media as "secret" or "secretive" (see, e.g., Wilber 2009; Associated Press 2009; Ryan 2006; Lewis 2002; Shenon 2002a, b). Perhaps to counter this perception, the government provides certain limited information, designed to inform the public about the court and its functions, on government websites. This chapter will examine information from two of these websites, using Huckin's (2002) model of manipulative silence.

31.2 Manipulative Silence

Manipulation has been a key concept in the teaching of public speaking since the days of the Greek Sophists (Huckin 2002, 367), a fact that is not surprising, given that the goal of rhetoric is to persuade. Nevertheless, scholars draw a distinction between legitimate and illegitimate persuasion. While legitimate persuasion seeks to achieve its goals by presenting the speaker's position in its strongest light, leaving recipients free to accept or reject its persuasive message (Van Dijk 2006, 361), illegitimate persuasion—that is, manipulation—intentionally misleads or deceives the recipient, to the speaker's advantage (Huckin 2002, 354). Manipulation occurs when recipients lack resources to detect the inaccuracy of the speaker's assertions and accordingly are deceived (Van Dijk 2006, 375).

Van Dijk defines manipulation as a communicative practice by which the manipulator exercises control over others, usually against their will or contrary to their interests (2006, 360). He focuses upon manipulation at the level of the group rather than the individual, as a form of power abuse that requires preferential access to media and public discourse, through which dominant groups reproduce their power (2006, 362–364). Thus defined, manipulation is a pervasive feature of contemporary public discourse, much of which is ideologically shaped (Huckin 2002, 354). For example, the opposing factions of the abortion debate label their positions as "pro-choice" and "pro-life," reflecting radically differing conceptualizations of the issues involved. To the extent that adherents of these positions, in their efforts to influence public policy, emphasize the interests that support their viewpoint while ignoring those that support the opposing perspective, their discourse is potentially manipulative in attempting to suggest that abortion involves *only* the woman's privacy and personal autonomy, or *only* the fetus' human status. Huckin (2002) refers to such omissions as "manipulative silences."

31.3 Methodology

Huckin's model of manipulative silence is based on the three criteria of *deception*, *intentionality*, and *interest*: He argues that manipulative silences deceive or mislead recipients by concealing relevant information that is known to the speaker, that the

concealment and resulting deception are intentional, and that it is in the speaker's interest to deceive the recipient (2002, 354–356). In order to identify manipulative silences, he proposes a four-stage analysis which focuses on compiling evidence of these criteria. According to Huckin's methodology, the analyst should:

- Determine the basis of the speaker's knowledge of the topic by collecting a corpus of texts that is representative of the larger body of discourse from which that knowledge is derived.
- Apply a qualitative content analysis to this corpus in order to compile a list of subtopics which represent the public discourse on that topic.
- Examine the original text to determine which subtopics are included and which are excluded. The latter constitute textual silences which may or may not be manipulative silences; the next step will determine this issue.
- Using a sociopolitical form of discourse analysis, raise questions relating to, e.g., the standard features of the genre and its conventions, the (likely) author of the text and his or her knowledge about the subject, and the sociopolitical pressure that he or she may have been under, in order to provide evidence of deception, intentionality and advantage. (Huckin 2002, 356–357)

Here the relevant public discourse is the ongoing discussion of the court in legal circles, a discussion which centers upon issues raised in cases challenging FISA's use. These cases, filed in the federal trial and appellate courts, involve the use of FISA evidence in the criminal context, and the reported (published) opinions that decide these cases constitute the existing body of federal law on the subject. As such, they are referred to collectively as "case law" and individually as "cases," terms that will be used here.

I developed a corpus of these cases that is drawn from two sources: (1) the cases listed in the United States Code Service, Lawyers Edition (USCS), which contains the official text of all federal statutes, together with annotations that list and summarize the cases interpreting each statutory section, and (2) the cases discussed in the annotation of FISA that appears in American Law Reports, Federal (ALR Fed), a widely used multivolume digest that summarizes and analyzes federal case law on specific individual topics.

The corpus includes all of the cases listed in the "Interpretive Notes and Decisions" following the text of each section of FISA in the USCS, as updated through April 2008, that raise issues relating to the constitutionality of the FISA Court and/or its decision-making process. It also includes all cases analyzed in 190 ALR Fed 385 (Dvorske 2005), as updated by the 2008–2009 Supplement issued September 2008, that raise either of the foregoing classes of issues. The combined total of 29 cases consists of 28 reported decisions of federal district or appellate courts plus the FISA Court of Review's 2002 published decision.

Having compiled this corpus, I performed a qualitative analysis of each case in order to identify the issues raised. I was guided in this process by the scholarly literature on the subject (e.g., Breglio 2003; Sloan 2001; Cinquegrana 1989), as well as news articles and commentary and my own legal background and experience as a litigator and appellate specialist. My close reading of these cases revealed distinct

patterns of topics and subtopics extending across the corpus and reflecting the concerns about the constitutional legitimacy of the court, its operations, and the legal framework enacted by FISA that represent the relevant public discourse on the subject.

Most of the cases raised multiple issues; the 29 cases yielded 95 issues, an average of 3.276 issues per case. I identified six categories of topics which, broadly stated, relate to the manner in which the court is constituted, the nature of its proceedings, whether FISA can be reconciled with the Fourth Amendment, the constitutionality of the PATRIOT Act amendment regarding the purpose of FISA orders, whether FISA violates the First Amendment, and whether FISA violates the Equal Protection Clause of the Fifth Amendment. These categories and their subcategories may be described as follows.

The first category of issues relates to how the court is constituted, and specifically, whether it meets the definition of a federal court stated in Article III of the US Constitution. Article III, Section 1, provides for lifetime tenure for federal judges with no decrease in compensation, whereas FISA appointments are for one nonrenewable 7-year term, during which they continue to serve as district court judges while receiving no additional compensation for essentially performing two jobs. In addition, Article III, Section 2, defines the jurisdiction of the federal courts as extending to "cases" or "controversies" (both of which are more extensively defined); however, FISA's jurisdiction is limited to issuing surveillance orders, and its proceedings are ex parte, involving only the government's representatives and not the target of the surveillance. This raises two related issues: whether the court decides "cases" or "controversies" and whether the nature of FISA proceedings results in a delegation of judicial power to the Executive Branch. Finally, the structure and jurisdiction of the court raise issues as to whether it violates the political question doctrine, which prohibits the courts from deciding political questions, or the Separation of Powers doctrine, which prohibits one branch of the federal government from exercising powers that are constitutionally vested in another branch.

The second category of issues relates to the exclusively ex parte (non-adversarial) and in camera ("in chambers," i.e., not in open court) nature of FISA proceedings and the impact of these procedures on the rights of criminal defendants when evidence obtained by use of a FISA order is introduced in a criminal trial. Specifically, the Fifth Amendment's Due Process Clause provides for notice of, and an opportunity to defend against, charges or evidence to be used in a criminal prosecution, and the Sixth Amendment provides criminal defendants with rights to counsel, the confrontation of witnesses (i.e., the right to examine and cross-examine) and a public trial; however, FISA's secret proceedings eliminate these rights.

The third category of issues relates to whether FISA can be squared with the Fourth Amendment, which ordinarily requires a warrant for searches of private property and which prohibits "unreasonable" searches. The numerous subtopics generated by this issue include the following: Is the warrant requirement applicable to foreign intelligence surveillance cases? Is a FISA order a warrant? Do FISA's standards meet the Fourth Amendment's probable cause requirement? Do FISA's standards meet the Fourth Amendment's particularity requirement? Do FISA's

standards meet the Fourth Amendment's reasonableness requirement? Is a FISA judge a "neutral magistrate" for Fourth Amendment purposes? Do FISA's standards preclude sufficient judicial scrutiny of the government's applications? Do physical searches (as opposed to electronic surveillance) under FISA violate the Fourth Amendment?

The fourth category of issues relates to the PATRIOT Act amendment to FISA, which broadened the language of the government's required certification in FISA applications from "*the purpose* of the surveillance is to obtain foreign intelligence information" to "*a significant purpose* of the surveillance is to obtain foreign intelligence information" (emphasis added), thus authorizing the use of FISA orders to obtain non-intelligence evidence for use in criminal investigations (see Breglio 2003, 196). The subtopics generated include whether this amendment violates the Fourth Amendment's probable cause requirement, and whether it violates the Fifth Amendment's Due Process Clause.

The fifth category of issues relates to whether FISA violates the First Amendment by infringing freedom of speech, and the sixth category of issues relates to whether FISA violates the Equal Protection Clause of the Fifth Amendment by its differing treatment of citizens and noncitizens. These two categories of topics are less frequently raised, and less extensively discussed and analyzed, than the previous four. My analysis will thus focus upon the first four categories.

31.4 Analysis

31.4.1 Understanding Intelligence Surveillance: A FISA Primer (www.uscourts.gov)

The first texts to be examined are among the materials posted on the federal government website of US Courts, www.uscourts.gov. The site contains detailed comprehensive information about the US federal court system and invites visitors to sign up to receive email updates on topics that are of interest to them and/or to subscribe to RSS feeds. A notice at the bottom of the site's home page states:

> **This page is maintained by the Administrative Office of the U.S. Courts on behalf of the U.S. Courts.**
>
> The purpose of this site is to function as a clearinghouse for information from and about the Judicial Branch of the U.S. Government.

The page includes a link labeled "Go to Court Map," which takes the visitor to a page displaying a map of the United States that shows the state names, boundaries and intrastate federal districts, and the geographic areas of the multistate federal circuits, beneath which is a list of links to the various federal courts and associated agencies. The FISA Court and FISA Court of Review are not included on either the map or the list, and there is no evidence of their existence on this page or the links thereto.

The site's home page also includes a link to the site's Educational Outreach page, which contains links to topics including "Understanding the Federal Courts." This link displays a page which describes the federal court system in some detail and lists the federal courts as including the US Supreme Court, the US Courts of Appeals, the US District Courts, the US Bankruptcy Court, the US Court of International Trade, the US Court of Federal Claims, the Military Courts, the Court of Veterans Appeals, and the US Tax Court. The FISA Court and FISA Court of Review are not included in this list or in the description of the federal courts.

Thus it is only by following a circuitous route through the Educational Outreach page's list of "Contemporary Topics" that the visitor, by clicking on a link that bears the nonspecific label "All Topics," is led to a page entitled "Contemporary Topic – Understanding Intelligence Surveillance: A FISA Primer," with additional links to pages describing the FISA Court and FISA Court of Review. Clicking on the first of these links, "What is FISA?" brings up a page entitled "A FISA Primer," which is examined below. Paragraph numbers have been added for convenient reference.

A FISA Primer

General Introduction

[1] One of the reasons that Congress enacted The Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C.A. §§ 1801 et seq., was to put in place checks and balances among the three branches of government in regard to domestic warrantless surveillance in the name of national security, a practice which had given rise to governmental abuse in the past.

[2] FISA created the Foreign Intelligence Surveillance Court (FISC), or the FISA Court, as it is popularly called. It is composed of 11 (previously seven) federal judges, selected by the Chief Justice to a non-renewable seven-year term. Its job is to review applications for governmental surveillance of persons within the United States whom the government suspects of having connections to foreign governments and/or terrorist organizations. A Foreign Intelligence Surveillance Court of Review also was established to review applications denied by the FISA Court.

[3] The primary purpose of FISA is to assist the government, specifically the Executive Branch, with gathering foreign intelligence, as opposed to evidence of criminal activity. Although intelligence operations often result in the discovery of evidence of crimes, this must be a secondary objective. Indeed, the FISA Court is instructed not to permit surveillance activities if the government's sole motivation is to use the surveillance for criminal investigative purposes.

[omitted material describing situations to which FISA is inapplicable]

Warrantless Wiretaps

[4] In 2005, news agencies reported that, in the wake of the September 11, 2001 terrorist attacks on the United States, President Bush authorized the warrantless surveillance of individuals within the United States whom the government had reason to believe were affiliated with foreign terrorists. Although he received criticism that this action violated both the Fourth Amendment (which prohibits unreasonable searches and seizures) and FISA, President Bush argued that he

has the inherent authority as Commander-in-Chief of the armed forces to authorize this action to protect U.S. citizens. As a result, a public discussion is underway in legal circles concerning the following questions:

What is the proper balance between preserving civil liberties and protecting national security in times of war and crisis; and

What is the proper role of each branch of government in authorizing warrantless surveillance during wartime?

Text 1: US Courts (www.uscourts.gov)

Here the text's opening paragraph states that Congress' purpose in enacting FISA was to "put in place checks and balances among the three branches of government in regard to domestic warrantless surveillance in the name of national security, a practice which had given rise to governmental abuse in the past." However, although the declared purpose of the text is educational, it does not define what is meant by "governmental abuse" and thus fails to mention the widespread infringements of the privacy interests of members of "dissident" groups, including civil rights activists and Vietnam War protesters (see Johnson 2004, 6–10; McAdams 2007, 2). Moreover, without this information, the paragraph is actually misleading, since the "abuse" referred to is the fact that the surveillance was aimed at persons whom the government had no reason to suspect (and in fact did not suspect) of being involved in foreign intelligence activities (Cinquegrana 1989, 806–807).

This paragraph also has the effect of suggesting that FISA *actually* acts as a check on the executive branch; however, this suggestion is refuted in the fourth paragraph, headed "Warrantless Wiretaps," which notes that media reports in 2005 revealed that, following September 11, 2001 (i.e., long after FISA was enacted), President Bush authorized domestic warrantless surveillance in the name of national security. Nevertheless, the potential conflict between the information contained in these two paragraphs is not discussed, and, instead, the description of Bush's actions is elaborated in a way that suggests that (1) his actions did not constitute "governmental abuse" and (2) were not inconsistent with FISA. Specifically, the use of the modifying phrase "in the wake of the September 11, 2001 terrorist attacks on the United States" acts to suggest that exigent circumstances called upon the President to take emergency action, providing a powerful justification for the argument attributed to him in the following sentence ("that he has the inherent authority as Commander-in-Chief … to authorize this action to protect U.S. citizens"), while preemptively invalidating the opposing position ("that this action violated both the Fourth Amendment … and FISA"). It thus presents a one-sided view (Huckin 2002, 354), and although the paragraph ends by noting that "a public discussion is underway in legal circles" regarding the appropriate balancing of civil liberties and national security and the role of each branch of government in authorizing warrantless surveillance, it does not provide any information about the issues which inform this discussion that would allow the reader to formulate an opposing view.

The second paragraph states that the court is composed of 11 (originally seven) federal judges appointed by the Chief Justice to serve a single 7-year term. It does not mention that judges appointed to the court continue to serve as district court

judges during their term on the FISA Court, and that they receive no additional compensation for presiding over FISA hearings, and thus fails to provide information that would point to a deviation from the Article III tenure-and-compensation provisions relative to federal judges.

The second and third paragraphs then state that the FISA Court's "job is to review applications for governmental surveillance," and that "[t]he primary purpose of FISA is to assist the government, specifically the Executive Branch, with gathering foreign intelligence…." Again, this (re)statement of the court's purpose implicitly negates the checks-and-balances function propounded in the first paragraph; however, the information necessary to reach this conclusion is not accessible to the uninformed reader, who will accordingly conclude that the statements are not contradictory. In addition, the "primary purpose" language of the third paragraph and the accompanying explanation—that obtaining evidence of criminal activity can be only "a secondary objective" of FISA surveillance—omit any discussion of the PATRIOT Act amendment and the massive controversy that ensued, leading to the government's first-ever appeal from a FISA Court ruling.

Readers interested in continuing after reading this page can click on the second link displayed at the top, "Foreign Intelligence Surveillance Court and The Court of Review," bringing up the following page, which provides additional information about the court's operations. Paragraph numbering has been added.

The Foreign Intelligence Surveillance Court and The Court of Review

[1] Another reason that Congress passed the Foreign Intelligence Surveillance Act of 1978 was to balance liberties and safety and enhance the ability of government to protect the citizenry from national security dangers while respecting privacy rights.

[2] This Act put an end to the practice of warrantless domestic wiretapping for national security reasons. It mandates that domestic "national security" wiretaps cannot be authorized without the approval of a specialized court created for this purpose, the Foreign Intelligence Surveillance Court (FISC).

[3] The FISC originally was composed of seven federal judges, selected by the Chief Justice of the United States to serve a seven-year, non-renewable term. The PATRIOT ACT expanded this number to 11 judges. At least three judges must reside within 20 miles of Washington, D.C. The Chief Justice designates one of these judges to serve as the Chief Judge of the Court.

[4] The purpose of the Court is to review applications for domestic surveillance of individuals the government believes pose a threat to national security. Requests for surveillance are made from various governmental intelligence agencies. They go to the National Security Agency (NSA), then to the Office of Intelligence Policy Review in the Department of Justice.

[5] The Department of Justice makes a recommendation to the Attorney General. If the Attorney General approves the request, the government asks the FISC to issue a warrant permitting surveillance activities to take place. These include both wiretapping (and other forms of electronic eavesdropping) and physical searches.

[6] The FISC meets in a room to review requests in the Justice Department and follows specific procedures. Only lawyers for the Department of Justice are allowed to appear before the Court. Person(s) under surveillance are not informed of the proceedings nor are they allowed to appear or be represented in the Court by a lawyer. When a legal proceeding involves only one party to a dispute, as in the FISC, it is called an ex parte (Latin: "from one party") proceeding.
[7] If the government's request for a warrant is declined, the government may appeal to the three-judge Foreign Intelligence Surveillance Court of Review. These are federal district and appellate court judges who, like the FISC judges, are appointed by the Chief Justice to a non-renewable, seven-year term. If this Court also declines the government's request for a warrant, an appeal may be taken to the U.S. Supreme Court.
[8] Although the Foreign Intelligence Review Court was established with the FISC in 1978, it rendered its first decision in 2002, in a case called *In Re Sealed Cases* (2002). With the exception of this one case, decisions of both the FISC and the Foreign Intelligence Court of Review have not been made public. To date, no FISA-related matter has been appealed to the U.S. Supreme Court.

Text 2: US Courts (www.uscourts.gov)

The first paragraph of this text references the opening paragraph of the previous page to expand on Congress' purpose in enacting FISA, stating that "[a]nother reason" that the statute was enacted was "to balance liberties and safety and enhance the ability of government to protect… national security… while respecting privacy rights." As was the case with the opening paragraph of Text 1, the phrasing of this paragraph suggests that FISA *effectively* balances civil liberties with public safety but omits any discussion of the privacy rights involved that would permit the reader to understand what is at stake or to evaluate the claim that the appropriate "balancing" has been achieved. The second paragraph then reiterates the claim that FISA "put an end to the practice of warrantless domestic wiretapping for national security reasons," a claim likely to confuse the reader who has just learned in paragraph 4 of Text 1 that warrantless domestic wiretapping for national security reasons was in fact authorized by President Bush.

The third paragraph repeats the information contained in Text 1 relating to the court's composition without further elaboration which would alert the reader to the Article III issues raised. The fourth paragraph repeats the description of the function of the court first stated in paragraph 2 of Text 1 and then states that "[r]equests for surveillance are made from various governmental intelligence agencies" without naming them or describing the circumstances that occasion such requests. Paragraph 5 then outlines the process that the government follows in applying for a surveillance order, which the text refers to as a "warrant" despite the controversy generated by the question of whether a FISA order actually constitutes a "warrant." The use of this term is, accordingly, deceptive, because it acts to conceal the considerable doubt over whether this label can constitutionally be applied.

The sixth paragraph describes the (unusual) nature of FISA Court proceedings and begins by stating that the court "meets in a room to review requests in the

Justice Department and follows specific procedures." This oddly worded sentence refers to the fact that, historically, FISA hearings were held in a room in the Justice Department, rather than in either a federal courtroom or the judge's chambers (office), the latter being the place where hearings that are closed to the public ordinarily are held. Because the Justice Department is a division of the Executive Branch, this location was not only unusual but problematic. However, the text omits any information that would alert readers to this fact, and its syntax suggests that the phrase "in the Justice Department" modifies "requests" rather than "room." Interestingly, although the court has recently moved to the District of Columbia's federal courthouse, due precisely to concerns that its location communicated a message of bias (Wilber 2009), this paragraph has not been updated to reflect the new location.

This same paragraph next describes the court's "specific procedures," stating that only the government's lawyers are present at hearings, and that targets of surveillance "are not informed of the proceedings nor are they allowed to appear or be represented in the Court by a lawyer." It then provides the following explanation: "When a legal proceeding involves only one party to a dispute… it is called an *ex parte* (Latin: 'from one party') proceeding." However, although the fact that this explanation is being offered hints at the unusual nature of these exclusively one-sided proceedings, the text provides no information that would alert the reader to the constitutional issues raised.

The seventh paragraph explains that the government may appeal denials of its applications to the Court of Review and describes how judges are appointed to that court; here again the text refers to the orders as "warrants" and also omits any information that would suggest the Article III tenure-and-compensation issues that are raised by the appointment process. The final paragraph begins, "Although the Foreign Intelligence Review Court was established with the FISC in 1978, it rendered its first decision in 2002, in a case called *In re Sealed Cases* (2002)." Considering that the source of this text is the Administrative Office of the US Courts, the sentence is remarkable for its misstatement of the name of the Foreign Intelligence Court of Review and of the case title, which is *In re Sealed Case* (not *Cases*). This paragraph omits any commentary on the highly unusual nature of the message conveyed, that is, that the court did not decide a single case in the first 23 years of its existence. It also states, again incorrectly, that no other decisions of the FISA Court or the Court of Review have been made public. In fact, the FISA Court's decision which was reversed by *In re Sealed Case* has also been made public,[8] as have two other decisions, one of the FISA Court and one of the Court of Review.

In these two texts, the government provides a simplified overview of the court that describes, in summary form, its purpose, composition and proceedings, and the steps that the government takes in preparing a FISA application. The descriptions are spare, almost totally lacking in detail, and thus largely omit any mention of the

[8] *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp.2d 611 (Foreign Intelligence Surveillance Ct. 2002).

problematic aspects of the court's operations and functions. Moreover, even when they are mentioned, no explanatory information is provided that would permit an uninformed reader to identify, let alone evaluate, the relevant issues. The texts thus promote a favorable view of the court that presents it as an effective check on (past) Executive Branch abuse, whose function is to "balance liberties and safety." In so doing, they fail to mention the recurrent constitutional questions that have been raised in a host of reported criminal cases in which FISA evidence has been used, even where the information that is provided directly implicates these issues. Thus, Text 1 states that the "primary purpose" of FISA is to review requests for foreign intelligence surveillance, and that "the discovery of evidence of crimes… must be a secondary objective" of a FISA order, but fails to note that this is no longer true, because the PATRIOT Act amendment to FISA replaced the required government certification that "the purpose" of the surveillance was to obtain foreign intelligence information with a certification that this was "a significant purpose" and describes the court's appointment process without referring to the Article III issues that the process raises. Similarly, Text 2 refers to the surveillance orders as "warrants" without mentioning that even the FISA Court of Review has questioned whether a FISA order is in fact a "warrant" for Fourth Amendment purposes[9] and, in reference to the court's proceedings, provides a definition of "ex parte," without commenting upon or explaining the constitutional issues that these one-sided proceedings raise.

Indeed, the only place in which any of these issues are raised is in paragraph 4 of Text 1, headed "Warrantless Wiretaps," which states that President Bush "received criticism" for authorizing warrantless domestic surveillance after 9/11, but argued that he had "the inherent authority as Commander-in-Chief… to authorize this action to protect U.S. citizens." The text then notes:

> As a result, a public discussion is underway in legal circles concerning the following questions:
>
> What is the proper balance between preserving civil liberties and protecting national security in times of war and crisis; and
>
> What is the proper role of each branch of government in authorizing warrantless surveillance during wartime? (Text 1, para. 4.)

However, these questions are too general to permit the uninformed reader to infer the specific issues to which they relate. These texts thus present a highly selective view of the court and its functions, raising the question of whether the author(s) intended to mislead or deceive visitors to the website, to the government's advantage. In considering this question, relevant factors include both the genre of the texts and the author's knowledge of the topic (Huckin 2002, 362).

The information that appears on the US Courts website is provided by the Administrative Office of the US Courts, which may be presumed to have extensive knowledge of, as well as access to, information about the federal courts, including the FISA Court and the Court of Review. Indeed, the site provides comprehensive

[9] *In re Sealed Case*, 310 F.3d at 741.

information about the federal courts, including an interactive map with links to individual courts, a list of links to various federal courts and agencies, and an overview entitled "About US Federal Courts," with a link to a page entitled "Understanding Federal and State Courts," which includes a more detailed description of the federal court system and the individual federal courts. However, none of these pages contains any reference to the FISA Court or the Court of Review—a fact that is itself deceptive and misleading. Thus, it is *only* by following the "All Topics" link on the site's "Educational Outreach" page that a visitor to US Courts will encounter *any* information about FISA or the FISA Court and Court of Review.

If the information in Texts 1 and 2 had been included in the court descriptions provided in "Understanding Federal and State Courts," it might be possible to argue that, in that particular context—that is, a summary overview of each of the federal courts—a description that presents the "received version" of the courts' function and operations is all that would be expected and is not intentionally deceptive. However, where the only information about the Court appears in the "Educational Outreach" section of the site, the declared purpose of which is to inform and educate the public, and where some of the controversies surrounding FISA and its implementation are hinted at (although not in a way that would allow the uninformed reader to understanding what was being conveyed), the government's silence on the topic must be seen as intentionally deceptive and manipulative.

31.4.2 Foreign Intelligence Surveillance Court (www.fjc.gov)

The third text to be examined appears on the website of the Federal Judicial Center, www.fjc.gov. The site's home page provides the following brief description of the center and the site's informational content:

> The Federal Judicial Center is the education and research agency for the federal courts. Congress created the FJC in 1967 to promote improvements in judicial administration in the courts of the United States. This site contains the results of Center research on federal court operations and procedures and court history, as well as selected educational materials produced for judges and court employees.

To the left of this paragraph are a number of links, the first of which is labeled "General Information about the FJC." Clicking on this link takes the visitor to a page headed "The Federal Judicial Center," which provides a more detailed description of the agency's functions and which summarizes its duties in the following bullet list:

- Conducting and promoting orientation and continuing education and training for federal judges, court employees, and others
- Developing recommendations about the operation and study of the federal courts
- Conducting and promoting research on federal judicial procedures, court operations, and history
- (www.fjc.gov)

However, the most prominent feature of the page is a second list of links which is centered on the page and is printed in larger type; the links include "Publications & videos," "International judicial relations," "Federal judicial history," and "Educational programs & materials." Clicking on "Federal judicial history" brings up a page containing a list of the "Courts of the Federal Judiciary." Those listed include the US Supreme Court, the US Courts of Appeals, the US District Courts, the US Circuit Courts (now abolished), and 13 individually listed "Courts of Special Jurisdiction," the twelfth of which is the Foreign Intelligence Surveillance Court. Clicking on the link to "Foreign Intelligence Surveillance Court" brings up the following text. Paragraph numbers have been added.

Foreign Intelligence Surveillance Court

[1] Congress in 1978 established the Foreign Intelligence Surveillance Court as a special court and authorized the Chief Justice of the United States to designate seven federal district court judges to review applications for warrants related to national security investigations. Judges serve for staggered, non-renewable terms of no more than seven years, and must be from different judicial circuits. The provisions for the court were part of the Foreign Intelligence Surveillance Act (92 Stat. 1783), which required the government, before it commenced certain kinds of intelligence gathering operations within the United States, to obtain a judicial warrant similar to that required in criminal investigations. The legislation was a response to a report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee"), which detailed allegations of executive branch abuses of its authority to conduct domestic electronic surveillance in the interest of national security. Congress was also responding to the Supreme Court's suggestion in a 1972 case that under the Fourth Amendment some kind of judicial warrant might be required to conduct national security related investigations.

[2] Warrant applications under the Foreign Intelligence Surveillance Act are drafted by attorneys in the General Counsel's Office at the National Security Agency at the request of an officer of one of the federal intelligence agencies. Each application must contain the Attorney General's certification that the target of the proposed surveillance is either a "foreign power" or "the agent of a foreign power" and, in the case of a U.S. citizen or resident alien, that the target may be involved in the commission of a crime.

[3] The judges of the Foreign Intelligence Surveillance Court travel to Washington, D.C., to hear warrant applications on a rotating basis. To ensure that the court can convene on short notice, at least one of the judges is required to be a member of the U.S. District Court for the District of Columbia. The act of 1978 also established a Foreign Intelligence Surveillance Court of Review, presided over by three district or appeals court judges designated by the Chief Justice, to review, at the government's request, the decisions the [sic] Foreign Intelligence Surveillance Court. Because of the almost perfect record of the Department of Justice in obtaining the surveillance warrants and other powers it requested from the Foreign Intelligence Surveillance Court, the review court had no occasion

to meet until 2002. The USA Patriot Act of 2001 (115 Stat. 272) expanded the time periods for which the Foreign Intelligence Surveillance Court can authorize surveillance and increased the number of judges serving the court from seven to eleven.

Text 3: Federal Judicial Center (www.fjc.gov)

This text includes much of the same information about the court and its operations that appeared in Texts 1 and 2 and displays similar patterns of omission. Thus, paragraph 1 explains that FISA judges "serve for staggered, non-renewable terms of no more than seven years" without reference to the Article III tenure-and-compensation issues raised by this limited appointment, and describes FISA's enactment as coming in response to "allegations of executive branch abuses" which remain completely unspecified. Similarly, paragraph 3 notes that prior to 2002, the FISA Court of Review had never met, a fact which the text attributes to the "almost perfect record" of the Justice Department in obtaining the surveillance orders that it requests, while failing to mention that, due to the ex parte nature of the proceedings, the government's applications are *unopposed*. However, inasmuch as the issues raised by these omissions have been discussed in detail in the previous section, the present analysis will focus on one particular feature of this text: its use of the word "warrants" to refer to the FISA Court's orders. In the following analysis, uses of the word in the text will be boldfaced.

The word "warrant[s]" appears six times in the 432-word text and is the key concept discussed in each of its three paragraphs. Indeed, it appears that the whole purpose of the text's description of the court is to establish that FISA orders are judicial warrants. Paragraph 1 begins by stating that the FISA Court was created by Congress "as a special court. . .to review **applications for warrants** related to national security investigations." The text explains that the court was established by FISA, "which required the government, before it commenced certain kinds of intelligence gathering operations within the United States, to obtain **a judicial warrant** similar to that required in criminal investigations," and adds that, in so doing, Congress was responding to the Supreme Court's "suggestion," in *United States v. United States District Court*, "that under the Fourth Amendment **some kind of judicial warrant** might be required to conduct national security related investigations." The text then continues to refer to FISA orders as "warrants," explaining that "**[w]arrant applications**… are drafted by attorneys in the General Counsel's Office at the National Security Agency" (paragraph 2), and that FISA Court judges travel to Washington on a rotating basis "to hear **warrant applications**" (paragraph 3) and notes that, due to the unparalleled success of the Justice Department in obtaining "**surveillance warrants,**" prior to 2002 (i.e., when it decided *In re Sealed Case*, which is not mentioned by name), the Court of Review had never convened.

Taken together, these statements have the effect of declaring that FISA orders are judicial warrants, while implying that FISA's procedures, as those devised by Congress at the Supreme Court's behest, are in fact constitutionally sufficient to meet that definition, thus illustrating "the annunciative and constitutive capacity" of

political discourse (Dunmire 2005, 483). Moreover, they do so without discussing the continuing controversy that surrounds this issue and thus conceal the questionable nature of the impression that they convey. In particular, the text includes only an elliptical reference to *In re Sealed Case* and accordingly fails to mention that, in that case, the Court of Review conceded that "a FISA order may not be a 'warrant' contemplated by the Fourth Amendment."[10] This raises the question of whether the text's use of the word "warrant" without disclosing this information is manipulative and intentionally deceptive. Once again, factors relevant to this question include the genre of the texts and the author's (presumed) knowledge of the topic (Huckin 2002, 362).

As was the case of the US Courts website, the Federal Judicial Center website is maintained by the agency itself. As the agency responsible for the continuing education and training of federal judges and court employees, whose duties include conducting research on federal judicial procedures, court operations, and history, it is officially constituted as a repository of knowledge on those topics. Yet although the educational mission of the agency is primarily focused on a specialist audience, the information that is publicly available on this site is designed for public use, rather than for use specifically by judges and court personnel. This being the case, it might be argued that the use of the word "warrant" to describe FISA orders is intended to facilitate the understanding of lay visitors to the site by analogy to criminal warrants and is not intentionally deceptive. However, given *In re Sealed Case*, this argument must fail: Where no lesser an authority than the FISA Court of Review has expressed doubt about the appropriateness of labeling FISA orders "warrants," the text's use of this word while omitting mention of any of the relevant information that would allow a reader to understand and evaluate the issues that it raises is intentionally deceptive and manipulative.

31.5 Discussion

Political discourse has a persuasive function; accordingly, its formal structure is primarily argumentative (Van der Valk 2003, 318). However, arguments are structured both by what is said and by what is left unsaid. Thus omitting certain subjects can be an effective way of influencing public opinion about an issue (Huckin 2002, 347). Selective omissions may be used to give added prominence to the information provided (Huckin 2002, 354) or to create distortions where recipients would receive a different impression if the omitted information were revealed. In either case, they serve as persuasive strategies that are designed to manipulate processes of comprehension so that "preferred models" will be built by the recipients themselves (Van Dijk 1993, 264).

Textual omissions, which are by definition *absent* from the text, are difficult to identify (Huckin 2002, 353), and it is even more difficult to establish their omission

[10] 310 F.3d at 741.

as intentional. This chapter has applied Huckin's model of manipulative silence to the government's descriptions of the FISA Court on two federal government websites, in order to identify the relevant omissions from these texts. In the foregoing analysis, I demonstrate that the texts provide an intentionally partial and one-sided description of the court that (1) omits specific relevant information known to the authors, (2) mentions but does not explain other relevant information, and (3) uses inaccurate terms while omitting information that would serve to clarify their meanings.

This description is manipulative in presenting an inaccurate version of the court that is constructed as authoritative by virtue of its source: the agencies responsible for providing information about the federal courts (cf. Van Leeuwen 2007, 94–95). Thus, visitors who have little or no prior knowledge of the FISA Court, and who access these sites in order to obtain "official" information about the court and its operations, are primed to accept such information as accurate and complete. As a result, by their omission from these texts, problematic aspects of the court's structure and operations—such as the tenure-and-compensation issues raised by the judges' limited terms, the PATRIOT Act amendment and its expansion of FISA's scope, the nature of the agencies that submit surveillance applications to the court (e.g., the National Security Agency[11]), and the highly unusual nature of its location and proceedings—are effectively concealed (Huckin 2002, 366).[12]

Similarly, the failure to explain other relevant information both avoids difficult questions (Huckin 2002, 366) and permits the authors to exploit the resulting vagueness to manipulate recipients' interpretations (cf. Hobbs 2008, 50). The opening of Text 1 announces that the purpose of the court was to remedy "governmental abuse," a term that is not defined. However, the word "abuse" carries a highly negative connotation. Accordingly, the vagueness of the term acts to shift the focus of the text from the (undefined) abuse to the government's (specified) remedial action, while the negative connotation casts the government in a positive light (cf. Van Dijk 1993, 264), for surely a government that admits abuse will not repeat it. This impression is bolstered by the text's incorporation of President Bush's justification of the use of warrantless surveillance following September 11, 2001. By implicitly endorsing the President's claim that "he has the inherent authority as Commander-in-Chief of the armed forces to authorize this action to protect U.S. citizens," the text

[11] The National Security Agency was established by President Truman in 1952 to serve as the primary agency responsible for intercepting and reviewing global "communications intelligence," including signals and information transmitted via telephone, facsimile, high-frequency and microwave radios, communications satellites, undersea cables, and the Internet (Sloan 2001, 1470–1474). A secretive agency whose very existence is unknown to most Americans, it is often referred to by insiders as "No Such Agency," the nickname derived from its acronym, NSA.

[12] The effect of the omitted information may be illustrated by the reaction of a law professor who, presented with the information that FISA Court judges are appointed for a nonrenewable 7-year term, immediately asked how it could be an Article III court where its judges are denied life tenure (S. Pager, personal communication 2009).

constructs his action as both legal and a moral necessity (cf. Van Leeuwen 2007, 96–97), thus demonstrating "the utility of interpretations" in resolving doctrinal disputes (Chomsky 1999, 146; see also Allot 2005, 148).

The same strategies may be seen in the opening of Text 2, which explains that Congress' purpose in enacting FISA "was to balance liberties and safety and enhance the ability of government to protect the citizenry from national security dangers while respecting privacy rights," but does not define or discuss the "privacy rights" to which it refers. It thus avoids the necessity of enumerating the privacy interests that are likely to be infringed in the course of this "balancing" (Huckin 2002, 366), while invoking the discourse of moral value to present the government as the benevolent protector of the rights and safety of American citizens (Van Leeuwen 2007, 97).

The third strategy—the use of inaccurate terms while failing to provide information that would serve to clarify their meanings—is most clearly illustrated by Text 3, the description of the FISA Court posted on the Federal Judicial Center's website. The text opens with the statement that the court was established by Congress "to review applications for warrants related to national security investigations." It then offers the apparently explanatory information that the court was established by FISA, which required the government "to obtain a judicial warrant similar to that required in criminal investigations" prior to conducting foreign intelligence surveillance; and that Congress was acting upon the suggestion of the Supreme Court "that under the Fourth Amendment some kind of judicial warrant might be required to conduct national security related investigations." The word "warrant" is then used to refer to FISA orders in the remainder of the text, conferring legitimacy by implying that FISA orders are indistinguishable from the warrants that are issued in criminal investigations (cf. Van Leeuwen 2007, 104).

However, the word "warrant" does not appear in the Foreign Intelligence Surveillance Act, which refers exclusively to the FISA Court's "orders." Yet, because Congress was obviously free to make use of the term adopted by the Supreme Court in suggesting that judicial oversight should be required, its failure to do so implies that it found the word inappropriate to procedures enacted in FISA. Moreover, any remaining doubts about this issue were conclusively resolved when, in its inaugural opinion in *In re Sealed Case*, the FISA Court of Review conceded that a FISA order may not meet the definition of a warrant. Considering the fact that *In re Sealed Case* was an unqualified endorsement of procedures that even the FISA Court had labeled unconstitutional, the Court of Review's failure to endorse this term is striking. And because the Court of Review was created for the purpose of resolving legal issues relating to the application of FISA, its interpretation stands as the official and authoritative statement of the law on this particular issue.

It is therefore clear that its use of the word "warrant" to describe FISA orders is inaccurate and incorrect, and that the text's use of the word without providing an explanation that discloses the Court of Review's ruling on the issue is intentionally manipulative and deceptive, an example of what Allot, citing Chomsky, refers to as the misuse of concepts in the manufacture of consent (Allot 2005, 147–148). Allot presents a pragmatic account of misused concepts in political discourse and

discusses a number of models used to analyze such discursive strategies, one of which, the code-word model, is particularly applicable here. This model proposes that the meaning of a well-known word is broadened by politicians (or by other elites, including the media) to incorporate situations or concepts that ordinarily would be excluded from its definition, resulting in "slippage" between the normal and "expert" uses of the word (Allot 2005, 153), which permits it to be used as a euphemism to disguise aspects of a situation that might be deemed objectionable if more clearly stated. Orwell famously argued that such abuse deliberately creates meaningless words which can be used with the intent to deceive: "That is, the person who uses them has his own private definition, but allows his hearer to think that he means something quite different" (Orwell 1961, 343). In some cases, including this one, such words have the additional advantage of announcing themselves as technical terms which are exempt from lay interpretations that differ from their "official" meanings (Hobbs 2008, 38).

Nevertheless, as Dunmire notes, even seemingly monologic texts contain traces of "alternative realities" that challenge the privileged version of the text (2005, 487). For example, in this case, the explanatory information included in the text's first paragraph is significant for the qualifying language used in connection with the word "warrant": "a judicial warrant **similar** to that required in criminal investigations"; "**some kind of** judicial warrant might be required." To the informed reader, these formulations may be interpreted as hedges that acknowledge the Court of Review's admission (cf. Hobbs 2003, 460–461); however, these cues are available only to legal professionals who are familiar with FISA and with the Court of Review's decision.

31.6 Conclusion

The FISA Court has been described as "the strangest creation in the history of the federal Judiciary," a court that is "like no other" (Bamford 1982, 368, 370; see also Breglio 2003, 188), and, indeed, many of the ways in which it differs from other courts would be readily apparent to those with no legal training or expertise. Thus, given their stark divergence from the basic courtroom procedures that are familiar to all Americans by virtue of the media, it is likely that many people would find these differences problematic—that is, if they were generally known. The fact that they are not is due to the secrecy that surrounds the court and shields it from public scrutiny.

Nevertheless, the court is occasionally the subject of media reports, and, perhaps in response, the government in recent years has provided information about the court on government websites, including those examined here. Although these websites contain some factual inaccuracies, the deceptive impressions that they convey are largely communicated by the omission of information about the problematic aspects of the court and its operations. These sites thus present the court as an otherwise unremarkable federal court that is distinguished only by the subject

matter of its cases. By encouraging discussion of the court while limiting the scope of the discussion to permissible topics (cf. Chomsky 1999, 147), these texts promote a sanitized view of the FISA Court and its operations that conceals the serious and recurrent questions that continue to be raised about the constitutionality of its proceedings.

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Part VII
Law and Popular Visual Media: "Case Studies"

Chapter 32
Seeking Truth and Telling Stories in Cinema and the Courtroom: *Reversal of Fortune's* Reflexive Critique

Cynthia Lucia

Abstract Based on attorney Alan Dershowitz's *Reversal of Fortune*, Barbet Schroeder's 1991 film centers on the attorney's successful attempt to win an appeal for Claus von Bülow, who was convicted of twice attempting to murder his wife Sunny by insulin injection. Among the first to be televised, the 1982 trial drew extensive media coverage—much of it sensational, given the von Bülows' social position and enormous wealth. The film's interest lies in posing sometimes unanswerable questions about character, motive, and the law. Giving voice to the comatose Sunny through flashbacks and voice-over narration, and creating a complex interplay of differing versions of events, the film reflexively questions the very nature and processes of understanding truth. The film is, in effect, two movies in one: a relationship narrative, centered on Sunny and Claus, that departs from conventional form, and a legal process narrative, centered on Dershowitz, that strictly adheres to classical storytelling conventions while also offering a critique of those conventions. This structural interplay further allegorizes the adversarial configuration of Western law that, the film implies, closes out dimensions of truth that lie in between, a notion the film foregrounds by calling attention to Sunny's body and her mind as objects of legal dispute that resist unambiguous interpretation. Through the intersecting lines of narrative and legal theories, this essay analyzes *Reversal of Fortune's* critique of storytelling conventions as a means of accounting for, "containing," or accessing truth—whether in the movie theater, the interrogation room, or the courtroom.

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32.1 Storytelling, Reflexivity, and the Law

The dark irony of her death in December 2008 may or may not have registered somewhere within Sunny von Bülow as she drew her last breath, but it would not have escaped her comatose counterpart in the 1990 film *Reversal of Fortune*. A film about the trials of her husband Claus, accused of twice attempting to murder her, and the tribulations of Sunny herself, weighed down by her wealth and her uncertain sense of identity apart from it, *Reversal of Fortune* delights in the sly humor that only the idle rich can provide as we try to imagine their daily lives. To understand Sunny's coma, the character Claus proclaims, "You have to understand that Sunny loved Christmas." Master of the non sequitur, Claus may have been onto something after all, considering that Sunny's death on December 6, 2008, occurred so close to Christmas—"27 years, 11 months and 15 days after she was found unconscious on the floor of her bathroom in her mansion in Newport, R.I.," *The New York Times* obituary helpfully explains (Nemy 2008). The fact that she would fall into a decades-long coma and eventually expire during her favorite season of the year lends a certain symmetry and resonance, perhaps to her real life and death, but most certainly to the film that reimagined her life and the circumstances leading to her unhappy and gradual demise—whether as a victim of Claus, suicide, an inexplicable medical condition, or perhaps a combination of all three.

Based on the Alan Dershowitz book by the same title, Barbet Schroeder's film centers on Dershowitz's successful attempt to win an appeal for von Bülow, who, in 1982, was convicted of twice attempting to murder his wife by insulin injection. Although evidence was circumstantial, the Newport, RI, jury was convinced by the prosecution's case that established compelling motives—an ultimatum delivered by von Bülow's mistress that she would end their affair unless he divorced Sunny and the 14 million dollar inheritance he would stand to lose upon a divorce. In December 1979, Sunny's daughter and son by a former marriage became suspicious of Claus, who was slow to summon doctors when their mother fell into a coma from which she recovered the following day. In December 1980, Sunny fell into a second irreversible coma, remaining "persistent vegetative," as Nicholas Kazan's screenplay defines the state in which she was to live for so many years to follow. The Rhode Island Supreme Court overturned von Bülow's conviction in 1984, on the grounds that evidence had been improperly gathered and admitted and that the prosecution had withheld exculpatory material. In the 1985 retrial, a Providence, RI, jury acquitted von Bülow, finding reasonable doubt in, among other details, Sunny's possible suicide attempt by aspirin overdose several weeks before her second coma.

Among the first to be televised, the 1982 trial drew extensive media coverage—much of it sensational given the gripping details of passion, jealousy, family bickering, possible murder, or suicide, not to mention the von Bülows' social position and enormous wealth. At the time of the film's 1990 release, most viewers would therefore have been familiar with the people and events represented. Many very likely walked into the movie theater with firm opinions about von Bülow's guilt or

innocence, opinions that the film—starring Glenn Close as Sunny, Jeremy Irons as Claus, and Ron Silver as Dershowitz—sought to challenge.

Focusing on the few months when Dershowitz and his team of attorneys and law students construct their appeal, the film poses largely unanswerable questions about character, motive, and the law. Through giving life and voice to the comatose Sunny in the form of flashbacks and, most poignantly, voice-over narration, and through its structure creating a complex interplay of versions of events, the film self-reflexively questions the very nature of truth and access to the truth—both its own and the law's. The film is, in effect, two movies in one: a film about Sunny and Claus presented in unconventional form—with multiple narrators and flashbacks nested within flashbacks—and a film about Dershowitz and the legal process, adhering strictly to classical narrative film conventions. These parallel but very differently structured narratives form a consciously reflexive commentary on storytelling—a staple of both the legal process and mainstream film—as a means of accessing truth. Playing the unconventional structure of the von Bülow relationship-centered narrative against the conventional structure of the Dershowitz law-centered narrative, *Reversal of Fortune* exposes the limitations of storytelling conventions, suggesting that, like traditional Hollywood narrative, legal storytelling is invested in reconstructing desire or motive, in building neatly interlinking chains of cause and effect that, in linear fashion, lead to an unambiguous resolution in the form of a verdict that aligns with the truth. *Reversal of Fortune* suggests that conventional storytelling—whether in the movie theater, the interrogation room, or the courtroom—are inadequate as a means of accounting for or "containing" the complexities and contradictions that form the truth.

This structural interplay, moreover, allegorizes the adversarial structure of Western law which, the film implies, closes out dimensions of truth that lie in between—a construct given greater resonance through the voice of the comatose Sunny whose existence hangs somewhere in between life and death, reality and dream. Foregrounding this notion of the "in between," the film assigns its first spoken words to Sunny. "This was my body," we hear in voice-over, as she lies inert on a hospital bed. A blue lens filter, the hypnotic rhythm of her respirator, and the floating Steadicam infuse the scene with an eerie feeling of detachment, of the "in between." We see the body but it reveals nothing; we hear the voice but it does not exist. The past-tense verb applied to the present-tense image and the words themselves hint at the complications of accessing a truth that lies in between. By calling attention to Sunny's body (and her mind) as an object of legal dispute—one that resists all attempts by the law to use it as a source of unambiguous truth—the film also draws reflexive attention to the relationship between the law, with its reliance on the visible as evidence, and film, among the most intensively visual of the arts. Revolving on a complex interplay of perceptions of presence and knowledge of absence, the film image takes on multiple meanings that accrue over time. Like Sunny's body, the visible, the physical, and their representation as image tend to complicate more than they clarify in a search for truth.

With his roots as a filmmaker in Europe before directing a number of US features including *Barfly* (1987), *Single White Female* (1992), and *Desperate Measures* (1998), Barbet Schroeder juxtaposes the Dershowitz and von Bülow narratives—one in tune

with Hollywood convention and the other unconventionally European.[1] The film creates multiple layers of reflexive commentary overtly aimed at the legal process while implicitly directed toward conventional Hollywood narrative structure, foregrounding the requirements and, indeed, the limitations imposed on narrative by both the legal institution and the Hollywood industry. Undermining the invisible, seamless structure of conventional storytelling through the less conventional von Bülow narrative, while simultaneously offering and drawing attention to conventional forms through the Dershowitz narrative, the film exposes the generally hidden template that structures stories for mass consumption as one that, more often than not, forecloses ambiguity, multiple meanings, and open-ended conclusions. Whether the public "audience" is defined as movie viewers, a jury of peers, or perhaps even a panel of judges, the requirements remain rigidly and hegemonically in place: a character-centered story must establish clear motivation (or motive, in the legal sense); obstacles in the path of character desire build conflict; neatly linking chains of cause and effect formulate and trace the journey toward a goal, with conflict functioning both to intensify and distract, forcing excursions afield that formulate secondary stories meant initially to complicate or corroborate but ultimately to reinforce and "loop" back into the primary narrative. Most importantly, structuring (or reconstruction) of cause-effect relations provides a logical framework for defining motivation or motive—how it can be compromised or thwarted and how particular actions and reformulated motivations can arise from and contribute to frustrated or sharpened desire. Chronological ordering presents (or represents) events as they most plausibly would or did occur, allowing for further clarity in determining motive, identifying obstacle, and elucidating cause/effect actions and reactions, all leading to an unambiguous conclusion—in Hollywood known as the hopeful, if not entirely happy ending; in law known as the verdict that, at its best, is commensurate with *the* truth.[2]

The similarity between Hollywood and legal process story construction is strikingly clear when Bennett and Feldman, in *Reconstructing Reality on the Courtroom*, point out that "stories 'develop' the relations between acts, actors, and situations from some point at which the action and the situation might have had multiple definitional possibilities to a point at which a dominant central action clearly establishes a significance for the situation and vice versa. This is what is often called the 'point' of the story (47)." In juxtaposing the Dershowitz "point"-driven legal narrative with the Sunny-and-Claus emotion-driven relational narrative—with its departure from conventional Hollywood structure and therefore its multilayered "definitional possibilities" that resist reduction to a "point"—*Reversal of Fortune* draws explicit attention to the similarities shared by the Hollywood and legal process

[1] Barbet Schroeder was born in Tehran in 1941, lived in Colombia as a child, and in France as a teenager, where he later started a production company and worked with well-known filmmakers of the French New Wave (Sklar 1991, 4). He has made films produced in France, Germany, and the USA.

[2] Bordwell-Thompson (2010) provides a concise outline of classical Hollywood structure upon which I draw and slightly modify (see *Film Art: An Introduction* 102–104).

approaches to narrative construction. Implicitly, the film also suggests the underlying hegemonic processes served by this dominant form of storytelling that overrules alternative possibilities in favor of a singular mass emotion or conclusion designed to confirm viewer/public faith in a system—whether in Hollywood's capacity to deliver generally pleasing, and even at times edifying forms of entertainment, or the law's capacity to deliver generally satisfying, and sometimes illuminating, forms of justice. Identifying the "master purpose" of the film industry as profit-driven and of the legal institution as power-driven—centered on "keep[ing] existing power structures in place… [to] postpone the final stages of social chaos"—David A. Black (1999) in *Law in Film* explains that only when hidden beneath an "ostensible function" can the "master purpose" be effectively achieved; in film, that ostensible function is to entertain whereas in law, that function is to dispense justice (48). By reflexively drawing attention to the storytelling process, *Reversal of Fortune* exposes the ostensible function of both film and law as just that and thus, to some extent, also exposes the respective master purpose buried beneath. Films about law are by their very nature reflexive since "the (real) courtroom was *already* an arena or theater of narrative construction and consumption and so was the movie theater," as Black claims; therefore, "the representation of court proceedings… brought about a doubling up, or thickening, of narrative space and functionality" (2). With that in mind, *Reversal of Fortune's* foregrounding the process of narrative construction offers an especially interesting commentary on legal storytelling, as Black points out:

> As it [the legal institution] turns to its ostensible function to provide a decoy from its master purpose, its committedness to the production of narratives must go unconfessed, because that committedness cannot easily be reconciled with the claim that the effect of legal process is the administration of justice. But whereas the generation of narrative is compatible with the ostensible function of cinema, it is not compatible with the ostensible function of the law. (48–49)

Through his deft reliance on non sequitur and equivocation, screenwriter Nicholas Kazan (son of American filmmaker Elia Kazan) illuminates a rigid legalistic narrative framework and its *inability* to contain Claus's story. The seemingly honest contradictions and ambiguity within Claus's narrative rapidly erode chains of cause and effect and defy neat patterns of logic. Kazan draws many of the defense-team questions and Claus's responses faithfully from Dershowitz's nonfiction book and often quotes Claus verbatim from media interviews. Placed in slightly reformulated contexts, enhanced by Schroeder's visual choices, and heightened by Jeremy Irons' Academy Award-winning performance that delights in drollery, the words now are peppered with subtle, dark humor. Playing the shadowy, witty Claus against an all-too-earnest Dershowitz—prompting Robert Sklar gleefully to entitle his article on the film *Saint Alan and the Prince of Perversion* (5)—*Reversal of Fortune* effectively opens gaps between truth and legal justice and between justice and law. (Dershowitz as near-deity in part may be a function of his son Elon's role as coproducer of the film but also appears to grow from Kazan's perception of Dershowitz as "basically such a good guy" that as screenwriter he had to invent character flaws, like a sometimes explosive temper, to make Alan dramatically appealing to audiences [Kazan 2000, DVD Commentary].) Through the voice-over narration of

Sunny von Bülow (and the unhurried, deliberate enunciation of Glenn Close, lending the performance an ethereal air) and the distinctive visual treatment setting Sunny's narration apart, Schroeder and Kazan indirectly articulate the generally hidden master purpose behind both the law and the cinema.

32.2 The Saint and the Prince

Although the Dershowitz book provides a detailed discussion of the first trial convicting Claus of twice attempting to murder Sunny by insulin injection and the second trial acquitting Claus on both charges, as well as the period between the trials when Claus hired Dershowitz to discover and argue grounds for an appeal, the main narrative action of the film concentrates on the period between the two trials as Dershowitz assembles a defense team composed of several of his Harvard law students, former students now practicing law, and Rhode Island attorney Peter MacIntosh (a character based on the former Rhode Island public defender John "Terry" MacFayden who worked with Dershowitz on the case). Dershowitz's first-person narrative voice in the book is crisp and informal ("… like most criminal lawyers, I had my opinions… two things seemed clear: first, that von Bülow was guilty; and second, that he would get off. The reason for my second conclusion had nothing to do with either the evidence or the brilliance of his defense. It was based on my assessment of the response to von Bülow as a person by the Newport townies [48–49]."). He admits to having had little detailed knowledge of the case initially and thus takes the reader along through every step of the process as he searches for motives, examines evidence, and gathers witnesses—in other words, as he structures the legal narrative and then restructures it when he comes to believe in Claus's innocence. With a New York Jewish background similar to that of Dershowitz, actor Ron Silver skillfully captures the Dershowitz voice of confident strategist who is both amused and intrigued by the chasm that separates him from the European aristocrat he's defending ("I noticed immediately one striking difference between von Bülow's home and mine: the Fifth Avenue apartment had no aromas of home cooking, no smells, no odors. There was no sense that his home was lived in, loved in, eaten in, slept in." [50]). The shrewd casting of Silver as Dershowitz playing against Jeremy Irons as Claus effectively replicates this chasm through the performers' divergent backgrounds and approaches to acting: Silver was trained at New York's HB Studio where, when she taught there, Uta Hagen (cast as Sunny's maid Maria in *Reversal of Fortune*) and other instructors adapted aspects of the "internalizing" method; the British-born Irons was trained in more formalized "external" approaches to acting at the highly competitive Bristol Old Vic Theatre School founded by Sir Laurence Olivier.

The law-centered narrative with Alan Dershowitz as its protagonist forms the frame and major through-line of the film but is itself framed by a prologue and epilogue filtered through the perspective and voice of the comatose Sunny, whose narration, sometimes accompanied by shifting time and place, interrupts the Dershowitz narrative at key points throughout, arresting the goal-driven, linear

movement of Alan as good-guy hero in dogged pursuit of a goal shaped and defined by the parameters of the law. Although first-person narration in the book belongs to Dershowitz alone, narrative privilege in the film is reserved most powerfully for Sunny, whose "in-between" state implies a level of omniscience no other character can attain—neither Claus, when recounting past events, nor Dershowitz, when briefly theorizing, near the end, what *may* have led to Sunny's final coma. Embedded within the Dershowitz narrative are additional disruptions to linearity arising as Claus narrates past events when prompted by questions Alan or his assistants pose. Expressive of his enigmatic character, Claus's narration is accompanied by flashbacks, sometimes nested within additional flashbacks that freely move back and forth in time.

The Dershowitz narrative is punctuated by references to time—drawing reflexive attention to its linearity and its bound and grounded nature—and, unlike the narratives provided by Sunny or Claus, it can neither escape time nor can it access knowledge beyond that which physical, visible evidence supplies. This entrapment by time, space, and imperfect knowledge, a state the viewer shares in real life, is ironically articulated by the comatose and presumably untethered Sunny who, in the film's final narration, addresses the viewer: "This is all you can know, all you can be told. When you get where I am, you know the rest." Sharply in contrast is the countdown to the appeal deadline that Dershowitz and his team must meet; the characters often refer to the time remaining to complete the 100 pages required: 45 days, 38 days, 7 days, 4 days, and finally 2 hours, during which Peter MacIntosh must drive the brief to Providence, RI, from the Dershowitz home in Cambridge, MA—a home that also serves as an impromptu 24/7 law office with various assistants in residence during the time available. To further establish Alan's real-world, regular-guy credentials, in dramatic distinction from Sunny's limbo-like existence, the film cuts abruptly from her ethereal opening narration—shot with a deathly cold, blue lens filter and ghostly steady cam hovering above her hospital bed (the visual tropes always reserved for Sunny)—to jittery hand-held close-ups of a dribbling basketball pounding the pavement of a driveway, our first introduction to Alan, whose face we don't see for a few seconds. The staccato slapping of the ball and random competitive shouts establish the rapid-fire pace of his reality in contrast to the rhythmic shush of Sunny's respirator and the dispassionate, measured cadence of her narration.

Further establishing the hear-and-now world of Alan are the editing patterns which, as Barbet Schroeder (1991) points out, imply that Alan is playing against someone, yet that person, once we are given a wider shot, turns out to be himself (Schroeder 2000, DVD commentary). This strategy in many ways establishes his dual, oppositional function in the law-driven narrative—both as a lawyer concerned with winning his client's case and an investigator who wants to discover the truth. In regard to Alan's investigative, truth-seeking function, screenwriter Kazan points out that the truth "is what we all want, and what we, as movie goers, want" (Kazan 2000, DVD commentary), thus acknowledging the need to align viewers with Alan and acknowledging viewer (and public) desire for some sense of closure that aligns law with truth and truth with justice. This desire, foregrounded in the Dershowitz narrative, is rooted in the idealized vision of law held by the general public and perpetuated, for the most part, by the mainstream media, including conventional Hollywood films, which tend

to view law as a source of truth and justice, with exceptions, in reality and in film, cast as aberrant rather than typical of the system, as critical legal theorist David Kairys points out (Kairys 1990, 2). Kazan and Schroeder realize and comply with the public desire for a vision of law as defined by its ostensible function, but they do so only to a point, presenting us ultimately with characters, composition, and mise-en-scene that resist both linguistic and visual penetration or interpretation, thus suggesting that "there is no truth" (Kazan 2000, DVD commentary) accessible in the von Bülow case and that, with its real-world temporal and spatial limitations, neither the actual or the fictional Dershowitz, nor the real or the represented law can have privileged access. Dershowitz reinforces this point in his book: "The truth may lie… in some mundane series of coincidences that reflect the muted grey of indifference rather than the clear white of total innocence or the deep black of unmitigated guilt. The blunt instrument of the law is rarely refined enough to discern shades of intent, motivation or character" (1986, 252). He further draws an analogy with film itself in saying that "under our system, the legal story is almost never the whole story. Some of the juiciest parts end up on the cutting-room floor … the result is a film edited and cut drastically from the vast footage of real life" (1986, 245).

In spite of the shared need with law to pare real life down to its most relevant essentials, cinema, in its less conventional forms, can transcend time and space to speculate and imagine, to give voice to and resuscitate the comatose Sunny—and Schroeder does so in purposeful terms. He refers to the "documentary style" of the real-world narrative and to the "fictional style" of flashbacks and narrated sequences, citing the "Hollywood-like depth of field" he employs in the flashbacks and further citing the influential melodramas of Vincente Minnelli and Douglas Sirk. Schroeder also points out his use of non-diegetic music to mark these as "fictional" sequences. In the Dershowitz narrative, on the other hand, Schroeder limits sound to the diegetic, or sound that is part of the "real-world" space of the story, in keeping with the documentary effect of the law-driven narrative (Schroeder 2000, DVD commentary). Most prominently and powerfully Schroeder employs the dissolve in those sequences narrated by Claus or Sunny, an editing technique that seemingly defies spatial-temporal coordinates—instantly transforming locations that exist in the present to their past state, inhabited by characters as they existed in the past. When Claus, in response to questions about Sunny's first coma, explains that "Sunny loved Christmas," for instance, the camera slowly tracks forward and cranes downward to reveal the elegant, if somewhat stark, foyer of the Newport mansion, as a dissolve magically places a lighted Christmas tree in that same space, along with poinsettias, a bright red settee, and lighted chandeliers (Figs. 32.1–32.3).

A piano and the voices of the 20-year-old Alex von Auersperg and the 12-year-old Cosima von Bülow fade in as they sing a Christmas carol. Although Schroeder speaks of the consciously employed "fictional" devices in these scenes, such scenes, nevertheless, bring us closer to *the truth about the truth*—reflexively suggesting that fiction may provide greater access than nonfiction to the *idea* of truth, with its multifaceted, multivalent nature.

Linguistically, Claus's responses to Alan's questions, beyond their sly understated humor, provide a glimpse into language, itself, as a multivalent source of psychological

Fig. 32.1 The dissolve in REVERSAL OF FORTUNE defies temporal reality, moving from the stark present to the more animated past

Fig. 32.2 The dissolve in REVERSAL OF FORTUNE defies temporal reality, moving from the stark present to the more animated past

and emotional expression, therefore pointing out the limitations of its more narrow uses in the law. In film, of course, spoken language is clarified, contradicted, or rendered ambiguous by the images and other sound elements that accompany it, while in the legal context, language is clarified, contradicted, or rendered ambiguous by verbal accounts, by visible physical evidence or by recorded evidence whether visual or auditory. The automatic reflexivity present in films about law, and in

Fig. 32.3 The dissolve in REVERSAL OF FORTUNE defies temporal reality, moving from the stark present to the more animated past

Reversal of Fortune especially, is heightened when spoken language is further complicated by differing versions of events filtered through varied voices and perceptual experiences—and perhaps manufactured in the form of lies. While the legal process stages testimony involving various voices, perceptions, and versions of events, it naturalizes the idea of both the staging process and conflicting accounts by linking it to the idea that there is a single truth or series of connected truths that will emerge, and it is up to the (supremely qualified) jury to determine what that (pattern of) truth is.

In a certain counter-reflexive sense, the jury is cast as a panel of (film or literary) critics, required to make determinations about the reliability of the witnesses ("characters") brought onto the courtroom stage in a predetermined, narratively functional order and with at least a partially predetermined script, as well as, perhaps, a bit of "directorial" coaching. The jury (critic) also determines the plausibility of witness accounts, based primarily on how effectively those stories are told, as Bennett and Feldman point out, explaining that "the key variables in justice processes involve facility with language, the ability to manipulate concrete facts within abstract categories and the manner in which interpretive contexts that represent social reality are structured" (1981, 144). Because Sunny is given a voice, equally articulate as that of Claus, and with greater implied knowledge, *Reversal of Fortune* denaturalizes the notion that somehow a single truth lies at the core of conflicting or differing accounts. Yet because the voices of Sunny (with her ethereal, detached air) and Claus (with his droll incongruities) are so removed from those heard in the everyday experiences of most film viewers (and jurors), the film also foregrounds "the discrepancies in language skills, patterns of language usage, and cognitive styles characteristic of different groups in society," that Bennett and Feldman conclude are

factors influencing judgments about witness reliability (1981, 144). The film cleverly presents this situation in reverse, for it is typically those inarticulate witnesses who are judged as less plausible in courtroom proceedings. Here, the verbally sophisticated Claus and the adroitly measured Sunny are placed in juxtaposition with the articulate but down-to-earth Dershowitz. The earnest Dershowitz in the film—with his trust in the law, even if tempered by a healthy though less fully articulated skepticism than that expressed by his counterpart in the book—works as a foil, allowing viewers greater access to the world of contingency as defined by Sunny and Claus and vice versa. In the end, the power to engage viewers lies more strongly with Sunny and Claus than with "the blunt instrument of the law." The emotion-driven relationship narrative trumps the point-driven legal narrative, just as the unconventional approach to cinematic narrative structure trumps the classical Hollywood approach for Schroeder in this film.

Upon Claus's declaration that Christmas was Sunny's "favorite season, really" and that "she loved giving more than anything else," the cut to the Newport foyer and the dissolving-in of the Christmas tree, along with both the diegetic singing and the non-diegetic musical score, all seem to corroborate his words. The next image, however, is clearly contradictory: Sunny, shot from behind, sits on a couch nearly motionless and isolated on the left side of the frame, with Alex and Cosima, together on a piano bench, facing the camera and occupying the right side of the frame. The camera gradually tracks closer to Sunny as Claus explains that "each year she always made a big bowl of fresh eggnog" and "on that year she drank a lot of it." As the image of Sunny remains onscreen, one of Alan's assistants, in voice-over, asks, "How much?" to which Claus answers, casually, "Oh, ten or twelve glasses," prompting an overhead shot of Claus ladling out a cup from a silver punch bowl in the foyer. As he does so, the singing voices fade and the camera follows him into the parlor where Sunny remains sitting—a masterful cinematic time warp that jumps to a point somewhat before or somewhat after Alex and Cosima sing together; we can't be sure. What this sleight-of-editing achieves is to place us more palpably within the temporal rhythm of what would have been a drawn out afternoon during which, Claus tells us, he and Sunny had been discussing divorce. Costumed in a slate gray skirt and light blue-gray sweater, colors that quietly evoke the ethereal blue used to represent her eventual comatose state, Close as Sunny is further evocative through her stillness on the couch, suggesting a near-catatonic state. She barely opens her mouth as she speaks, asking Claus whether the "subject of his work" is a "pretext" when the real subject prompting their discussion of divorce "is her"—referring to Alexandra Isles, Claus's mistress whom prosecutors cast as a primary motive (along with the fortune he would inherit) prompting Claus's attempted murder of his wife. In his version of events (and nowhere present in the Dershowitz book), Claus locates the main source of tension in the marriage, not in his affair with Alexandra but in his own desire to work and Sunny's adamant refusal to accept it. "You marry me for my money, then you demand to work. You are the prince of perversion…. Are you trying to destroy our whole family?" she asks later that evening before the first coma, as the couple lie awake in bed. Blue tones and light in the bedroom not only anticipate the final irreversible coma but also propose this as

one emotional source. In earlier portions of the flashback, Sunny has consumed so much eggnog that she nearly collapses at the dinner table; whereas now she seems implausibly animated as she argues with Claus. A careful viewer will notice this disjuncture—but what we also begin to realize is that viewers, like jurors, are not always so careful. Claus's vision (and version) of Sunny in this and other flashbacks presents her costumed in cool colors and, variously, in a drunken, drugged-out haze, or actively approaching hysteria whether when arguing about their relationship or, as in one scene, frantically searching for drugs hidden from her after her first coma—all underscoring her drive toward self-destruction. Schroeder, however, continually inserts visual qualifiers that complicate Claus's version of events, thus suggesting that fiction trumps nonfiction and cinema trumps law when attempting to approach truth—or, in this case, the truth about the nature of truth.

Nested within the extended flashback, which is set on the day and evening before the first coma in December 1979, is a second flashback to a party held the previous August, when Claus casually informs Sunny about his affair: "Oh, I've been meaning to mention—our understanding about my [pause] extracurricular activities. I've been involved with someone who falls outside the parameters of our agreement—someone peripherally in our circle: Billy Bodsky's daughter, Alexandra Isles." (The real Alexandra Isles is daughter of the Danish Count Moltke who helped smuggle Claus, as a boy, out of Denmark when the Nazi's invaded [Dershowitz 1986, 30]) In this scene, Sunny appears, uncharacteristically, in a long white and gold evening gown, and while beautiful, she continues to be so measured in her words and reactions as to lend her an otherworldly quality while also providing grounds for and adding texture to her later pronouncement of Claus as "the prince of perversion." The news he delivers has, as the mise-en-scene suggests, pushed her into a downward spiral of depression, drug and alcohol abuse—in a sense, this is the moment when things have tipped decisively in that fatal direction. And if not guilty of later injecting her with insulin (which he may possibly have done), Claus is nevertheless guilty of pushing Sunny dramatically further along the course of self-destruction. Through costuming, subtle shot composition and editing, Schroeder most certainly implies these variations—she was a more balanced, if not happier, person at this party 4 months before falling into the first coma. The film implies the possibilities: Did Claus drive Sunny further along the path to self-destruction, even though it may have been a path she already had chosen (as mildly suggested by her demeanor) through his affair with Alexandra? Did he aid her and perhaps prompt her through his own indifference and passive acquiescence? Or was he actively engaged in destroying her through a calculated "performance" of indifference or through an injection of insulin? Though somewhat contradictory, all possibilities potentially coexist as truths.

Sunny reacts to Claus's announcement by saying, simply yet pointedly, "Well, that must be better for you than what you've had to put up with," to which Claus responds, "You're referring to the call girls?" Polite yet mildly spiteful, the two continue as Sunny asks, "Yes… And isn't this better? Or is Billy Bodsky's daughter a call girl, too?" With the hint of a flickering smile and the flick of his cigarette ash Claus replies, "This is much better." The final lingering close-up of Sunny, as she

holds her own cigarette, much as she does the following December when sitting on the couch, conveys repressed anguish and works to qualify Claus's offhanded reference to the "parameters" of their agreement and their marriage, something that lends significance to his choice of words when, during the discussion of his desire to work, he claims, "I simply want some [pause] intercourse with the world." Kazan's precision of word choice and Schroeder's careful attention to mise-en-scene and editing rhythms continually build emotional contingencies around the notion of language as a source of uncomplicated truth.

Narrative structure does much the same. In placing Claus's narration concerning the details of Sunny's aspirin overdose *before* the story of the first coma, for instance, even though the overdose occurred nearly a year *after* the first coma and 3 weeks before the second coma, Schroeder and Kazan powerfully imply Claus's complicity through passivity while at the same time presenting Sunny's deeply distressed and consummately unhappy state. After Sunny falls to the bathroom floor, this time in the New York apartment, and Claus drags her back to bed, she repeats, in a foggy haze, "I just want to be left alone. I want to be left alone with all of those beautiful letters. Why did you write those letters?" Her words are in response to Claus's question about whether or not he should call a doctor. The camera lingers on him, alert, and motionless, as he stands over Sunny's bed. The duration of the shot and Claus's watchful yet rather impenetrable gaze is infused with an ambiguity that complicates his simple question to her, thus inviting viewer discomfort and speculation (a strategy repeated at several other key moments in the film): Why didn't he simply call a doctor regardless of her wishes, given her clearly impaired state? What motivated him to ask Sunny first? The placement of this image, *before* discussion of the first coma, adds a haunting tinge of doubt when Claus answers a similar question concerning the hours he waited, a year earlier, to call a doctor when Sunny had fallen into her first coma. He proclaims, "Because Sunny detested doctors!"—a seemingly self-evident fact that may reflect his own understanding of his role in Sunny's life as part husband-part servant, but a reply that also is performed and seems designed to foreclose all further questions.

Moments like these cleverly complicate the question of legal innocence by introducing the emotional, moral, and ethical dimensions at play. As based on the Dershowitz book, the film also manages to suggest Claus's legal innocence, somewhat ironically, on the very basis of his impenetrable passivity. Would a man so apparently passive be capable of injecting his wife with insulin—even though he and Sunny did give each other vitamin injections when it was a fad in the 1960s, as Claus points out? At the same time, his question to Sunny in the overdose scene, when considered in retrospect, seems charged with the expectation that she will refuse medical aid. Perhaps Claus asks the question in anticipated defense of his own inaction—knowing that a year earlier, after the first coma, family members accused him of having waited far too long to summon a doctor. Is he motivated to speed her along to what he understands as her inevitable, self-destructive demise? As we read into the lingering close-up, we can perhaps imagine Claus asking himself, *"Is this it? Is this the final, the fatal moment?"* That irreversible moment would occur, of course, only 3 weeks later.

Likewise, when asked why, on Sunny's request, he got her a glass of scotch when she had nearly passed out after drinking so much eggnog on the evening of the first coma, Claus replies simply with the words, "Sunny got what Sunny wanted." According to Kazan, this was a line Claus von Bülow actually uttered, though in a different context. Here, his words reverberate with the idea that "she no longer wanted to be conscious" (Kazan 2000, DVD). But they also imply Claus's possible maneuvering and taking full advantage of this knowledge. The visual cues echoing those from the aspirin overdose scene—again, given resonance by the narrative structure departing from chronology—suggest that Claus may very much have shaped and controlled what Sunny wanted or thought she wanted through his very "performance" of indifferent compliance with her immediate wishes while ignoring her larger psychological needs and emotional desires. A moment set in the hospital after the first coma poignantly captures this duality of need, motive, and desire on both their parts. On the one hand, Sunny admonishes Claus in hushed tones for having called a doctor—however belatedly—saying, "I would have been better off. You would have been better off." On the other hand, as she turns away from him, in a barely audible voice, she pleads, "Claus, what am I going to do with myself?" Although it's clear that he hears these words, Claus continues on his way through the door, exiting her hospital room.

The meaning of Sunny's lines concerning the "beautiful letters" spoken during the aspirin overdose remains unclear until much later in the film when the same scene is repeated and we learn from Claus that the letters are love letters he had written to Alexandra, which Alexandra had returned, in anger, and Sunny intercepted. This, again, is a strategic structural choice that places us in a position of skepticism concerning Sunny's general lucidity and state of mind, perhaps stacking the deck in Claus's favor, as Dershowitz does in his book. The repetition of this moment near the end of the film, however, repositions us and invites rereadings of the earlier scene. In his book, Dershowitz discusses speculation that Claus and Alexandra orchestrated this love-letter scenario and others like it in order to push Sunny more rapidly and determinedly toward acts of self-destruction (1986, 251). Although only briefly voicing this theory, the film does, through repetition, require the viewer to reexamine and revise initial impressions of Sunny, suggesting the emotional truth of betrayal as the source of her seemingly incoherent words and manner.

The very rhythm and design of the flashbacks Claus narrates confer them with greater visual and emotional resonance through their juxtaposition with the more "two-dimensional" present-day sequences, in which Alan and his team pose their questions and carry out their legal work. The narration concerning the first coma takes us from the very casual, lived-in space of the Dershowitz house with its high key lighting, sharply defined lines, and slightly hollow sound design, to the highly stylized elegance of the Newport mansion which, in her opening voice-over, Sunny refers to as her "cottage"—a word that elicits more than a few snickers from the audience. In the same way, the narration concerning Sunny's aspirin overdose takes us from an inelegant Chinese restaurant where the defense team interviews Claus to the ornate Fifth Avenue apartment where the overdose occurred. It's no accident, of

course, that when Dershowitz enters this apartment for his first meeting with Claus in the present-time, law-centered story, he is greeted with imposing, elegantly appointed rooms—devoid of human presence—as Wagner's *Tristan and Isolde* plays at high volume, a piece slyly hinting at Claus's possible necrophilic tendencies and one that calls attention to the racial chasm between them (Is Dershowitz, as a Jew, offended or intimidated by the music of Hitler's favorite composer?). While the stylization of the von Bülow world does display the heightened mise-en-scene of melodrama and the world of Dershowitz appears familiar and commonplace by contrast, the surface stylization of the von Bülow world nevertheless conveys the psychological and emotional entanglements just beneath its lavish surface. The Dershowitz law-driven world implies that little exists beyond what meets the eye—an impression that carries over to conceptions of truth as shaped by each world.

Following the "nested" flashback narration centered on the first coma, Claus, the "prince of perversion," continues with his story, unprompted, stating that the second coma, "of course, was much more theatrical." "Saint Alan," predictably, bristles with a self-righteous rejoinder: "Theatrical? What is this, a fuckin' game? This is life and death. Your wife is laying in a coma. You don't even make a pretense of caring, do you?" Claus's response articulates the "prince/saint" dichotomy: "Of course I care, Alan. I just don't wear my heart on my sleeve …. We can't all be *you*, Alan." The fact that Claus, so clever and nuanced in his use of language, would resort to a well-worn cliché insinuates that, when in Alan's world, playing by rules governed by the "appearance" of sincerity or truth, only the most banal of language will do. Claus's unflustered demeanor draws further attention to the duality of language when the legal and human contexts collide as happens earlier when, based on a study of the Rhode Island Supreme Court's precedent in reversal cases, Alan says to Claus, "True or not, now I do want to hear your side of the story." Without missing a beat as he stirs his coffee, Claus proclaims, "With pleasure. Innocence has always been my position." This densely and deliciously equivocal line raises a few eyebrows in the room, as it elicits a few giggles in the movie theater.

Narrating the story of Sunny's second coma later in the film, Claus presents details that echo those of the first coma. This time instead of eggnog—or in addition to it—Sunny consumes only an ice cream sundae for dinner, despite her hypoglycemia, a factor contributing to her another near-collapse. We can only speculate why she wears an oversized pair of sunglasses at the dinner table—to protect, or hide, her eyes made overly sensitive or unattractive from drugs consumed or tears shed? A brief shot set earlier in the afternoon reveals Claus and Sunny, silent, positioned at a distance from each other in their Newport bedroom with curtains drawn, as Claus, in voice-over, explains that the continued and more serious discussion of divorce prompted him to talk with the children. Mise-en-scene, editing rhythms, and repetition of details make palpable the same cloying atmosphere as the previous year, the enormous space lending a mausoleum-like pall. This atmosphere and repetition of visual and narrative detail imply the depths of lived experience that perhaps escape conscious awareness through the sheer force of habit and routine. Drawing attention to the strangeness of Sunny and Claus as defined, in part, by their excessive wealth,

the film manages to immerse us in their world while simultaneously distancing us—allowing us to recognize behaviors and patterns that defy cause-and-effect definition and that the law, therefore, cannot fully account for.

As they sit transfixed by an old movie on TV, Alex and Cosima barely acknowledge Claus when he announces that he and "mommy" will be separating for a time while he goes abroad to work, since the idea of his working is something she simply cannot not "tolerate." The oddly muted response of the children adds to the feeling of a hermetically sealed world in which Sunny's seemingly inescapable fate also is sealed. Costuming contributes to this feeling of inevitability, with Sunny wearing a similar gray skirt and blue-gray sweater as the previous year and when she and Claus discuss their situation later that evening in bed—this time at Claus's prompting, while in the previous year Sunny prompted the discussion. The blue lens filter and subtle play of shadows, cast by a crocheted bed sheet, all but enshroud Sunny.

32.3 Body of Evidence

Impervious to the point-driven function of legal narrative and the resolution-seeking function of conventional film narrative, Sunny's inert body and ethereal voice present the film's most explicit critique of the law—and its implicit critique of classical narrative cinema. Framing the main narrative (a final, darkly comic vignette features Claus)[3] and interrupting its forward, linear flow at key moments throughout, Sunny's narration implies knowledge of what *really* happened, but her refusal to tell draws attention to the limitations of law and of cinema—neither of which can gain access to complete knowledge. Although Kazan uses her opening narration to fill in the facts of the case, Sunny's narration is largely reflective rather than factual, often raising deeply unanswerable questions.

Following the credit sequence surveying the beachfront mansions of Newport, RI, the floating Steadicam makes its way down a hospital corridor in upper Manhattan (the real Sunny spent many years at Columbia Presbyterian) as a door to one room opens magically, never drawing the attention of a police officer stationed outside. The camera, clearly purposeful in its movements, adopts a ghostly subjectivity, as it pauses for a moment to contemplate the immobile Sunny bathed in blue-filtered light (Fig. 32.4).

After cutting to close-ups of the IV drip and tracheal tube that keep her alive and the bedside bag collecting her urine, the camera slowly floats out to a full shot as we hear the first dispassionate words: "This was my body." A dissolve immediately places us in the Newport bedroom of the von Bülow mansion, as Sunny and Claus

[3] Following the reversal decision, Claus enters a drugstore for cigarettes—Vantage, no less—as the prominently displayed *New York Post* headline screams, "Lawyer: Claus will Win!" Claus notices that the clerk has suddenly realized that the man pictured on the front page is standing before her. When she asks if he'd like anything else, he replies, "Yes, a vial of insulin." Her timid yet shocked response prompts his impish grin, "Just kidding," he says. The last, darkly comic word belongs to Claus.

Fig. 32.4 Repeated shots of Sunny's inert body in REVERSAL OF FORTUNE foreground resistance to unambiguous truth

materialize on the bed. In a composed voice, Sunny summarizes the events leading to her present condition. She deems emergency room activity after the second coma "pointless," and with understated obstinacy proclaims, "I never woke from this coma and I never will. I am what doctors call 'persistent vegetative'—a vegetable. According to medical experts I could stay this way for a very long time …." With these words, we return to the present-time hospital room to survey Sunny for a brief moment until her words, "Enter Robert Brillhoffer," prompt an image of the attorney based on former Manhattan District Attorney Robert Kuh, hired by Sunny's eldest children, Alex and Ala, and her mother to conduct a private investigation in response to the second coma. Alex and a private investigator are shown combing Claus's Newport closet where they discover a black bag filled with drugs. "On top of that," Sunny mildly states, "the hospital lab reported that my blood insulin on admission was fourteen times normal, a level almost surely caused by injection. Insulin injection could readily cause coma—or death."

Although we are never shown a vial of insulin and in voice-over we never hear of its presence among the confiscated drugs, a close-up of a needle reveals a white encrustation at its tip as Sunny explains, "This encrusted needle tested positive for insulin." Her ironically distant tone immediately casts doubt on the status of this key piece of physical, "visible" evidence as central to the prosecution's evolving narrative. Particularly telling is the line that follows: "Now they felt they had the murder weapon. All they lacked was the motive." By drawing reflexive attention to what narratologists call backward story construction, Sunny's voice-over foregrounds story construction as an activity central to the law and the film. Her tone hints that the game or contest between adversaries is, if not silly or childish, then at least spectator-centered rather than a genuine effort to arrive at truth(s) or a deeper understanding—a point given further resonance with the abrupt cut to Alan dribbling his basketball. Here, an investigation is centered on constructing a story to prove that

the irreversible coma is in itself proof that a crime has been committed and that Claus, alone, is the guilty party.

With more than a trace of irony, Sunny draws attention to a simplistic process of cause-and-effect construction, divulging, after pointing out the need to establish a motive that, "my husband was vacationing with his mistress." A cut from Brillhoffer's office takes us aboard a lavish sailing yacht with Claus at the wheel as Alexandra plays a prank. Though they kiss, Claus and Alexandra seem to play at passion rather than embody it. Perhaps this is what Schroeder means by the "fictional" effect he was aiming for in the flashbacks, as influenced by Sirkian melodrama. Like those melodramas, in which heightened stylization both presents and critically interrogates the social milieu that is their subject, *Reversal* uses heightened stylization to both present and interrogate the rarified milieu of the von Bülows, albeit leavened with dark humor. The most serious critique, however, is reserved for the law—something with which all viewers have a connection—and the "point-driven" simplicity of legal narrative. As we watch this scene on the yacht that displays both a *show* of passion and a clear constraint (Claus never kisses Alexandra fully on the lips), Sunny discloses a second motive with emphasis on gamelike expedience: "Brillhoffer also discovered that at my death, Claus, whose own net worth was only a million dollars, stood to inherit fourteen million from me. Alexandra later testified that Claus showed her a legal analysis of my will." A cut to the courtroom of the first trial reveals Claus's controlled response as he hears the guilty verdict. As the camera cranes across the crowded courtroom, it rests on Maria, Alex, and Ala, with Alexandra seated behind them, as Sunny smugly confides, "Even Alexandra Isles testified against him."

While this moment would be the end of a conventional courtroom drama or an actual courtroom proceeding, it is just the beginning of the narrative here—as if to point out that verdicts are hardly proclamations of truth or satisfactory forms of closure. As we see Claus's response, Sunny calmly addresses the film viewer: "You are about to see how Claus von Bülow sought to reverse or escape from that jury's verdict." At this moment, we return to the blue-filtered hospital room, as Sunny probingly challenges, "You tell me"—paradoxically pulling us into the adversarial game, while also distancing and inviting us to examine our own interpellation within a system that normalizes this game and perpetuates the idealized correspondence of law with truth and justice. Just as Dershowitz's conversational informality in the book establishes a bond with the reader, Sunny's intimately collusive narration in the film, measured and otherworldly as it is, invites the viewer to conspire in questioning the reductive mission of the law—and the entire conceptual history of crime and punishment, for that matter—when attempting to account for events that remain shrouded in uncertainty.

Through its strategic positioning of Sunny's second narrational sequence, *Reversal of Fortune* foregrounds incertitude as a dimension of human emotion and behavior—and the degree to which legal and conventional film narrative seem ill equipped to address or represent it. When Alan, during his second meeting with Claus at the Fifth Avenue apartment, wonders who Claus "really" is, Claus's retort, "Who would you like me to be?" speaks of both his own amoral complacency and of narrative contingency, drawing attention to character construction as an element as central to

legal narrative as to fictional narrative. Later interrupting this law-centered exchange is a striking overhead shot of Sunny as nurses' hands massage her inert fingers and exercise her limbs, all presented, once again, in an ethereal blue-filtered light. In voice-over, Sunny echoes the incertitude of Claus with her own unanswerable question, but this one more direct and candid: "Did Claus drive me crazy? Even I don't know." As if to answer the question, she catalogues her daily ritual of pill taking and consumption of sweets (despite her hypoglycemia, she is careful to add), the numbers of cigarettes she smoked, and her "'problem' with alcohol"—clearly asserting a self-destructive, if not suicidal, tendency. In hauntingly humorous terms, she goes on to detail her daily schedule, which involved waking at 9:30, doing "a little exercise and shopping" and returning to bed at 3:00, "for the remainder of the afternoon," she explains, as the nurses sponge her upper thigh and buttock cheek. She savors the next lines: "I *liked* to be in bed. I didn't much like anything else." Although she expresses her desire to escape consciousness, the positioning of this narration so near to Claus's cryptic question heightens its resistance to simple categorization as evidence of Claus's innocence. Immediately following this line, editing places us somewhat abruptly in the present-time world of the law, as Claus arrives in Alan's driveway for their Chinese restaurant dinner. The hard-edged glare of the late afternoon sun as it strikes the windshield and black body of Claus's limousine and his earthbound words to the driver, "Hold on here, will you?" are jarring reminders of the equally earthbound measures by which law can (and must) decide.

This contrast between the world of the living and the comatose in-between state that Sunny occupies lends a certain authority to her most explicit critique of the law in two narrational sequences to follow. In a yacht club restaurant with Claus, Alan adopts a law-driven and self-serving position when stating that, in proclaiming Claus's innocence should Claus again be found guilty, "my reputation, my credibility, my career, [will be] destroyed." Alan's next several "Fuck you's," in too loud a voice for the yacht club regulars, gradually morph into a begrudging smile, as he says, "I'm glad we understand one another." This moment of law-centered sport is juxtaposed with Sunny's narration as she says, "It's easy to forget all this is about me, lying here." We return to the hospital room as the floating camera gazes at her and then pans to reveal Cosima, now a teenager, at her bedside. "To many of you, my name means 'coma.' My second marriage means 'attempted murder.' Everything that came before—everything beautiful—does not exist in the public mind. No one thinks of how I loved my children. Look at Cosima—and Alex, of course, and Ala." With these words, her usual irony is replaced by a genuinely moving tone, expressing Schroeder's idea that "the voice-over was also a way to be as close as possible to Sunny, because she was somebody who was always forgotten in whatever was said about the trial or the affair …. What was important was the failure and disaster of a marriage that maybe had lasted a little longer because there was money, and the money was adding an extra element of tragedy" (Sklar 6–7).

To reinforce this idea, Sunny's narration continues as the scene shifts to a hillside castle bathed in the orange glow of sunset, a warm color scheme that exists nowhere else in the film. The heightened, fairy-tale effect also hints at elements of dark gothic romance, as Sunny narrates the dissolution of her first marriage to

Fig. 32.5 On her wedding day to Claus, a joyful and animated Sunny presents a picture at odds with the version Claus offers in REVERSAL OF FORTUNE

"Prince Alfred Edward Frederich Vincenz Maria von Auersberg"—with a hint of her usual irony returning for just a moment—and her falling in love with Claus. As Sunny brushes her hand invitingly against Claus's upon witnessing "Alfie's" flirtatious infidelities at a 1964 dinner party, the floating camera moves in to get a closer look at a beautiful, receptive Sunny as she and Claus lock eyes. With a split-second cut, we are in an ornate bedroom, where Sunny and Claus rendezvous with gestures of heightened passion that are tempered, significantly, by blue-filtered light, deeper and more intense than that reserved for the hospital room, registering this moment of passion as the first step toward Sunny's demise, her irreversible fate apparently initiated by both the tentative and perhaps self-serving passion *of* Claus (his hands remain slightly clenched as they embrace) and by her retaliatory and perhaps self-destructive passion *for* Claus. Stylized soft focus, overexposed images of their garden wedding follow, as Sunny explains, "It's not the passion I remember most. It's the tenderness." The two again gaze at each other as a pet tiger cub runs to their table and Sunny feeds it continuing, "I never liked people much, not as a rule. But Claus was somehow different—not a normal person, I guess." (Fig. 32.5)

Those final words become even more evocative when juxtaposed with the image that follows, set in the Fifth Avenue apartment bedroom, where Claus and his new girlfriend Andrea sleep—once again in blue-filtered light—perhaps to suggest something about the deadening, heart-rending, if not injurious potential of Claus's involvements with the various women in his life. "Of course, now he lives in my apartment. My bedroom. My bed," Sunny explains, with a tone of ironic resignation. "Cold, isn't it? Cold and brutish and the way of the world." The ethereal camera hovers over the couple and moves in for a closer glimpse. Sunny again poses an unanswerable, though deceptively simple, question: "Looking at him now the issues seem simple. Is he the devil? If so, can the devil get justice?" The camera now floats outside Alan's house in the dark of night as Sunny continues to narrate: "And all this

legal activity—is it in Satan's service?" At this moment the voice of Alan's assistant bleeds in before a cut to the interior of the house. He reads what is most likely trial transcript testimony: "Sunny von Bülow was totally vulnerable to Claus von Bülow." When Alan says, "Can't argue with that," the assistant retorts, "But its speculation, exaggeration… totally inflammatory." This dialogue, crucially placed, almost as if in answer to Sunny's question, provides a clear commentary on the inflexibility of the law, as represented by the assistant while slightly tempered by Alan, who nevertheless orders the assistant to "keep working on it," perhaps implying that, although Sunny's vulnerability is inarguable, it can be remolded into a new legal narrative that will mesh more closely with Claus's version of events *and* his version of Sunny.

In flashbacks prompted by Claus's narration, Sunny appears near-catatonic or near-hysterical, at turns—a sharp contrast to Sunny's version of the "happy memories" of their early days together where she appears vibrant, even when faced with Alfie's hurtful infidelities. In playing these two very different versions of Sunny and the relationship against one another (admittedly with wide gaps of time and experience in between), the film positions its viewers as highly self-conscious jurors, much as Sunny's narration calls attention to our role as objects of the storytelling process, whether for the sake of entertainment or the duty of deciding where truth resides. The competing narrative constructions required by an adversarial legal system further are shown to mold nuanced and multitrack human behavior into single-track narratives that often are both "exaggerated" and "inflammatory," to quote Alan's assistant, and, as a result, less than fully truthful.

Sunny's next brief narration explicates this idea. Prompted by Alan's continued questions concerning Alexandra Isles and the love letters she returned that may have prompted Sunny's aspirin overdose—and whether Claus may indeed still love Alexandra—Claus responds, "Of course I still love her. And hate her. Alexandra, Sunny, Andrea—I love them all." To this sentiment, Sunny seems to respond as we see her in close-up, curled on her side in the hospital bed: "Being a human being is very literal. You're trapped. Time moves in only one direction, forward. It's stupid and boring and results in a lot of silliness." At this point, we are taken outside the Providence, RI, courthouse on the day Alan will argue for the appeal. As Alan approaches the entrance with mobs of reporters surrounding him, Sunny narrates: "Example, the legal process. In this particular case, a vast amount of time, effort and money were spent trying to determine precisely what happened on those two nights so close to Christmas…." At this moment, as if by magic, we return to the Newport bedroom—to the same neatly made bed we saw in Sunny's first narration, yet without the earlier dissolve that magically brought the past into present life. "It happened right here. Even now, it all looks the same, feels the same, smells the same. If you could just go back in time and take a peek, you'd know. And all this would be unnecessary." Now inside as the court is called to order, Sunny with mild mockery adds, "Then again, everyone enjoys a circus." The film here most explicitly comments on the limitations of story construction in both the legal and conventional cinema contexts. The inability of reality-governed law and the refusal of formula-governed cinema to go back in time, to juggle time and place, to shift and change and follow a pattern dictated, not by cause-and-effect relations but by the associations

of the human heart and mind, results in both "silliness" and in the "circus" that provides entertainment for the public and fodder for the media—whether in the courtroom or the movie theater.

32.4 A Brief on *Reversal's* Feminist Reversal

Beyond its critique of the law through a narrative structure creating parallel law-centered and relationship-centered strands and through its giving voice to the comatose Sunny, *Reversal of Fortune* offers a poignant commentary, from a feminist perspective, on various institutional uses of the female body. Midway through her second narrational passage, nurses turn Sunny over and massage her limbs. "As for my state of mind," Sunny sardonically giggles, "I had not had sex with my husband for years." Resistant to definitive medical or psychoanalytic diagnoses, to legal point-driven, cause-and-effect narratives or to conventional cinema's attempt to "fix" the female body as spectacle, Sunny's body remains "unreadable" and in many ways reverses the institutional patterns centered on containing and controlling the female body, even if in rather paradoxical terms.

The very title of the book and of the film (which, tellingly, was originally to be called *Devil's Advocate*, according to Kazan [2000, DVD Commentary])[4] would seem to juxtapose Sunny's irreversible state with Claus's continually reversible one—not only in the most obvious sense but also in acknowledging the irreversible position to which Sunny's wealth and gender consigned her. Could she believe that any man would marry her for reasons completely apart from or more fundamental than her money—no matter how wealthy or well-situated he also might be? Could she be cast as anything other than a victim in legal or cinematic narratives, both of which draw upon long histories of relegating women to the margins of their own stories, of positioning their bodies as sexualized objects of the male gaze, or as aberrant, diseased objects of institutionalized interrogation? Claus can admit to loving *and* hating all of the women in his life, with the expectation of many more to come. When Dershowitz says to Claus during their first meeting, "From what I've seen of the rich, you can have them," Claus retorts with a knowing smile, "I do." He is granted an appeal, a second trial, and continued life as a free and officially innocent man. Sunny's position, on the other hand, remains static in much the sense that the female character and body occupy a static position as specular objects in conventional cinema. Yet, in foregrounding this body and giving voice to Sunny's imagined higher knowledge, *Reversal of Fortune* recuperates, though not without compromise, the position of the female victim—whether in the context of the cinema or the law—thus performing its own modest reversal, insofar as Sunny von Bülow is concerned.

This reversal is especially interesting to consider in relationship to the traditional woman's films of the 1940s that position the female as active and in possession of the

[4] *Devil's Advocate* later became the title of a 1997 film directed by Taylor Hackford and starring Al Pacino and Keanu Reeves, based on the Andrew Neiderman novel, *The Devil's Advocate*.

gaze rather than simply as object of the gaze. Yet, as feminist film scholar Mary Ann Doane points out, while offering a degree of resistance, the woman's film nevertheless implies that "the woman's exercise of an active investigating gaze can only be simultaneous with her own victimization" and is "designed to unveil an aggression against itself" (Doane 1984, 72) . In the woman's film "the erotic gaze becomes the medical gaze" with the female body as "a manuscript to be read for the symptoms which betray her story, her identity" (Doane 1984, 74). In these films, women are often blind, mute, or psychologically traumatized, "trapped within the medical discourse" (Doane 1984, 75). And, as Doane argues, though these films "purportedly represent[s] a female subjectivity," the presence of the medical discourse, functioning much as the legal discourse does in other genres, "makes it possible once again to confine female discourse to the body" which is ultimately "interpretable, knowable, subject to a control." She incisively concludes that "what the body no longer supports, without the doctor's active reading is an identity" (Doane 1984, 76–77).

Reversal of Fortune foregrounds the confused empowerment thrust upon Sunny by her wealth that does, to a degree, claim her as a victim of gendered cultural codes her position could be seen to reverse. The addition in the film of Claus's desire to work as a chief cause for discussions of divorce, in its own way, implies the untenable position of a woman of enormous wealth. That her body should become the subject of intensive medical, legal, psychoanalytic, and cinematic interrogation seems in line with the conventions of the woman's film, while at the same time, her body remains uninterpretable, unknowable, and beyond medical or legal discourse, to reverse Doane's conclusions in regard to the woman's film. And while, in the public mind, the identity of that body has been subsumed by medical interrogation ("To many of you, my name means 'coma.'") or legal interrogation ("My second marriage means 'attempted murder.'"), in reality that body remains resistant and the full truth remains in possession of that body/identity/consciousness alone. In giving voice to Sunny who draws attention to the failure of these (patriarchal) institutional efforts to contain and control "the truth," *Reversal of Fortune* does manage to reverse, to some degree, the patterns of representation employed by the law, medicine, and *the cinema*.

Although in "real" terms of the narrative, both men *do* ultimately win—Alan and Claus win in the legal narrative and Claus wins, though presumably not unscathed, the ability to go on with his life. Sunny, even if trapped in an irreversible coma, does reverse or loosen the hold of seemingly irreversible patterns used to consign women, at least in the context of this movie. But of course, herein lies the paradox—cinematically and in every other way, she remains unable to act.

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Chapter 33
Hollywood's Hero-Lawyer: A Liminal Character and Champion of Equal Liberty

Orit Kamir

Abstract Hollywood's hero-lawyer movies are a distinct group of American feature films. Typically, they each depict a lawyer who unwittingly finds himself at the heart of a moral drama involving a client and/or a community in distress, gross injustice, the rule of law and powerful, obstructive forces that must be overcome. Alone with nothing at his side but his professional legal skills, courage, and integrity (and sometimes a good friend and a good woman), the lawyer reluctantly comes to the rescue, often at great personal sacrifice. In the process, he must balance individuality and social commitment, and loyalty to friends, to the law, to the spirit of the law, to the legal community, to justice, and to himself. This chapter argues that Hollywood's hero-lawyer is the symbolic "champion of equal liberty" as well as a liminal character on the frontier edge of society. This chapter claims that the hero-lawyer's frontier-based liminality is inseparable from the moral-legal principle of equal liberty that he personifies. This chapter considers the ways in which Hollywood's hero-lawyer's liminality is linked with the character's role as champion of equal liberty. This chapter follows the nuances of the hero-lawyer's liminality and moral heroism in 15 films, focusing on the classic cinematic formulations of these points and tracing their variations in contemporary film. Presenting the classic Hollywood hero-lawyer films, this chapter demonstrates how contemporary cinematic hero-lawyers (such as Michael Clayton, from 2007) are modeled on their classic predecessors. Yet, in contradistinction to their mythological forerunners, they seem to encounter growing difficulty when coming to the rescue out of the liminal space on the outskirts of society. Contemporary hero-lawyer films present a world in which personal identity

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is acquired through membership in and identification with a professional elite group such as a corporation or a big law firm. The social world, according to these films, is no longer made up of individuals and their relationships with society but of closed elite groups that supply their members with their social needs. In return, these elite groups exact their members' absolute adherence and loyalty. Further, despite their liminal personas, the new hero-lawyers often lack a frontier. They are trapped on the edge of an "inside" with no recourse to an "outside," a Sartrean no-exit hell, if you like. This predicament undercuts the classic construction of the "liminally situated champion of equal liberty," questioning both the significance of equal liberty and the meaning of liminality.

33.1 Part I: Introduction

33.1.1 Layout of the Argument

Law-and-film scholarship has always been enamored with Hollywood's celluloid hero-lawyer. Professors of law, as well as scholars of cinema, have bestowed ample attention on this iconic character.[1] This chapter does not veer from this honorable tradition. It contributes to the genre by highlighting two attributes that I believe to be fundamental to the venerated fictional character and by suggesting an association between them. Simply put, this chapter argues that Hollywood's hero-lawyer is the symbolic "champion of equal liberty" as well as a liminal character on the frontier edge of society. This chapter claims that the hero-lawyer's frontier-based liminality is inseparable from the moral-legal principle of equal liberty that he personifies.[2] This chapter considers the ways in which Hollywood's hero-lawyer's liminality is linked with the character's role as champion of equal liberty. This chapter follows

[1] Speaking of "Hollywood's hero-lawyer," I do not refer to any and every image of a lawyer that appears on the screen in a Hollywood film. As in previous articles and chapters (see Kamir 2005, 2006a, b, 2009a, b), I specifically apply the term to the lawyer that stands up to overwhelming power and at significant personal risk, against all odds, does his best to defend the equal liberty of the weak and downtrodden. In other words, as I explain shortly, the term refers to the cinematic successor of the "hero cowboy" of the "classical plot western," the subgenre that "revolves around a lone gunfighter hero who saves the town, or the farmers, from the gamblers, or the ranchers" (Wright 1975, 15). Many cinematic lawyers and most of those featuring in television series do not belong in this category. As I argue elsewhere (Kamir 2005), these lawyers can be regarded as successors of the hero of the "professional plot western," the subgenre that portrays "a group of heroes who are professional fighters taking jobs for money" (Wright 1975, 15).

[2] Due to length considerations, this chapter focuses solely on these two thematic elements of the hero-lawyer film and will be followed by a future project focusing on cinematic motifs.

the nuances of the hero-lawyer's liminality and moral heroism in 15 films, focusing on the classic cinematic formulations of these points and tracing their variations in contemporary film.[3]

The moral principle I have titled "equal liberty" is the notion that every individual has an equal right to civil liberties and social recognition of his life choices. Equal liberty is arguably the spirit of the American constitution and the core of the value system cherished by many law films. As Edward J. Eberle states in his comparative analysis of the American Constitution, "Americans believe in individual liberty more than any other value. For Americans, this means freedom to do what you choose" (Eberle 2002, 6). But Americans are similarly devoted to the concept of equality and value it above anything other than liberty. The result is a deep commitment to an egalitarian concept of individual liberty which can best be titled "equal liberty." Equal liberty refers to everyone's identical right to personal freedom. It refers above all else to every individual's civil liberties, that is, freedom from state restriction, but takes on a wider range of meaning. The American commitment to equal liberty is the spirit of the American constitution, both as interpreted by the legal system and as popularly understood. It is the moral core of the American value system: the popular meaning of "justice," "right," and "good." In this sense, it is at the heart of the American vision or "natural law." This American worldview becomes most evident when the American constitution is compared to other constitutions that cherish human dignity—the notion of personality—above all else (Eberle 2002). This chapter argues that Hollywood's hero-lawyer personifies the moral principle of equal liberty.

The symbolic personification of equal liberty casts the hero-lawyer as "champion" or "priest" of the American "civil religion" of legalism and constitutionalism. To rightly embody the core of the American value system, he must resist, transcend, and transform prevailing social norms and do so at great personal cost. Further, I suggest that in addition to this central attribute, Hollywood's hero-lawyer is also typically fashioned as a liminal character, positioned on the outskirts of the community he serves. He is both close to and distant from the individuals and families he attempts to rescue, both like them, and uniquely different. There are different types of liminality. Liminality can be related to a character's ethnicity, gender, age, economic status, or situation in life. That of the hero-lawyer is usually associated with some kind of "frontier." I further suggest that his liminality is inherently linked with the hero-lawyer's personification of the equal-liberty principle.

[3] These include the four classics—*Anatomy of a Murder* (1959), *Inherit the Wind* (1960), *The Man Who Shot Liberty Valance* (1962), and *To Kill a Mockingbird* (1962)—…*and Justice for All* (1979) and *The Verdict* (1982), which are discussed in Part IV, and the 1990s films, introduced in Part V: *Class Action* (1990), *A Few Good Men* (1992), *Philadelphia* (1993), *The Firm* (1993), *The Client* (1994), *Time to Kill* (1996), *Devil's Advocate* (1997), and *Civil Action* (1998). *Michael Clayton* (2007) is briefly presented in the conclusion to this section. I believe these to be the most outstanding, significant, and influential among Hollywood's hero-lawyer films. Personal preferences undoubtedly interfered with the selection and choice of films, and I apologize to readers whose favorite hero-lawyer was left out. I hope to expand this discussion in the future and perhaps include additional hero-lawyer films.

Such a fashioning of the cinematic character dominates the classic hero-lawyer films—*Anatomy of a Murder* (1959), *Inherit the Wind* (1960), *The Man Who Shot Liberty Valance* (1962), and *To Kill a Mockingbird* (1962). These classics have become the models for the hero-lawyer films produced ever since. Yet, "the liminally situated champion of civil religion" had its forerunner. Cinematic context reveals that the classic hero-lawyer films merely refurbished Hollywood's vastly popular gunfighter/ sheriff/ deputy hero of the western genre.[4] For convenience, I will refer to him as the "hero cowboy." That mythological character, who rode the American screen and popular imagination for half a century, dwelled on the border between society and wilderness. At the same time, he embodied the "natural law" of manly honor, fairness, and integrity as the popular predecessor of the more legalistic "spirit of the constitution," the hero-lawyer. The classic hero-lawyer is thus a variation on the archetypical "hero cowboy."[5]

Contemporary cinematic hero-lawyers are modeled on their classic predecessors. Yet, in contradistinction to their mythological forerunners, they seem to encounter growing difficulty when coming to the rescue out of the liminal space on the outskirts of society. Contemporary hero-lawyer films present a world in which personal identity is acquired through membership in and identification with a professional elite group such as a corporation or a big law firm. The social world, according to these films, is no longer made up of individuals and their relationships with society but of closed elite groups that supply their members with their social needs. In return, these elite groups exact their members' absolute adherence and loyalty. Further, despite their liminal personas, the new hero-lawyers often lack a frontier. They are trapped on the edge of an "inside" with no recourse to an "outside," a Sartrean no-exit hell, if you like. This predicament undercuts the classic construction of the "liminally situated champion of equal liberty," questioning both the significance of equal liberty and the meaning of liminality.

Further, the latest of these films, *Michael Clayton* (2007), presents a world in which status, identity, and even social existence itself depend upon one's credit card, cellular phone, frequent flyer miles, and Facebook address, a world nauseously reminiscent of *The Matrix* (1999). Life "on the borderline" becomes all but impossible in the World Wide Web this hero-lawyer film suggests that we now inhabit. Here not just equality but liberty too seems to be inconceivable. Such contemporary portrayal of the human condition is hard to reconcile with the one represented by the classic hero-lawyer's individualistic position on the edge of social order, championing equal liberty. Thus, social reality as depicted in contemporary hero-lawyer films gives rise to fundamental doubts regarding the prospect and life span of the

[4] More accurately, as will be explained, the hero of the "classical plot" western, as defined by Wright (1975).

[5] My argument complements F. M. Nevins' (1996). Nevins suggests that westerns were the predecessors of law films, that is, that westerns feature legal themes. I argue that hero-lawyer films are descendants of westerns, that is, that they emulate the western preoccupation with frontier and liminality as inherent to justice and morality.

hero-lawyer and his personification of the spirit of the constitution. It may be no coincidence that far fewer significant hero-lawyer films were produced in the first decade of the twenty-first century than in the last decade of the twentieth.

Following the introductory section that unfolds, the second part briefly presents the "hero cowboy" of the western genre, emphasizing his role as "champion/ priest of natural law" as well as his liminal status. Part Three examines in some detail the classic hero-lawyer films, *Anatomy of a Murder, The Man Who Shot Liberty Valance, To Kill a Mockingbird*, and *Inherit the Wind*. The discussion in this section highlights the analogies between the western genre's "hero cowboy" and the hero-lawyer while also stressing the distinction between natural law and equal liberty. The fourth part presents two films that constitute a "transitional phase" between the classic hero-lawyer films and the contemporary ones. These films introduce new themes that became central to their successors. Part Five briefly follows the hero-lawyer into the 1990s and the twenty-first century, questioning the possibility of liminality in Hollywood's portrayal of contemporary America and reflecting on its possible implications.

33.2 Part II The "Hero Cowboy" of the Western Genre: Liminality and Natural Law

33.2.1 Tall in the Saddle

Decades after his disappearance from the screen, the mythological "cowboy hero" of the western genre is still vivid in our collective memory. Westerns "became less prominent in movies and television beginning in the 1970s, but the image of the cowboy, the model of individualism, still permeates our consciousness" (Wright 2001, 9). We still revere the laconic man who emerges from nowhere and never thinks twice before rising to the all-demanding challenge that leaves everyone else dumbfounded—the man who rides through the open, monumental landscape, unbound by relationships, commitments, promises, or fears, devoid of family, property, past, or future, as free and silent as the horse he rides. Yet when the homesteaders or the townspeople are at their wits' end, he appears to face the strong, evil ranchers or gamblers, fights the ultimate battle, and saves the day—only to ride back into the wilderness, the open, endless frontier, silent and tall in his lonely saddle, never looking back.

33.2.2 Shane: Plot Summary

In his structuralist study of the western genre, Will Wright defines the western plot sketched above as "classical" and states that it is "the prototype of all Westerns, the one people think of when they say 'All Westerns are alike.' It is the story of the

lone stranger who rides into a troubled town and cleans it up, winning the respect of the townsfolk and the love of the schoolmarm" (Wright 1975, 32). *Shane* (1953), Wright declares, "is the classic of the classic Westerns" (34). It features the lone gunman, Shane (Alan Ladd), who rides out of the mountains into a newly settled valley. Taken with Starrett (Van Heflin), Marion (Jean Arthur), and their little Joey (Brandon de Wilde), he agrees to stay as their hired hand, and together the two men manage to uproot a tree stump that Starrett had struggled with for 2 years.

The homesteaders in the valley are threatened by the Riker brothers, ranchers who want to seize all the land to themselves and their ever-growing herds. They bully the settlers and burn down their farms to drive them off the land. Starrett, the unofficial leader of the community, feels that he must confront the Rikers. When they send to invite him to a meeting, he decides to go and plans to confront and kill them. If he fails, the other homesteaders will leave, the community will wither away, and he will not feel man enough to face his wife and son. Shane learns that Starrett is about to walk into a trap. He also understands that Starrett is offering to sacrifice himself, knowing that Marion and Joey will be safer—and perhaps happier—with Shane, rather than Starrett, as the man of the house. To prevent Starrett's altruistic suicide, Shane fights him, knocks him down, hides his gun, and rides into town in his place. In the final showdown, he proves his professional superiority by killing the Riker brothers as well as the professional hired gun they had commissioned. Then he advises Joey to grow to be strong and honest and rides into the mountains never looking back, as Joey cries and begs him not to leave.

33.2.3 Shane: Champion of Honor and Natural Law

In their fairness, generosity, hospitality, loyalty, sense of obligation, and altruism, both Starrett and Shane rank as upstanding men of honor and both uphold the norms of natural law. But only Shane is the champion of these values; he alone can uphold them by fighting and defeating the Rikers. Starrett is strong and noble—but unable to protect the community and its value system from the brutal, bullying enemies. He is not a trained warrior and is not likely to overpower the Rikers or even to survive the encounter with them. Additionally, his death would be detrimental to his family and to the whole community. Shane, on the other hand, can confront them because he is an excellent professional gunfighter and because he is unattached. Neither a family man nor a pillar of the community, he is dispensable. Having nothing to lose, he can afford to be fearless. Shane is free of the ties that hold Starrett back.

Starrett's determination to confront the Rikers can be regarded as an attempt on his part to claim the status of the film's champion of honor and natural law. This move challenges Shane to prevent Starrett's heroic attempt and to fill the role that he, Shane, was reluctant to assume. Had Shane stayed and allowed Starrett to sacrifice himself, he would have taken another man's home—his land, property, and family. He would have accepted more than he deserves, received more than he

had given. As a man of honor, Shane must decline such an offer and stop Starrett. Phrased differently, the acceptance of Starrett's offer would contradict the norms of fairness, masculinity, and natural law that Shane cherishes. To secure the natural order of things, he must prevent Starrett from confronting the Rikers. He must, therefore, undertake the battle himself and then leave Starrett's home. He must be the liminal champion of honor and natural law. Marion confirms this by explaining to little Joey that Shane does what he has to do.

Let me clarify that "natural law" in this chapter does not refer to any specific jurisprudential school of thought or philosophical treatise. I use the term loosely to refer to the popular set of notions of fairness, personal integrity, decency, adherence to reciprocity, and respect for others. In this sense, natural law is akin to significant parts of what was popularly known as "the honor code" of "true men." The honor code underlies the world of the western genre, whose heroes are usually "men of honor." I have analyzed this value system as well as its connection to natural law in detail in other law-and-film articles.[6]

33.2.4 Shane: A Liminal, Open Frontier Character

Shane features a community of hardworking men and women trying to settle the west and build a civilized society. Having emerged from the wilderness, title character Shane, the unfettered outsider, attempts to take on a minor role in the life of the community as a hired laborer. He buys work clothes, shuns fighting and drinking, and dances (with Marion) at the farmers' picnic. But he sleeps in Starrett's barn, his head on his saddle, while Marion warns Joey not to grow too fond of him, because one day he will move on and be gone. Shane is literally on the threshold of society. His liminality is inseparable from his deep, inherent connection to the wilderness. It is a feature of his "cowboy hero's" fundamental persona as a man of the open frontier. In Will Wright's words, "[t]he frontier defines the cowboy" (Wright 2001, 7).

Further still, Shane's heroic battle to save the community from the evil ranchers seals his liminality, barring him from entering the community and plucking the fruit of his triumph. I suggest that this aspect of Shane's liminality is "Moses-like." Moses led the Hebrews out of Egypt and through the desert for 40 years. He dedicated his life to bringing them into the Promised Land. But he could not enter that land. A man of the desert, he died on Mt. Nevo, literally on the threshold of the land. There he stood, seeing it but unable to enter. He did not belong in the phase of settlement and statehood. His liminality meant that he was doomed not to be part of the world that he dedicated his life to make possible.

Interestingly, both his unlimited freedom and his professional warring, the qualities that make Shane suitable to play the role of champion of honor and natural law,

[6] See Kamir (2000, 2005, 2006a).

are inherently associated, in the world of the western, with his liminal status, with his inherent attachment to the open frontier. For in the world of the western, unbridled freedom precludes playing a central role in communal life. A man who does not own land, work it or raise a family is not a pillar of the community and is hence dispensable. Similarly, in this world, professional fighting is not performed by members of the community. Farmers, shopkeepers, or even most cowboys or sheriffs are not professional gunmen, but wilderness "cowboy heroes" are. The frontier man "has a special skill at violence, and this is also a wilderness skill. Violence is necessary in the dangerous wilderness where law and government are absent" (Wright 2001, 38). Outstanding, professional fighters are outsiders, wanderers. They arrive on the scene when hired to perform a violent job and ride out upon completion. They do not belong in the community. *The qualities that make Shane the champion of honor and natural law are, thus, also the features of his frontier-based liminality.*[7]

33.3 Part III: Hollywood's Classical Hero-Lawyer

33.3.1 The Man Who Shot Liberty Valance: Plot

Shane's most obvious successor among the classical hero-lawyers is the protagonist of *The Man Who Shot Liberty Valance*. *Liberty Valance* lends itself so well to the analogy because in addition to being a hero-lawyer film, it is also a western. It features a young lawyer, James Stewart's Ranse Stoddard, who, in the opening scene, is making his way west by stage coach. Riding through the wilderness, the stage coach is held up by the notorious gunman Liberty Valance (Lee Marvin). Ranse attempts to protect a female fellow passenger and is whipped by Liberty to unconsciousness. Arriving in Shinbone, Ranse receives compassionate nursing from Hallie (Vera Miles), who works in her parents' restaurant. At the restaurant, Ranse encounters John Wayne's Tom Doniphon. Ranse is chivalrous, proud, courageous, honest, and loyal. But Tom is the western's uncontested "hero cowboy." Strong, fearless, independent, and decent, he is a "true man." The best shot in the territory, he is the charismatic, unofficial representative of natural law, and Shinbone obeys him out of fear and respect. Tom is in the process of building a house, and Hallie is the girl he plans to marry.

Ranse works at the restaurant, where he and Hallie form a romantic attachment. He writes for the local newspaper, organizes a school for the town's children and

[7] Will Wright suggests that the close affinity to wilderness is the source of the "hero cowboy's" dedication to equality and freedom, as well as the source of his expertise in violence and commitment to honor (Wright 2001, 46). Wright's "wilderness" is the "outside" liminality that I associate with the character's inner one. In other words, his inherent connection with the "outside"/"wilderness," that is, his innate liminality is what makes the "hero cowboy's" champion of natural law.

illiterate adults (including black ones), and dreams of starting his law practice. He teaches townspeople the merits of democracy, citizenship, and equality and encourages them to vote for statehood. But the big land and cattle barons oppose statehood, preferring to keep the territory lawless and their own power intact. They hire Liberty and his gang of thugs to intimidate the townspeople into voting against statehood. At a town meeting, Ranse and his friend, the newspaper editor, are elected to be the delegates who will represent Shinbone in the vote on statehood. Liberty fails to get elected, and in a violent act of vandalism, he and his gang burn down the local newspaper and nearly kill its editor. This leads to the ultimate, unavoidable showdown between Ranse and Liberty. Liberty challenges Ranse, who feels compelled to confront him. Fearing for his life, Hallie sends for Tom, who appears at the last moment and unnoticed, and shoots Liberty from a nearby alley.

Ranse is credited with winning the duel and is titled "the man who shot Liberty Valance." He is elected to represent the territory in the discussion of statehood at Washington D.C. and marries Hallie. Later he is elected governor of the new state and finally serves as a Washington D.C. state senator. Having lost Hallie, Tom burns down the house he was building and leads the lonely life of a drunkard. When he dies, years later, Ranse and Hallie come from Washington to pay their respects. They hardly recognize the altered town. In a newspaper interview, Ranse confesses that he did not kill Liberty Valance, but the newspaper editor declines to publish his confession, preferring the legend to historical facts. Ranse and Hallie return to Washington, leaving Shinbone behind.

33.3.2 Tom: Champion of Honor and Natural Law

Unlike Shane, Ranse does not leave Shinbone alone: He allows Tom to sacrifice himself for his sake and then takes away Tom's girl in return. Ranse accepts from Tom the chivalrous gift that Shane refused to accept from Starrett. There can be little doubt: Ranse, the hero of this hero-lawyer film, is not its most honorable man. This causes great frustration to the western lover, marking *Liberty Valance* as a transitional film that shifts from following western conventions to establishing new ones—those of the classic hero-lawyer movie. It is a film that discards its ultimate John Wayne man of honor and transfers his girl and glory to the emerging hero-lawyer. In so doing, *Liberty Valance* defines a new criterion for cinematic heroism. The new hero is not the man of honor and natural law but the champion of law and equal liberty.

33.3.3 Ranse: Priest of Equal Liberty

Tom Doniphon clearly epitomizes honor and natural law. But *Liberty Valance* favors the rhetoric of equal liberty. In a telling, self-conscious move, the film names its villain "Liberty." Liberty represents a complete, selfish commitment to personal

liberty that is devoid of any respect for equality. A ruthless outlaw and a hired gun in the service of the land and cattle barons, Liberty is much like *Shane*'s Riker brothers and their professional gunfighter. Like them, he stands for brute, uncurbed freedom that comes at the expense of other community members. Tom Doniphon offers to impede Liberty through the traditional western ethics of honor and natural law. He does everything that Shane did a decade earlier. But *Liberty Valance* prefers the ideals represented by Ranse and opts to declare *him* "the man who shot Liberty Valance"—the man whose egalitarian worldview defeats the threat of unrestricted liberty. In this film, the man who represents commitment to literacy, democracy, free speech, and the rule of law is the hero because he constitutes the alternative to Liberty's reign of terror. Tom could eradicate Liberty Valance but not lay the foundations of a stable alternative. It is the hero-lawyer's vision that liberates Shinbone's community by introducing the spirit of the American Constitution. *Liberty Valance* votes for him.

Let me reiterate Cheney Ryan's take on this point. Ryan maintains that

> At the deepest level, what opposes Valance's law, the rule of "anything goes," is what might be termed the natural law of honorable violence – the law that the film identifies with the beliefs and actions of Tom Doniphon. This is the law of the *fair fight*, the law that says: don't hurt women, don't shoot people in the back, don't gang up on people and so on. […] I have said that Liberty Valance plays the savage in this film. He actually plays the *ignoble* savage to Doniphon's *noble* savage. (But both, significantly, end up drunk and dead). Where does this leave Stoddard and "civilization"? (Ryan 1996, 37)

What Ryan plays down is the fact that Ranse brings to Shinbone a new, enabling discourse. Yes, Tom is honorable and loveable. But his natural law includes the tenet "out here we fight our own fights." This conservative principle upholds the rule of the mighty; they are the ones who can best fight their own fights and win them. Ranse teaches that every person's liberty is as valuable as everyone else's. This means that if an individual is unable to protect his equal right to liberty, the community must do so for him. It must constitute civil liberties and enforce them for everyone's equal benefit. In *Liberty Valance*, this is the only coherent way to overcome Liberty Valance. This stance casts the film more in the hero-lawyer genre than in the western.

Of all the hero-lawyers, Ranse may be the keenest "priest" of the legal culture. Other hero-lawyers practice it; Ranse teaches it, fights for it, represents it, and preaches it.

33.3.4 Ranse: A Liminal Character

Reading *Liberty Valance* against the western *High Noon* (1952), Cheney Ryan stresses the similarity between Ranse and Kane, *High Noon*'s sheriff hero: "Both Kane and Ranse, for example, are figures of detachment, indeed isolation. They are 'in' but not 'of' the communities they inhabit. […] Though the film twice depicts [Ranse] arriving in Shinbone […], he never really arrives…" (Ryan 1996, 28).

In other words, Ranse is always on the threshold of Shinbone; he is a liminal character. As Ryan rightly points out, even as Ranse becomes teacher, reporter, representative, and Hallie's husband, he is never an insider. In the film's opening scene, he arrives in Shinbone, and in the closing scene he leaves it. Just like Shane. Interestingly, as he represents the town in the capital of the territory and then the state at Washington D.C., Ranse remains liminal in a Moses-like manner: he leads his people to the Promised Land but always remains outside it. Furthermore, in *Liberty Valance*, Tom Doniphon is liminal in an analogous fashion. He too leads his community to a new future, and he too is doomed to remain outside of it. The two men, the hero-cowboy and the hero-lawyer, share in this Moses-like liminality.

33.3.5 Ranse: Both Liminal and Priest of the Constitution

Like Shane, Tom is both liminal and the champion of honor. Ranse's liminality, on the other hand, is not intertwined with honor but with his legalistic commitment to equal liberty.

Complete devotion to equality requires some detachment both from oneself and from one's peers. Deep engagement with oneself or with others is likely to yield favoritism. It is hard to be deeply passionate about your life or strongly invested in the lives of others, yet treat these lives exactly as you would treat everyone else's. It is hard to love your daughter and not believe that she is smarter, better, and deserving of more attention, patience, understanding, and support than anyone else's daughter. It is hard to limit her liberty (to succeed, to spend, to compete) just as you would limit anyone else's. Ryan points out that Ranse "hardly knows anyone, and those whom he does remember he treats like strangers" (Ryan 1996, 28). This detachment is crucial for his full commitment to their equality. Ranse represents the spirit of the legal frame of mind. Legal equal liberty requires what is often referred to as neutrality. Such neutrality necessitates emotional disinterestedness. It necessitates emotional freedom that comes from being, existentially, at a distance, on the threshold. It is no coincidence that Ranse, like most western heroes and hero-lawyers, has no progeny. His type of liminality precludes it.

33.3.6 Inherit the Wind: Defending Equal Liberty from the State

Like Shane and Ranse, Spencer Tracy's Henry Drummond arrives in Hillsboro at the beginning of the movie and leaves it at its end. Like Shane and Ranse, he arrives and leaves alone,[8] and throughout his stay, as he fights the film's villains in an attempt to save the community, we learn nothing of his past or of his family. His liminal

[8] Historically inaccurate, this depiction is a dramatic devise. See Moran (2002, 29).

position vis-à-vis the film's community complements his declared status as high priest of civil liberties at large and freedom of speech in particular. Drummond, the fictionalized image of Clarence Darrow, is renowned worldwide for his commitment to civil rights. He has traveled a very long way (by bus) to fight for the constitutional right of Bertram Cates (Dick York) to teach the theory of evolution and thus practice his freedom of speech. Drummond comes to town in order to fight the religious fundamentalists who managed to limit evolutionists' freedom of speech.

Cates, a teacher at the local school and engaged to be married to the daughter of the town's charismatic, fundamentalist reverend Brown, is deeply rooted in his community.[9] He is strong, decent, and committed to his ideals, including Darwinism and the equal freedom of speech. But he cannot successfully fight the community, which attempts to curtail his liberty. He cannot undertake his own battle both because he is not a "professional fighter" and cannot conduct his own legal defense and because he is too involved with the community to fight it effectively. It is Reverend Brown, his father-in-law-to-be, who leads the fundamentalists in their crusade against him. Drummond is both a professional legal warrior and an outsider to the community. He is the man for the job. Accordingly, the film portrays him as fighting the duel, winning the argument, and bringing about his opponents' death in the course of the trial.[10]

Drummond's characterization as "the liminal high priest of equal liberty" is highlighted by the film's contrasting treatment of Fredric March's Matthew Harrison Brady, the fictionalized image of William Jennings Bryan. Brady, who conducts the case for the prosecution, is portrayed as both the high priest of fundamentalist religion and an existential "insider." Brady fervently stands for equality devoid of freedom. According to his firm belief, everyone must study the Bible, and no one should study evolution, regardless of their beliefs or desires. Brady arrives in Hillsboro with his wife and is paraded into town by a crowd of devotees and admirers who sing "what's good enough for Brady is good enough for me." He eats his meals with his followers and participates in their church meeting. Rachel, Cates' fiancé and the reverend's daughter, comes to confide in him and ask for his advice and help. Never having set foot in Hillsboro before, he is completely immersed in its community.

Drummond is poised not just in opposition to Brady but also between Brady and Gene Kelly's Hornbeck, the fictionalized character of reporter H.L. Mencken. If Brady stands for equality with very limited freedom, Hornbeck, representing the press, stands for complete and unlimited freedom of speech. There seems to be no other value in his worldview. If Brady is completely immersed in Hillsboro's community, Hornbeck is the ultimate loner, devoid of compassion, warmth, or

[9] This Starrett-like cinematic depiction is purely fictional. The real John Scopes was not native to Dayton, Tennessee, was not engaged to be married there, and was not deeply rooted in the community (Moran 2002, 25; Garber 2000, 140).

[10] In fact, Clarence Darrow lost the case and appealed the decision. Jennings died several weeks after the trial.

human connections. He does not care enough about people to worry about their equality. Elitist social Darwinism may sit well with his biting cynicism. Against these two extremes, Drummond is portrayed as the commonsensical, middle-of-the-road, reasonable American, who is naturally committed to freedom as well as to equality. Like Brady, he believes in an egalitarian community, and like Hornbeck, he is committed to liberty. Leaving the courtroom, he holds both the Bible and Darwin with equal respect.

Inherit the Wind contains an important feature that is absent from *Liberty Valance*. In his battle for equal liberty, the hero-lawyer fights against the state that tries to curtail some people's liberty. He does so in the context of criminal law.

In a liberal context, constitutional protection of every person's liberty is meant, above all else, to prevent the state from restricting some people's liberty. Equal liberty aims to provide all persons with similar protection from the state's potential attempts to limit their freedom. *Liberty Valance* is situated in a prestate era and associates the fight for equal liberty with the struggle for statehood. In *Inherit the Wind*, it is the state that prosecutes Bertram Cates and the state that deprives him of the freedom of speech that it awards his antievolutionist opponents. State power is abused by a fundamentalist majority to curtail some people's civil liberties. State apparatus is used to censure some types of speech and to prosecute certain individuals for their speech. Championing the spirit of the constitution, *Inherit the Wind*'s hero-lawyer is a criminal lawyer defending the hapless defendant from the state.

33.3.7 Anatomy of a Murder and to Kill a Mockingbird

Anatomy of a Murder, produced a year prior to *Inherit the Wind*, and *To Kill a Mockingbird*, produced 2 years later, both present a similar situation. In each of these classic hero-lawyer films, the hero-lawyer is a criminal lawyer fighting for the civil rights of an unpopular defendant.[11] In *Mockingbird*, Gregory Peck's legendary Atticus Finch fights to exonerate a black man falsely accused of raping a white woman. Like the religious fundamentalists in *Inherit the Wind*, who abuse the law to discriminate against an evolutionist and deprive him of his civil liberty of speech, here southern bigots abuse the law to discriminate against a black man and deprive him of his civil liberties. The film's community, dominated by racist elements, locks Tom Robinson up and attempts to deprive him of the equal protection of the law. Atticus Finch takes on the ungrateful task of providing the black defendant with adequate legal representation in an attempt to restore his freedom. Despite his painful failure to save Tom's life, the film presents Atticus as having succeeded to confront state power and bigotry.[12]

[11] For detailed analyses of these films, see Kamir (2005, 2009a).

[12] Many writers admire the character and the film, hailing them both as classics at its best. See Asimow (1996), Osborn (1996), and Strickland (1997). For an incisive criticism of both character and film, see Banks (2006).

Similarly, *Anatomy of a Murder* features James Stewart's Paul Biegler defending a man who practiced what the film presents as his traditional, honor-based right to kill the man who had tried to rape his wife. *Anatomy* construes the husband's "unwritten right" as a fundamental liberty that must be protected from the power-hungry state and from the prosecution's legalistic attempt to curb it.[13] The prosecution is portrayed as a sleek, powerful, threatening Goliath, challenging the film's righteous David-like hero-lawyer.

Paul Biegler and Atticus Finch are not liminal characters in a Shane-like fashion: they do not ride into town at the beginning of the film and into the wilderness at its end. In fact, they are both deeply rooted in their small-town communities. Biegler was at one time elected district attorney, and Atticus brings up his children in the little southern town that seems to be his lifelong home. Nevertheless, his status as reclusive widower who raises his children alone sets Atticus apart from the rest of the community. Despite the courtesy he displays, he does not mix much with his neighbors. His willingness to represent Tom Robinson and the interest he takes in Tom's black family marginalize him even further. In fact, Atticus' antiracist legal activity endows him with a Moses-like liminality. He fights for a future that he does not live to see.

Similarly, despite his respectable status, Paul Biegler is a slightly eccentric loner with no family ties, living on the fringe of his small-town community in Michigan's Upper Peninsula. Having lost his position as the district attorney, Biegler has withdrawn and resorted to frequent, long, secluded fishing trips and piano jazz playing, neglecting his private legal practice (Kamir 2005). As his good friend, Parnell (Arthur O'Connell), an older lawyer-turned-drunk warns him, he is on the road to complete seclusion. Interestingly, unlike Atticus, at the end of the film, Biegler is less marginal than before and more likely to go back to his private practice and to spend less time sidetracking. His heroic legal performance has not marginalized him.

In conclusion, both these classic hero-lawyers are loners on the outskirts of their small, frontier-like, marginal towns. Neither is married or otherwise emotionally attached. Each has suffered a great loss (Atticus lost his wife and Biegler—his career), and they are both "outsiders within" at the edge of their communities. Atticus Finch's professional activity as a hero-lawyer estranges him further from his community. Paul Biegler's marginality is associated with the loss of a central position in the legal world and with his deep friendship with an older, failed lawyer. Yet at the end of the film, he is less marginal than he was before he fought his heroic battle. All these elements were embraced by subsequent hero-lawyer films to become the genre's building blocks.

All four classical hero-lawyers are enthusiastic champions of equal liberty. Additionally, they are all liminal characters in frontier-like communities, in the Wild West (*Liberty Valance*), in the Deep South (*Inherit* and *Mockingbird*), or in

[13] For a full analysis of the film of Biegler as a hero-lawyer and of the film's complex treatment of honor rights, see Kamir (2005).

the uppermost North (*Anatomy*). They are also "frontier men" professionally: Ranse struggles to bring the law to Shinbone, to create the rule of law, and to establish a state. The law is his professional frontier. The other three classical hero-lawyers fight for unpopular defendants' civil liberties. Their professional frontier is the legal realm of civil rights.

33.4 Part IV Transitional Phase: Old and New Elements in *…And Justice for All* and *The Verdict*

The classic hero-lawyer movies were produced between 1959 and 1962. The next big wave of hero-lawyer films took place in the 1990s. Two hero-lawyer films that were released around 1980 can be regarded as marking a "transitional phase" in the history of hero-lawyer films. Both these films, *…And Justice for All* (1979) and *The Verdict* (1982),[14] feature many of the classic hero-lawyer characteristics, bringing them up-to-date.

…And Justice for All stars Al Pacino as Arthur Kirkland, a small criminal lawyer fighting not merely the state prosecution but also a depraved, sadistic judge and a vengeful ethics committee that conspire to blackmail and silence Arthur. In his heroic—yet unsuccessful—attempt to save his downtrodden clients from unjust and inhumane imprisonment, this hero-lawyer encounters a deeply corrupt and uncaring system. The legal world that he faces is a nine-headed monster, and his struggle with this Hydra is not merely against all odds but plainly hopeless. At the end of the film, he betrays a client, the depraved judge, who blackmailed Arthur to represent him in a rape charge. Arthur announces his own client's guilt in court, demanding that he be convicted. Arousing a scandal, Arthur is thrown out of the courthouse and left on the imposing building's outer steps. He is likely to lose his license and never enter a courthouse again.

Like three of the four classic hero-lawyers, Arthur Kirkland resorts to criminal defense to fight the state. The state is represented by both prosecutors and judges, who threaten and unjustly curtail the liberty of Arthur's clients, the weakest social elements in the food chain. Further, Arthur challenges the unlimited liberty of a sadistic judge to abuse his judicial power while himself breaking the law and tampering with evidence. In fact, Arthur commits professional suicide by exerting himself to ensure that the judge's liberty to continue raping is indeed denied. Arthur is clearly the priest of equal liberty for all, at a very high personal cost.

At first, Arthur seems less liminal and certainly is far less laconic than the classic hero-lawyers. True, he is a small-time, divorced, criminal lawyer, estranged from both his children and his parents. Yet he practices law in the metropolis of Baltimore rather than in a small frontier town and is surrounded by colleagues, friends, his

[14] In some respects, *Jagged Edge*, made in 1985, can also be considered to belong to this category, though I hesitate to define its protagonist a "hero-lawyer."

grandfather, and even admirers who cheer as he exposes the sadistic judge. Arthur's lover is a member of the ethics committee and supplies him with inside information. Yet what gradually marginalizes Arthur is his devotion to his hero-lawyer role, his insistent refusal to play along with the corrupt system. Like Atticus Finch's, Arthur's commitment to the civil liberties of his indigent clients hampers his professional advancement and alienates him from the legal system. His refusal to "make a deal" with the prosecution and to silently adhere to the whims of the sadistic judge estranges him from the legal community. His ultimate insistence on curtailing the judge's unlimited liberty exacts from Arthur a far greater price than that paid by Atticus. Whereas Atticus is marginalized by his community, Arthur, playing the hero-lawyer role, loses his license and is finally consigned to the literally liminal place on the threshold of the courthouse.

Three years later, Paul Newman starred in *The Verdict* as Frank Galvin, a once promising young lawyer who takes the rap for a senior lawyer in his law firm, loses his job as well as his wife, and deteriorates into a drunkard ambulance chaser. Frank's loyal friend and mentor offers him a last chance in the form of a big tort malpractice case that would involve confronting a doctor and his supporting peers, the hospital, the church that owns the hospital, and their big law firm. The client is a young woman who was given the wrong anesthetic and has been comatose ever since. The hospital and its doctors, the church, the law firm, and a hostile judge all conspire to undermine Frank's case, but with the help of his good friend, he overcomes all the hurdles and convinces the jury to compensate his client for the life that was taken away from her.

Frank is clearly a marginal character on the very fringe of both the legal world and society at large. Handing his card to bereaved widows at funeral homes, he seems to have reached the rock bottom of ambulance chasing. Not surprisingly, at the opening of the film, Frank is hardly a hero of any kind. It is only in the course of preparing his case and sobering up that he gradually evolves and grows into a true warrior for his client's right to equal acknowledgment as a worthy human being. He fights to limit the enormous liberties usurped by the doctors, the church, and the lawyers and to free his client at least from the economic hardship imposed on her and on her family. For Frank, the legal battle that constitutes him as a hero-lawyer is also an act of redemption and salvation. His professional hero-lawyer's pursuit of equal liberty awakens him to a new existence, true to his deeper, most gallant nature.

This "redemption motif" recurred in many hero-lawyer films ever since. Most hero-lawyers do not start out as Atticus Finch characters; they grow into the hero-lawyer role through a professional conduct that also entails personal redemption and salvation.

Unlike his predecessors, Frank Galvin does not practice criminal law and does not fight to restrict the all-powerful state and its legal institutions. Frank is a tort lawyer, and the powerful systems he tries to contend are private social organizations: a hospital and its medical guild of doctors, a church, and a big law firm.

Traditionally, the state is the power suspected of usurping too much liberty at the expense of some individuals'. But in *The Verdict*, the state is represented by a

spineless judge who is only eager to please the mighty respondents. The real power is in the hands of the big institutions, including their law firm. This reflects the film's worldview. In *The Verdict*, society is no longer made up of individuals, community, the state, and the law; it is ruled by powerful elite groups.[15] These groups are professional enclaves, each motivated by its members' collective best interests in terms of power, status, and wealth. In this movie, the hospital is such an elite group, as are church and law firm. They each offer their members identity, meaning, purpose, status, stability, and income. In return, each of them demands these/its members' complete loyalty. Each elite group places its members' collective interests above all else and exacts their full adherence to this principle. This, of course, comes at the expense of individuality, society, and community: the institutions/elite groups collaborate to supersede the liberal state, its democratic principles, and its philosophy of civil rights.

In this context, Frank's case can be seen as a battle lodged in the name of liberal democracy and its doctrine of equal liberty against oligarchy, the social structure of elitism. This is why Frank's threat to expose one elite group (the hospital) and hold it accountable for its wrongdoings prompts the collaboration of several ruling elite groups in a struggle to protect their collective hegemony. In this dramatic, ideological battle, the law firm takes center stage. In *The Verdict*'s brave new world, the law firm has become an elite group. Law firms have taken over the legal world, abusing their professional skill to serve their own interests, their clients' wishes, and oligarchy's whims.

This worldview deeply impacts the symbolic meaning of the hero-lawyer. In *The Verdict*, the hero-lawyer's role is to represent the individual, who was harmed by an elite group and demands acknowledgment as an equal and autonomous citizen of a liberal democracy. On behalf of his client, the hero-lawyer challenges a particular institution, as well as the rule of the elites. In the process, he challenges a big law firm, itself an elite group in the service of other elite groups and the new, rising oligarchy. This hero-lawyer is a democratic David fighting an elitist Goliath law firm. He plays a central role in the "cultural clash" between democracy and the new oligarchy that is rapidly superseding it. It is no coincidence that Frank's triumph is facilitated and declared by the jury, which stands for the community. The community takes the side of liberal democracy, while the law firm represents the respondent elite group and the new social order.

The Verdict's view of social reality, the legal world and the big law firms, and its reconceptualization of the hero-lawyer's role in this context have all become trademarks of many hero-lawyer films of the 1990s.

Let me ground this in reference to the western genre discussed earlier. *The Verdict*'s villains, the large, strong institutions, bring to mind the powerful ranchers and gamblers of the western genre. The western's portrayal of social reality in the Wild West seems to be mirrored by *The Verdict*'s portrayal of the early 1980s. It is as if the antistate forces of the prestate era had evolved into the big institutions of the "post state" condition of the Reagan age.

[15] I use this particular term following Wright (1975); see below.

In his analysis of the western genre, Will Wright shows that the "classical plot western" was replaced by what he calls "the professional plot western" (Wright 1975, 85–123, 164–184). In this subgenre that emerged in the 1950s and peaked in the 1970s, the place of the lone warrior who fights for the downtrodden and embodies honor and natural law was taken by the group of mercenaries who form an elite group and fight for the thrill of the fight, and, of course, for money. Society and its values not merely become irrelevant but are completely rejected: " [T]he group of elite, specialized men in the professional Western relate to ordinary society only professionally; their need for social identity is totally satisfied by membership in the group" (Wright 1975, 180). Wright explains:

This group of strong men, formed as a fighting unit, comes to exist independently of and apart from society. Each man posses a special status because of his ability, and their shared status and skill become the basis for mutual respect and affection. Thus, the group of heroes supplies the acceptance and reinforcement for one another that the society provided for the lone hero of the classical plot. This change in the focus of respect and acceptance naturally corresponds to an important change in the qualities or values that are being respected and accepted. The social values of justice, order, and peaceful domesticity have been replaced by a clear commitment to strength, skill, enjoyment of the battle, and masculine companionship. (86)

Popular law firm television series, such as *L.A. Law* and *Ally McBeal*, mirror the professional plot westerns. In *The Verdict*, however, the hero-lawyer is not replaced by a professional law firm with its bunch of specialized legal warriors. On the contrary, Paul Newman's hero-lawyer becomes "the man who shot the law firm." In this film, the law firm is the nemesis; it is the Liberty Valance that serves the evil hospital, doctors, and church. Frank is the man who stands up to this professional elite group of lawyers, fights it against all odds, and prevails. His liminality and commitment to equal liberty qualify and empower him to do so. His victory is that of the classical plot western over the professional plot western of democracy and the American constitution over oligarchy. Interestingly, at the end of the film, Frank is less liminal than before. He is slightly reconciled with the community and with himself. There seems to be hope of his reentering society and perhaps even the legal world.

Both protagonists of the "transitional hero-lawyer films" are champions of equal liberty. Neither is set in frontier towns in the Far West, South, or North. In fact, they are both big eastern city lawyers. In their personal and professional lifestyles, both lawyers are liminal characters; yet only Frank Galvin is situated in a new legal frontier. Arthur, attempting to use criminal defense to promote civil liberties, feels that he is facing a dead end. In 1979, Hollywood portrays, civil liberties were no longer perceived as the exciting new legal field of endless possibilities. In fact, the struggle for civil liberties seemed to have reached its limit. Arthur Kirkland is thus a pessimistic hero-lawyer. He is a liminal character with no frontier, that is, he is a threshold character with no "out." He is trapped on the edge of a corrupt and hopeless "inside," with no "wilderness" to empower him and no horizon to aspire to. Frank Galvin, on the other hand, the 1982 civil, tort lawyer, discovers a whole

new professional frontier—that of individual[s'] damage claims against corrupt, cynical, powerful institutions. This new professional frontier empowers him and fills him with hopeful purposefulness; it redeems his earlier tragic downfall.

33.5 Part V Hero-Lawyers of the 1990s and Beyond

The 1990s were the heyday of hero-lawyer films. Of the 15 hero-lawyer films that this chapter refers to, eight were released between 1990 and 1998. Of these, three continue in the tradition of the classic hero-lawyer films and …*And Justice for All*; four follow the revised, "tort law and redemption" model proposed by *The Verdict*; one combines the two models.

33.5.1 Criminal Hero-Lawyers of the 1990s

The three most notable movies that featured aspiring successors of Atticus Finch, Henry Drummond, Paul Biegler, and Arthur Kirkland are *A Few Good Men* (1992), *The Client* (1994), and *A Time to Kill* (1996).[16] Each of these films imbued its hero-lawyer with commitment to equal liberty as well as some form of liminality. The two Grisham-based films (*The Client* and *A Time to Kill*) mostly explore the rearrangement of familiar elements, while *A Few Good Men* uses them to convey an unusually optimistic worldview.

In *A Few Good Men*, Tom Cruise's lieutenant Daniel Kaffee is a young navy lawyer. He "has plea-bargained forty-four cases in a row and has yet to try one" (Bergman and Asimow 1996, 73). He ostensibly aspires to drift through his professional career with as little trouble or inconvenience as possible. Son of a renowned jurist, Daniel reluctantly strives to live up to the model set by his father. Kaffee is assigned the defense of two marines who killed a fellow marine in the course of executing "Code Red," that is, the brutalizing of a marine who "dishonored" the navy. They are charged with murder. In the course of preparing the case, Kaffee encounters Jack Nicholson's Colonel Nathan Jessep, a "bad father" character, who had instigated the Code Red in the name of navy honor but now evades responsibility. He protects his own liberty at the expense of the defendants'. Kaffee realizes that he was chosen to conduct the defense in hope that he would settle the case. He therefore decides not to settle and to go after Jessep despite the personal risk to

[16] *The Accused* (1988) is a good candidate for this subgroup. Since its (woman) hero-lawyer is a public prosecutor, rather than a criminal defender, it belongs to a subcategory of hero-lawyer films that requires a discussion that is beyond this chapter's scope. *The Music Box* (1989) is another worthy candidate, but the protagonist's "heroism" is not a professional, legal one. It is not surprising that Hollywood's women lawyers are harder to define as "hero-lawyer." For a systematic analysis, see Lucia (2005).

his career. In the courtroom showdown between Kaffee and Jessep, Kaffee evolves into a hero-lawyer, proving full commitment to the equal liberty of his clients. Kaffee matures into an honorable lawyer and human being, just like his father before him, and earns his clients' appreciation.

In the process, Kaffee sheds his liminal position as a junior lawyer on the threshold of the legal profession. His initial liminality is revealed to have been a chrysalis one due to his unresolved Oedipal issues. He was "on the fence," reluctant to jump into the water, in fear, and resentment of having to live up to his father's heritage. He suffered from "adolescent liminality," a passing phase on the road to hero-lawyerism. The process of becoming a hero-lawyer through litigation turns out to be a rite of passage for Kaffee, both professionally and personally. This unusual cinematic optimism echoes some classical plot westerns in which the gunfighter cleans up the town and then settles in it and becomes a pillar of the community (think, e.g., of *Destry Rides Again*, 1939[17]).

The Client's protagonist, Susan Sarandon's Reggie Love, is liminal in almost too many ways: She is a woman, a very small-time lawyer, a divorcee, a rehabilitated alcoholic, and a mother who has lost custody of her children. Protecting her client—an underage witness to a suicide—from both the ruthless mafia and the self-serving prosecutors, her growth into a hero-lawyer entails a process of redemption and salvation, a la Frank Galvin. *The Client* thus combines a variation on the criminal hero-lawyer plot with *The Verdict*'s personal salvation motif. Reggie wins her heroic legal battle, but the victory leaves her, Moses-like, at the threshold of the family she has saved. As her client boards a plane with his mother and brother, she stays behind, alone.

A Time to Kill, another Grisham-based hero-lawyer thriller, similarly reworks familiar motifs. It fuses a *Mockingbird*-like plot of racist persecution of a black man with an *Anatomy of a Murder*-like premise that the law and the legal system must allow a man to pursue his "unwritten rights." In this movie, a white attorney defends a black man who shot the two white men that had brutally raped his 10-year-old daughter. Matthew McConaughey's lawyer character, Jake Tyler Brigance, evolves from an uncommitted professional into an Atticus Finch in his insistence that the law must honor his black client's unwritten right to avenge his daughter's victimization, just as it would have honored a white man's right to do so in an analogous situation. Like Atticus, Brigance's commitment to his unpopular client ostracizes him from his racist community, and he is left in Mosaic isolation.

33.5.2 Civil Hero-Lawyers of the 1990s

Most prominent among the 1990s civil law hero-lawyer films are *Class Action* (1990), *Philadelphia* (1993), *The Firm* (1993), and *Civil Action* (1998). Each of these films' protagonists undergoes the transformation from a brash, self-serving

[17] In *Destry*, too, the title character struggles to come to terms with the legacy of his dead sheriff father.

attorney to a conscientious hero-lawyer, committed to civil liberties, fighting the big, powerful elite groups, and making a personal sacrifice. All these films focus on their protagonists' struggle with professional liminality, exploring it through variations on the Frank Galvin redemption theme and the Daniel Kaffee rite of passage motif. Most notably, in all four films, *The Verdict*'s evil "social institutions" have transpired as full-blown corporations: self-interested commercial entities, solely concerned with their economic gain. In *Class Action,* the hero-lawyer's nemesis is an automobile manufacturing company; in *The Firm,* it is the mafia; and in *Civil Action*, it is a tannery—a subsidiary of a chemical company. Additionally, every one of these films features a large, successful law firm that is financially motivated, just like its clients. The law firm represents the corporate world and serves its interests. It is just as greedy, corrupt, and harmful as any other corporation. In fact, in these films, the law firm has become the hero-lawyer's archenemy.

Class Action's protagonist is a woman lawyer in a highly competitive, testosterone-flooded professional legal environment. At the end of the film, in an Arthur Kirkland gesture, she exposes and betrays her corporate law firm and its greedy, negligent automobile-manufacturer client. She loses her job but not her license and finds a professional home in her father's small, old-fashioned human rights' law firm. Her initial liminality, the film seems to indicate, was "adolescent," like Kaffee's, and, like him, she too resolves her Oedipal issues in the course of her professional rite of passage. Unlike Kaffee, however, in joining her father's law firm, she does not become an honorable insider but embraces the liminality of the father's professional role. Stepping out of "the game," she chooses the idealistic past over the corporate present. She will do "good law" but has no hope to effect a significant impact upon the corrupt environment.

The Firm's protagonist struggles to escape his identity as the guy raised by a single mother in a trailer park, whose big brother serves time for homicide. As his wife points out, his enormous endeavor to blend in the prominent law firm that hires him out of law school is a conscious effort to become a legitimate member of that "in-group," which he regards as a "mainstream family." Mitch McDeere's painful growth into a hero-lawyer is complemented by his relinquishing of this dream. Betraying and exposing the law firm that turns out to be fraudulent and murderous, he embraces the humble vision of life as a good lawyer in a small, unpretentious law firm. Performing his rite of passage, he is redeemed of the desperate desire to fit in and finds both his inner hero-lawyer as well as the type of liminal existence that suits him best.[18]

In *Philadelphia*, one of the protagonists is a black, lone, ambulance-chasing lawyer, while the other, his client, is a gay lawyer with HIV, shunned and discriminated against by his prestigious law firm. Both men outgrow their self- centeredness and rise to the ideological challenge they face together. Seeing, in a Mosaic liminality, the Promised Land he will never enter, the gay lawyer dies of AIDS. The black lawyer seems to remain as marginal at the end of the heroic battle as he was at its beginning. Having found his moral core, he embraces his liminality but goes nowhere.

[18] For a more detailed analysis, see Kamir (2009a).

Civil Action's protagonist starts out as a lawyer at the height of his success in every possible way (he is, among other things, the most popular bachelor in his community). The senior partner of his law firm, he is an expert at making quick, easy profit. Unexpectedly, he takes on a class action against a tannery that pollutes the drinking water, causing the deaths of many members of a small community. At the end of the film, having sacrificed and lost everything in zealous pursuit of justice and recognition for his clients, he is ruined, bankrupt, and alone. But redeemed of his egotistical professional *hubris*, he is proud and content in his liminal existence, at the outskirts of both the legal world and society.

As this brief outline points out, in each of these films, being a hero-lawyer entails fighting an all-out battle against the corporate world and a strong, evil law firm. Waging this battle requires a deep, existential liminality and leads the protagonist to a professional one. Having found his or her true self, the newborn hero-lawyer rejects the fantasy of membership in an elite group law firm and embraces a liminal professional existence. Hero-lawyerism and liminality seem, more than ever, to be fused together.

Of the seven 1990s hero-lawyer films, five entrap their protagonists in a liminal condition devoid of an open frontier. They are pessimistic, hopeless hero-lawyer films. Only the two Tom Cruise films, *A Few Good Men* (portraying the *Bildung* of a young criminal defense hero-lawyer) and *The Firm* (featuring the growth of a young lawyer fighting the corporate world), supply their young lawyers with open frontiers. In *A Few Good Men*, the young lawyer discovers the path of honorable service as a marine attorney. *The Firm*'s young lawyer looks forward to a peaceful, quiet professional life and a fulfilling personal one. His horizon is not professional but rather emotional and familial. The criminal defense hero-lawyer's bright future lies in the navy; the corporate-world hero-lawyer's lies in the personal sphere, away from law and the public sphere. Of the seven 1990s films, only these two offer an optimistic vision.

33.5.3 The Devil's Advocate (1997) and Michael Clayton (2007)

The Devil's Advocate is unique in its combination of the criminal lawyer, the shadow of the lawyer father, and the big law firm nemesis, pushing all three elements to the limit. It further combines the hero-lawyer subgenre with the horror genre, opening up new, supernatural possibilities. Additionally, it offers two endings and thus two interpretations of legal heroism and liminality.

Kevin Lomax, Keanu Reeves' young lawyer character, is a criminal defense attorney who never lost a case. Representing a defendant accused of raping a minor, Kevin realizes that his client, Gettys, is guilty and finds himself facing the dilemma of how to proceed. Deciding to win at all costs and maintain his record, he destroys the victim's credibility and is recruited by John Milton's big New York firm. Milton (Al Pacino) turns out to be Satan and also Kevin's biological father. He designs to use the law to rule the world and to use Kevin to beget the Antichrist. Kevin is

tempted to win at all costs the big cases his father throws his way and loses his wife and his soul in the process. At the last moment, he decides to prevent his father's plans and commits suicide. Alternatively, Kevin decides to withdraw from Gettys' case at the risk of being disbarred. He saves his soul and his family but is tempted to be interviewed and made famous by a reporter who, the viewer knows, is John Milton, father/Satan.

The first plot line suggests a variation on the Daniel Kaffee personal and professional development theme. Confronting the "bad father" character, the young criminal lawyer realizes that his professional ambition has brought him too far, and the only course of redemption and salvation is death. Here, the human frailty of the excellent professional lawyer leads him to moral doom, as he cannot resist the temptation to join the big law firm. In the alternative plot, the excellent young lawyer resists the temptation, doing the right thing, but only to face a new temptation every day. Surrender is merely a matter of time. In the world of big law firms/mega temptation, hero-lawyerism is inhuman and impossible. In such a world, it is hard to speak of a meaningful "inside," "outside," or liminality. But there can be no doubt that the film offers its protagonist no frontier, no out, and no hope other than death.

A decade later, *Michael Clayton* situates the hero-lawyer in the dark setting of *film noir*.[19] Clayton, a big law firm's "fixer," is an inherently liminal character. Having discovered that it had consciously assisted a big corporate client in concealing its lethal business practice, Clayton betrays and exposes his law firm. His professionally suicidal act of heroism leads him to an Arthur Kirkland-like limbo, only more so. I suggest elsewhere that "in line with the logic of *film noir*, even when exposing a corrupt corporation and bringing it down, Clayton remains trapped as ever because in the 'asphalt jungle' of *film noir* one can run—but never break free. The turn to *film noir* thus signals, accommodates and enhances a bleak mode of cynical despair regarding lawyers, as well as the hope of civil rights and rule of law that they once stood for" (Kamir 2009a, 830). I further claim there that "in *film noir* style, *Michael Clayton* bars its protagonist from reentering his world, his community or the law, voiding his self-sacrificing act of meaningful heroism and of true social significance. The villains are overpowered, but the community is not saved. In *Michael Clayton*'s world, life, community and law are all aspects of the labyrinth. They can be neither empowering nor redeeming. There can be no inside or outside, victory or change, meaning or moral action (848)."

From a slightly different perspective, the film defines Michael Clayton as "a lawyer with a niche." According to the senior partner of Clayton's law firm, this is the most desirable situation a lawyer can aspire for. It renders him unique, highly specialized, and indispensable to his law firm. It provides him with some security in an uncertain world. In Wright's terms, it guarantees him a role in his professional elite group, where "each man possesses a special status because of his ability, and their shared status and skill become the basis for mutual respect and affection" (Wright 1975, 86). The catch is that in order to enjoy his status as "a lawyer with a

[19] For a full analysis, see Kamir (2009a).

niche," a lawyer must belong to the group in which there is such a niche. Clayton, his firm's fixer, knows all there is to know about every one of its lawyers: their skills, strengths, weaknesses, connections, and secrets. Granted the authority to do so, he can fix anything for them and for the firm. But outside this elite group, his highly specialized skill is worthless. For him, liminality is only possible as a member of the firm. Riding away in a New York cab at the end of the film renders Clayton devoid of any professional merit. He can no longer be effective in any way. He cannot even survive.

33.5.4 Discussion: The End of Liminality?

Classical hero-lawyers of the 1960s were mature men, at the height of their careers, who fought for equal liberty from the threshold of their frontier communities. Most often, they were portrayed as winning their battles while remaining liminal, or becoming even more so.[20] In the hero-cowboy tradition, their liminality was associated with open professional frontiers, usually the then promising horizon of civil rights. Despite their liminal state, they succeeded in being effective and influential. Their professional activism made a difference. Even if they did not live to see society change and become more respectful of equal liberty, their spectators knew that such a change would prevail and that these hero-lawyers had helped bring it about.[21]

The hero-lawyers of the transitional phase were men in their mid-careers. Arthur's heroic professional suicide leaves him outside the legal world. In his experience, there is no hope of social change, and he leaves the arena. His liminality is devoid of professional frontier and thus hopeless. Frank's hero-lawyerism, on the other hand, opens up the possibility of a professional future for him. His success at reaching the jury gives rise to hope that the community would use its judgment and power to set things right. Around 1980, when these two films were made, the future seems to have been unclear.

Whether they feature criminal defense lawyers or lawyers fighting corporations, most hero-lawyer movies of the 1990s offer their protagonists no professional frontiers and no hope for a future. On the linear axis, the hero-lawyers of the 1990s can be grouped into two clusters. In the first part of the decade, *Class Action* (1990), *A Few Good Men* (1992), *The Firm* (1993), and *Philadelphia* (1993) feature very young lawyers on the threshold of their careers. All four evolve into hero-lawyers, and all four win their heroic battles. One of the four (Daniel Kaffee) sheds his liminality and becomes a member of a community that is, on the whole, good enough. The film supplies him with an honorable professional future to look forward to, in the service of the navy. The other Tom Cruise young hero-lawyer

[20] Atticus Finch was portrayed as losing his case and Paul Biegler as becoming somewhat more integrated in his community.

[21] Atticus Finch and Henry Drummond.

abandons the hope to become a superstar corporate lawyer and embraces, instead, a dream of a meaningful personal life. The open frontier the film grants him is intimate rather than professional. The other two newborn hero-lawyers end up in a pessimistic, hopeless liminal state, and their battles seem to have no effect on society. The corporations and their law firms continue to rule. They continue to cut corners, to sell defective cars, to launder mafia money, to tamper with evidence, and to discriminate against homosexuals. The hero-lawyers' hard-won victories are but drops in the ocean. While hero-lawyers may win some battles, the corporate world wins the wars.

This message becomes far more evident in the second half of the 1990s. In *The Client* (1994), *A Time to Kill* (1996), *The Devil's Advocate* (1997), and *Civil Action* (1998), the protagonist lawyers are older, in their mid-careers. Their heroic deeds are not rites of passage but acts of redemption. They usually win their cases (in three out of four films) and always embrace liminality. But none of them has an open frontier; none of their victories has any hope of making a difference. The corporations (and in *A Time to Kill*—racism) may suffer anecdotal loses, but the system is immune. Heroic lawyerism seems to be touching, but futile.

The last of these films, *Civil Action*, makes the point most poignantly. It is also most explicit in its disillusionment with liminality as a viable, operative place. *Civil Action* shows that in our contemporary, corporate world, fighting a big, strong corporation requires the kind of funds that only corporations can raise. A liminal lawyer that attempts to take on such a battle is doomed to lose and go bankrupt. Liminal hero-lawyerism is thus a tool of the past. It is unsuitable to fight the corporate world. *Civil Action* is a docudrama; it is based on a true case and depicts the story of a real lawyer. This makes its message all the more chilling.

Following *Civil Action*, fewer hero-lawyer movies were made, and Hollywood seems to have started searching for new avenues. In 2000 *Erin Brockovich*, a docudrama, narrated the story of a hero-legal-clerk and an environmental activist. Five years later, *North Country*, another docudrama, presented the story of a blue-collar mine worker who initiated a sexual harassment class action against her workplace.[22]

The 2007 *Michael Clayton* revisited the hero-lawyer of the late 1990s. Encountering the lethal practices of U North, a giant corporation, the title character, a mid-career "fixer," takes on the role of "Shiva, the god of death." He succeeds in bringing professional "death" to two individuals, the corporation's CEO and the chair of its Board of Directors. Clayton manages to expose these individuals' personal responsibility and corruption. But not even god Shiva can curtail the liberty of U North, the giant corporation that had brought death and illness to many unsuspecting farmers. The corporation will pay a fine and continue to grow, pollute, and rule. No hero-lawyer can stop it.

Will Hollywood experiment in search of a new hero, who will deploy new tactics to fight the corporate world? Will the American film industry abandon

[22] For a detailed analysis, see Kamir (2009b).

its belief in common law and in lawyers' power to solve the nation's problems one at a time? Will it embrace the corporate world and create its new heroes from its entrails? Will it opt for governmental policies that can regulate the corporate world and ensure equal liberty? Will *Michael Clayton*'s characters continue to feature on our screens and commit professional suicide, like whales throwing themselves at the shore? Or will movies supply them with new frontiers, either professional or legal? In a densely populated universe, will the new frontier be internal, within the protagonist's psyche? In a world too crowded to have real physical, territorial frontiers, such as the Wild West, will the new frontier be a psychical horizon? Time will tell.

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Chapter 34
The Representation of Law on Film: *Mr. Deeds* and *Adam's Rib* Go to Court

Wim Staat

Abstract Stanley Cavell's comedies of remarriage sometimes end up in court. When they do, the law featured in these films is not be mocked. In all seriousness, Cavell claims that these courtroom comedies pertain to the morality of law. To be sure, these films are not about front-page moral dilemmas. They are about what usually remains unnoticed about morality: its being engrained in everyday life. The special courtroom setting lets the everydayness of morality come into view. *Adam's Rib* makes clear that the private lives of its lawyer protagonists sometimes are on public display in the courtroom. This turns out not to be a mistake but a precondition for their marital success. *Mr. Deeds Goes to Court* uses the courtroom stage for the display of the privacy of public moralities. In terms of Charles Sanders Peirce, morality in courtroom cinema works as the habit that comes into view because a change in that habit retrospectively makes us realize that we had a habit in the first place. These courtroom comedies are not asinine pastimes; rather, in so far as they bring into view what before remained unacknowledged, that is, the morality of everyday life, they are, as Peirce would have it, intelligent entertainment.

34.1 High Stakes for Comedies

Mr. Deeds Goes to Town (1936, directed by Frank Capra) and *Adam's Rib* (1949, George Cukor) are comedies made in the so-called golden age of Hollywood, the 1930s and 1940s of the twentieth century, the time of large inner-city cinemas, the time before television. The golden age Hollywood comedies entertained millions. Their box office success, of course, did not go unnoticed, and a critical interest in

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comic genre conventions is still developing. In fact, this chapter can be considered as an attempt to take at least some of these comedies seriously, too seriously, perhaps, for those who just want to enjoy the fact that these quick-paced comedies still can make us laugh. Be forewarned, then, that in just a few paragraphs considering what these comedies may be about, we will go from ethics rules for professional lawyers to a reference to the Declaration of Independence. As will be argued, moreover, these films do not jokingly undermine these earnest references; instead, the earnestness remains, not in spite, but actually in virtue of the comedy.

In this chapter, law on film is approached by way of Stanley Cavell's books on cinema. The two case studies presented have at least two purposes. They are cases in point concerning *both* the relevance of courtroom scenes for our understanding of Cavell's work *and* the significance of cinematic courtroom renditions of private life for our understanding of the morality of law. Although courtroom scenes are discussed by Cavell, they are yet to be developed as crucial to our understanding of the relation between private and public life in Cavell's work. The fact that many characters in Cavell's favorite genre are journalists or otherwise employed by the newspaper business does get some of his attention: "The newspaper figures (…) sometimes so prominently that one may wonder whether it is a feature required by the genre" (*Cities of Words* 11). True, the public's business is the issue, but as this chapter will confirm vis-à-vis Cavell's work, the front-page moral issues for the newspaper are not the moral issues at stake. The case studies' contention will be that newspaper headlines often are beside the point; however, the courtroom scenes are not. What makes the courtroom scenes morally relevant is not their reference to what is in the general public's interest. Instead, their public presentation of private matters is only relevant to a specific audience of experts capable of evaluating these matters precisely as private. These experts are not members of a very exclusive group though. They are the general audience of courtroom comedies.

Regarding the morality of law, the insights offered by our Cavellian case studies of courtroom scenes pertain to the principles of the rule of law. They concern the idea that in a democracy, the law is a coded, that is, procedurally warranted expression of the morality of the people, succinctly captured by Jean-Jacques Rousseau's (1712–1778) formula that laws are acts of the general will (*The Social Contract*, Book II, Chapter 6). The law, then, can be seen as a particular representation of the general will. However, this does not imply that the general will, or morality for that matter, is a constant. An expression of morality can actually change the morality from which it came. Therefore, the case studies' contention will not be that the courtroom scenes are more or less accurate depictions of how law may stand for morality. Instead, the case studies will contend that the film medium's aptness for uneventful everydayness is crucial for our understanding of the processes involved in the interrelationship between morality and courtroom interaction.

More specifically, the relation between morality and law on film can be addressed in terms familiar to experts in signification processes. In this chapter, then, we will use the terminology of Charles Sanders Peirce (1839–1914) in order to reflect on what can be called the semiosis of law on the screen. The interrelationship between law and film will be nuanced. Peirce's semiotic helps to focus: we begin to understand why it is that we need to let the courtroom comedies have us take a look at

the everydayness of our own habits. Peirce's abstractions actually bring us closer to what is right in front of us.

In their legal analysis of *Adam's Rib*, law professors Paul Bergman and Michael Asimow acknowledge the fact that this film is intended as a comedy and should therefore not be taken too seriously. They are cinephiles and write appreciatively about *Adam's Rib*. Nevertheless, Bergman and Asimow are concerned about the suggestion that the protagonists, prosecutor Adam Bonner (Spencer Tracy) and defense lawyer Amanda Bonner (Katharine Hepburn) would take their marital problems to court by way of a case concerning Mrs. Doris Attinger (Judy Holliday) shooting her adulterating husband. As Bergman and Asimow (1996) point out, we should not mistake such law on film for real courtroom interaction. In real life, lawyers may of course get married, but it would be "completely inappropriate for a husband and wife (…) to be opposing each other in court" (89). The serious issue of shooting an adulterating husband is presented comically enough, though, no mistakes there. Yet, we also should not be mistaken about the seriousness of Bergman and Asimow's project either (1996). Indeed, their reference to the legalese of ethics rules turns *Adam's Rib* into a lesson for aspiring attorneys: "A lawyer should not represent a client when that representation may be adversely affected by the lawyer's responsibilities to a third person or to the lawyer's own interests" (89). The professional Bonners, then, should not endanger the interest of a client and should not be opposing each other in court; the private Bonners should leave behind their personal worries at home. But they do not; they break the rules. Interestingly, acknowledging that the comedy of *Adam's Rib* is a result of the Bonners breaking the rules actually brings these rules to the fore, exactly where law professors would want them.

Law scholars appear interested in the representation of law on film, perhaps because many of them believe that not only serious cinematic renditions of actual cases but even courtroom comedies can be excellent illustrations of otherwise unimaginative rules. The image of Katharine Hepburn's character violating ethics rules sticks; unfortunately, the rules themselves do not. As beginning law students will be more familiar with cinematic or televised versions of courtroom interactions than with actual judicial proceedings, law professors may be quite right in admitting film as evidence into their classrooms. The point of these legal experts is that we can learn something about law from the difference between law in popular films and law in actual courts. We may even learn something about popular culture from this very difference, although the legal experts may not be primarily interested in that.[1]

[1] In *Film and the Law* (2001), Greenfield et al. systematically address different purposes of law on film, particularly for scholars of law. Their work aims beyond stating obvious differences between "screen law" and "real law": "There seems to us little point in spending too much time pointing out that screen law does not obviously mirror real law" (26). Their point is that even though it is hard enough to determine what to understand by screen law, it would be impossible to describe what real law is independent of what representations of law make of it. In other words, according to Greenfield et al., what we might compare is not so much the representation of law on the one hand and the law itself on the other. Our understanding of the law is what it is, not least because of popular representations of the law. Hence, if there would be an appropriate comparison at all, then "the proper comparison to make is between the cinematic portrayal of law with the cinematic myth of law" (27).

Film scholars perhaps would be, but there is a remarkable mismatch in publicized scholarly attention. Film scholars, it would seem, are not as interested in law films as lawyers are. To be sure, there are many more law professors than film scholars. But even if we would take that quantitative difference into account, it would seem that there is a lack of scholarly attention in film studies. The law film, for example, rarely is considered to be a genre by itself, like the Western or the action-adventure film. Courtroom dramas appear to be relegated to the division of subgenres in crime films; courtroom comedies are even more difficult to classify.[2] This does not imply, however, that the representation of law on film is uninteresting. Film scholars are interested, but not necessarily in terms of a genre called the law film. In this chapter, whether or not comedies like *Adam's Rib* and *Mr. Deeds Goes to Town* belong to this genre is less important than what the courtroom scenes in these films do for our understanding of the interrelationship between private and public lives. In fact, the courtroom scenes are more important from the perspective of quite another genre, a genre described by Stanley Cavell as "the comedy of remarriage." By means of the comedy of remarriage, then, Cavell is able to abstract from the legal implications of the law film. Yet, he doesn't abstract from the morality of these films.

We will return to Cavell shortly, but let us first consider what is implied by the display of private and public lives in remarriage comedies. In semiotic terms, this is where private lives and public spheres dynamically signify each other. Film in general can be considered as a privately viewed aspect of the public domain. More specifically, law films like *Adam's Rib* and *Mr. Deeds Goes to Town* show us how the public sphere signifies the realm of privacy and vice versa. In both examples, courtroom scenes are contrasted with scenes dealing with the protagonists' private lives. These films, then, make their viewers experts in evaluating the dynamic, both of courtroom renditions of formerly private interactions, and of domestic repercussions of formerly isolated professionalisms. In the terminology of Charles Sanders Peirce (1931–1934), the interrelationship inherent in this mutual signification can be described as *semeiotic* – Peirce's idiosyncratic way of emphasizing the process of dynamic signification rather than the architecture of a static sign system.

In contrast with the idea that Peirce's work (1931–1934) is highly abstract and notoriously inaccessible, many of the terms he holds crucial for a better understanding of his semiotics are not abstract at all. An example of this, in relation to our understanding of interactions in a continuum of private and public lives, is his use of *habit* and *habit change*. For Peirce, habit cannot be understood without *habit change*. A change of moral behavior may retrospectively signify the familiarity of addressing matters of right and wrong. Without the change of habit, we would not be able to observe the crucial quality of the morality already inherent in our behavior, namely its being a matter of course. From the perspective of Peircean semiotics,

[2] In Thomas Leitch's book on *Crime Films* (2004), for example, the "lawyer film" is just one of nine subcategories. Still, the fact that there are many problems inherent in defining the law film as a genre *per se* should not be sufficient ground for labeling the law film as a minor or marginal subgenre. Genre theory in film studies is fraught with problems of definition. Even the Western is not as clear-cut a genre as it would seem.

we can claim that *Adam's Rib* and *Mr. Deeds* can help us understand in what way private lives and public spheres can signify each other. Through Peirce we may hope to better understand the way in which a public realm must already have had a private significance, and vice-versa.

Returning to Cavell, recall that Cavell, like Peirce, is not a law professor, nor a film scholar by training. Cavell does have a pedagogical interest, however, in films like *Adam's Rib* or *Mr. Deeds*. In his *Pedagogical Letters on a Register of the Moral Life*, which is the subtitle for his recent *Cities of Words* (2004), Cavell reserves a chapter for *Adam's Rib*.[3] In this chapter, Cavell is concerned with legal language and legal documents, albeit less explicitly than law professors Bergman and Asimow. For Cavell, *Adam's Rib*, is a paradigmatic case of the remarriage comedy. Cavell writes that the remarriage comedy shows that marriage requires "a double ratification (…) by its being chosen out of experience not alone out of innocence; and by its acquiescence in allowing itself to become news, open beyond the privacy of privilege, ratified by society" (75). Cavell seems to argue that films like *Adam's Rib* depict how, after the innocence of being in love has perhaps subsided, a married couple enters the public realm of certificates and licenses. But that is not why these films are called comedies of *re*marriage. To wit, it is not even why Cavell takes his comedies seriously. In fact, the stakes are higher, because the ratification Cavell is interested in is a reflexive one. To be sure, Cavell does not deny that a happy couple requires from society the ratification of its marriage. According to Cavell, however, society requires ratification from married couples as well. "In effect," the happy marriage of the remarriage comedy, Cavell writes, "ratifies its society as a locale in which happiness and liberty can be pursued and (…) preserved" (75). Obviously, writing about liberty and the pursuit of happiness in one sentence can hardly be missed as a reference to the Declaration of Independence. Indeed, for Cavell, an interest in these comedies implies an interest in American democracy. It is precisely in their being about a repeated marriage that democracy is involved.[4]

According to Cavell, the comedy of remarriage presents a lighthearted but not naive version of repeated consent. And repeated consent, Cavell claims, is a crucial ingredient of democracy because of John Locke (1632–1704). The much debated difference between express and tacit consent in Locke's writings, conditioning legitimate government, cannot be resolved once and for all, Cavell claims. Not because there is proof that Locke was wavering in his argument, but rather because

[3] Stanley Cavell born (1926) is a philosopher by training, but he has written several books about film appreciated by philosophers and film scholars alike. *Cities of Words* is the condensation of a lecture course on Moral Perfectionism and combines chapters on canonical philosophers with chapters on melodramas and comedies from the 1930s and 1940s.

[4] Cavell has written earlier about *Adam's Rib* in particular and about the remarriage comedy in general. The high stakes involving the theory of democracy, then, are not new to *Cities of Words*. In *Pursuits of Happiness. The Hollywood Comedy of Remarriage* (1981), Cavell writes: "It is not remarkable to be told publicly that the integrity of society depends upon the integrity of the family. But it is something else to be told that the integrity of society is a function of the integrity of marriage, and vice versa" (193–4). This is, Cavell continues, "the dialectic of remarriage" (216).

wavering is essential to consent. Consent itself is always wavering between the express confirmation of its existence and the imminent doubt about the idea that consent would exist only in so far as it is expressed. In Cavell's words:

> Apart from our (…) consent, a Politick Society (Locke's term, WS) does not exist. So that so far as I am in doubt whether I have, or how we have, given consent, I am so far in doubt whether my society exists, whether it speaks for me and I speak for it. And it seems to me that what Locke's wavering indicates is his sense that this doubt is never permanently resolved. (…) That this doubt of the existence of consent, hence the legitimacy – hence of the existence – of society, is never permanently resolved, strikes me as revelatory of the nature of democracy. (68)

We may doubt the legitimacy of our democratic society, and as we are its constituents, this may very well be one of its fundamental weaknesses, but the continuation of this doubt even after we have expressed our consent by our vote is also its forte. Democracy requires from us the endless repetition of our express consent, which will always be doubted as soon as the votes are in. In other words, we need the actualization of our consent in a particular expression of it, not to make it definite, but rather to be able to question it again. What Cavell is emphasizing here is that the uncertainty about consent belongs to the nature of democracy, which is another way of saying that in Locke's work, we have found an early argument for periodical elections. But the theater of elections, the political arena that may come to mind first, is not the only stage for the expression of democracy.

Original about Cavell is that he claims that one of the modern arenas of democracy is popular cinema, not only when politics are explicitly thematized but even when "mere" romance is involved. In these latter cases, the cinema is not so much a place of reflexive contemplation of marital consent projected on the screen; rather, it is the locus of expressed and doubted consent itself, asking from the viewer a participatory role in as much as his readiness to question his own consent to marriage, to law, or to any institutionalization of human interaction becomes an issue for himself. The insight into the repetitious cycle of expressing and doubting consent that comes to the fore in and through film, according to Cavell, is potentially revolutionary, because it reveals the politics of everyday life. The movie camera appears to penetrate deeply into every life. And yet, what we come to see is not so much a front-page truth about, say, technological manipulation by capitalism.[5] Instead, what we see may be our own conformity to the status quo, the kind of consent that remains undoubted.

[5] Soviet filmmakers Sergej Eisenstein (1898–1948) and Dziga Vertov (1896–1954) examined and propagated the revolutionary potential of the new medium film. Vertov made news reels which he called *Kino Pravda* ("Film Truth"), because he believed film could unravel truths the naked eye could not see. Walter Benjamin (1892–1940), in "The Work of Art in the Age of Its Technical Reproducibility," compared the movie camera to a surgeon's scalpel and lauded the penetrating insights with which film would mobilize the masses. But Benjamin also warned for the aestheticization of politics, to which use Nazi propaganda has exploited the same medium. Benjamin was therefore suspicious of mass entertainment through film, although he has also written appreciatively about comedy. For Benjamin, Charles Chaplin's comedies have addressed one of the major issues of modernity and technology in a critical albeit entertaining way. For Cavell, however, comedy and melodrama are not first and foremost palatable ways of addressing, by way of everyday-life situations, what Cavell calls front-page moral dilemmas. On the contrary, as everyday-life situations are central to, and not detours from our understanding of morality in film, the effort to substantiate morality in film by referring to the death penalty, abortion, technological manipulation, climate change, etc. would be a byway itself.

Hence, not any film will suffice. A traditional romantic comedy, for example, would not be adequate, because the conventional variations of the expression "I do" are never questioned. Contradistinctively, the comedy of remarriage is premised on doubting these very words, which means that any expression of consent in these films always needs a second coming, as consent is never final.

34.2 *Adam's Rib*: Setting the Courtroom Stage for Remarriage

The moral issue of doubting consent is generic in remarriage comedies, but not because it is thematically featured in terms of front-page moral dilemmas.[6] To be sure, there is such a front-page moral dilemma in the diegesis of *Adam's Rib*, but according to Cavell, this moral issue is actually less important for our understanding of the repetition of consent than *Adam's Rib*'s average everyday embodiment of it. Before we address this everyday embodiment of consent, though, let us take a closer look at the moral issue thematized by *Adam's Rib*. The headlines of the newspapers in the film are shown to develop an interest away from the shooting of the husband by his wife. We move from "Wife Shoots Fickle Mate," to gender inequality personified by Amanda Bonner's courtroom performance in "Social Standards Unfair to Female Sex, Declared in Court by Mrs. Bonner." Notwithstanding the film's lightheartedness, then, Amanda Bonner does indeed face the dilemma whether or not to try Mrs. Attinger's case as her own opportunity to address the general issue of equal rights in contemporary society. However, and this is crucial for Cavell's interest in comedies like *Adam's Rib*, if we were to take this moral issue, perfectly understandable as it is in terms of newspaper headlines, as the only moral issue worthy of the attention of legal and/or film scholars, then we would reduce the potential of these comedies to illustrations of what we already know. In this case, we already know that we should, as Amanda Bonner says, "believe in equal rights for women"; we do not need this particular film to be reminded of that. *Adam's Rib*'s mise-en-scene of equal rights before the law, even if the particular case of Mrs. Attinger suffers because of it, merely is coincidental. For the purpose of generating discussion about equal rights, or about lawyers going public over the interest of their clients, we could have chosen any other film addressing a similar theme.[7]

[6] In "The Good of Film" (2005), Cavell explains that he is less interested in films concerning "front-page moral dilemmas, say about capital punishment (as in *Dead Man Walking* [1995]) or about whistle blowing (as in *The Insider* [1999]) (…) since such films, whatever their considerable merits, tend to obey the law of a certain form of popular engagement that requires the stripping down of moral complexity into struggles between clear good and blatant evil, or ironic reversals of them" (334). Given Cavell's many pages dedicated to remarriage comedies, it is safe to assume that in Cavell's view, these comedies may actually honor moral complexity and avoid the law of popular engagement according to which morality is presented in terms of clear goods and blatant evils.

[7] In an appendix to *Pursuits of Happiness* about "Film in the University," Cavell describes the reduction of the significance of a particular film to what we already know as follows: "It represents just one more instance of using film as an *illustration* of some prior set of occupations rather than constituting an effort to study the medium in and for itself, to gather what it specifically has to teach" (272).

But we need not confine the relevance of *Adam's Rib* to an illustration of preconceived morality. Alternatively, we can point out that the mise-en-scene of Amanda Bonner's claim to equal rights is conditioned by the mise-en-scene of her marriage to Adam Bonner. *Adam's Rib* warrants our understanding of the moral issue of equal rights less through the Attinger case, but rather by way of our insights into the private life of Adam and Amanda Bonner. Their private life is showcased, literally via text cards with drawings of stage curtains adorning the words "That Evening," five times after a day in court, or "and That Night," when the Bonner finally make up. Moreover, the Bonners' dinner party, after the first "That Evening" card, features a home movie entitled "The Mortgage the Merrier" made by the Bonners themselves. In this silent home movie, the Bonners show the celebration of their final payment on their country home. During the screening, the guests exchange witty remarks on costumes, pets, and funny walks. In the privacy of their apartment, the Bonners' home movie is a public display of their private life, shown to entertain their guests, among them their parents but notably also judges from their professional setting[8].

With this home movie, *Adam's Rib* puts on a display of "nested" privacy. It appears to remind us of the fact that the public display of professionalism in court is counterbalanced not so much by letting us, the viewers, in on the secrecy of the Bonners' privacy, but rather by presenting us with yet another public display, the display of the Bonners' private life at home. The courtroom is not the public opposite of the private Bonner residence. Both the courtroom and the Bonner apartment are settings for the interrelationship of the Bonners' public and private lives. Hence, the dilemma facing Amanda Bonner is not confined to her professionalism. It is not just about the Attinger case versus the common good of equality before the law. Instead, both Amanda and Adam are faced with the prospect that trying the Attinger case could actually amount to their divorce. The Bonner marriage is on trial precisely because their marriage to a certain extent is also public. That is why in *Adam's Rib,* the embodiment of the everydayness of the Bonners' lives is mostly, but not exclusively private. The Bonners' everyday privacy, in as much as it has become significant for us, the viewers, is public.

In a more technical, Peircean term, the public display of their marriage qualifies the Bonner's embodiment of everydayness as the *interpretant* of their marriage. The significance of the 'Bonnerian' embodiment of marriage, is not so much their being married on the basis of, say, a specific romantic adventure or specific wedding vows;

[8] In 1959, Erving Goffman wrote about *The Presentation of Self in Everyday Life*. He used the theater as his main source of metaphorical reference to make sense of the staging involved in both public and private appearances. Goffman emphasizes that public and private appearances cannot be understood in isolation. According to Goffman, frontstage behavior cannot be understood without reference to backstage behavior and vice versa. He emphasizes the remarkable possibility that front- and backstage activity often contradict each other; Goffman interrelates "front regions where a particular performance is or may be in progress, and back regions where action occurs that is related to the performance but inconsistent with the appearance fostered by the performance" (134). Unlike Goffman's examples, the public and private lives of the Bonners in *Adam's Rib* are not really inconsistent. Very much like Goffman, however, *Adams Rib* lets us understand public appearance by way of private life and vice versa.

instead, it is the average everydayness of their marriage that we acknowledge as having been significant for them even before it went on pubic display. Typical for Peirce, as referred to earlier in relation to the recognition of a habit by way of a habit change, is his acknowledgement of our being unavoidably delayed in grasping what has already taken effect. Tracing the immediacy of signification via something else, that is, by way of a third term in a semiotic constellation, has become characteristic for Peirce.

In "Survey of Pragmaticism" (*Collected Papers*, Vol. 5, § 464–496, dated 1907) Peirce writes: "For the proper significate[sic] outcome of a sign, I propose the name, the *interpretant* of the sign" (5.473). A whole theory is implied in a short phrase. We should observe that according to Peirce, semiotics is the doctrine of semiosis (5.488). Semiosis, then, is defined as a "tri-relative influence not being in any way resolvable into actions between pairs" (5.484). Peirce interchangeably calls actions between pairs 'dyadic' and 'dynamical', on the other hand, triadic action he calls 'intelligent' (5.472). If habitual morality is triadic, it is not dynamical, but intelligent. Within the myriad of Peirce's terminology, habits are described as the essence of the interpretant (5.486), although recognizable only, as we have observed earlier, in retrospect after a habit change has taken effect. We know that the interpretant is crucial for Peircean semiotics. And because the interpretant pertains to intelligent, i.e., triadic not dynamical, action, we should be able to recognize triads in habits, which in their turn are retrospectively acknowledgeable by habit changes.

Peirce's own example of triadic action involves an army officer's command: "Ground arms!", which of course is a sign. But in what sense is this example triadic? Peirce first considers the object of the command: "the object the command represents is the will of the officer that the butts of the muskets be brought down to the ground" (5.473). If the command were merely dyadic, the expression of the officer's will by saying the words would be independent of soldiers disposed to perform the act of bringing down the weapons. If, on the other hand, such a soldier's act were to take place, this act would again be a sign, an interpretive sign, or better yet, in Peirce's terminology, an interpretant. The command (the uttered phrase), in this case, must be triadic and thus intelligent, because it simultaneously stands both *for* something (the officer's will) and *to* something (the soldiers' act). The command can be acknowledged as triadic, because it is intelligible to consider alternative outcomes to the command. In this example, if the soldiers were deaf, then the interpretant, an actual bringing to the ground of weapons, would not come about. More importantly, however, in all likelihood the army officer would not utter his command in the first place, because he already knows the senseless of such a command. In terms of the habit change that retrospectively made us aware of the existence of the habit that went before it, it is consistent with a conceivable alternative to what has actively been going on. The habit change, then, can be thought of as 'real' but not necessarily 'actual.' In that sense, the soldier's command "Ground arms!" can be intelligent and not merely the direct expression of his will, after all.

We will come back to Peirce and his example of the soldier's command, but let us first return to *Adam's Rib*. The film's public display of privacy in the cinema can be considered as a public display of the everyday embodiment of consent taking

shape as the everydayness of marriage. Moreover, we are reminded of the limits of this public display, precisely by the film's respect for some aspects of privacy. We can see the Bonners' private life, but not all of it. Right until the end of the film, we are reminded that we are not so much seeing the Bonners' private life, counterbalancing their public lives: we have access to only a part of it. Still, the intimacy of this couple's private life is not what makes their marriage work as a marriage. In Cavell's words: "intimacy is not sufficient for marriage" (*Pursuits of Happiness*, 215). An aspect of it needs to be on display. We have already discussed the dinner party featuring the Bonner home movie, but even the courtroom sessions cannot be understood unless we acknowledge the possibility of public access to what seemed exclusively private lives – the working-class married woman on trial is contrasted with marital sophistication inside the Bonner residence. Towards the end of the film, however, the courtroom actually becomes the stage for the display of the Bonners' marital dissent. In the final scenes, the Bonner marriage seems to approach its public end.

In the office of "certified public accountant Jules Frick," the Bonners agree on a final settlement of money and property before their divorce. Again, we are witness to a public expression of doubt and this time also of consent, repeated as it is to overrule the separation of goods and money. However, there also is an emotional outburst by Adam, this time a flood of tears. As revealed in the final scene, though, Adam's crying turns out to be just another public performance. Nevertheless, the tears trigger the Bonners reminiscing about their country home. Within a few hours, they surely could be there for dinner. Still, Adam is not certain about Amanda's willingness to indeed take off and leave the accountant's office. To express his doubts, Adam exclaims "you don't really wanna go," in response to which Amanda is able, at last, to repeat the formula of her consent: "I do." To be sure, these are not Amanda's final words, because away from the public accountant's office, both in the privacy of their home and in public venues, the Bonners will, as the film suggests, inevitably address the issue of equality before the law again, and again, and again... As a result, their antics will never be an entirely private matter. Their marriage will always find itself staged, on public display. As such, the mise-en-scene of their privacy will be essential for the success of their marriage. At the same time, the institutions elemental to our present society are reconfirmed by the very recurrence of expressed consent, not just figuratively, although the Bonner marriage could be taken as a metaphor for our society, but also concretely in the shape of repeated vows and doubts.

The concreteness of the everyday embodiment of doubt and consent belongs to film as medium. Film actually articulates what otherwise would be considered a mere matter of course: the everydayness that would be considered to speak for itself, as a given. The remarriage comedy in general and *Adam's Rib* in particular make recognizable for us that we should acknowledge the necessity of making at least part of that privacy a substantial part of our public lives. It is the part of our private life that needs voicing, that is, the part that expresses doubt and consent, which, as Cavell pointed out, will condition the legitimacy of our democracy. True, *Adam's Rib* does not address this moral and political issue directly, although it comes close when equality before the law is concerned. But as argued before, the

way in which the remarriage comedy works, does not require film to thematize politics. Even a comedy like *Mr. Deeds Goes to Town* (1936), which more explicitly than *Adam's Rib* refers to Washington politics and to the ideology of democracy, does not need its courtroom scenes to convince its contemporary audience about, in this case, the legitimacy of Rooseveltian federalism. The courtroom scenes in *Mr. Deeds* are necessary for us, however, to understand why Mr. Deeds (Gary Cooper) is convinced to publicly voice his doubts about the homely comfort of his own habits, and to become part of our society again.[9]

34.3 *Mr. Deeds Goes to Town*: Setting the Courtroom Stage for Habit-Change

In *Cities of Words*, Cavell's chapter on *Mr. Deeds Goes to Town* accompanies his chapter on John Rawls. Mr. Deeds (Gary Cooper) is an eccentric young man living in Mandrake Falls, Vermont, and he is characterized by one of his quaint townsmen as "very democratic" because he "talks to anybody." Mr. Deeds appears to be the only heir to a 20 million dollar fortune. It brings him to the big city. He turns out to be Cavell's favorite character to address what Cavell calls an odd question about Rawls' theory of justice. In this theory, Cavell writes, we should be willing to give up "unrestrained freedom for fairness and security in being governed" (187). Cavell then wonders: "Why are those relatively advantaged prepared to consent? Who is to remind them of society's worthiness for consent?" (188). If the advantaged couple in remarriage comedies does not consent, it runs "the risk of snobbery," which Cavell explains as "a tendency to distance oneself from the cultural costs of democracy" (189). It is the snobbery tempting the Bonners to permanently retreat into the wealthy privacy of their country home, even if that would mean that they would make themselves vulnerable to skepticism toward each other. Mr. Deeds is another such character tempted to distance himself from democracy. Interestingly, though, Mr. Deeds' temptation is not the indulgence in the millions of his inheritance. In fact, toward the end film Mr. Deeds is tempted to give his fortune away in order to retreat into the privacy of Mandrake Falls. Surely, Deeds is in an advantaged position, because even before the inheritance, Deeds was a homeowner and not suffering from any financial distress. He was clearly leading a private life with relatively modest pubic responsibilities. The 20 million dollars, then, are not experienced by Mr. Deeds as his privilege. In other words, in Cavell's comedies the relatively advantaged are privileged, not so much because of their possessions, but because of their privacy.

[9] Three years later, Capra upped the political ante with *Mr. Smith Goes to Washington* (1939). In this film, set for a large part in the United States Senate, the cynicism and corruption of corporate business and politics are explicitly thematized in opposition to the small-town honesty of boy scout leader Mr. Jefferson Smith (James Stewart). Compared to Mr. Deeds, however, Mr. Smith does not need encouragement to speak and take part in democracy. In fact, the film's finale is Jefferson Smith's filibuster—he does not stop speaking until he collapses from exhaustion.

The courtroom session regarding the sanity hearing of Mr. Longfellow Deeds, lasting the final 30 minutes of the film, therefore, is really about Mr. Deeds' attempt to retreat from democracy. His refusal to be represented by lawyers and his refusal to speak make it clear that indeed Mr. Deeds' character is on trial, specifically his refusal to live up to the characterization of being very democratic, willing to talk to anybody.

As in *Adam's Rib*, newspaper headlines seem to make clear what the issues are in the case. Montage sequences of headlines mark the passage of time, but they also mark the front-page moral issues involved in Mr. Deeds' sanity hearing. Is a millionaire really free? Are the dust bowl farmers of the 1930s entitled to what they were promised? Should the police prevent farmer demonstrations? As in *Adam's Rib*, public issues are important enough, but they are largely coincidental to this film. Thematically, any film could do. More specifically, the courtroom sessions in *Mr. Deeds* are the stage for the expression of Longfellow Deeds' doubts and consent concerning his worries concerning his private life becoming a public matter. When he finally does speak, his first words do not express his opinions on general issues. The "two cents worth" with which Mr. Deeds begins to speak concerns the articulation of seemingly minor observations. He specifically remarks on the so-called sanity of everyday appearances and calls attention to inadvertent aspects of the comportment of legal professionals: expert witnesses, lawyers, and judges. He makes clear that in spite of their probable attempts to conform to what their profession demands, they inadvertently convey that their behavior does not coincide with what is prescribed. Mr. Deeds explains that there is nothing wrong or insane about that: "Everybody does something silly when they're thinking." The judge fills out the letter "o" in his legal documents, the psychology expert "doodles," and there are ear pullers, nail biters, nose twitchers, and knuckle crackers among the plaintiffs. Cavell points out that Mr. Deeds' observations "may seem to be about the most trivial feature of human beings, the fact that they are fidgety." But they are crucial for film, because they are "the feature of human mortality that the *motion* of the motion picture photography cannot fail to capture" (*Cities of Words* 199).

Trivial as it may seem, the acknowledgement of fidgeting habits constitutes a series of what Andrew Klevan (2000) calls "little events," part and parcel of "undramatic achievement in narrative film" (26). Mr. Deeds' observations express a "willingness for the everyday" (Klevan 22) that will change the very everydayness of habits into showcases of 'normalcy.' In Peircean terms, the achievement that is *un*dramatic would be addressed in terms of habit change. In *Mr. Deeds*, the courtroom audience at first does not notice the fidgeters cracking their knuckles, twitching their noses. Like the audience in the courtroom, we need Mr. Deeds' perceptive comments to retrospectively acknowledge that even the judge and the scientist are creatures of habit, surely able to change but only after Mr. Deeds' observations have taken effect. In fact, Mr. Deeds' observations lead to roaring laughter in the audience. But then, a masterful sequence of three shots adds a layer of self-awareness to the observations (Fig. 34.1).

Unaccompanied by dialogue, these three medium shots show us three men isolated from the crowd, catching themselves in their habits. As the camera does not occupy the viewing position of any of the characters, these are not point of

Fig. 34.1 Three medium shots of fidgeting. *Mr. Deeds Goes to Town* © Columbia

view shots. And the time it takes for these men to catch themselves in the act appears to be isolated as well: there is a noticeable but unattributable pause before Mr. Deeds continues. Inadvertent penciling, twirling, and finger tapping are observed by "the penciler," "the twirler," and "the tapper" themselves. And we are able to observe these observations on display. It is not clear whether or not Mr. Deeds can see what we see. For him, the inadvertent silly things themselves are proof enough in retrospect what these men were really doing was thinking. In these three shots, the three men are shown to become suddenly aware of what they were doing, that is, habitually acting in a certain way as their accompaniment to thinking. They come to realize that they always already had those habits, and that they needed Mr. Deeds' so-called willingness for the everyday to become aware of them. What we have here, then, is the mise-en-scene of an everyday phenomenon;[10] it is the courtroom staging of an everyday undramatic event, which makes us notice something about the everydayness which Mr. Deeds apparently desires. As Peirce would observe, the habit change lets us retrospectively know the habits of our everyday life.

Let us try to extrapolate *Mr. Deeds*' examples to what we can learn about the relationship between habits and morality in general. Are moral habits semiotically related to something like a general will? Or, when we say that moral habits are a concrete expression of the general will, do moral habits stand for the general will in a semiotic relationship? The answer to the latter question must be: not unless a third is involved. We need something else. Before we can speak of intelligent moral habits, we need something that brings the habits to the fore. And as we have seen in *Mr. Deeds*, that something else is the habit change. For this, we can go back to Peirce's army officer (1931–1935). In the example of the command, the officer's action of uttering the words without the actualization of the soldiers' compliance would still stand for something, i.e., the officer's will, but it would merely be a dynamic action, not an intelligent one. A subsequent soldiers' act, on the other hand,

[10] Goffman in *The Presentation of Self in Everyday Life* also proves interested in the significance of inadvertent gestures: "the audience may (…) read an embarrassing meaning into gestures or events that were accidental, inadvertent, or incidental and not meant by the performer to carry any meaning whatsoever" (51). Goffman does not, however, go into much detail as to what exactly triggers the audience's attention to detail.

would be the response that retrospectively changes a dynamic command into an intelligent one. As explained before, the response by the soldiers that, in retrospect, makes the command intelligent would, in Peircean terms, be called the interpretant. To be sure, our moral habit may very well be taken as an expression of the general will, but it is not immediately clear whether the habit is dynamically or intelligently related to this will. Only an interpretant would retrospectively make the habit intelligent. Such an interpretant is conceivable: it is the habit change that retrospectively makes our habit intelligent.

There is no contradiction in the claim that habits are the essence of the interpretant and the thought that habit change is best called an interpretant. To understand this, let us revisit our earlier example. The command 'ground arms!' can be audible, but is not necessarily heard. Similarly, our moral habit can be in plain view, but is not necessarily seen. With respect to our habits, we need a habit change to know that we had them. The habit change, and thus our intelligent morality, can settle and become habitual itself: by that time, again, in plain view but not seen. This is another way of saying that semiosis is endless; every interpretant will, in due time, lose its preliminary finality with respect to yet another interpretant.

In section 5.491 of his "Survey of Pragmaticism," Peirce (1931–1935) describes this as follows: if, "under given conditions, the interpreter will have formed the habit of acting in a given way, [then] the real and living logical conclusion *is* that habit." Peirce (1931–1935) continues that the verbal expression, the proposition with which the habit is caught, so to speak, may be called "the logical interpretant" of that habit. He insists, however, "that it cannot be the final logical interpretant, for the reason that it is itself a sign of that very kind that has itself a logical interpretant." In our case, there is no 'ultimate' interpretant, for that would halt the semiosis of morality. Retrospectively, we should conclude that all habits, including our moral ones, once were habit changes and that the words 'habit formation' and 'moral change' are expressions of 'semiosis.'

34.4 Conclusion: Intelligent Film

With respect to Stanley Cavell's courtroom comedies we can conclude the following. First, we have come to understand that the courtroom mise-en-scene of the interrelated repetitiousness of marital and societal consent makes our moral habits noticeable, so that morality becomes intelligent and does not remain merely dynamical. Second, we may begin to understand why, with respect to our habitual everydayness, Cavell often refers to Ralph Waldo Emerson's (1803–1892) definition of self-reliance: self-reliance is conformity's aversion. A society's unwillingness to change and its stifling influence on its members, demanding from them a definitive consent to being governed, is best characterized as a dynamical morality. It is paradoxically dynamic, and not, for example 'ossified', because it still concentrates on certain actions. But the actions it demands are all in conformity with the habits that have been established before. Alternatively, a society that makes pursuits of happiness

real venues for its citizens, asks from them not to conform to what has been consented to before. Instead, it lets the citizens repeat their consent by making way for scenes of doubt. The mise-en-scene of doubt is the precondition for repeated, but always preliminary expressions of yet other versions of consent. Dynamical morality is mere conformity; intelligent morality is conformity's aversion.

Our two films are intelligent. Mr. Deeds' intelligent morality becomes apparent when he realizes that he cannot just go home to the relative isolation of Mandrake Falls' familiar habits. He can't, because he has already changed the very habits that used to determine his home. He can't simply play the tuba anymore, because has already spoken about his habit to play the tuba to be able to concentrate. For some time, then, his tuba playing cannot go unnoticed as a mere practice session. The people of Mandrake Falls, and the people of New York, for that matter, will recognize the reference to the courtroom display Mr. Deeds has made out of the silliness of his insanity hearing. We, the viewers, will probably recognize something of Mr. Deeds in any tuba player crossing our paths. That is, until the habit change settles, and becomes a habit itself. After which, again, we would need a character like Mr. Deeds with a willingness to resist the temptation to retreat into privacy. Most importantly, however, Mr. Deeds can't just go home, because he has heard his lover, Babe Bennett (Jean Arthur) say that there is no need for him to doubt her, because he has heard her say 'yes' in court to the question 'are you in love with him?' Nothing remains the same because he has started speaking, and there is no doubt that it was her courtroom expression of consent that made him do it.

Mr. Deeds is a comedy of *re*marriage because the courtroom is the stage for the second time consent is expressed. For the repetition of consent, relating the public and the private dimension of our everyday lives, however, *Adam's Rib* probably is a better example. Yet, recalling that the mores of morality are its habits, *Mr. Deeds*, excellently brings into focus the everydayness of our morality. But the film does so paradoxically: it shows that the habits determining our morality will have changed as soon as we have noticed them. That is why the three medium shots of reflexivity, caught in stills a few pages ago, are key: in their own time, isolated from the drive that propels the plot forward to the (re)marriage of Deeds and Babe, the three characters in these shots come to identify themselves as conforming to habits they did not know they had. They are experiencing habit change and for a moment they self-consciously appear to be inventing themselves anew.

Remarkably then, the courtroom comedy, as a sub-genre of the remarriage comedy, brings us closer to what is near. And what may have seemed a detour, the mise-en-scene of private matters in the public sphere of a courtroom setting, is, in fact, a precondition for our insights into everyday morality. What we have come to see, though, is not something that was hidden from us; instead, we have come to "understand something that is already in plain view" – this is Cavell's Wittgensteinian motto capturing the purpose of philosophical investigation (Wittgenstein quoted in *Cities of Words*, p. 294). The change of our habits made us notice the everydayness of our morality. More abstractly put: habit change is the reflexive precondition for our understanding of the process of signification that always already has taken place in the nearness of our own attempts to understand it.

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Films

Adam's Rib. 1949. Directed by George Cukor, written by Ruth Gordon and Garson Kanin. 101 minutes, MGM, USA.

Mr. Deeds Goes to Town. 1936. Directed by Frank Capra, written by Robert Riskin and (uncredited) Miles Connolly, based on the story "Opera Hat" by Clarence Budington Kelland. 115 minutes, Columbia Pictures, USA.

Mr. Smith Goes to Washington. 1939. Directed by Frank Capra, written by Sidney Buchman and (uncredited) Myles Connolly, based on the story "The Gentleman from Montana" by Lewis R. Foster. 128 minutes, Columbia Pictures, USA.

Chapter 35
Justice for the Disabled: Crime Films on Punishment and the Human Rights of People with Learning Disabilities

Majid Yar and Nicole Rafter

Abstract Research evidence shows considerable inequities in the administration of criminal justice and punishment when dealing with persons with learning disabilities. The difficulties encountered by such individuals when negotiating the criminal justice system are exacerbated by wider cultural framings and understandings of intellectual disability and criminality. This chapter seeks to uncover such cultural constructions through a qualitative analysis of the representation of persons with learning disabilities in popular crime films. Through this reading, we conclude that popular representations largely oscillate between those that attribute to the disabled innate criminal tendencies and those that unrealistically attribute to them qualities of childlike innocence. Neither, we suggest, are helpful in fostering appropriate and sensitive understanding of such disability or in promoting the rights of the intellectually disabled in their encounters with the criminal justice and penal systems. However, we also discern a more recent trend in which sentimentalised and stigmatising stereotypes are giving way to a more balanced and sophisticated representation of the intellectually disabled, thereby promoting a more realistic understanding of this group's rights and needs within the domain of criminal justice process.

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35.1 Introduction

This chapter aims to explore the representation of the intellectually/learning disabled in popular crime films. It traces the historical development of these representations, arguing that we can discern a significant shift in the ways that such person's relationship to criminality and responsibility is semiotically coded. An earlier tendency that associated such disability with innate criminality has given way to representations that depict the intellectually disabled as the innocent victims of prejudice and maltreatment at the hands of the criminal justice system. We evaluate this shift and suggest that while more recent films sensitise viewers to the challenges faced by disabled individuals in their encounters with the criminal justice system, they tend to do so by often resorting to simplistic views of the disabled as 'childlike innocents', thereby eliding the true complexity of the issues at stake.

The expectation of fairness and equity in the administration of criminal justice is a central, enduring feature of Western discourses on human rights. Starting in the mid-eighteenth century, the language of rights placed emphasis upon citizens' protection from the arbitrary and unjust exercise of state power and a corresponding entitlement to due process, a fair trial and proportionality of punishment (Halstead 2005, 7–8; Beccaria 1963). However, those identified variously as 'intellectually disabled', 'retarded' or 'backward' have long suffered marginalisation or exclusion from the language and practice of human rights. Their exclusion stemmed from the central place attributed to *rationality* in Enlightenment discourses of humanity, such that those held to be deficient in this capacity have historically been situated outside 'universal' conceptions of the human community where it comes to rights and entitlements. In other words, Enlightenment discourse constructed an effective hierarchy of subjects who could be placed on a scale of the 'more' of 'less' rational, and these classifications were translated into conceptions of lesser eligibility for enjoyment of legal, social and political rights. Consequently, the intellectually disabled (alongside the mentally ill, subjugated ethnicities and women) have historically been conceived as less than fully enfranchised human subjects and have suffered the denial of human rights, in whole or part, as a consequence. Such denials have ranged from exclusion from political participation through voting rights, the right to marry or bear children and the right to own property, to the subjugation of 'lesser persons' to forced incarceration and medical experimentation.

Given this context, it should come as no surprise that the administration of criminal law has been far from just in its treatment of the intellectually disabled. Certainly, the origins and development of criminological thinking have been bound up with stigmatising associations of intellectual incapacity with innate criminality (Rafter 1997). Mobilising the labels of 'idiocy', 'degeneracy', 'imbecility' and the like, the nineteenth and twentieth centuries saw both scientific and practical attempts to remove from society the intellectually disabled, who were seen as an incorrigible source of criminality (Ibid.). The founder of 'scientific criminology', Cesare Lombroso, constructed a naturalistic anthropology of criminal types that included 'idiots' and 'imbeciles' amongst his categories of the incorrigibly criminal (Lombroso 2006). The psychologist Henry H. Goddard, a leading authority on the nature of learning

disabilities in the early twentieth century, insisted that 'the moron … is a menace to society and civilization [and] responsible to a large degree for many, if not all, of our social problems' (Goddard 1915, as quoted in Ellis and Luckasson 1985, 418; for discussion of Goddard's project of intelligence testing and its application to the learning disabled, see Zenderland 1998). Given that Goddard served as president of what was later to become the American Association on Learning Disabilities, the articulation of such views vividly attests to the extraordinarily negative conceptions that circulated at the heart of the institutional apparatus dealing with the intellectually disabled.

Recent decades have certainly seen profound changes in the ways in which criminologists, psychologists and policymakers situate those with intellectual disabilities, and long-established practices such as the forcible institutionalisation of the disabled have given way to programmes of assisted community living (Bleasdale et al. 1996). This has been characterised by Wolfensberger (1972) as a process of 'normalization' and by Scull (1984) as one of 'decarceration'. However, the criminal justice system continues to discriminate against the intellectually disabled, partly due to the persistence of beliefs that the intellectually disabled suffer from impatience, frustration, poor impulse control and other inabilities that dispose them towards criminal conduct (Endicott 1991). People with learning disabilities have special difficulties when they encounter criminal justice officials; for example, they may have trouble lining up a lawyer, and they can be bamboozled into false confessions (Sarason and Doris 1969; also Edds 2003). They comprise somewhere between 3 and 10 % of the US prison population, an incarceration rate up to three times their presence in the general population (Endicott 1991; Russell and Stewart 2001). Not only are those with intellectual disabilities liable to suffer discrimination and a disproportionate likelihood of custodial detention, but they are also moreover vulnerable to a range of dangers in prison with which they may be ill-equipped to cope, including violence, bullying and abuse from both fellow inmates and prison personnel (Russell and Stewart 2001). The criminalisation of those with intellectual disabilities stands in stark contrast to the criminal justice system's neglect of the same population in terms of their disproportionate likelihood of criminal victimisation. For example, the intellectually disabled are considerably more likely to be victims of assault, sexual abuse and robbery than the general population (Petersilla 2000, 9–10). It is against this background of the system's failure to protect the human and civil rights of the intellectually disabled that we wish to examine the ways in which popular film represents this group's encounters with crime and criminal justice.

In what follows, we first identify our research methods and outline our basic argument. The next section reviews five films in which the person with learning disabilities is portrayed as fundamentally innocent. It is followed by a section on three films in which the intellectually disabled lead character is shown to be criminalistic. This second group is of particular interest in that over time, although they do not deny the criminality of the central character, their conception of learning disabilities seems to be becoming more sympathetic and realistic, a change, we conclude, that may eventually lead to a better understanding of the special human rights problems of people with intellectual disabilities.

35.2 Methods and Argument

To identify films dealing with human rights issues related to LD (learning disabilities), we looked for titles in the relevant scholarly literature (which is very scant, consisting mainly of Devlieger et al. 2000). We also used the listings on movies about LD in the Videohound Golden Movie Retriever (Craddock 2003), on the Internet Movie Database (www.imdb.com) and on websites identified via Google. We limited our sample of films so as to include only movies in which a character with LD plays an important role (thus excluding *Rain Man*, in which the lead is autistic). We also limited the sample to films in which crime and justice issues are central (thus excluding, for example, *Forrest Gump*, 1993, and *I Am Sam,* 2001). Furthermore, we excluded non-English films, made-for-TV and direct-to-video films, overt fantasies and comedies. In short, we looked closely only at movies concerned with the criminal responsibility of people with LD. Our final list included eight films:

Film title	Date of release	Construction of LD character
Of Mice and Men	1939 (with remakes 1982, 1992)[1]	Inherently criminalistic
To Kill a Mockingbird[2]	1962	Innocent
Let Him Have It	1991	Innocent
Brother's Keeper	1992	Innocent
The Hand that Rocks the Cradle	1993	Innocent
Sling Blade	1996	Criminal/but
The Green Mile	1999	Innocent
Monster	2003	Criminal/but

The first film concerned with the criminal responsibility of people with LD was *Of Mice and Men*, released originally in 1939. Not until 1962, with the release of *To Kill a Mockingbird*, did another film address these issues. Then came another long gap, from 1962 to the early 1990s. But between 1991 and 2003, six more films of this type were released, a change which no doubt reflects recent efforts to destigmatise people with learning disabilities and to mainstream them into the community.

The majority of our films portray people with learning disabilities as essentially innocent, angelic and saintlike, incapable of committing a crime. We explain this construction in terms of the historical associations between learning disabilities and childishness, but we argue that these flat, unrealistic depictions in fact sentimentalise those with learning disabilities, blocking understanding of their human rights issues. We see more hope in several of the films that portray the intellectually

[1] We discuss only the first version of *Of Mice and Men*; obviously, it tells the most about the construction of people with intellectual disabilities at the time that Steinbeck published the novel on which all three versions are based.

[2] Boo Radley, the intellectually disabled character in *To Kill a Mockingbird*, appears only briefly on camera, but arguably, the entire film is about learning how to look at and interpret Boo.

disabled as capable of committing crimes because here there has been a definite reconceptualisation over time, with a sloughing off of old prejudices and efforts to explore the complexity of their human rights issues.

Our analysis assumes that movies do cultural work, providing interpretive frameworks on which viewers draw to organise their own experiences and opinions (Gamson et al. 1992; Rafter 2006, Introduction). A film such as *Of Mice and Men* that frames people with learning disabilities negatively provides a bit of cultural information that viewers may draw upon in the course of daily life when they encounter intellectually disabled people accused of crimes. If the only available constructions are negative, then it is difficult for people to shift to a new way of framing experiences and analysing human rights issues, but a series of new constructions, such as those that can be found in some recent films, can cumulatively contribute to the creation of a new cultural frame. Of course, movies are not our only source of cultural information, but they are a source that is widely shared. This is why what they say about justice for the intellectually disabled is important.

The above point brings us to a reflection on methodological strategies for reading crime films. As Yar (2009) elaborates, there are a number of current methodological approaches for reading film texts, all of which can be applied to crime movies. One common strategy is that of Content Analysis, which adopts a quantitative approach by numerically mapping the occurrences of particular types of representation in films, typically on a longitudinal basis (for recent examples of criminological analysis of films using Content Analysis, see Allen et al. 1997, 1998). However, we have opted against this approach for two main reasons. Firstly, on a practical level, there are an insufficient number of relevant films to furnish an appropriately large sample for quantitative analysis. Secondly, and perhaps more importantly, we view Content Analysis as limited by the fact that while it may furnish insights about the occurrence of representations, it tells us little about their *meaning*. The symbolic and affective coding of representations can only be uncovered through a detailed *qualitative* reading of particular film texts, thereby uncovering the prescribed meanings that are offered to audiences. Therefore, we have chosen a small sample of relevant and well-known crime films upon which to focus our analysis.

The method adopted here is consistent with the principles of semiotic analysis, as developed by Barthes (1967, 1973). Here, filmic representations are read as systems of signs that encode and naturalise (mythologise in Barthes' terms) particular socioculturally contingent understandings. Particularly important for us is the distinction between the denotative and connotative levels of signification. While a signifier may denote a particular and seemingly straightforward meaning, it can and does also connote further 'second-level' meanings of an 'ideological' character. Thus, in a number of the films we examine, particular modes of speech and expression are used to denote 'disability'; however, such signs simultaneously function, at a second level, to index further clusters of meaning associated variously with 'childishness', 'innocence', 'gullibility' and so on. In this way, film texts construct a set of significatory associations that perform the ideological labour of communicating particular cultural understandings (both empirical and normative) about disabled persons and their place in society.

35.3 Childhood, Innocence and Learning Disabilities in Crime Films

Historians such as Phillipe Aries (1965) have explored the ways in which childhood, far from being a natural and universal category, is in fact a contingent social and cultural construct subject to dramatic variation across time and place. In the pre- and early modern periods of Western society, little differentiation was made between what we would now consider to be thoroughly distinct and different categories of social subjects, namely, adults and children. As soon as the young were physically capable of doing so, they were entitled and often expected to take their place in the wider community, engaging in the full range of normal practices of work and leisure, including gruelling physical labour, sexual activity, consumption of intoxicating substances and so on. Alongside such equivalence, the young were largely treated in a manner indistinguishable from their elders where it came to crime and criminal responsibility – they were routinely tried and incarcerated alongside the old and were considered appropriate targets for the full range of punitive impositions, including corporal and capital punishment and transportation.

However, the late eighteenth century began to see the emergence of a distinct social category of the child, a being attributed with a wide range of characteristics to differentiate them from adults. There emerged an understanding of childhood as a unique developmental stage in which individuals are behaviourally, physically, emotionally, psychologically and morally unlike their elders. These constructions were variously positive and negative, valorising and stigmatising, in their orientations. However, perhaps the most influential where it came to the treatment of the young within the criminal justice system was the emergence of an equation of childhood with *innocence*. This viewpoint originated in late eighteenth-century Romantic discourses that idealised the child as an innocent, not yet sullied by the corrupting influences of the social world (Hendrick 1990). As a consequence, we see in the nineteenth century a separation of children and adults in the criminal justice system. The practice of incarcerating children alongside adults was progressively discontinued on the grounds that children would inevitably be corrupted by their proximity to criminally inclined and morally delinquent adults. The separation culminated with the legal institutionalisation of the doctrine of doli incapax, a legal doctrine according to which young children, due to their innate lack of moral, cognitive and emotional development, must of necessity be excused from criminal responsibility (Bandalli 1998; Crofts 2002).

The emergence of a discourse of childhood innocence is pertinent for our purposes in that a consistent feature of popular cinematic representations of the intellectually disabled is their recuperation within discourses of childhood. As we shall discuss in some detail below, one of the enduring associations in films about the intellectually disabled is a propensity to depict them as childlike, and thus by extension, fundamentally innocent.

The semiotic chain of disability-childhood-innocence is clear, for example, in the film *Let Him Have It* (1991). The film dramatises the real-life story of 19-year-old

Derek Bentley (played by Christopher Eccleston), who was tried, convicted and executed for murder in 1953. For more than 40 years after his execution, Bentley's sister Iris pursued a campaign to have her brother posthumously exonerated for what became widely held to be a gross miscarriage of justice. In 1998, Bentley was finally pardoned. The film tells the tale of how Bentley, impressionable and hungry for friends, was drawn into participating in a botched robbery by his 16-year-old friend Chris Craig. In the ensuing confrontation with the police, Craig shot and killed an officer. Both men were tried for murder, even though Bentley had already surrendered himself without resistance to the police by the time Craig shot the policeman. Both men were found guilty; while Craig was too young to receive the death penalty, Bentley was hanged. Bentley, the film reveals, was intellectually disabled by an injury during the London blitz that left him with a mental age of about 11 – a fact withheld during the trial.

Let Him Have It portrays Bentley as a naive innocent, a big man with a childlike credulity and a basically loving nature, exemplified through his relationship with his sister. He is barely cognisant of the danger inherent in the ultimately tragic enterprise into which Craig entices him. For Bentley, the idea of going out at night wielding a gun is simply an exciting extension of the world of comic book and movie adventures that he consumes enthusiastically. In contrast to the childlike Bentley, the diminutive and skinny Craig is depicted as a cunning, pugnacious and aggressive character, cynical and knowing beyond his tender years. Thus, the film performs a semiotic reversal in which the man becomes the child and the child becomes the man. Bentley's disability is neither recognised nor appreciated by the police or the vindictive judge who is intent on seeing someone hang for the crime. The film thus exemplifies a number of motifs that organise the representation of the intellectually disabled, crime and criminal justice – innocence communicated via childlike mannerisms and enthusiasms, vulnerability to manipulation by the more intellectually able and unscrupulous, and the criminal justice system's malign indifference to individuals with mental disabilities and its insistence on treating them as 'normal' adults at best and malevolent and dangerous at worst.

Similar themes are adduced in the revenge thriller *The Hand That Rocks the Cradle* (1992). The film begins with a prosperous suburban couple, Emma and Michael Bartel, appointing a woman named Peyton Flanders as nanny to their two young children. However, Peyton is not all that she seems. She is in fact the widow of disgraced gynaecologist Victor Mott, who committed suicide after being exposed for sexually molesting his patients. As Emma Bartel was one of the women to testify against Mott, Peyton holds her responsible for both her husband's death and her own subsequent miscarriage. She insinuates herself into the Bartel household in order to secure her revenge. It is at this point that we meet Solomon, an intellectually disabled black gardener employed by the Bartels. Solomon (played by Ernie Hudson) is portrayed not only as an innocent but also as a near-saint – a gentle and loving soul, dedicated to both the Bartels and their children.

Solomon soon intuits that Peyton is far from the gentle nanny she pretends to be. Fearing exposure, Peyton frames Solomon for sexually abusing the Bartels' daughter Emma, by planting the girl's underwear amongst Solomon's things, then ensuring

that Mrs. Bartel will find the incriminating item. The shocked Bartels are all too ready to believe that their devoted gardener is in fact a dangerous paedophile and child molester, and they dismiss him. With Solomon neatly out of the way, the increasingly deranged Peyton is now free to execute her plan to kill the Bartels and take their children as her own, replacements for the child she lost. At the denouement of the film, just as Peyton is on the verge of finishing off the Bartels, Solomon return and saves the day, culminating in a grisly death for Peyton, who is impaled on a spiked garden fence.

Throughout *Hand That Rocks the Cradle*, Solomon embodies a sentimentalised vision of childlike purity and unconditional love. His close relationship with Emma, the Bartels' daughter, appears as one between equals – he, by virtue of his disability, stands emotionally and intellectually in the preadult world. The accusation of sexual perversion is rendered particularly dramatic as the film has previously gone to great pains to depict Solomon, the man-child, as thoroughly asexual; this occurs in a scene in which the manipulative Peyton touches him in a sexualised and seductive manner, and Solomon recoils in horrified confusion. Thus, his purity of heart is demonstrated, and we are assured of his exemption from the sordid word of adult desire. Conversely, the film implicitly criticises social prejudices, as the otherwise archetypically liberal Bartels fall prey to the ancient assumption that the intellectually disabled cannot be trusted to behave in a manner consistent with moral conventions. Solomon's heroic intervention, saving the family that has shunned him, stands as a pointed rebuke to all those who would stigmatise the intellectually disabled.

Central themes adduced in *The Hand that Rocks the Cradle* also recuperated in the hit film *The Green Mile* (1999). *The Green Mile*, set in 1930s Louisiana, deals with the relationship between veteran prison guard Paul Edgecomb (Tom Hanks) and death row inmate John Coffey (Michael Duncan Clarke). Coffey is black and a veritable giant of a man. He has been sentenced to death for the rape and murder of two little girls. He is also intellectually disabled. The movie follows the relationship that develops between the cynical, world-weary yet humane Edgecomb and his charge. What intrigues Edgecomb is that Coffey's demeanour is entirely at odds with his expectations and experiences of brutally violent offenders. Coffey is gentle and childlike, devoid of any apparently violent tendencies despite his Herculean and heavily muscled physique. As the film progresses, the mystery of Coffey deepens, as it becomes apparent that he is possessed of miraculous healing powers that he uses to save lives. Coffey, it is revealed, is innocent of the child murders, yet is ultimately executed. This film, we suggest, takes the theme of those with learning disabilities as saintly innocents to its apotheosis. It operates through an overdrawn dualism of good and evil. The character is set up as the epitome of wickedness, as he is held to be guilty of the worst crimes that contemporary society can imagine, the rape and murder of children. Moreover, not only is Coffey initially depicted as a bad man; he is a *big black* bad man – a reference to the stereotype of sexually overcharged and aggressive black masculinity that has featured so consistently in America's racialised fantasies.

Against all these indicators of evil, his actual goodness and innocence shines all the brighter. Moreover, not only is he an unusually good man; he is divinely so.

Coffey appears as an allegorical Christ figure, the purveyor of unconditional love and healing miracles. In case the audience fails to spot this association, Coffey's initials (JC) advertise his divinity in a less than subtle signpost. Like the other JC, Coffey also ultimately dies for the sins of others. What are we to make of this extraordinary representation of the intellectually disabled? The mixture of race, disability and innocence certainly works effectively as an emotional device, and the film has proved wildly popular with viewers. Yet its elevation of the intellectually disabled to the status of beautiful souls does a profound disservice to those disabled people who have to negotiate the law and criminal justice. The film dangerously conflates two distinctive notions of innocence – innocence from the crime with which the individual has been charged and a total innocence or purity of being. The film does not allow the disabled to be no better or worse than other people – only if they can demonstrate purity and goodness can they be known as criminally innocent. As with Solomon in *The Hand that Rocks the Cradle*, Coffey is not allowed to be human – to hate as well as love, to experience anger and resentment, to come into conflict with others, to feel those problematic urges of desire which the non-disabled take for granted as part and parcel of being 'normal'.

The conjunction of race, disability and innocence is likewise apparent in the film *To Kill a Mockingbird* (1960), based upon Harper Lee's Pulitzer Prize-winning novel. Like *The Green Mile*, *To Kill a Mockingbird* is set in the American South in the 1930s and likewise features an innocent black man unjustly accused of a sex crime. The film narrates the defence of the innocent man, Tom Robinson, by Atticus Finch, a principled lawyer who attempts to stand up to the entrenched racial prejudice in the town where he lives. The developments around the trial are followed through the eyes of Finch's young children. However, unlike *The Green Mile* and *The Hand That Rocks the Cradle*, *To Kill a Mockingbird* disaggregates the issues of race and learning disability, the latter being explored through another character, Boo Radley. Radley is the town recluse and the object of intolerance and fear on the part of the residents. The tales of Robinson and Radley follow a parallel path as the film unfolds, as we learn of the innocence of both men – Robinson is not guilty of the rape with which he has been charged, and Radley is not the terrifying bogeyman that the children have been led to expect. When the reclusive Radley finally makes his appearance on screen towards the end of the film, it is to save the children from harm. Meanwhile, despite Finch's noble efforts, Robinson is inevitably found guilty by an all-white jury steeped in racial prejudice. While Radley never encounters the apparatus of criminal justice, the themes of his guilt or innocence are nevertheless examined through the racism of the trial. Both Robinson and Radley are victims of prejudice, and both are made to suffer because of this prejudice despite their innocence. While Robinson pays with his life, Radley also pays with his life in a more subtle yet equally devastating manner, namely, by being forced to live as a non-person, one who is isolated, shunned and excluded from the community in whose midst he resides. The film effectively uses its audience's sensitivity to issues of racism to draw attention to another kindred kind of prejudice that is largely overlooked, that against persons with intellectual disabilities.

Another significant exception to the usual maudlin treatment of accused innocents is *Brother's Keeper*, a documentary by Joe Berlinger and Bruce Sinofsky. Subtitled 'A Heart-Warming Tale of Murder', *Brother's Keeper* begins with a title card of the Cain and Abel passage from the Bible ('Am I my brother's keeper?') and moves on to the 1990 trial of Delbert Ward for the murder of his brother Bill. Delbert and Bill had passed their entire lives with two other brothers, Roscoe and Lyman, on a dairy farm in upper New York State, living in a squalid shack and tending their cows. Low in IQ (Delbert tested at 63), the elderly men had never had much education, nor had any of them married. Shy, gentle, uncomprehending, and, in old age, toothless and hard of hearing, they spent their days on farm chores. But when Bill died, local police and prosecutors brought Delbert and Lyman in for questioning and suggested, with words and gestures, that Delbert had suffocated Bill, whose health was failing, in a mercy killing. The authorities promised that things would go 'easier' for Delbert if he waived his rights and signed a confession, which he did, thinking that he would then be able to return home. As later became clear, he could not even read the documents he signed. Similarly, Lyman signed a paper testifying that Delbert had smothered Bill. Thus, Delbert went to jail and was eventually tried for the crime.

The title *Brother's Keeper* works on two levels. It refers, first, to the close and loving relationships amongst the four eccentric old men and second, to the way the local community rallied around them. Neighbours raised Delbert's bail money and packed the court with supporters during the 3-week trial. Not all of them disbelieved the charges; to some, mercy killing seemed possible given the brothers' lack of medical and other resources. But all the supporters recognised the injustice of trying someone like Delbert, who could barely follow the proceedings. The jury returned a verdict of not guilty, and the three men returned to their farm.

Brother's Keeper presents a vivid, real-life example of the human rights problems of intellectually disabled defendants. The film-makers – through trial footage, television clips and interviews with participants – push viewers to reach conclusions about what fairness would consist of in such cases.

What, then, can we conclude from this set of films? It is clear that the intellectually disabled are consistently associated with romanticised notions of childhood and innocence. They are insulated from accusations of criminality through their exemption from supposedly adult emotions of hate, envy, greed, resentment and desire – they are literally doli incapax, incapable of evil. Particularly noteworthy here is the exculpatory role played by sexuality in a number of these films (or, more accurately, its absence). The intellectually disabled are repeatedly equated with a kind of edenic purity, existing in a state before 'the fall', without 'knowledge of sin' (i.e., sexuality). Their pre- or asexual subjectivity is emphasised through unjust accusations of sexual crimes, especially those of a perverted nature; it is not coincidental that Coffey (*The Green Mile*) and Solomon (*The Hand The Rocks the Cradle*) are both unjustly accused of sexually molesting children. The figure of the paedophile functions in contemporary cultural discourse as a kind of leitmotif of wickedness and perversion in its most distilled sense, fuelling moral panics about the threat of evil stalking society, waiting to violate the innocence of children (Wilson and Silverman 2002; Kitzinger 2006). By juxtaposing asexuality with predatory

sexuality, the movies exonerate intellectually disabled men from charges of having dangerous criminal tendencies.

However, we must note a fundamental ambivalence in these characterisations, such that the disabled individual's exoneration from assumptions about criminality and deviance comes at a price. The innocence of the disabled is symbolically secured through the association with childhood, and as a consequence, the disabled are denied a right to a position in the adult world. Through their infantilisation, however benign, they become eternally becalmed in the realm of the pre-social, denied the right to legitimately claim adult experience, sensation or satisfaction. To recognise such rights would shatter the semiotic association with childhood – after all, the disabled cannot *simultaneously* be both innocent *and* knowing. Consequently, the disabled are consigned to a position of social passivity, at best the objects of benign paternalism, but never fully enfranchised social subjects with a right to experience the world on adult terms.

At the other end of the spectrum from these images of childish innocence lie films that frankly portray people with learning disabilities as criminals. But although criminality is a constant theme here, what this set of movies assumes about the relationship between criminality and intellectual disability has changed over time. *Of Mice and Men*, based on a novel by John Steinbeck, was made when the main cultural framework for understanding learning disabilities was to equate it with criminality (Rafter 1997). Starring Lon Cheney, Jr. as Lennie, the backward bumbler who cannot avoid harming pretty things, this film's very title likens him to an animal, a mouse, and subsequent scenes strengthen this association, showing that unlike a true adult, Lennie cannot control himself. Through overly enthusiastic patting and petting, he kills first a puppy and then the overseer's wife, crimes for which he was not criminally responsible, the film tells us, because he did not understand what he was doing. George, Lennie's friend and protector, sadly concludes that he has to kill Lennie to protect him from the justice officials who are ready to lynch him. However, even this movie does not simply indict people with learning disabilities, it portrays the justice system itself as rough and brutish (the opening and closing scenes present the most vivid lynch mob scenes in movie history), and the sadistic overseer, Curley, is himself far more evil than the well-meaning Lennie. Thus, Lennie is simultaneously childlike, naive, animalistic and criminalistic. We see the crimes through his perspective, grasping how he might want to pat the cute puppy and the sexy wife with her soft curls, but we also see them through George's perspective, and it is George who, however reluctantly, decides that Lennie must be put down like an animal to protect him from the lynch mob.

Sling Blade presents a Lennie-like character, Carl Childers (played by Billy Bob Thornton), but isolates him on the stage of his drama, denying him an adult protector. The film begins with Carl's release from the state mental hospital where he has spent several decades since slashing his mother and her lover during a puritanical fit (he found them naked on the floor). We follow Carl's difficulties as he tries to re-establish himself in the small Arkansas town where he grew up, support himself, make friends and cope with hazing as a 'retard'. While Carl is portrayed as intellectually limited and in some ways grotesque, his character also includes a

large dose of the childlike-saint cliche. Predictably, he kills again, this time with a sharpened lawnmower blade, to get rid of the evil lover who has moved in with a widow and her son who help him. The second killing, like the first, is shown to be a function of his disability – Carl simply cannot see another way to handle the situation. However, because he putatively saves the widow and her boy (the movie assumes they have no options), he (unlike Lennie in *Of Mice and Men*) is also something of a Christ figure or avenging angel. He ends up back in the mental hospital, satisfied with having sacrificed himself for his friends. Thus, *Sling Blade* tries to sustain two contradictory interpretations, showing Carl to have been both criminally responsible and criminally irresponsible for the slayings. While it is not unsympathetic to the human rights problems of the intellectually disabled, it is conceptually incoherent.

Of all the films discussed here, the most successful at exposing the human rights issues of people with limited intelligence is Patty Jenkins's *Monster*, a biography of Aileen Wuornos, the prostitute who became known as 'America's first female serial killer' and was executed in Florida in 2002. Based closely on Wuornos's actual life and character, the film portrays her as slow-witted, socially inept and hopelessly naive. But it does not turn her into a flat character, nor does it sensationalise her. Charlize Theron, in a brilliant characterisation, shows Wuornos to have been crude, self-deluded and desperate and yet at the same time loving, brave to the point of heroism and loyal. Her mental 'backwardness' is but one factor amongst many (including an abusive childhood, alcoholism and brutalisation by customers) that push her into her killing spree. But her mental and emotional disabilities were key factors in preventing her from mounting an effective defence. Without excusing Wuornos's crimes, *Monster* shows that they were perhaps acts that any of us in similar circumstances might have committed.

35.4 Conclusion

Movies have been portraying intellectually disabled offenders for over 60 years, but only since the early 1990s have they shown anything like a sustained interest in the subject. Earlier representations (such as that in *Of Mice and Men*) clearly conform to the contemporaneous understanding of the intellectually disabled as criminalisitic, as incapable of exercising appropriate control or restraint over impulses, and thereby constituting an unwitting threat to society. The more recent films track a kind of moral rehabilitation of the disabled in cultural understanding, inviting audiences to sympathise and empathise with their sufferings at the hands of 'normal' society and its institutions. However, many of them are content to portray injustice in the stark, wrenching terms of the executed innocent and the institutionalised saint. They generate their narrative force and empathetic identification via an unrealistic beatification of the disabled as pure, childlike innocents, paragons of gentleness of goodness. Thus, they buy sympathy at the price of wildly inaccurate and improbable expectations of the disabled, denying them the right to be flawed human beings with the complex emotional and behavioural repertoires that 'normal' people take for granted.

However some, specifically *Brother's Keeper* and *Monster*, are starting to explore the sources of such injustice in more depth, examining the reasons why intellectually disabled people have difficulty negotiating the criminal justice system. Such films go beyond easy dualisms of innocence and evil and address the complex and conflicting factors that contribute to offending by those with intellectual disabilities, alongside a more subtle appreciation of the practical problems they face within the justice system. If we take these films in sequence, what we see is a process of cultural reframing, a broad, slow shift in the terms in which people with learning disabilities and their criminal responsibility are understood. While we cannot conclude that there has been a definitive break with earlier popular cultural constructions, we can nonetheless suggest that a more reflective exploration of the issues is beginning to emerge in contemporary film-making, one that has the potential to contribute to a more refined and appropriate public understanding of the issues at stake.

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Chapter 36
'Make Enough Money, Everything Else Will Follow': Litigation and the Signification of Happiness in Popular Culture

Jason Bainbridge

**I'm gaining on happiness and I am going to get there one day.*

(Ally McBeal, Ally McBeal, 'Sideshow', Season 2, Episode 15)

Helping people is never more rewarding than when it's in your own self-interest.

(Richard Fish, Ally McBeal, 'The Attitude', Season 1, Episode 7)

Abstract In this chapter, by taking litigation as a signifier, I want to explore the multiple levels of meaning litigation can have for both the lawyer and the litigant they represent by analysing popular visual media representations of litigation. I argue that mapping how film and television have treated and tested the limits of litigation suggests a common argument arising from these texts: that while legal actions give us a sense of the social – involving litigants and practitioners in a contextual society of laws, codes and precedents – the law does not bring people together. Rather, according to these popular visual media representations, it keeps them alone and individuated, unable to express themselves without reference to a system that can only offer money as consolation. While litigation seeks to signify happiness, by most often equating it to monetary compensation, these texts suggest that those seeking 'happiness' must almost invariably look *outside* the legal system to find it. Indeed, in their location of happiness outside 'the system', be that the law, society, bureaucracy or modernity more broadly, these texts are presenting an inherently Romantic notion of happiness – a transcendent idea of 'happiness' that also serves as an antidote to the ubiquity of modern litigiousness that I have termed a

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postmaterial happiness. The chapter therefore concludes with the suggestion that these popular visual media texts may in fact be offering a new level of signification; in bringing Romanticism back to the lawyer rather than the legal system, they present the lawyer as signifying a kind of Romantic pioneering spirit, successful in spite of the system of which they are a part.

36.1 Introduction

In 1998, God was sued.

In a case from the second season of *Ally McBeal* 'Angels and Blimps' (2:13[1]), litigator Ling Woo (Lucy Liu) represented Eric Stall (Haley Joel Osment), a boy dying of cancer in an action against God. She reasoned that God could be sued through the church of St. Christopher's, for they act as an agent of God. As the family contributed generously to the church, Ling argued that an implied covenant of good faith had come into effect, and therefore there was a duty on the church to give back in Eric's need (in regard to both his cancer and the death of his father from being struck by a lightning bolt). Ling argued that the church would settle because of the negative publicity – and they did. According to Ling, the reason behind the action was to make Eric *happy*, because it gave him something to focus on as his life slipped away.

Ling's reasoning raises a couple of interesting questions: What is the function of civil litigation (hereinafter referred to as 'litigation')? What is the relationship between litigation and happiness? I want to explore these questions in this chapter. The fact that Ling Woo is a fictional character, and that the vehicle for raising these questions is a popular media representation of law, the television series *Ally McBeal*, is also important. It points to the ways in which these popular media representations contribute to wider cultural understandings of both law's functioning and its limitations, becoming part of what the journal *law/text/culture* terms 'law's textuality – the texts and subjects which the law touches and shapes and which, in turn, impact on and change the law' (1994, 1, 6).

It is clear that an expansion of how legal scholars conceive of law beyond the traditional institutions of legality has been in development for some time. Early examples of this trend would include the Critical Legal Studies movement of North America, feminist jurisprudence (Graycar 1990) and Critical Race Theory (Delgado and Stefancic 1993), all of which succeeded in not only opening law up to 'new challenges and discourses' (Cheah et al. 1996, xiii) but in actually taking 'legal theory beyond the body of the law' (Cheah et al. 1996, xiv). I would argue, following Joshua Meyrowitz (1985), that it is with popular media's taking up of law that we are seeing a greater expansion now than at any time previously. This is because more media forms are articulating ideas about law – from the multiple texts of the *Law & Order* franchise and the law shows of former-lawyer-turned- writer/producer David E. Kelley (like *Ally*

[1] References to specific episodes are presented as season number: episode number, followed by the episode name, if applicable, for example, 1: 7 'The Attitude' refers to season 1 episode 7 entitled 'The Attitude'.

McBeal and *Boston Legal*) on network television[2] to the films based on John Grisham's books, to the existence of Court TV and 'real law' series like *Judge Judy* (1996–). Airing these diverse conceptions of law across the mediasphere means that, in legal scholar John Denvir's words, '"law" is no longer a concept limited to the law reports; it is a consciousness that permeates American – and by extension the world's – culture' (Denvir 1996, xiii). Even more importantly, these popular media representations become 'the main source of *common* knowledge about the law… (exerting) a powerful influence on ordinary people's attitudes to, and expectations of, law and the legal system' (Laster 2000, 10–11)[3] simply because they *are* so much more accessible to the general public than law reports or even visiting courtrooms for themselves. How popular media represent litigation is therefore vitally important in determining how litigation is culturally defined and understood.

I have previously argued that Swiss linguist Ferdinand de Saussure's (1983 [1916]) notion of *semiotics* provides a set of tools suitable to unpack how law – and by extension litigation – is culturally defined (Bainbridge 2006). Saussure adopts a structuralist approach to communication, breaking down communication practices into a series of units that produce meaning called *signs.* Each sign is comprised of a physical component (*the signifier*) and a mental concept associated with that physical component (*the signified*) with the relationship between the signifier and the signified being defined as *signification,* the process by which meaning is made (see Saussure 1983; Hawkes 1977). In this chapter, by applying Saussurean semiotics to popular media representations of litigation, I want to explore the multiple levels of meaning (the possible signifieds) that litigation (the signifier) can produce for both the lawyer and the litigant in these popular visual media representations and thus map the ways in which litigation is culturally defined through such popular media representation.

This chapter argues that, taken together, these popular media representations of litigation suggest multiple levels of signification for civil litigation. First, litigation signifies research and development: lack of case law is represented as leading to the advancing of test cases to expand the legal system. Second, litigation signifies invasive practice: increasing litigiousness is represented as inescapable in all aspects of capitalist society, an idea that reflects and expands upon Foucault's notion of law guaranteeing freedom and privacy while actually legitimating and extending state control. Third, while litigation aims to signify happiness, by most often equating it to monetary compensation, these representations ultimately suggest that those seeking 'happiness' must almost invariably look *outside* the legal system to find it. Therefore, litigation ultimately does not signify happiness even though it appears to do so, via money.

[2] While this chapter acknowledges that television programmes are the product of vast numbers of people, David E. Kelley maintains an authorial voice throughout programmes bearing his name, as creator, writer/producer and showrunner. From the repetition of ideas and themes between his series to press acknowledgement of his editorial control over these programmes, it is more than arguable that the ideas audiences see on-screen are those that are being raised for debate by Kelley himself. This chapter will therefore refer to Kelley as author and source of a number of ideas that subsequently represented and debated on-screen.

[3] Importantly, while I agree with Laster's proposition that texts form 'the main source of *common* knowledge about the law', I downplay the idea of 'influence' with its implications of power over the viewer.

The bulk of the examples are American because, internationally, popular American television law shows and films constitute the bulk of all popular law shows and films currently in production and circulation (both as a proportion of the total drama produced in each country and in absolute terms). Law shows have been a successful part of the American television schedule since Perry Mason was first broadcast in 1957 and remain an even more popular export around the world. More particularly, locally produced media programmes often follow 'the American series' formats (Smith 1995, 8) leading Smith to conclude that 'one question in every mind must be whether the geographical source of an individual's or country's media any longer matters' (Smith 1995, 1), while Kathke notes that even European screenwriters are being actively encouraged to follow the Hollywood model (Kathke 2006).

The key texts here are the popular television law shows *Ally McBeal, Law & Order* and *Eli Stone*, along with the sitcom *Seinfeld*. All are illustrative of popular media's representation of litigation, with *Ally* being one of the few legal televisual texts that deals almost exclusively with civil litigation,[4] gives a face and a character to that oft-used legal term, the 'vexatious litigant' (Ling Woo, later a litigator herself, debuting in Season Two) and, as McKee notes, that takes 'happiness' as its central concern – 'What is it, how might you find it, and how would you know when you finally have it?' (McKee 386); *Eli Stone* demonstrates that *Ally's* ideas on happiness and litigation are still relevant in the 2000s and offers an alternative way of reconciling them, while *Law & Order* and *Seinfeld* speak to the expansion of the law of torts over the 1990s. Where relevant, other media intertexts dealing with related concerns will also be mentioned.

36.2 Litigation as Signifier

The action (or lack of action) which results in unlawful interference with an individual's person, property or economic interests is referred to by the law as a *tort*. These torts give rise to civil causes of action (civil litigation, the signifiers) that aim to place the plaintiff in as near as possible the position they would have been in had the tort not been committed. The most common way the court achieves this is through the award of damages, that is, monetary compensation for the loss suffered. It is worth noting that where this would not be sufficient or appropriate a court order can also be issued restraining the tortfeasor (the person committing the wrongful action) from commencing or continuing such an action. But money remains the

[4] A sample of cases from *Ally McBeal* include a class action brought against telephone companies for annoying calls in people's private time; a rabbi goes to the antidefamation league after a lawyer calls Judaism 'hoopla'; office women launch a same-sex sexual harassment claim against another woman they deem too sexy (thus creating a sexually charged workplace); the family of a man who perished in a plane crash sue the airlines; and a waiter discharged by a restaurant for being straight sues the restaurant for discrimination (*Ally McBeal* Season Five; 1:7 The Attitude, 1:9 The Dirty Joke, 1:13 The Blame Game, 1:20 The Inmates).

most common form of court relief, and in the United States, plaintiff lawyers are allowed to take a percentage of those winnings or settlement, which can be as high as 45% (Bagnall 31). Inevitably it seems that most civil actions will be about money, from the perspective of both the plaintiffs *and* their lawyers.

Jaap Spier (1996) opens his book on liability with an anecdote that publishers rejected Joel Bishop's proposal to write a book on tort law in 1853 claiming that not only was there no call for a work on the subject, no one would be interested in reading it. Now it seems it would be a bestseller. Throughout the 1980s and into the 1990s, Western societies became increasingly 'claim conscious' (Markesinis 1990) because fewer individuals were inclined to bear their own losses, preferring instead to find a tort and sue the tortfeasor 'responsible'. The amounts awarded similarly increased, impacting on both tortfeasors and insurers. Indeed, as Spier sees it, 'One cannot escape from the impression that legislators and/or courts are trying to find new ways to compensate victims suffering personal injury' (Spier v), or as Ally McBeal (Calista Flockhart) puts it, it would be 'almost unconstitutional for [someone] not to sue' (1:18 The Playing Field).

In *Ally McBeal* lawyers arguing the right of a family to sue an airline for the death of their father in a plane crash say that the tortious system has become 'all about blame. If you get hurt, file a claim, get money…. If you get hurt there's got to be a bad guy. Somebody to blame' (1:13). The lawyers go on to cite several instances – if you have cancer, sue a doctor; if you slip on skis, sue the government – and they finish by citing the real case study of a man whose house was destroyed by a tornado (an act of God) who successfully sued his church (as agent for God) and won (paralleling Ling's claim, which opened this chapter). In another Season One episode (1:7 The Attitude), a defence lawyer claims that the correspondingly high litigious climate may work in his client's favour as he 'sense[s] a waning public appetite with sex discrimination laws and suing people who aren't actually hurt'.

Naturally there are some limitations on how the law of torts operates. Torts require proof of fault, either intention or negligence, on the part of the defendant (the tortfeasor). As Eli Stone (Jonny Lee Miller) notes in the series of the same name: 'Litigation is only about what you can prove in a court of law' (1: Pilot). The damages that can be causally imputed to the tortfeasor can then be recovered. Liability itself is primarily moderated by the 'duty of care', that is, the idea that the defendant owed the plaintiff a duty to exercise reasonable care. The existence of a duty of care helps determine 'the situations in which the law of negligence will operate and the type of damage it will compensate' (Spier 4). The duty is wide ranging in respect to acts and physical damage, narrower regarding omissions or statements or pure economic loss, and rests on four key concepts: policy, fairness, proximity[5] and forseeability – the classic formulation of the 'neighbour principle' espoused by Lord Atkins in the 'snail in the bottle' case that gave rise to the modern tort of negligence.[6] It is the vagueness of these latter three – fairness, proximity and

[5] *Jaensch v. Coffey* (1984) 155 CLR 549 at 583 per Deane J.

[6] *Donoghue v. Stevenson* [1932] AC 562 at 580.

foreseeability – that has given the courts some latitude in reaching their decisions and permitted the corresponding extension of the duty of care present today.[7]

This expansion of the law of torts is perhaps best illustrated by three legal examples from the popular American sitcom *Seinfeld*. While not a law show, like the other popular media examples herein, on its receipt of a 1992 George Foster Peabody Broadcasting Award, *Seinfeld* was cited as an example of 'comedy (being) universal and instructive in many aspects of everyday life', and across its nine seasons, the 'show about nothing' was equally 'instructive' as to the expanding duty of care.

In 1992, the Fourth Season's 'The Virgin' depicts a traditional tortious claim: a lawyer sues Elaine for knocking her nephew, Ping, off his bike while on a delivery route. In this first action, we have a clear duty owed by Elaine to the bike rider, the same owed by every driver on the road to other vehicles and pedestrians. By 1995, in the Seventh Season's 'The Postponement', the tort has become more unusual; Kramer is scalded with hot coffee and in the following episode, 'The Maestro', sues Java World with the assistance of Jackie Chiles, a character modelled after O.J. Simpson's attorney Johnnie Cochran. In this second action against Java World, Jackie Chiles argues that a duty of care is in existence between the coffee shop and their customers regarding the temperature of the coffee served.

Chiles returns in a number of episodes but perhaps his most significant case is that of Season Nine's 'The Finale' (1998), the final episode of the series. *Seinfeld* is renowned for examining the minutiae of daily life and taking them to a ludicrous extent. Therefore, in the '*Seinfeld* world' in the wake of the death of Princess Diana, the law of torts has expanded to include the imposition of a *positive duty* on bystanders to assist someone in distress. This 'Good Samaritan Law', as it is known in Latham, Massachusetts, results in the series' protagonists, Jerry, Kramer, Elaine and George, being arrested when they make fun of an overweight man as he is choking, rather than coming to his aid. Chiles defends the 'Gang of Four' as witnesses (guest stars) from across the nine seasons give evidence on the inactivity and downright maliciousness of the characters, convincing Judge Arthur Vandalay that they are all guilty and sentencing them to prison. In this third action against Jerry and his friends, we have the imposition of a positive duty of care on bystanders (the Good Samaritan Law) to come to the assistance of someone in distress. Expanding the boundaries of the duty of care in this way leads to a corresponding increase in public

[7] This is commented upon in popular media representations too. For example, as regards the concept of 'fairness': in an *Ally McBeal* case involving a jilted bride (1:22 Alone Again), Judge Whipper Cone (Dianne Cannon) says 'courts don't legislate love' leading to a spirited argument from lawyer Richard Fish (Greg Germann) that courts delve into marriage all the time. From alimony to prenuptials to child support, he argues, it all comes down to fairness, which is the basis for rulings on palimony and same-sex union rights. Judge Cone concedes that 'courts are all over the institution of marriage and tort law seems to be expanding into broken hearts'. Similarly, Ally notes that Cage and Fish have become a 'magnet for strange cases' and because so many involving sex seem to be concerned with the violation of a legal right, it has virtually become a case of 'do it and sue' (2:6 Worlds Without Love) – the case here involving a nun (Chrissa Lang) who had an affair with a man and now wants to rejoin her order.

liability. Drivers owe a duty of care to other people on the road; coffee shop owners become responsible for the heat of the coffee served; bystanders must help people in distress. With each new case it becomes easier to argue that bit further, to move from a duty to avoid to a positive duty to assist, expanding the signifier – the ability to litigate – a little more each time. Therefore, while legal academics *debate* the present state of law, popular media representations are *actively* testing the limits of litigation through test cases like the one involving 'the Good Samaritan Law'.

It is important to understand this expansion of the duty of care because it is the context in which popular media representations throughout the 1990s and 2000s – be they law shows like *Ally McBeal,* medical series like *Chicago Hope* or educational series like *Boston Public* – all operate. It is what sets them apart from their thematic forbears like *Perry Mason, St. Elsewhere* and *Welcome Back, Kotter,* where the 'brooding omnipresence of the law', Justice Storey once referred to, has become an action-in-waiting to (potentially) remedy any and every wrong suffered – by the clients in *Ally McBeal*, the patients in *Chicago Hope* and the students and teachers in *Boston Public*.

36.3 Signifying Research and Development

Popular media representations' first proposition about civil litigation is that it is part of free enterprise, encouraging individuals to generate new ideas for creating money and thereby signifying research and development (R&D). As civil law does not keep up with technology or social change, the main task of courtrooms frequently becomes R&D – with *Ally McBeal's* Richard Fish (Greg Germann), Ling Woo and John Cage (Peter MacNicol) being part of this new wave of lawyers, finding new ways to sue, generating new ideas for creating money.

Writer producer David E. Kelley frequently constructs bizarre test cases in *Ally McBeal* to test the limits of the legal system. When Karen Horowitz (Brenda Vaccaro) wants to sue a rabbi to get out of her marriage to her comatose husband (1:7 The Attitude), the lawyers of Cage and Fish's first thought is to check whether they have a cause of action. When asked whether a sexual harassment case can be made out, lawyer Caroline Poop (Sandra Bernhardt) notes that 'the law says it's possible' and therefore the lawsuit becomes a 'tool to advance our position' (1:8 Drawing the Lines). Indeed, when confronted with a novel situation, *Ally's* lawyers respond by trying to mould or stretch the legal system to accommodate litigation.

Richard Fish, senior partner of Cage and Fish, sees this as the lawyer's role; lawyers are advocates, not judges and juries. They do not decide the merits of the case, but just fight the fight (and he keeps this argument on tape; 1:8 Theme of Life). Furthermore, where cases have no 'obvious' basis in law, then lawyers are 'pioneers' (1:18 The Playing Field), to be praised for finding new frontiers of litigation. This is a radical reinterpretation of the role of the lawyer. In popular media then, lawyers move beyond simply representing clients towards actively finding ways to expand the law, to take the law into regions it has not been before – something that would

traditionally be thought of as, perhaps, more of a judicial or even parliamentary role. Litigation therefore signifies R&D.

By way of example, litigation as signifier of R&D is demonstrated in two episodes from the first season. In 'Forbidden Fruit' (1:16), US Senator Foote is sued by his new wife's ex-husband for 'interfering with otherwise happy marital relations', something not generally recognised by the law. Here, the expansion in law is made with reference to precedent (*Beck v. Foote* on intentional interference in marital relations) and an action based in contract law. By applying these principles, the ex-husband seeks to enforce his marriage contract or at the very least find accountable the senator who breached it. Contract law is therefore applied in the context of marriage, and the law continues to expand.

Similarly in 'Body Language' (1:14), the lawyers of Cage and Fish represent a woman who wants to marry a convicted felon. They resort to Supreme Court precedent, Turner, but are told this does not apply to maximum security prisoners. Attorneys Ally and Georgia Thomas (Courtney Thorne-Smith) argue for both a constitutional right to be married (that fails) and then for a court order for sperm deposits from the prisoner, reasoning that if the client falls pregnant there will be a compelling state interest for them to be married. Again then litigation signifies R&D, trying to expand the scope of the law regarding marrying inmates by applying the principles of another area of law, here, constitutional law. Ally says excitedly: 'This is why I got into the law- nuance', but the client is less certain, reasoning that 'harvesting a child as a means of circumventing prison rules (is) perverse'. Eventually, however, the client backs down, and, touched by the lengths she is willing to go to, the warden agrees in his discretion to let them marry.

At the conclusion of this case, Ally suggests, half-jokingly, that the lawyers' role is 'to distort the law beyond all commonsense', and from both of these examples, it is clear that Ally and Fish alike recognise the importance of litigation as R&D; whether lawyers are 'pioneers' or 'distort[ing] the law beyond all commonsense', the end result is the same; litigation signifies research and development, expanding the reach of law, researching new ways to make money and developing new ways to sue.

John Cage's approach to test cases is demonstrated in 'Silver Bells' (1:11) where three parties, two women and a man (two of whom are lawyers), seek to be joined in a legally recognised marriage. They argue that this is the next step in the evolution of the nuclear family, and the case falls to John Cage, the 'whiz on unorthodox arguments', according to Ally. Cage tries two arguments, one based in science (procreation is supposed to be with multiple parties) and one based in emotion (that following the heart does not necessarily lead to monogamy), but both fail. As Judge Whipper Cone says, 'Your timing might be right on this issue but you picked the wrong judge'.

In *Ally McBeal,* it is Ling Woo who most often uses litigation as R&D, first as a litigant and then, when it is revealed she has a law degree, as a lawyer. In her first appearance (2:2 They Eat Horses Don't They?), she sues shock jock Harold Wick on the basis that his show contributes to a sexually charged workplace. Attorney Nelle Porter (Portia de Rossi) argues that Wick has a duty against discrimination,

analogous to the duty tobacco companies have to non-smokers in regard to second-hand smoke. 'Courts are willing to clamp down on free speech where it leads to discrimination or oppression', says Nelle and points out how ludicrous the law is that an employer can be sued for playing Wick's show but Wick himself cannot be sued. This, she claims, is an issue of fact (proof) for the jury (not an issue of law for the judge). Nonetheless, the sexual harassment claim is dismissed for, as a matter of law, it is untenable that a radio talk-show host could be held liable for 'employmental' discrimination at place where he does not work.

However, Ling also claims for negligent infliction of emotional distress based on the notion that Wick's gratuitous sexual comments systematically devalue women – and on this ground, she is successful. Judge Peters (David Ogden Stiers) reasons that free speech is not always protected: 'if it is foreseeable that some product put out there is capable of causing harm then liability is right around the corner.' Since movies have been sued, Judge Peters considers radio talk shows may be next, and while Wick's lawyer argues this is 'a slippery slope', Judge Peters maintains this is a question for the jury: whether or not they value free speech over the harm it causes (incidentally the same question that writer/producer David E. Kelley often poses for his viewers when he raises these issues). Tellingly Ling dismisses her own case by giving a press release implying Wick's impotence (but as Wick's lawyers cannot prove reckless disregard for the truth, the firm remains safe from further action).[8]

This idea of litigation signifying research and development is also regularly taken up by the *Law & Order* franchise, where the DAs use text cases as ways of expanding liability – such as suing parents for raising a homicidal child or suing a gun manufacturer for the multiple deaths of victims of a gunman (the design of the gun allowing the assailant to rapidly reload). An episode of *Law & Order: SVU* reveals how this R&D works in a medicolegal context. Here, the police investigate the rape of a female coma patient (Stephanie) that has left her pregnant. At first, they suspect a necrophiliac. Later it turns out that it is Stephanie's doctor, Dr Mandel (Bruce Davison), who is responsible. It then turns out that Mandel has done this previously, impregnating women in comas and then having the foetus' aborted so the embryonic stem cells can be used in researching a cure for diseases like Parkinson's and Alzheimer's.

ADA Cabbot admits that the law is not up with technology on the theft of body parts like foetal tissue for stem cell research. Defence counsel tries to argue that as Stephanie was an organ donor she would have consented to this. Ultimately, Cabbot's prosecution fails because Stephanie's pregnancy is not the result of Mandel's *rape* but rather the result of Mandel artificially inseminating Stephanie with semen from

[8] Other examples of Ling Woo's pioneering litigation from the Second Season include an action for misrepresentation brought against a nurse on the basis the surgeon claimed her breasts were his work (they weren't, they were real), and her sister's breasts are not as good as hers (the suit is abandoned because the sister assumed that risk) (2:3 Fool's Night Out), suing the environment (2:12 Love Unlimited) on the basis that, if the land has rights and a tree has standing, then they should be capable of being sued too and drafting a boilerplate she has partners sign before sex, involving a waiver and confidentiality agreement (as she has trade secrets) (2:22 Love's Illusions).

millionaire David Langley, himself dying of Parkinson's and funding much of the research. 'There is just no precedent for this kind of case yet', ADA Cabbot is forced to admit; the law lags behind technology. Even more unsettlingly, the episode ends with Langley preparing an action for custody of the unborn child, claiming that the earlier case against Mandel has in fact proved his paternity. In other words, Langley has used the case as R&D to assert his right to ownership of the embryonic stem cells. While the outcome of this (second) action is never revealed, it is clear that the case itself is developing a new area of law, R&D into property laws regarding embryonic stem cells, another potentially lucrative (and litigious) field of law.

In *Eli Stone*, attorneys Taylor Wethersby (Natasha Henstridge) and Matt Dowd (Sam Jaeger) even argue that tort law extends to chimpanzees (more specifically two gay chimpanzees the zoo is trying to separate to the detriment of the chimpanzees' health), on the basis that chimpanzees are emotionally, behaviourally, morally and even genetically similar to humans. The judge entertains this 'Theory of Chimpanzee Tort Protection', creating new law, even though it will undoubtedly be overturned on appeal in between 6 and 12 months (11: Patience).

Common across all these examples is the idea of litigation signifying R&D, testing out new areas for law (new ways of interpreting the marriage contract, new ways of applying constitutional law, new ways of defining family) motivated by the desire to find new ways of making money (boilerplates for sexual secrets, being able to sue the environment, asserting a proprietary claim to embryonic stem cells) that reveals litigation to be an inherently capitalist tool – capitalist in the sense that it is not only interested in making money but in generating *new ways* of making money.

36.4 Signifying Invasive Practice

Popular media representations' second proposition about litigation is that it signifies invasive practice, leading to unacceptable interference with state institutions. Indeed, Kelley suggests that the problem with the expansion of litigation is the law's corresponding intrusion into all aspects of life. There are two parts to this argument. First, there is the very traditional, very Romantic suggestion that some aspects of life *should* be outside the reach of the law (and thus of modernity – of equality and fairness and all that modernity implies) and, second, that law is unduly invasive in the running of state institutions.

The first idea, that some elements of life should be outside the reach of law, comes through phrases like Ally's criticism of sexual harassment laws that overprotect women and make them feel like victims in *Ally McBeal* (1:9 The Dirty Joke), lawyer Anna Flint's admission it is sad her client 'had to come to court for that verdict. Sad in these times he has too' (1:16 Forbidden Fruit) and John Cage's concern about pursuing a relationship with associate, Nelle Porter, because the law might require her removal (2:9 You Never Can Tell). His fears are borne out in a

wrongful termination suit against Cobb Company (2:14 Pyramids on the Nile) who introduced a 'date and tell' policy amongst their co-workers as a by-product of sexual harassment laws to act as a safeguard against liability, leading to the sacking of a couple who were dating there. Cobb Company's lawyers 'establish the law as villains and them as victims' effectively putting 'the law on trial' to defend their policy. 'You're a beautiful woman Nelle', says Cage, 'I know it goes without saying but the law shouldn't require it to go unsaid.' He argues the couple were fired for trying to keep their private lives private and they win the suit.

David E. Kelley consistently suggests there should be limits to the invasiveness of law and that privacy (in the sense of private places) should be enshrined – but invariably people resort to litigation as the only way of making their voice heard and therefore make the private public. Litigation therefore comes to signify invasive practice. When Ling sues an employee for having sexually charged thoughts about her (the issue being whether the conduct of the defendant results in a hostile working environment for the plaintiff), the judge is quick to deliver a directed verdict that courts cannot legislate thoughts (2:9 You Never Can Tell). Similarly, when Georgia sues Cage and Fish for contributing to the breakdown of her marriage to Billy (3:11 Over the Rainbow), the court recognises 'the expanding exposure and liability stemming from workplace environments. Be it civil rights, health or sexual harassment we're only too happy to get in there and legislate when we don't like what's going on. But assessing blame when it comes to marriage, that's still a path we're loathe to go down.' Here Kelley seems to be arguing for keeping privacy sacred from litigation.

Second, there are many demonstrations of how litigation signifies invasive practice that interferes with the running of state institutions. At its best, law remains a safeguard, a restraint on abuse of power offering protection for those at risk of harm. At its worst, it is an impediment that interferes in the efficient running of these institutions. By way of example, recourse to the law makes it difficult for doctors to discharge their functions. *Ally McBeal's Goldstein v. Butters* involves a case for intentional and negligent infliction of emotional distress brought by the patient when her doctor, Greg Butters (Jesse L Martin), temporarily transplants a pig's liver into her body because there was no human organ available for transplantation (the hospital was insulated from liability in this case because they did not authorise the pig-liver transplant). Cage says the saddest thing about the action is that 'when she (the patient) woke up she didn't say thank you… she called her lawyer' (1:17 Theme of Life), the implication again being that law has become the automatic response, even before simple etiquette. *Ally McBeal* is therefore endorsing negative assessments of litigation (see, e.g. Bagnall 2001) as being the only way left for people to communicate with each other. Rather than providing a dialogue, litigation is presented as a form of dependency for people trying to settle any and every perceived wrong.

Here, Kelley is clearly playing into the old debates between modernity and humanity and Romanticism and bureaucracy – but Kelley also transcends these old binaries by presenting the issues uncritically, often using a few characters as counterpoints and leaving uneasy resolutions. So when Bobby Donnell (Dylan

McDermott) and Helen Gamble (Lara Flynn Boyle) debate the ethics of euthanasia in *the practice*, Kelley's script endorses neither one's view. Similarly in *Ally McBeal,* Fish's capitalism is presented without criticism, as is Ally's reluctance to date a bisexual man; it is left to the audience to debate, to engage with the popular media representation and make their own conclusions.

Kelley's series therefore operate in a similar way to legal novelist Philip Friedman's claim that a legal context is functional not only because it allows him to deal with every societal issue (as every societal issue shows up in the courtroom) but because it also leaves it to the reader to judge which outcome is best (qtd Lawson (1994) *The Bestseller Brief*). Taking this idea also makes it very hard (and dangerous) to say whether any one character is indicative of Kelley's personal viewpoint.

This view of litigation signifying invasive practice also intersects with Foucault's ideas on social contract theory and how, even as the theory promises individual freedom, it perversely legitimates state control. Foucault describes how the system of rights and the domain of law together actually act as 'polymorphous techniques of subjugation' (Foucault 1980, 96) '[where] right should be viewed… not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates' (1980, 96). As presented in these popular media representations, litigation can be understood in a similar way; as a tool designed to protect our freedoms and articulate our rights, it actually signifies how every aspect of our lives is governed, with judges and lawyers desperately seeking to keep some spaces (most notably love and marriage) private.

The problem with medicolegal issues in this regard is aptly demonstrated in Kelley's series *Chicago Hope*. Alan 'The Eel' Birch (Peter MacNicol, later John Cage on *Ally McBeal*), the in-house attorney for the first few seasons, is charged with maintaining the delicate balance between medical misadventure and negligence in a hospital using cutting-edge and experimental medical procedures. As Chief Surgeon Jeffrey Geiger (Mandy Patinkin) tells him, hospitals require in-house attorneys like Birch to 'keep [them] all afloat'. Here again, litigation signifies invasive practice, as the threat of litigation actively threatens the operation of the hospital.

A typical example occurs where Alison (Rosalind Chao) asks to be impregnated with the sperm of her husband, who is being kept alive on life support. This raises a host of ethical issues, not least of which is 'necrophilia' and the argument that harvesting sperm and impregnating Alison without her partner's consent violates every principle of reproductive choice. The difficulty with such actions is highlighted when Chief of Staff Watters (Hector Elizondo) asks Birch if there is any case law and Birch is forced to confess that 'post-mortem sperm retrieval is too new for case-law', despite his ethical objections that Alison's husband should not be made a father against his will.

As demonstrated above in the *Law & Order: SVU* example, lack of case law is a major problem in medical cases and forces lawyers to become creative, using litigation as research and development. In this instance, the lawyers for Ellen (Alison's mother-in-law) try to stop the retrieval by making a motion to annul Alison's marriage and thereby hold the hospital civilly and criminally liable for rape. Ultimately the case is not resolved; Alison decides not to proceed with the retrieval, and mother and daughter-in-law are reconciled as the husband dies. Kelley raises the issue,

debates the ethics and teases at the possibility of litigation signifying R&D but most importantly demonstrates how litigation signifies invasive practice through the inadequacy of law to keep pace with medicine. This lacuna in the law of precedent allows for more test cases to be run; indeed, it is this *inadequacy* of law to keep pace that *encourages*. The different levels of signification litigation offers are therefore not discrete but often function together; litigation signifies R&D which can also function as invasive practice just as litigation signifying invasive practice can also lead to R&D.

When seeking a court order to *induce* a coma (2:11 In Dreams), Ally McBeal asks Judge Cone to rule on one case, not on 'the bigger picture'. 'Why do we get so focused on procedure?' she asks, saying that it seems silly to apply precedent when it comes to medicine because technology is completely different today from yesterday. Importantly Judge Cone agrees with her argument, and the request is granted to put the litigant 'out for a week' and see how it goes. As in the Butters case, the law is presented as ill equipped to deal with experimental medical practices; litigation that signifies invasive practice becomes R&D.

The examples here all demonstrate how litigation can signify invasive practice, interfering in the operation of state institutions. Presenting litigation this way suggests an added desire on Kelley's part for some aspects of life, what may conventionally be termed 'the private' – such as love, marriage and etiquette – being kept apart from the law. What Kelley seems to be arguing for here is an alegal space – a space without law – and the reasons for this become clearer in the context of 'happiness'.

36.5 Signifying Happiness

Popular media representations' third proposition about increased litigiousness is that litigation has limitations – it cannot provide happiness, only money. If we conceive of litigation as an outgrowth of capitalism and being tied up with notions of free enterprise, then it is hardly surprising that the remedy litigation provides for almost any and every wrong (with limited exceptions) is money. In his address to the jury in *A Civil Action* (1998), a corporate attorney (Robert Duvall) acting for the parent company of a company accused of polluting a small town's water supply, resulting in the deaths of eight children, neatly summarises the aim of the civil court:

> The idea of criminal court is crime and punishment. The idea of civil court and of personal injury law by nature – though no-one likes to say it out loud, least of all the personal injury lawyer himself – is money. Money for suffering, money for death. As if that could somehow relieve suffering. As if that could somehow bring dead children back to life.

Ultimately then litigation cannot provide happiness for litigants, only money. Here happiness is defined, as the Greek philosophers who first pondered the question defined it, 'the activity of the soul in accordance with virtue' (Colebrook 2001, 9 qtd McKee 2004).

Similarly, David E. Kelley consistently presents litigants who really *are not* just after money but rather, happiness; the discriminated, the jilted, the accused, all seek a positive resolution, a happy outcome. Foot fetishist Mark Henderson (Barry Miller) really wants to win the woman of his affections, rather than the case. He believes that if the jury 'lets him off', then maybe so will she (1:19 Happy Birthday Baby). 'Will suing make you feel better?' Georgia asks a jilted bride (1:22 Alone Again). The bride says yes, the 'lawsuit is an alternative to castration'. An ex-boyfriend of Ally's (Dennis – Craig Bierko) sues Ally not because she rear-ended him but because she dumped him (3:12 In Search of Pygmies). Ally tells Georgia (then going through a messy separation from husband and fellow lawyer Billy Thomas) that she does not have to 'fight a law suit to spend time with us' (3:11 Over the Rainbow), again getting to the real reason for her action. This is echoed in *Eli Stone* where a mother suing a pharmaceutical firm for mentally damaging her son states 'All the money in the world isn't going to make my son better' (1: Pilot) and again where 15-year-old Peter Johnson hires Eli to sue anaesthetist Dr Agon, whose perceived negligence killed his mother on the operating table:

> Peter: 'Going to court was supposed to make it all better, but I feel worse now than I did before'.
>
> Eli: 'I'm going to make you a promise that I'm not supposed to. There's no amount of money that we can win for you that's going to make up for what happened but that's not why you're here anyway. You want justice right? [Peter nods] Well, that's the promise I'm going to make to you. I won't stop until you get it. OK?' (7: Heal the Pain)

More commonly litigation signifies revenge, as if getting even can provide the client with a sense of happiness. *Ally McBeal's* John Cage encourages a woman seeking to get out of a prenuptial to 'put yourself in our hands, we're in the business of getting even' (1:8 'Drawing the Lines'), and a prolonged example occurs in 'The Green Monster' (2:21), in the case of *Mannix v. Mannix*, involving a wife (Christine Estabrook) who drops her husband's antique piano on his Porsche. She says to Cage and Fish that 'I want you both to be everything people hate about lawyers' and later admits to her husband, 'I want you to hurt'. Cage concludes that 'The thing about lawsuits, especially divorce [is]… it's often more about people trying to get each other rather than work it out'. Mannix agrees, calling the attempted settlement 'pound of flesh time'. Cage concludes, referring to her husband's serial cheating, that 'you can call her a vandal if you want, what's he? Consider what he did. She's not allowed to sue him for his infidelity' because it is a no-fault state and therefore Mr Mannix cannot be blamed for his cheating or his affairs. 'Maybe we can't hold this lying, cheating philanderer liable in a court of law, but we would be damn fools to reward him'. Correspondingly damages against Mrs Mannix are awarded… in the amount of 35 cents.

Law firms certainly present litigation as signifying happiness. Fish promises victory for every client 'as a way of attracting new business' (2:21 The Green Monster) and instead of counselling encourages them to 'go forth and be vicious', citing 'redemption, revenge and retainer' as three reasons to sue (1:22 Alone Again), all of which are supposed to bring happiness and all of which, once again, reinforce

the idea that litigation is a capitalist tool and therefore its endpoint is money, damages, even where this is sorely inadequate, as where a family member suing the airlines for the death of his father in a plane crash realises, 'My father's dead and we're in here trying to win the lottery' (1:13 The Blame Game).

What clearly emerges across a number of *Ally McBeal* cases is that the law cannot provide happiness as it cannot provide the remedy litigants are really seeking. When Georgia sues her law firm for sexual harassment, Cage warns her 'you'd get money not future employment' (1:7 The Attitude). Jilted bride Mary drops her lawsuit because she no longer feels sorry for herself (1:22 Alone Again). Harold Wick claims that 'buying fame' is the most common reason people sue – 'anyone with enough money today to afford a lawyer can buy some fame' (2:2). Nelle confronts frequent litigant Ling with the revelation that she is 'emotionally inaccessible… you're an unpopular person (who finds it) easier to deal with if you're fighting everybody' (2:3 Fool's Night Out).

In all these instances, it is not the law itself that provides happiness. Rather happiness becomes something similar to Lyotard's (1988) notion of a *differend*, something not recognised by law: 'in the differend, something "asks" to be put into phrases, and suffers from the wrong of not being able to put into phrases right away… ' (xi). This is distinguished from 'damages' which, as Litowitz (1997) notes, 'can be *proven* to the satisfaction of the dominant system of justice and which are therefore reparable in "litigation" under the law' (120). In the above cases then, litigation is incapable of signifying happiness because it is incapable of awarding that which the parties truly desire. Rather, the best litigation can offer is provide a public forum wherein parties can find their own forms of happiness, the 'differends' unrecognised by law that therefore have to exist *outside* the law.

In *Ally McBeal* Richard Fish delineates the practice of law in a sweeping statement that is particularly applicable to civil litigation. Fish says, 'The Law sucks! It's boring'; rather, he favours using it as a weapon to 'bankrupt somebody, cost him all he's worked for. Make his wife leave him. Maybe even cause his kids to cry' and as a way of making 'piles and piles of money. If I help someone along the way, that's great!' So law is not only equated with money for the litigants, it is equated with money in the eyes of the lawyers as well. This idea of legal practice is aptly displayed in the opening credits of *L.A. Law,* featuring a number plate on an expensive car, or in the law show *Philly*, where the show's title is superimposed over a banknote. Indeed, in *L.A. Law* Brigham notes how the courtroom becomes 'subordinate to the boardroom. Recurring in the opening of each episode, the long table around which attorneys gather to discuss business becomes the unifying frame for the show… it serves as a prominent and realistic expression of the corporate core of modern law' (Brigham 30), an image replicated in subsequent series including *Family Law, The Guardian, Ally McBeal* and *Eli Stone*. Clearly, the assumption here is that lawyers are supposed to derive their happiness from the money they make.

But as I have previously noted (Bainbridge 2003) in a number of popular media texts, including those derived from the work of John Grisham and the comedy-law show *Ed*, happiness is not found *within* the legal system but rather *apart* from it. This is characterised by leaving the legal system to return to a more 'natural' state,

moving closer to an 'ideal' of law through education, running a small (often rural) legal practice or just providing 'a sense of building (or rebuilding) a family by learning how to be a better friend or a better husband, or by simply starting over' (Bainbridge 2003, 25).

These are ideas that are mirrored in *Ally McBeal*. Ally herself came to the law out of love, love for law student Billy (Gil Bellows) and later had an affair with her evidence law professor (1:4 The Affair). Billy notes that Ally 'work(s) through [romantic] things with work' (1:4 The Affair) and while she complains that 'happiness is overrated' (1:5), she spends most of her time searching for it in various ways from 'smile therapy' and theme songs with Dr Tracy (1:17 Theme of Life) to kick-boxing (1:17), to religion (or at least the confessional) (2:6 Worlds Without Love). Ally even admits to longing for emotional dependence as an avenue of happiness, to be *so* in love (2:18). Ultimately happiness for Ally – as it is for Kelley's other protagonists, Bobby Donnell and Lindsay Dole in *the practice* and Jeffrey Geiger in *Chicago Hope* – is similarly away from the law, raising a 10-year-old daughter, Maddie, a product of a mix-up at a fertility clinic she discovers she has in Season Five:

> You know, I've always had a hole too Maddie. And I always thought that it was going to be filled up with a man. And yet I could never picture… him. Well, maybe the man turned out to be you. Maybe it's been you. And I know that this sounds crazy but it's as if I have always known that you were out there… It's as if a part of me just knew. And now it just makes so much sense that you're here. Oh, if you only knew how much money I've spent at therapists trying to work out who is that guy. And now it turned out that the guy is a ten year old girl. And she's home. (5.11)[9]

In each of these popular representations, happiness is achieved away from law, through familial interaction. But as McKee notes: 'Kelley's first proposal [in *Ally McBeal*] is that in search of happiness, it might be desirable to deny reality and embrace fantasy… Indeed, it was Ally's fantasy sequences, visualising a world where the diegesis was altered by the altered perceptions of the main character (expanding breasts, exploding heads) that was one of its first selling points in the media' (McKee 399), with the second and third seasons depicting 'Ally wrestling with the desirability of madness, refusing medication, uncertain as to whether sanity is desirable' (McKee 400). The programme's ambivalence is perhaps best summarised in Billy's defence of a bonds trader who saw a unicorn: 'We all want to be happy. Different people get there different ways. So you could never see a unicorn? Good for you. Or maybe not' (2.10) – and confirmed only an episode later ('In Dreams') where Ally successfully fights for the rights of her terminally ill old teacher, Bria, to spend the rest of her life in a coma (2.11), a clear rejection of reality as a source of happiness in favour of an internal fantasy world.

Eli Stone develops these ideas of fantasy, happiness and litigation to present another alternative, where litigation *is* capable of signifying happiness. Indeed, Stone's closing argument (on behalf of a man who believes God is telling him

[9] For more on *Ally McBeal* and happiness, see McKee (2004).

not to have chemotherapy and wants to die) directly mirrors Billy's argument (in *Ally McBeal*) when he says:

> A few months ago, I started hearing and seeing things that indicated the presence of God in my life. I tried to follow what I thought God wanted. And I paid the price. Looking back, I think it's been the best time of my life. David had a feeling. I saw George Michael. Is that crazy? If it inspires us to change our lives for the better, then I hope, I pray, we're all crazy. (1: 13 Soul Free)

Here, Stone, a high-profile attorney who previously 'worship[ed] the holy trinity of: Armani, accessories, and my personal favourite, ambition' (1: Pilot), starts having visions that appear to have been caused by a 3 mm brain aneurysm. While the option to remove the aneurysm seems clear, his acupuncturist and spiritual adviser Dr Chen (James Saito) advises it may not be that simple:

> Chen: 'Everything has two explanations Eli, the scientific and the divine. It's up to us to choose which one we buy into. Science explains the enlarged vessel in your head. But does it explain how the girl you lost your virginity to [Beth] happened to be suing your law firm, how her son happened to spell out a message to you with his blocks?'
> Eli: 'Okay, so what would your divine explanation for all of this be?'
> Chen: 'Almost all religions believe that there are those sent to help us find our way. Some people call them prophets'.
> Eli: 'A prophet? You think I'm a prophet. Like Moses?'
> Chen: 'God told Moses he'd send a prophet to every generation. Why not a lawyer? A high profile attorney handling cases that got a lot of notoriety that the world would read about'.
> Eli: 'The difference between those guys and me is… I don't believe in God'.
> Chen: 'Sure you do. You believe in right and wrong. You believe in justice, in fairness. And you believe in love. All those things, they're God, Eli'. (1: Pilot)

The series presents Stone's efforts to follow Chen's advice, using the visions as a sign 'I need to somehow change my life and start using my legal skills to make the world a better place' (1: 2 Freedom), representing the poor and disenfranchised through pro bono work, often against the corporate clients of the firm he works for, Wethersby, Posner and Klein. Through the combination of Eli's fantasy world and his practical skills as a litigator, litigation comes to signify happiness for those he represents. This is explained, by Eli himself, when he is charged with violation of the State Bar Act Article 12: Incapacity to Attend Law Practice (1: 6 Something to Save):

> Eli: 'I was a very good lawyer before all this and I think I would've grown into a great lawyer. But I wouldn't have been a great person. Two months ago, I cared about winning my cases, but now I care about helping my clients…. I know that each case could be my last and I try that much harder. I take cases that are that much more important to me. And I think I'm a better lawyer for it. Yes, my behaviour has been a little odd, but odd isn't always worse. My father had the same condition and it didn't prevent him from raising two sons, one who became a doctor and another who became a lawyer. And being a lawyer is all I ever wanted to be. One day I may have to stop being one. But that's not today. Today, I can still do some good. All I'm looking for from this hearing is the chance to keep doing it'. (1: 6 Something to Save)

Eli continues successfully practising law, defending the disenfranchised and changing his firm in the process; managing partner Jordan Wethersby (Victor Garber) tells his daughter Taylor that 'I'm changing. The firm is changing' (1: 13) because of Eli, and even after the aneurysm is removed, Eli continues having visions, becoming a partner and takes pro bono cases (Season Two).

Though Eli is glimpsed in one vision as a well-known prophet who may, indeed, have abandoned the day-to-day practice of law (and therefore found happiness away from law, like Grisham and Kelley's protagonists, again through family) for the duration of the series, he continues to reconcile his visions with his lawyering. This is because, ultimately, Eli's visions seem to point him towards the lacunas, the limits to the law, the 'differends' that should otherwise exist apart from the law. As Eli describes them to an associate: 'It's like I see things now, you know, things that were always there, but that I just never noticed before' (7: Heal the Pain). Eli Stone therefore offers a way of reconciling the practice of law with the production of happiness, meaning that litigation can become a productive and positive discourse capable of signifying happiness for both litigants and lawyers.

The idea of Eli Stone being a reconciliatory figure, able to bring together opposing ideas, is repeated throughout the series. For example, when he is described as a 'man whose words and deeds reminded us that there is no faith without hope, no justice without compassion, ho humanity without fairness; the man who reminded us that every one of us, the least of us, is still divine' (David Mosley in 11: Patience). Similarly when Eli is defended by managing partner, Jordan Wethersby (Victor Garber), Jordan notes that 'Miss Klein's [a senior partner at WPK attempting to oust Jordan because of his support to Eli] problem with Mr Stone isn't that he's eccentric, it's that he applies his considerable talents to underdogs and individuals instead of conglomerates and CEOs. He reminds us that in business there is still room for humanity, that capitalism without mercy is tantamount to evil. He reminds us of the best part of ourselves. Yes, I have protected Eli Stone because I believe this firm needs Eli Stone. I believe that every firm, every company, everyone needs an Eli Stone. And by your vote you'll say whether or not you agree. If you don't, then this place has become something I don't want my name on anyway' (12: Waiting for That Day). Eli therefore offers the possibility of litigation signifying happiness, but only, it seems, if lawyers themselves remain moral, ethical and involved in pro bono work – or capable of receiving visions from an indeterminate source. Even in its optimism then, *Eli Stone* seems to be suggesting that in most cases, litigation and happiness will remain separate things.

36.6 Conclusion

In the United States, happiness is constitutionally guaranteed by the state. However, these popular visual media texts suggest that law, through litigation, does not signify happiness. Rather, happiness actually exists outside law – through interpersonal

interaction, a new job away from law or a more nebulous 'fantasy' world. Indeed, in their location of happiness outside 'the system', be that the law, society, bureaucracy or modernity more broadly, these texts are presenting an inherently Romantic notion of happiness – a transcendent idea of 'happiness' that also serves as an antidote to the ubiquity of modern litigiousness.

This is what I term a *postmaterial* happiness, one that transcends the materiality of legal culture. In this way these popular media representations bring Romanticism back to the lawyer rather than the legal system, representing the lawyer as signifier of a kind of Romantic pioneering spirit. Whether they are involved in R&D (like *Ally McBeal's* Ling) or pro bono work (like the titular Eli Stone), they are successful in spite of the limitations of the system of which they are a part. While this may seem a hopelessly old-fashioned and Romantic view of happiness, privacy and the function of litigation, these popular visual media texts' challenges to litigation remain important – not because they suggest that litigation is good for business but because they present litigation as signifying the very limits of law, as a way of exploring the law's limitations (through its inability to signify happiness) as much as its potential (by signifying R&D) and its excesses (by signifying invasive practice).

Talking about *Eli Stone,* Jason Winston George (who plays attorney Keith Bennett in the series) said: 'Well a friend said to me one time… who do people pay more attention to now? Their clergy or their lawyer?' ('Turning a Prophet: The Creation of Eli Stone', 2009). Such a comment brings to mind cultural theorist Douglas Rushkoff's (1994) statement that 'popular cultural forums' (like film and television) offer a 'conceptual interface between the order of our laws and the chaos of our world' (51) that makes them:

> the place for us to evaluate our rules and customs… because lawyers, unlike detectives or policemen, are well-suited for open discussion of such issues as they are nominated as our culture's best professional debaters. (Rushkoff 1994, 52)

Popular media texts therefore allow us to debate what litigation can and cannot achieve, and through the application of semiotics to these texts, we can explore how and what litigation signifies, to both the lawyers and litigants involved in its practice. In this way, these popular media representations contribute to wider understanding of the functioning of litigation, becoming important parts of 'law's textuality' in that they change and impact on popular understandings of what litigation currently is and can become.

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Chapter 37
Trial by Ordeal: CSI and the Rule of Law

Christina O. Spiesel

Abstract The popular American television dramatic series, *Crime Scene Investigation* (*CSI*), with its emphasis on forensic analysis, has become an icon for anxieties within the legal system about truth-finding and legal outcomes. This chapter reviews empirical research on the "CSI effect" and then explores cultural dimensions of the show as suggested by analysis of its paradigms and style rather than the narrative content of specific episodes. *CSI* is related to larger trends within American legal culture and raises questions about the future of the rule of law.

Photo: Gunshot Residue Lab, Connecticut State Forensic Science Laboratory, 2006. Christina Spiesel, All rights reserved.

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37.1 Introduction

Television, like film, is fertile ground for what we might call cultural dream time analysis.[1] Their works are mostly made to please large and diverse audiences, and their production budgets are high, so decisions during production about their content and style are closely scrutinized. They are, for the most part, nonrandom, highly determined cultural expressions that are useful tools to explore the temper of the moment. American television is glutted with programs that one way or another have to do with the law: There are courtroom dramas (on the prosecutorial side, Law and Order; on the defense or plaintiff's side Boston Legal) shows about investigation, or reality television shows like "Cops," actual trials broadcast, and made for television small claims proceedings like Judge Judy to name just a few. The "new" entrant into the mix at the millennial moment was *CSI: Crime Scene Investigation,* set in Las Vegas, debuting in 2000 on CBS, followed by *CSI: Miami* in 2002 and *CSI: New York* in 2004. The Las Vegas show commands the most audience, 22.71 million viewers in the week of March 26–April 1, 2007, and now down, along with all television viewing, to 14,287 million for the second week in January 2010.[2] With its emphasis on forensic investigation, *CSI* brought science into the mix of crime-solving entertainment and with it new kinds of reasoning about what happened often aided by the demonstration of many kinds of new technologies, making it "the *howdunnit* rather than the *whodunnit*" (Robbers 2008, 89).

Anecdotal press reports began to appear by 2002, with gathering frequency, claiming that prosecutors and judges were blaming failed prosecutions on jurors' expectations about evidence formed by television programming that features forensic analyses. Their fears were gathered under the coined name "the CSI effect," which refers to the putative influence of this kind of television programming on legal decision making with reference to kinds of proof, especially scientific proof, offered in legal proceedings. This chapter will survey the research that tries to establish the claims for the effect and then offer a rather different reading of what the show represents and why its effects, differently understood, may be important for the rule of law.

Three studies, all from 2006, question the claims for the existence of a *CSI effect.* Psychologist Tom Tyler argued in the *Yale Law Review* that, based on what we know of the psychology of jury decision making, a *CSI* effect could cut equally both ways—that is, juries could demand more in scientific proof and would then be less apt to convict if the cases are weak and if they are less trusting of the authority of

[1] American television shows are broadcast around the world, but this discussion is confined particularly to the United States.

[2] Nielson ratings: The 2007 statistics are drawn from a report: http://www.sfgate.com/tvradio/nielsens/. Accessed April 9, 2007. 2010 statistics are from http://en-us.nielsen.com/rankings/insights/rankings/television. Last accessed January 30, 2010.

prosecutors, judges, and lawyers. On the other hand, juries have a desire for the closure that conviction and punishment can bring. Tyler concludes that there are at least three "alternative explanations for the allegedly increasing acquittal rate that has led to speculation about a possible *CSI* effect. First, juries may have increased sympathy for defendants. Second, juries may simply be less likely to convict than people with legal training and court experience expect them to be. Third, as the public's trust and confidence in the courts and the law decline, jurors may be increasingly skeptical of, and less inclined to defer to, the arguments of legal authorities" (Tyler 2006, 1085). Tyler suggests that to the degree that any of these three alternative explanations is correct, "there may be an increase in acquittals that is not linked to watching *CSI*. The effect may exist, but it may not be a '*CSI* effect'" (Tyler 1084). (Later studies have shown that there is no increase in acquittals. I would also point out that a decrease in deference may or may not mean a lack of trust or confidence in the system but may mean, instead, a higher commitment to participation.)

The two empirical studies published in the same year—Dr. Kimberlianne Podlas' "The CSI Effect: Exposing the Media Myth" (2006) and Donald Shelton and coauthors' (2006) "A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the CSI Effect Exist?"—conclude that there is no solid evidence of the television show having a specific effect on juror decision making. Podlas decides that the *CSI effect* is "nothing more than a fiction." Shelton suggests that there may well be a "tech effect" from the fact that jurors are coming to court with a more sophisticated general knowledge of technology and scientific forms of proof rather than a specific influence from *CSI* programming in particular.[3]

In 2008, Monica Robbers did a study of the social construction of forensic reality in television shows and its effect on criminal trials from the point of view of judges and counsel working in the criminal justice system and their perspectives on jury behavior. She concludes the study, which is qualitative and anecdotal (but with a large statistically valid sample), claiming that "Overall, results from the current study support the notion popular media are actually hindering the criminal justice process" (Robbers 2008, 100). She suggests that jurors generally do not have experience of real forensic analysis and so they fall back on television viewing experiences which are out of synch with the reality of the criminal justice system and prosecution in particular, and that legal professionals, in response to their perceptions about the "*CSI* effect," may alter their work patterns in various ways, adding up to more concerns about their cases. It may be that it is the response to these shows in the minds

[3] In a more recent article, Judge Shelton reports on empirical studies on this notion of a "tech effect." He concludes that there is an expectation of increased science in evidence, but the *CSI* itself is only a small part of the media stream that molds expectations. He does envision a problem of raised expectations for all parts of the criminal justice system, from changed legal strategies in argument to pressures on an inadequately funded justice system (Shelton 2010). For very recent coverage on the reality of medical examiner's work in contrast to television drama, see A.C. Thompson et al. (2011).

of criminal justice professionals she interviewed that is causing the effect.[4] This is, in fact, the ultimate conclusion drawn from an empirical study published the next year, 2009, in the *Stanford Law Review* by Simon Cole and Rachel Dioso-Villa. They looked at the show(s), their ranking, anecdotes from legal actors, jury surveys, and psychological experiments and compared acquittal rates before and after the introduction of the *CSI* franchise of shows into the media sphere. For comparison, they examined data reflecting the reality or unreality of media concern with "the litigation explosion"—too many torts cases being brought—which, according to their research, is largely a myth lacking supporting empirical data. They conclude: "Whereas the litigation explosion [theme] may have resonated with a societal anxiety about relying on law too heavily, the *CSI* effect would seem to resonate with anxieties about using the law too little, increasingly abrogating its truth-producing function to science" (Cole 2009, 1373). It is very hard to know whether anxieties come from a comfortable system being disrupted by a more assertive public, whether that public properly or improperly wants better proofs, subconscious issues being activated in participants in the professional criminal justice system by the scrutiny, or from a whole host of other considerations including the state of modern forensic science.

These two studies, the 2008 and the 2009 studies discussed above, both suggest that the *CSI* effect is more in the minds of those who have devoted their lives to the criminal justice system than in those of the juries they convene for cases.[5] Also in 2009, Kim, Barak, and Shelton published an empirical study using a much larger sample of people called to jury duty (in contrast to the typical university student subjects used by many empirical researchers) in a district in Michigan. They used a survey with some written case examples. Employing a variety of analytic tools, their research shows the following: (1) In circumstantial cases, those who were CSI watchers had higher expectations of scientific evidence, and "their increased expectations lowered the willingness to convict defendants without scientific evidence of any kind," and (2) these expectations did not influence jurors' willingness to convict on the basis of eyewitness testimony. Jurors' age, race, gender, education, and political views, not surprisingly, were significantly related to jurors' willingness to convict older, less well-educated, more conservative respondents were more willing to convict on circumstantial evidence without scientific evidence (Kim et al. 2009, 458–59).

So the available empirical research on the *CSI* effect suggests that it is a media creation—with strong assertions that it exists, those most persuaded are those in

[4] It is perhaps our own naiveté to imagine that people who serve in the justice system are not immune to the same media influences that the rest of us are. It should be no shock to us that Justice Scalia can say, seemingly without irony, that Jack Bauer, a character in Fox's dramatic series *24*, "saved Los Angeles." Quoted by Peter Lattman (2007), "Justice Scalia hearts Jack Bauer." *Wall Street Journal Law Blogs*. http://blogs.wsj.com/law/2007/06/20/justice-scalia-hearts-jack-bauer/tab/article/. Last accessed August 8, 2010.

[5] This is perhaps indirectly substantiated in a recent article by Tamara F. Lawson (2009, 119). She examines specific cases and lays out her argument for a "*CSI* infection" in the ways the cases were handled. The term infection carries the emotional force of disease, corruption, and perhaps even epidemic in the criminal justice system from something outside, a viral presence, perhaps.

the justice system who, of necessity, pay attention to media representations of the law. Not just entertainment media but news and opinion. There are (and have always been) concerns around the truth-finding function of legal proceedings. On what basis shall we determine the truth of the matter at hand in a reliable manner? The problem is that legal truth and scientific truth are different, even if the one takes advantage of the insights of the other. To establish scientific facts, researchers have to take all the time necessary; others have to repeat the experiments; new knowledge has to be tested against old knowledge. Legal cases happen within a much shorter time frame; their variables are full of confounds; narrative is important as well as facts; broad community standards are different from in-group standards of scientific professionals. A decision has to be made absent full knowledge with the best means available. To this reader, the empirical studies of the *CSI* effect have shown us that it is essentially a cultural problem. In the analysis that follows, I discuss the sort of cultural problem that I think *CSI* reflects. But first, a look at the show.

37.2 Some Aspects of the Cultural Envelope

The audience for the *CSI* franchise shows is hard to define because it is so large. Other than viewership numbers, I have been unable to locate any detail on demographics. It is safe to assume that it includes young people—there has been an explosion in applications for forensic training on the part of young adult students.[6] But that the dramatic formula retains features from the youth of the parents of these viewers, suggests that we have both cultural continuities and cultural differences in audiences for the show. In terms of social class, there is little difference from a 1973 study that reported that most "TV crime is committed by middle-class people who simply are not satisfied with what they have and desire more. Their motivations are obvious. The threat to society comes not from people who are fundamentally dissatisfied with the existing *system* (italics added) but from people who are fundamentally greedy" (Dominick 1973, 250).[7] While this is still true and speaks to continuity, crime is more broadly presented as coming from people who are somehow misfits but still individually culpable (Dowler 2003). This content analysis applies reasonably to the plots that *CSI* viewers consume three nights a week now, so older viewers will find much that is familiar. The really new feature is all the technology, about which I will have more to say. Certainly, there is probably a culture gap in technological familiarity between younger viewers and older viewers, as there is in the rest of society, but it is not at all clear that this would be relevant to the issues I wish to raise.

[6] From an interview with Elaine Pagliaro in March 2006. She is the former Acting Director of the Connecticut Forensics Science Laboratory. Notes on file with the author.

[7] For an analysis of specific crimes and their frequency in *CSI*, see Deutsch and Cavender (2008).

I am going to look closely at aspects of the television show(s) and suggest ways in which it undermines the law (thought of as the product of the work of legislators, lawyers, and judges, the legal academy, and within a crime show, especially prosecutors, the defense bar, and prison system) and also undermines notions of science, substituting a closed system that has only a superficial connection to either law or science as immensely important human activities. Unlike the empirical studies referenced above, this essay reflects a rather ethnographic approach, a semiotic reading of what appears to be there. Full disclosure: I have watched the 2004 and 2005 seasons intensively and subsequently checked in on all three shows in the franchise to be sure that my conclusions were still relevant. Recently, I have watched portions of the first season, including the pilot. This was very illuminating: While many of the show's strategies were observable in the beginning, *CSI* underwent a sharpening of its inspiration and development of its visual style after that first season that strengthened the elements that I am particularly focused on. Without a doubt, success brought more resources—from CBS, from technology companies interested in placing their products, from the "accident" of history that the show was rolled out just as a revolution was in motion in all aspects of digital visualization.

To see this in a technological context, Photoshop 1.0 was marketed in 1990 (people could use scanners to digitize pictures and then edit them with a Macintosh). *Toy Story*, the first American animated feature length film entirely animated with computers, came out in 1995. The first megapixel digital camera for consumers came out in 1997. It was not cheap. Public video surveillance began in the 1990s, and many viewers had, no doubt, seen themselves on camera in stores and banks. While the first uses of DNA evidence go back to 1986, the human genome project began in 1990, and the "first draft" was published in 2002; illustrations of genetic code were ubiquitous in press coverage. In 2000, average Americans had access to a variety of consumer film and video cameras, including Polaroid technology used in the first season of *CSI.* If they were technologically inclined, they had access to computing and knew about using software to edit photographs and create wholly new pictures with graphics software. We were used to family snap shots, home video, and appearing in low-resolution surveillance video; we were being shown pictures of data that could not be seen by the human eye—those DNA strands, for instance.[8] *CSI* with its many tools, especially tools of visualization, was not only leading the culture, it was and is reflecting it.

[8] See Wikipedia for technological history: http://en.wikipedia.org/wiki/Photoshop; http://en.wikipedia.org/wiki/History_of_the_camera#Digital_Cameras; http://en.wikipedia.org/wiki/Polaroid_camera; http://en.wikipedia.org/wiki/Toy_Story; http://en.wikipedia.org/wiki/MRI; http://en.wikipedia.org/wiki/Human_Genome_Project http://en.wikipedia.org/wiki/DNA_profiling. This report details the history of surveillance technology in the United States: http://www.library.ca.gov/CRB/97/05/crb97-005.html#overview

37.3 *CSI*: The Television Show

The first *CSI* series, *CSI: Crime Scene Investigation*, now in its eleventh season, set the pattern for all shows in the franchise, and the formula has been scrupulously maintained across shows set in Las Vegas, Miami, and New York. The titles all preserve the same format—shots made by cameras on planes flying over and closer in on the natural environment and urban texture in the named city. (This is one of the stylistic elements that was clarified, intensified, and expanded upon when the show developed after the first season.) The "eye/I" begins above the action, a bird's (or God's?) eye view, with broad establishing shots of the cities in wide-angled vision. The credits then come in very close-up onto portraits of the forensics team associated with the specific locale interspersed with graphic material from the evidence visualizations frequently displayed during evidence analysis. (A marker for change: in the first season, the character Warrick Brown is shown holding and examining an athletic shoe, trying through his serious expression to signal that it is important evidence; subsequently, it would have been a print of the sole or some other visualization rather than the shoe itself.) The camera of the long overview shots moves us to the close-ups, connecting the scientific material (implicitly derived from universal truths) with the characters who are professional and technically proficient (but who are actually neither police nor scientists) and who mediate viewers' relationship with the science. We overhear their conversations, see what they are showing to each other, and sometimes look with them down a microscope eyepiece or at a large screen monitor, but they control what we see and tell us how to see it, thereby asserting that there is only one possible view and that they are its interpreters. They are photographed most often in ways that separate them from the background, a partial, at least, extraction from context.

Most often, the episode will begin with the discovery of a homicide and the arrival of the forensics team. Grisly details are withheld in the first views. Often the team shows up seemingly without a phone call or dramatization of how they knew there had been a crime, how they got there, etc. Rarely are uniformed police officers seriously a part of the dramatic mix. After establishing the main investigative problem, a secondary situation is introduced, and the show moves toward the resolution of both plot lines by the end of the hour through forensic investigation and, very importantly, through flashbacks imagining how the crimes leading to the investigation might have happened. That is, investigators faced with wounds of one kind or another will imagine the scenario that might have caused them. These flashbacks are attached to branching narrative considerations—it could be this or that might have happened. Time is a layered construct right from the beginning, moving between the present of the investigation, possibilities from the past, reconstructions based on deductive reasoning or imaginative recreation. The story told is not the fleshed out narrative of the human situations that led to homicide or other criminal acts (personal histories are sketchy at best, and human motives are finally reduced to a single sentence) but what engages us is the story of the progress of forensics professionals puzzling through the evidence, considering various versions until the evidence leads them to focus on a particular explanation.

The team starts with detailed inspection of the scene for circumstantial evidence that can be evaluated back in the labs. Wearing gloves, they carefully place bits and pieces of stuff in plastic envelopes or arrange for large items to be hauled way. Police are shown to be too casual and thoughtless in their treatment of the scene, "They see evidence just in terms of the obvious."[9] Most importantly, copious numbers of photographs are taken, and to this viewer anyway, it can seem as if the scene only becomes real to the investigators when it is captured by the camera. And it is the camera that most frequently inspires the thoughts of the investigators as they imagine various scenarios to explain what they are seeing. These mental pictures, "movies of the mind," are photographed differently so that viewers are clearly cued as to what is outside and what is inside the heads of the team. (Recreations are signaled by lower-resolution pictures.) Making forensic findings explicit (not to mention entrancing), the show also includes computer-generated animations of things the naked eye could not see—the path of a bullet inside a body, for instance, which Sue Tait has called "the *CSI* shot" (Tait 2006, 53). Sometimes, investigators are shown watching the same "movie," joining in a common fantasy about what the precipitating or immediately prior events were, or who might have been involved. And it is the camera that allows us to see, too: the camera recording the show and the pictures made by cameras within it.

Most frequently, the homicide turns out to be murder, often with ingenious methods of inflicting death—not just the usual weapons but also insects, animals, poisons, and odd chains of events. The "special features" included on the first season's DVD explains that all of the cases are based on some real episode. That said, obviously stories would be tweaked to make them satisfying to audiences and to fit into the hour-long format, they are fictions based on some facts; life is rarely so neat. Sometimes, the death itself is accidental, but then people involved get into trouble with the justice system out of their desires to cover up information fearing that they will be improperly implicated or have secrets revealed. Once the puzzle of the scene has been solved, the narrative made clear and attached to human agents who can be considered responsible, the perpetrator is identified from among various candidate suspects. The "properly" accused is brought into the offices of the forensic investigative team and then confronted with the accumulated evidence. This happens across a table in conversation, most often with one of the women on the team; the tone of the interchange is warm, intimate, even, full of understanding and encouragement. Everyone feels better for it. The perpetrator confesses and feels better. The team has successfully solved the puzzle and can feel good. And once confession is achieved, society need not worry further. We know who did what to whom, and we never see the cases go to trial or other judgment or how they have come under authoritative control. Order is restored.

In spite of the fact that all three shows take place in urban areas that are culturally defined as places of entertainment, action, nightlife, and glamour (not to mention big

[9] Gil Grissom, explaining to his team, first episode, October 6, 2000 (http://en.wikipedia.org/wiki/CSI:_Crime_Scene_Investigation. Last accessed February 4, 2011).

money and organized crime), which might invite a broad brush canvas other than the opening credits, most scenes unfold in intimate spaces like the confession at the end, inside buildings, in the homes and offices of suspects and victims, or on the more confined spaces of streets and alleys and sidewalks. Victims are often young, attractive, individuals of an age to be sexually active as are the perpetrators. Unlike crime stories that involve the scary "other" (people of different backgrounds, race or country of origin, etc.), *CSI* deals with perpetrators who, if they would just not be deviant in their thinking, would be just fine as members of the community. So social class is not a guarantee of innocence in *CSI*; it is very much in play in a majoritarian (and rather narrow) definition of the human community. Characters are mostly middle class, binding them to the viewers as potentially their friends, neighbors, family members. In the course of any episode, there are always groups of people talking about the victim, talking about the suspects, and talking to suspects to play them off each other. In fact, "any character not a member of the investigative team is either a victim, a murderer, or a suspect" (LaVigne 2009, 387). What about viewers? Do viewers want to be victims or suspects—or a member of the team? Who else can they identify with but with the investigators, adding the viewers' own credibility to their power? Thus, these dramas might be compared to chamber operas with small casts, close-up, with intense inward action in intimate spaces. It's all about what is in the mind. So what are these "operas" about as American cultural texts?

37.4 The Larger Frame for *CSI*: Science and Law

First, of course, the shows are about epistemology: How do we discover the truth about the crimes that intrude on our social space? The truth telling of the confrontation and confession takes place in the labs but not until after a lot of data has been gathered. We are not in the realm of psychological hunches or psychic phenomena, but in data that is independently gathered and subjected to testing, to science, and the *CSI* teams claim to represent science itself. Gil Grissom, team leader in the Las Vegas show, says in the pilot, "I'm a scientist. I like to see it" (prefiguring the enormous and soon to grow quantity of scientific pictures audiences are treated to), and he urges his team to "follow the only thing that cannot lie—the evidence."[10] Physical signs are left by the thing itself; sometimes, they require enhancement to be "read." These traces are then analyzed, but they continue to carry with them that first impression of having been made by the thing itself—that gives them a special flavor of being factual. Then, because evidence is photographed and the whole show is the product of carefully coded photographic strategies, evidence is sealed in a form that we are inclined to believe is "true" because the camera lens is commonly believed not to lie.[11]

[10] From "Pilot" first broadcast October 6, 2000.

[11] There is a vast literature on photographic truth. For a general discussion of the role of photography in law, see Feigenson and Spiesel (2009).

The investigation often involves changing the natural properties of the physical evidence—taking samples, using chemistry to reveal the hidden traces, using equipment to visualize, especially to visualize what cannot be seen by the unaided eyes, to interpret, to match. So analysis involves interpretation by means of "translation" where these "translations" are assumed to seamlessly connect one thing through a variety of states to the end of the series, thereby connecting the body of the perpetrator to that of the victim. Because the process is seamless, we are asked to believe that there are no slips in meaning, no introduction of the personal and speculative, the relative and contingent. Occasionally, the program offers explanations of what is happening in the analysis, but often we just watch as seemingly sacred rituals are being enacted. A shoe leaves a print on crime scene; a shoe is used to make a new print in the lab which is then scanned, may be enhanced by software, and then visual comparisons are made on a computer screen between the "original" print and the lab print for identification purposes, much like fingerprint comparisons. The outcome is regarded as self-evident as the audience can see the same thing the technicians are seeing.

Is this science itself? Viewers have little access to laboratory science. They do not necessarily apply their own experience of lawnmowers freezing up or computers misbehaving, paper running out and toner, too, to experiences of people working in labs. They do not imagine a difference between their bricolage in the kitchen with the careful protocols that must be defined to achieve significance in laboratory results. They have few yardsticks to measure the difference between what forensics professionals do, applying techniques to specific cases, and what scientists do. They are primed to believe the pictures, both cognitively and culturally (Feigenson and Spiesel 2009). One of the clearest statements in legal opinion on the nature of science comes from the legal challenge in America to the teaching of Intelligent Design in public schools in Dover, Pennsylvania (*Kitzmiller v Dover* 2005), by Judge John E. Jones III: "This self-imposed convention of science, which limits inquiry to testable, natural explanations about the natural world, is referred to by philosophers as 'methodological naturalism' and is sometimes known as the scientific method (5:23, 29–30 (Pennock)). Methodological naturalism is a 'ground rule' of science today which requires scientists to seek explanations in the world around us based upon what we can observe, test, replicate, and verify (1:59–64, 2:41–43 (Miller); 5:8, 23–30 (Pennock))." Science is the counter story to the common sense knowledge that people use in living their lives; this common sense knowledge is full of generalizations based on the individual's experiences and the surrounding or available culture, and while in general common sense serves us well, as a system of proof it is not reliable.

The labs the forensic scientists inhabit in *CSI* were transformed between the first and second seasons. I visited the Connecticut State Forensic Science Laboratory in the course of this research out of a need to test the realism of the shows. The set décor in the first season was much closer to the picture accompanying this article; in subsequent seasons, the physical space underwent transformation, rendering it more mysterious. Rooms flow into one another, substituting a clear plan view with a workflow view that emphasizes that it is all one thing, all the different functions

are part of one science story. Their lighting changed too, after the first season, becoming more dramatic in shifts from light to dark and overall, much darker, presumably to make machine reading clearer. I believe that lights are kept low in the service of underlying metaphors. It is impossible to tell day from night in these professional places, and the glamorous clothing worn by both the male and female investigators contributes both to the day/night confusion and to the sense that these are special people serving special rituals. The work of the team sheds light on the darkness of human action and brings to light data that provides information about what happened and who caused it. Light that does not change can be the equivalent of climate control, for sure, but it also is the light of the eternal or universal.[12]

CSI also tells us "stories" about our wonderful inventions, about the materially beautiful products of engineering that can reveal so much to us. The forensics teams of *CSI* are privileged to handle this powerful, shiny, high-design concept equipment that shines forth from the gloom of the low lighting. They do so with practiced ease of ritual performance, holding up beakers to the light so we see the color of the fluids they contain, or we watch with them colorful data visualizations made by computer graphics. They can handle things large and microscopic with equal and unerring skill. This mastery protects them as they go, unscathed, into dark places—literally into unusual scenes of crimes and metaphorically into unusually dark human situations. While they may not actually be very scientific (given all the debates about forensic science as science), they are certainly adept and admirable in their articulation of essential values that they try to adhere to with professional commitment. There are tests of character among the members of the various investigative units as well and moral queries. Grissom, leader of the Las Vegas team, often expresses concern if he sees that his employees are emotionally involved with a case, reminding them that they serve science, not feeling, and that doing the job properly and well requires devotion to values. "There is no room for subjectivity." Their job requires them to understand the evidence through science, so that in serving a sacred ritual, they and their process must be ritually pure and complete.

These are also stories about the law, broadly conceived. The law stories start with a fuzzy boundary between police and forensics specialists who are, normally, not themselves police officers in real life.[13] On *CSI,* forensic technicians get to investigate as well as scientifically explore, and they effectively get to compel testimony from the perpetrators. That is, they can bring them in, they can question them, they can confront them. These are all normally the province of the police. The televisual

[12] Color varies under different lighting conditions, hence, platonically inflected thinkers have long regarded color as unreliable compared to chiaroscuro, painting less reliable than drawing. The literature on this is large. Readers might try Gage (1993). Note that noir, meaning black, is a frequently used label for the whole class of crime fictions in various media, particularly arising from the dark lighting favored by filmmakers who created the genre.

[13] Elaine Pagliaro interview—noting disappointment of students who sign up for forensics training when they discover that the forensics people are not the investigators at all.

blurring is so effective that some articles written about the show carry this confusion forward. So the characters with whom we "live" through every episode function to link the heavenly view from above with the earthly, even below earthly view of what is underneath the problem. If we can call the shots into data that give the show its distinctive and new visual edge, the view into and under visual phenomena available to the unaided eyes (Gever 2005) mirrors this process. The investigators become "the law." I will have a great deal more to say on this shortly.

While seemingly critical of the police, the program aligns itself with the prosecutorial side. It does not tell stories of exoneration of the wrongfully convicted. Only the "right" people get convicted in this system. Lawyers do not fare well on *CSI*. In the *Crime Scene Investigation New York* episode, "Past Imperfect,"[14] Mac Taylor, the team leader, is in conversation with a defense attorney who accuses him of having a weak case against his client. Mac counters with the statement that lawyers are full of manipulative dodges where he, on the other hand, is about the certainty of scientific truth. He will stand by that standard against all efforts to deter him; he will get the perpetrator even if the lawyer springs him from custody on some kind of technicality. Grissom asserts that "they are trained to ignore verbal accounts." While he is addressing the subjectivity of witnesses, this might also be a comment on the law, surely a discipline of words. This is a world freed from the burden of rhetoric, of psychological, especially unconscious, psychological motivation, liberated from all the ambiguities of words and their construction of social meaning. Clearly, rhetoric, the persuasive narrative that relates the facts to a moral story (Burns 1999), has no place in this fictional legal world.

The other story told by the shows is, not surprisingly, an erotic story, not just of deviant sexual practices leading to murder, or mistaken passions, but of erotic pictures. Often the homicide scene is the first thing we see, usually with the body of the victim in it. The ugliness of the death dealing wounds may be superseded for us by the inevitable scenes in the autopsy room where the corpse is not only displayed but cut open to view, parts sometimes held in hands rather like holding up a newborn. The camera may not only penetrate the corpse but it may move into the anatomy as animation taking the viewer on a "fantastic voyage" through the body in ways that even the medical examiner might find new and unusual. These potentially problematic pictures of damaged bodies (that might cause disgust or worse) are mitigated for the viewers by dialogue that restores "innocence" to the victim, sometimes accompanied by flashbacks that may show us the victim in life. Later display of the cleaned up corpse in the autopsy room, photographs from the person's life, and reenactments of life events shown in the course of the narration all help to distract us from the terrible pictures. But we also get them—safely satisfying our curiosity about bodies without our having to leave our chairs. So there are remnants of dirty/the clean, cultural/ natural, corrupt/ incorruptible

[14] Original air date—April 25, 2007.

categories of a binary world ruled by what French anthropologist Claude Levi-Strauss has called "the raw and the cooked." In a very real way, the job of the forensic investigators in the drama is to clean up the mess occasioned by crime and, as a result, restore the proper borders between things—whether it is human relationships or our places in the world. And through the ritual of watching a serial show, we too are kept in our proper places.

The examination of the corpse can play another role as well. When the body is that of an attractive young person, it can take on an erotic dimension, gratifying voyeurism while keeping any thought of action at a distance. The victim is, after all, dead, and most viewers are not necrophiles. "The erotic death…is a means of conjuring the limits of sexuality within a context that at once cautions and punishes, feigns objectivity, fantasizes power …"[15] (Tait, 57). But, because the body has also been "tortured" both by whatever brought about death and through the actions of the pathologists, viewers can find gratification not just of erotic voyeurism but of sadistic impulses as well. The pathologists are just doing their jobs, jobs that permit them to violate the body, to exercise power and control over it. These representations are not being shown randomly. Instead, we must look at *CSI* in terms of its—and our—historical moment.

John Yoo's torture memo outlining the permissible range of military interrogation practices was written in 2003. The television show *24*, which debuted in 2001, has torture as a recurring method of obtaining information. It is not an exaggeration to suggest this as a leitmotif in the detailed and recurring scenes in the autopsy rooms. While the attitudes expressed there are not the anger and aggression we know from scenes of actual torture on film or written accounts, these horrific maimings occur as a result of both criminal acts and bureaucratic ones, "Reducing the other to a state of utter powerlessness gives you a sense of limitless power…. Transgressing human laws thus makes you feel close to the gods" (Todorov 2009, 58–59). So when the criminal transgresses the human law, it is out of bounds. When the technocratic bureaucrat, closer to the gods by definition within the program, does it, it is part of their job. They violate the integrity of the body and let us look bad people, or bad circumstances, acted on the living body, but now we can all safely see it. In contrast, torture of the living is openly discussed in *24*, and Jack Bauer is allowed to break a lot of rules, including acting on the bodies and minds of others, to achieve what is defined as a higher goal, a greater good, the end justifying the means. Most of the *CSI* episodes have been produced and broadcast in post-9/11 America. *24* was in production just prior to the terrorist attack. In 2000, the United States had the highest rate of incarceration of its own people in the world, and it continues to hold that lead (Niman 2000; Hartney 2006). As a culture, we have been exercising control over millions of living bodies, so much so that it is completely normalized and outside our daily consciousness.

[15] Note that I have rendered the Tait quote gender neutral as heterosexual women viewers might well have the same enjoyment from the beautiful young men pictured dead.

While it is true that science strives to get past the limitations of our common sense and our subjectivities, scientists themselves may be very passionate about their work, their failures, and their results. So the emphasis on mental "purity" as well as careful practice comes across as religious vocation. Further, the implicit assumption that intuition is absent from science does not reflect the mental activity of creative scientists who use different mental habits to form hypotheses, create tests, evaluate data, and so on.

Along with the birth of this television show placing determinations of truth, especially legal truth (this is a crime drama, after all, even a new entrant into the police procedural formula), in the hands of scientists who apply rational deductive reasoning to data they consider facts, we have, in the real world, new doubts about the very science that is used to substantiate the truth claims. The press claims not just a "*CSI* effect" in decision making but also reports on discredited forensic work that has come to light, arising from carelessness or the willful desire to produce evidence that will serve particular prosecutorial (or government) objectives. Serious questions have been raised about how scientific some forensics practices actually are and how the lack of statistical data about outcomes make it very hard to assess their reliability.[16] So many questions have been raised that Congress, in 2005, requested that the National Academy of Sciences review the state of forensics in the United States. The committee report, published in 2009, found that "in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis" (National Academy of Science, National Research Council, Committee on Identifying the Needs of the Forensic Sciences Community 2009, 4). Before the report was issued, the necessity for it was laid at the feet of *CSI* audiences by National Public Radio "*CSI* viewers are part of the problem: After watching blood spatters analyzed and carpet fibers tweezered night after night, there may be a sense out there that forensic evidence is infallible" (Temple-Raston 2009). The academy in a section of its report titled "CSI effect" discusses it in relation to the pressures on forensics personnel as well as on police and prosecution.[17] This mirrors comments of judges and lawyers. The target of their anxieties is not television but members of the public whom they assume to be influenced by the television. As we have seen from the empirical studies, that influence is not so clear. Perhaps this is what Freud called a "screen

[16] See, for instance, Jeffrey Toobin's article on hair and fiber evidence, "The CSI Effect," Annals of Law, *The New Yorker*, May 07, 2007 at: http://www.newyorker.com/reporting/2007/05/07/070507fa_fact_toobin. For examples of coverage on other forensics problems, see Associated Press, "North Carolina: Crime Lab to Be Examined" March 5, 2010 at http://www.nytimes.com/2010/03/06/us/06brfs-CRIMELABTOBE_BRF.html?_r=1&ref=forensic_science; also Bob Herbert, "Innocent But Dead", August 31, 2009 at http://www.nytimes.com/2009/09/01/opinion/01herbert.html?ref=forensic_science. All last accessed 8/4/2010CGI.

[17] For the discussion of CSI in the NRC report, see pp. 47–48.

memory" transformed as a collective "screen issue."[18] It is a delightful pun in this circumstance when we are considering what is on actual screens. A "screen memory" refers to anxiety expressed about a subject that is a displacement of a deeper, repressed anxiety; it seems more acceptable and masks the real source of anxiety which may be much harder to articulate or accept. If members of the legal professions are anxious about something they call "the *CSI* effect," and if that is a screen for something deeper that they worry about, what could it be? First, let me state clearly that all I can offer are a few speculations with no basis in empirically established data.

Increased public scrutiny, always a thread in the comments about CSI, might well be unsettling for a variety of reasons: the public is not uniform and the criminal justice system has many political dimensions, making it harder to steer through the public media sphere; "trade practices" that used to be in the penumbra of private professional work may be revealed, bringing an increase in accountability and a loss of discretion or reveal actual bad behavior or skirting the law. Legal decisions have to be made absent full knowledge on the basis of what facts are available and provable, and so there always remains uncertainty. In spite of television programming, very few cases actually go to trial, so as the level of responsibility for the decisions made in plea bargaining increases for the participants, so there is a large gap structurally between "the public" as represented by television viewers and their expectations of trials and the reality of criminal law now. In fact, given the statistics regarding plea bargaining, much of our justice occurs behind closed doors as far as the public knows, and so practitioners might fear scrutiny because they are not so used to it.[19] Perhaps conviction rates in actual cases help practitioners to feel better about the numbers of untried defendants who are nevertheless put away for crimes on the basis of evidence not tested in court. This would cut in favor of their finding support in the belief in evidence in *CSI*, except that "science" is trumping police work, creating a new standard, perhaps, a changing notion of "beyond a reasonable doubt" that could also be unsettling. Finally, one reason why plea bargaining is playing such an important role is that it reduces overwhelming case loads. A demand for more and better forensic evidence similarly would stress the justice system which is already underfunded (Rath 2011). I am not a part of legal practice, and I am sure there are other factors that I cannot imagine. Finally, there may be observable elements in the *CSI* shows that are troubling for other reasons. It is some of these that I will explore in conclusion.

[18] I am grateful to Dr. Sydney Z. Spiesel for his suggestion that collectives can engage in this process mirroring individual psychology (Spiesel 2008). For references in the Freud canon to this subject, see Laplanche and Pontalis (1973), 411.

[19] There seems to be substantial agreement guesstimating that the plea-bargaining rates fall between 90 and 95% of all criminal cases. Established numbers for 2003 are in *Sourcebook of Criminal Justice Statistics*, 426 tbl.5.24.

37.5 *CSI* and the Ordeal

The world of *CSI* is a world where in a very real way law, as we know it, is unnecessary. The contest is over which physical traces are relevant. Once they are properly attached to a perpetrator, there is no need for an adversarial proceeding. So plea bargaining (which arises out of a set of humanly negotiated compromises, however many pressures there are), eliminating the need for a trial with a jury, is substituted for by "absolute proofs" in this fictional world; there are no alternative versions because the "revealed" truths of science rule the kingdom of evidence. I have briefly described how science in *CSI* is coded as the output of analytical machines (which seem to operate independently from the humans) and not as the results of science as it is usually practiced, which often accepts conclusions only tentatively, leaving room for exceptions or new knowledge. To believe in the identification of the perpetrator and truth told in his/her "confession" during a *CSI* episode, one has to believe that the machines always work, that they are properly calibrated, that they are up to date in their information, that they never need to be reset or run out of paper, and that what they show is incontestable. These machines have nothing to do with the tools we all use every day.

The otherworldly light (whether day or night), the jewellike equipment, and the practiced movements of the professionals who dress with care (not in police uniforms) and look nice, who have "vowed" to follow a clear intellectually and morally demanding vocation, all these evoke a different universal that of the church and religious practice. The forensics teams are shown to lack bad motives, to be able to stand against the blandishments of higherups who may have motivations contaminated by self-interest of one kind or another; their private lives are only glancingly referred to if at all, making them seem to withdrawn from worldly concerns and therefore more priestlike. There are no tests that fail, no competing hypotheses (in the scientific sense), and when a new thought is stimulated, a new evidentiary possibility, the hardware and software already exist to do the test. There is no need for invention in this enclosed world of the laboratory with its science appliances. And what are they looking at? Physical signs that explain the relation between the body of the perpetrator and that of the victim. From this perspective, we are looking at laboratory rituals that resemble the old medieval judgment by ordeal[20] that also linked physical signs to the discovery of truth.

The ordeal consisted in submitting the accused (in the absence of witnesses and perhaps, even, an accuser) to physical tests—the hot iron, boiling water, cold water, trial by battle, etc.—from which there would derive physical evidence of God's decision. For instance, hands that had to carry the hot iron for three paces would be bandaged and inspected after 3 days for signs of corruption. A clean and healing wound would be a sign of God's proclamation of innocence (McAuley 2006, 474). In this scenario, God speaks through the accused's body and makes it testify to that

[20] I am very grateful to Pamela Hobbs who initially suggested to me, in 2006, that I ought to explore the connections when I presented an earlier version of this chapter.

which could not be seen—the person's soul that may or may not have committed crimes. Justice is done by the highest [imaginable] authority—and, by the way, an invisible one.

The ordeal was an extremely old way of proving guilt or innocence. Historians believe that it predated Christianity and the Christian kingdoms; there are suggestions that it had Frankish origins and was spread quite widely through Europe because it was one of those indigenous customs that the Church chose to absorb—I imagine like the Roman Saturnalia became Christmas. It was ended by canonical decree in 1215. Few customs so old go out quite so dramatically, but because it was administered by the Catholic Church and tied to Church ritual, it was possible for a powerful authority to accomplish this major change by decree.[21] Generally, the ordeal took place within the Church after a mass and was a source of revenue for the places that held them. The modern ordeal takes place in a lab in my analysis, setting up an analogy lab = church.

"The core belief behind trial by ordeal is that when men are submitted to this form of test according to the proper rituals and invocations, God will reveal their guilt or innocence by changing the natural properties of the elements (i.e., hot iron will not burn, water will not allow a heavy body to sink)" (Bartlett, 162). In short, God will provide an indexical sign, unarguable because there is no "interpretation."

The ordeal was the method of proof to be used when it seemed necessary that God decide what men (humans) could not. Cases not requiring the ordeal would be decided by assigning a number of people to be sworn witnesses on behalf of the accuser and/or the accused. These were called compurgators, and their oaths were essentially character references; we can understand them as a nascent jury—giving human judgment rather than divine, but only certain people qualified for this service. A stranger would be unable to supply the necessary social texture. A slave or servant would not be regarded as being able to swear an oath, nor would a woman. Toward the end of the practice, exemptions were granted to three classes of people: clerics, Jews (not being Christian, they could not participate in the associated religious rituals), and perhaps most interestingly, the nascent middle-class townspeople (exemptions only to the citizens and burghers, and not everywhere (Bartlett, 53–58)). We might say this represents the early ascendency of a governing elite of persons with means but not royalty. Langbein suggests that "the collective judgment of an ad hoc panel of the folk, uttered as the voice of the countryside, unanimously and without rationale, seemed less an innovation than the principled law of the Medieval jurists" who took over justice after the ordeals were banned (Langbein et al. 2009, 77–78).

To believe in the ordeal, one would also have to believe (1) that God exists, acts, and knows, (2) that God can change the natural properties of the physical world, and (3) that God intervenes in the world to dispense justice (Paraphrase of Bartlett, 163).

[21] There is substantial agreement between authorities on this history. The most complete version can be found in Bartlett (1986). Other sources include John Langbein (2006), Pollack and Maitland (1968), Plunknett (1956).

To believe in the *CSI* investigation, one would have to believe (1) that the science shown by our technology produces unambiguous truth, (2) that the properties of the physical world can give us sufficient knowledge about human situations, and (3) that the truths of crime are individual, are knowable, and arise from bad thinking and action and not from social circumstances or systemic issues. Interestingly, the Roman canon law administered by continental professional jurists after the abolition of the ordeal did not regard circumstantial evidence as strong enough for conviction[22] (Langbein et al. 2009, 54). The moment of turning away from the ordeal might be seen as the founding moment of what became our modern western legal regimes. But this was not the end of the power of the indexical sign as a test of truth.

This association between "scientific" investigation and the ordeal has been made in print in a policy review on the potential use of polygraph evidence in Australia: "Does the coercion of people to undertake lie detector tests vary significantly from subjecting hapless women in the dark ages to trial by ordeal? Do these devices any more accurately determined truth? Or have we simply invented a modern form of witch dunking?" (Clark 2000) We are now offered ever more subtle temptations to use traces from machines as indexical signs to convict in the various brain imaging technologies in use now (Stronge 2009).

While the ordeal was discontinued, the witchcraft trials that occurred in both Europe and North America, particularly in the seventeenth century just after the founding of modern nation states, share some of the same features: legal rituals applied to the accused, the inspection of the bodies of the accused for signs, the public ceremonies of adjudication, and the death penalty carried out through ritual and through spectacle. John Demos suggests that the newly formed states were insecure in the legitimacy of their power and that they "were eager to harness the influence of the church" (Demos 2008, 54). In short, among other impulses behind witch-hunting (which is very complex, multifactorial, and has been studied with a variety of lenses) is that it is an instrument of governance—one that can unite a population against an "other" on which the population can project bad thoughts and actions, thereby "cleansing" the state. It is not possible to do justice to the story of witch-hunting within the scope of this chapter, but there seem to be thematic connections between *CSI* and witch-hunting. Women are often victims as well as perpetrators in both. The display of the body, especially private parts not normally on view, is part of the ritual. The proofs are read through physical signs, but some of the evidence in witch trials was "spectral," "apparitions not visible to others, but imbued with supernatural powers and inseparably identified with the accused" (Demos, 160). Much of the "evidence" produced in the forensics labs can seem to be "spectral" to the audience because produced by evanescent flickering light. We see autopsies "protected" by the mediation of the camera and television screen. Monitors of all kinds show us these images of the world we see, revealing also new worlds in

[22] For an extended discussion of the end of the ordeal and canon law, see McAuley (2006).

data world we do not see any other way. But whether descriptive or conceptual, pictures on screens are just made of colored light; most often their presence is fleeting, dematerialized, and untouchable. Handheld cameras (what most consumers use) can go with us wherever we go and respond to our searching impulses. But when these cameras record a picture, the picture is perceptual and perspectival because the camera's lens reflects a point of view, like human vision. Many of our optical devices and digital picturing tools are not perspectival at all. People who look down microscope eyepieces have their viewing controlled by the mechanism—they have to maintain a certain position to see at all. Video game pictures are generated by graphics engines similarly keep us in our place in front of the screen as long as we play. So as long as we are audience for those pictures, the mechanism of the production to some extent controls us. "Television and the personal computer, even as they are now converging toward a single machinic functioning are antinomadic… They are methods for the management of attention that use partitioning and sedentarization, rendering bodies controllable and useful simultaneously, even as they simulate the illusion of choices and 'interactivity'" (Crary 1999, 75). What the forensics teams are particularly paying attention to is the output of these devices. (Their actions are mostly cerebral in contrast to those in *24*, a show that unfolds like a Hollywood thriller). This connects forensics yet further to religious sorts of cognition. The revealed truths of the sacred are not regarded as perspectival, but, instead, as universal and unchanging in contrast to all the contingencies of life on earth, even if perspective is used to lead the eye to a vision of God sitting at the vanishing point of converging lines. As *CSI* characters are fixed in space by their devices looking at pictures that do not seem to be contingent even as they may flicker, they connect the "heavenly" realm with the problem in the narrative and with us as viewers. When the pictures are generated by machines, they can perhaps make us feel godlike in our mastery—we have escaped the perspectival—but we must beware of thinking we can escape the human.

David Noble traces the origins of the west's path of technological invention in medieval monastic practice (allied to desires for human transcendence), "On a deeper cultural level, these technologies [in general—our modern explosion of tools] have not met basic human needs because, at bottom, they have never really been about meeting them. They have been aimed rather at the loftier goal of transcending such mortal concerns altogether. In such an ideological context, inspired more by prophets than by profits, the needs of neither mortals nor of the earth they inhabit are of any enduring consequence. And it is here that the religion of technology can rightly be considered a menace" (Noble 207). Menace is a strong word.

David Noble summarizes simply, "… the technological pursuit of salvation [in the religious sense] has become a threat to our survival" (Noble 1999, 208). The menace is that we may give over too much power and lose too much autonomy and be robbed of the opportunity to make important social choices by a powerful elite that has no interest in the rest of us. This theme is reflected in a recent opinion piece by technologist Jaron Lanier published in the New York Times: "When we think of computers as inert, passive tools instead of people, we are rewarded with a clearer, less ideological view of what is going on—with the machines and with ourselves…

computer scientists are human, and are as terrified by the human condition as anyone else. We, the technical elite, seek some way of thinking that gives us an answer to death…" (Lanier 2010).

If the ordeal was created so that God could decide when humans were stuck, *CSI* shows us how godlike machines can play that role. Who needs a jury when we have a trained professional using the right stuff to do the job? Like other traditions of crime fiction, the crime stories in *CSI* are seemingly obvious problems whose solutions lie in specific evidence. We do not have to worry about "the system" itself, whether society is fair or justice is done. We do not have to think of problems of human conflict as arising from legitimate differences, and we do not have to leave it to a human judge to sort out on a case-by-case basis. All we have to do is provide the technologies for truth-finding and avoid reasonable doubt—in our technology.

CSI was created in an America already struggling with very deep ideological rifts. On the surface, the fault lines are over control of reproduction, evolution, psychology, over social studies curricula in the schools, not to mention other "lifestyle" issues, all generally subsumed under the term "culture wars." More deeply, they are over religion and its proper role in the cultural order. And race is never far from the questions. At the same time, there has been a turn to punitive law as opposed to rehabilitative law, "just deserts" jurisprudence, and, under the influence of our technological age, dreams of algorithmic judgment. The menace of *CSI* is that it can seduce people into accepting that technology can take care of the problem of human conflict and bad behavior, that it lulls us to believe in the smooth working of bureaucratic "machines." Concluding that religious zeal provided the driving force for the great witch hunts, Norman Cohn writes that massive killings occurred when people were forced to testify against others. "The great witch hunt can, in fact, be taken as a supreme example of a massive killing of people by a bureaucracy acting in accordance with beliefs which unknown or rejected in earlier centuries, had come to be taken for granted, as self-evident truths" (Cohn 1975, 255). Our information technologies have diverse and important uses. They are wonderful—to be solipsistic, when they let me sit at my desk and access most all of the research materials I need at any time of day or night. But we should pause when we think of their use in public administration and communications, opening the door to extensive surveillance. And that might be just the beginning.

The kinds of thinking I have outlined in *CSI* are invading the actual world of the law. A panel at the 2010 meeting of the American Bar Association asked "Justice 12.0—Is There an App for That?" The questions raised begin with convergence of artificial intelligence, cognitive science, and nanoscience. Will we be able to predict crime? Manage people through psychosurgery? Would judgment through artificial intelligence "go a long way toward eliminating the effect on case outcomes of the individual unconscious biases and passions of decisions makers, as well as disparities in the caliber of parties' legal representation, both of which result in inconsistency and unpredictability in the justice system today." (ABA 2010, 153–54) This outline raises the question squarely: Is the law about meeting a single standard, or is it about human problem solving? Should judgment be made by a "god in a machine" which may not have an intelligence that we could recognize as "human" even if it is

capable of unimaginably rapid calculations? Or should communities of humans continue to sustain a legal system that permits them to face each other? The problem with the *CSI* attitude is that we do not even get to raise these questions. It is all given, and we must accommodate to it without asking about the wizard behind the curtain or in this case, behind the screen.

The alternative to the promise of a highly efficient system is the very human system described by a philosopher and an ethnographer—Anthony Kronman and Bruno Latour. Writing about rhetoric and constructing an argument about the reasons for having the law in all its complexities, Kronman asserts that "Our humanity comes to light only within the horizon of the public world. Only here can we show and see the special being we possess. But the public world must be built and then guarded" (Kronman 1998, 700). And for Latour, the law is an "endeavor to make coherent through a continuous process of reparation, updating, forgetting, reification, codification, comments, and interpretations, so that nothing is lost and nothing is created, everything that passes by—time, humans, places, goods, and decisions—remains attached by a continuous thread, so that legal stability serves as a net for all potential applicants, and humans can live in the house of the law" (Latour 2002, 277). What will be the price of giving up this stage on which we can display ourselves (Kronman's metaphor), this house in which we can live (Latour)?

It is a mistake to believe that mere exposure remakes the entire mental life of members of the audience for a television show. When it offers such gratifications—intellectual stimulation, godlike power, forbidden sexual impulses, beautiful things—and its deeper messages are left implicit, though, it should be answered. If participants in the legal system are feeling anxious about the effect of the show, maybe they need to ask again about what effects they are considering. Judges and lawyers face a task of restoring confidence in our system of justice itself. Well-substantiated cases, clear and just procedures, and effective communication are all a part of this. Science can tell us a lot, but maybe we should be paying more attention to its methods, its critical thinking, and less to "answers" produced by science appliances. Legal systems were created to solve human conflicts. Who better to understand them than human participants? And who better to restore the principle of the rule of human law than the judges and lawyers who participate in its application? A place to begin is to understand the effects of *CSI* not as an argument about evidence, but as an "argument" against the legal system itself. This argument needs a public answer.

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Chapter 38
The Visibly Offensive Offender: A Semiotic Phenomenology of an Execution

Jody Lynée Madeira

Abstract Starting from the premise that claims concerning "closure" from executions are actually claims about the lived experience of witnessing an execution, this chapter considers how the visual dynamics inherent in execution and the culture of capital punishment are impacted by execution method, whether and how an execution is witnessed, and the identities of the condemned and the execution witnesses. It focuses upon the semiotic interplay of visibility and invisibility in light of Oklahoma City Bomber Timothy McVeigh's 2001 execution by lethal injection. Applying semiotic phenomenology to interpret witnesses' conscious experience of McVeigh's execution, this chapter illustrates how the condemned body is steeped in semiotic meaning and reveals three themes essential to the lived experience of witnessing McVeigh's execution: the perception of being compelled to witness, a perception of communicative interaction, and a sense of completion. The lived experience of witnessing McVeigh's execution was that of rendering "justice" visible and McVeigh invisible. This phenomenological investigation reveals that perception of "accountability" and "justice" is not related only to an offender's crimes but also to his personality and level of visibility before and after trial and sentencing, and confirms that family members' emotional needs are, for better or for worse, tied to the criminal justice system and certain procedural outcomes.

38.1 Introduction

Over the past 150 years, the practice of capital punishment has altered dramatically. The grisly public spectacles favored for centuries have been moved inside prison walls, and painful execution methods have been gradually replaced by ever more

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humane and discrete lethal technologies. The rhetorical justification for capital punishment has also changed radically in the last 20 years, gradually becoming increasingly oriented toward murder victims' family members (Zimring 2003). Private executions, once witnessed exclusively by public officials and media representatives, now may be viewed by family members in most states as well. This shift in orientation has engendered controversy. Some claim that the death penalty is essential in resolving grief, minimizing trauma, and reaching "closure" to the murder; others argue that the criminal justice processing of capital cases intensifies suffering and delays healthy adjustment to the loss of the victim—without systematic empirical evidence on either side.

Whatever the case, "closure" concerns are omnipresent. Criminal justice officials use "closure" as support for capital punishment. Attorney General Ashcroft approved the closed-circuit broadcast of Timothy McVeigh's 2001 execution to Oklahoma City bombing survivors and victims' family members, stating, "I hope that we can help them meet their need to close this chapter in their lives" (Department of Justice 2001). Prosecutors often work directly with family members in determining whether to seek the death penalty (Karamanian 1998) and frequently cite a need for "closure" as justification (Gross and Matheson 2003). "Closure" is frequently cited in the media as an expected outcome for families of homicide victims in death penalty cases (Radelet and Borg 2000). Family members themselves, however, assert that "closure" in the sense of deriving a sense of absolute finality from an execution does not exist (Madeira 2010).

One might assume that these changes in the rhetorical justification of capital punishment were made on the basis of social science evidence that confirmed that witnessing executions brought "closure" to family members. Unfortunately, the state of research on "closure" and the impact of witnessing an execution is woefully inadequate. The massive body of research on capital punishment is either oriented toward theoretical concerns or documents patterns in implementation. In addition, the growing bank of literature on surviving family members of homicide victims has not adequately investigated the claims made on both sides of the capital punishment debate. Instead, it has chronicled the extreme psychological, emotional, and physical toll that victims' families endure for years. But this lack of empirical inquiry has not prevented policy makers and witnesses from asserting either that capital punishment offers something to murder victims' families that no other punishment can or that the institution harms more than it ever helps.

These "closure" concerns are in actuality phenomenological claims about the lived experience of witnessing an execution. Like other, less dramatic life occurrences, for witnesses, executions are "communicative events lived through as existential moments" (Lanigan 1988, 147). Therefore, it makes most sense to analyze the lived experience of witnessing executions through semiotic phenomenology, which "simultaneously has the capacity to engage the immediacy and concreteness of persons' lived experience without essentializing it" (Martinez 2003). While phenomenology as a methodology "is properly described as an attitude or philosophy of the person" and explicates research participants' experiences of certain phenomena, semiotic theory focuses on the expressive medium of language and on how meaning is embodied within signs (Lanigan 1988, 8). When these analytic tools are used

together, "language as signifier is intertwined with the significance of lived meaning…" (Wolff 220). A semiotic phenomenology of execution witnessing illustrates how victims' families are reflexively interconnected to the lifeworld and its semiotic systems (Ihde 1986).

With respect to its methodological brick and mortar, applying semiotic phenomenology to interpret witnesses' conscious experience of an execution entails the "synergistic" application of the description-reduction-interpretation sequence (Lanigan 1988, 8). Within this sequence, "relationships are created between 'parts' and these relationships become new 'parts' to be added into the total scheme" (Lanigan 1988, 8).

The first phase, phenomenological description, involves the deconstruction of conscious experience. For purposes of this study, the description consists of transcribed interviews with 28 Oklahoma City bombing victims' family members and survivors, 9 of whom were execution witnesses. This analysis includes relevant parts of interviews with all 28 participants discussing reactions toward McVeigh and his communicative behaviors as well as more extensive parts of interviews with execution witnesses.

In the second phase, these descriptions are subjected to phenomenological reduction, in which the essential parts of the description are identified through imaginative free variation—systematically imagining each part of the experience with "cognitive, affective, and conative meaning" as present or absent in order to reduce the description to its key elements (Lanigan 1988, 10). These key elements often appear as "revelatory phrases," expressions "that signify the lived-meaning of the discourse as life-event" and thus "function as existential signifiers" (Lanigan 1988, 147). Reduction can be both paradigmatic (within the responses of individual research participants) and syntagmatic (across multiple participants' responses) (Wolff 221).

The third and final phase, phenomenological interpretation (also known as semiotic or hermeneutic analysis), involves the "specification of the value relationship that unites the phenomenological description and reduction" (Lanigan 1988, 10, 11). This step consists of two activities. The list of revelatory phrases is first subject to critical examination, and one or two phrases are chosen as the "signified"; that particular phrase is then "used as the key part of the hermeneutic proposition," which is a "statement… that gives the meaning implicit in the explicit discourse" (Lanigan 1988, 147). Practically speaking, interpretation involves "finding further thematizations which bring together initial themes into all-encompassing ones" (Wolff 1999, 220). A hermeneutic proposition may either be constructed by the researcher, or it may be an actual sentence from the description (*Id.*). In either event, interpretation enables the researcher to define the phenomenon in a way which ties together all the themes embodied in the revelatory phrases.

38.2 Visibility and Invisibility and Objectivity and Subjectivity

Themes of visibility and invisibility have always been central to theories of discipline and punishment. These concepts are the cornerstone of the panopticon, a prison structure designed by Jeremy Bentham in 1785 that allowed one prison

official to supervise an entire population of prisoners while simultaneously keeping this supervisor invisible and isolating all prisoners from one another. Foucalt described the panopticon as follows:

> at the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows of the tower; the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in the central tower and to shut up in each cell a madman, a patient, a condemned man, a worker or a schoolboy. (Foucalt 1979, 200)

The panopticon's efficacy lies in its ability to isolate inmates while rendering them perpetually visible. The threat of this visibility stems not from a supervisor's actual presence, but from his implied presence; the supervisor is invisible, and so the central tower need not be manned at all times. Because the prisoners are always unsure whether they are actually being monitored at any given moment, they experience an "anxious awareness of being observed" (Foucalt 1979, 202). The panoptic design also renders prisoners themselves invisible—segregated from one another, and from the outside world. Thus, "invisibility is a guarantee of order" not only because anxious inmates must continuously monitor their behavior out of fear of surveillance, but also because invisibility from imprisonment ensures that inmates are not at large committing further crimes (*Id.*).

The panopticon, then, is a mechanism with two interdependent effects: to make cell inmates continuously aware that they are being watched and to allow the tower supervisor to maintain constant vigilance and therefore control over them (*Id.*). It is an authoritarian structure, designed for the exercise of disciplinary power. Disciplinary power also depends on dynamics of invisibility and visibility; it "is exercised through its invisibility; at the same time it imposes on those whom it subjects a principle of compulsory visibility" (*Id*. at 187). For Foucalt, visibility is inherent in every application of disciplinary power, and so disciplinary power requires the human gaze—of supervisors and others—to achieve its communicative goals. The communicative medium of disciplinary power, the text on display, is the incarcerated body.

In a panoptic setting, the imprisoned body is the target of an objective gaze. As Foucalt notes, the prisoner "is seen, but he does not see; he is the object of information, never a subject in communication" (*Id*. at 200). The supervisor in the central tower keeps a prisoner under surveillance for purposes of control, not out of curiosity or for communicative interaction. Incarcerated bodies' behaviors are only important to the supervisor in that they may endanger the exercise of disciplinary power through rebellion or escape; otherwise, an inmate's individuality and personhood are of no more note to the supervisor than an insect's. The supervisor's gaze, then, regards the inmate as an object, not a subject. This objectifying authoritative gaze is no accident, but an inherent and integral part of the panoptic model; it is what induces in the inmate an anxious awareness of perpetual surveillance.

The objective gaze which surveys the inmate has as its antecedent the horrified and curious gazes with which anonymous masses viewed grisly medieval public executions. Most often, crowds attended public executions as a form of entertainment; their roles as spectators and sometimes participants usually stemmed not from

acknowledgment of a condemned's subjectivity, or a recognition of the criminal's individuality, but from other social and political causes. Power was communicated through pain; executions were public so that the citizenry could take away certain moral and civic lessons from the display, namely, the "truth of the crime," the vindication of the sovereign, and a healthy fear of his justice (*Id*. at 35, 47). Condemned bodies were but educational objects, bloody communicative mediums upon which penal lessons were inscribed; "in him, on him the sentence had to be legible for all" (*Id*. at 43).

Significantly, these bodies were kept invisible until execution; the condemned "body, displayed, exhibited in procession, tortured, served as the public support of a procedure that had hitherto remained in the shade" (*Id*.). Short of public punishment, criminal proceedings occurred in the absence of public witnesses and most times without the accused himself, and prisoners were hidden within the dark confines of jails or dungeons (*Id*. at 35). Most condemned prisoners were unknown to spectators, enabling attendees to objectify the prisoner as a medium of moral and civic instruction. This is not to say, however, that the masses never viewed an infamous prisoner beloved by the populace subjectively and were motivated to witness his last moments because they were *his* and not for prurient entertainment. Even after executions were moved out of public view, criminal bodies continued to serve as communicative mediums, albeit more bloodless ones. Punishment continued to necessitate physical privations that extracted tolls from imprisoned bodies through "rationing of food, sexual deprivation, corporal punishment, [and] solitary confinement" (*Id*. at 16).

At no time has the condemned body been more of a bloodless communicative medium than in execution by lethal injection. Dynamics of invisibility and visibility are still omnipresent in this execution method. The state still endeavors to keep the body of the condemned inmate invisible until execution, hidden away on death row. After his capital conviction, the condemned body appears most often as an impersonal textual presence in legal appellate briefs, asserting claims involving innocence, constitutional violations, or procedural error. The condemned prisoner's body enjoys only limited visibility at the time of his execution.

Contemporary lethal injection occurs in private execution chambers within prison "death houses." The architecture of execution chambers resembles an inverted panoptic model, with the inmate in a central lethal injection chamber around which are placed one or more viewing rooms separated from the execution chamber by one-way glass windows. Most witnessing rooms have a glass window with a curtain through which attendees may view the procedure; the curtain opens when the prisoner is strapped to the gurney and all preparations are complete, and closes moments later after the prisoner is dead. The lethal injection protocol casts the execution as a humane, quasi-medical procedure in which the prisoner, strapped to a gurney in a sterile room and often covered by a linen sheet, receives a sequence of injections of lethal chemicals via IV catheter that render him unconscious, paralyze his respiratory muscles, and ultimately cause cardiac arrest.

The sanitized nature of this execution method is critical; not only is it ostensibly more humane than hanging or electrocution, but it is also easier to witness. The United States Supreme Court itself has recognized that the paralytic in the lethal

cocktail helps to ensure death while preserving decorum: pancuronium bromide "prevents involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride… the Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress" (Baze v. Rees 2008, 1535). Thus, the ultimate exercise of disciplinary power, once displayed through a bloody and battered body, is now reduced to the bloodless sight of a condemned inmate falling asleep. Although the execution may still be witnessed, death itself is rendered invisible.

However, distant this aesthetically clinical execution process is from medieval butchery, one key visual dynamic of the execution has been left intact. Scholars portray the modern execution as an event where the exercise of disciplinary authority is still enabled by a criminal body, put on display to be objectified by witnessing gazes. Prison officials, representatives of the media, and victims' family members are there to watch the state execute the inmate, not to engage in interpersonal interactions with him; they witness to see what the prisoner will do or because of his criminal involvement, not because of who he is as an individual. Such witnesses are concerned with the condemned's behaviors for reasons directly related to their motive in attending the execution: because such behaviors must comply with certain codes of conduct, or are newsworthy, or reveal reactions to being held accountable for another's murder. Thus, the condemned prisoner theoretically still finds himself under the same objective scrutiny as an insect under a magnifying glass.

38.3 The Semiotic Dimensions of the Condemned Body

The condemned body as depicted in Foucalt's writings is steeped in semiotic meaning. According to Lanigan's theory of semiotic phenomenology, communication is "constituted and regulated by systems of signs" and thus is comprised of "formal and structural relations between *signifiers* (elements of expression) and *signifieds* (elements of perception)" (Lanigan 1982, 63). Communication is also phenomenological "by force of being constituted and regulated by consciousness of experience (the signifier) and its entailment as the experience of consciousness (the signified)" (*Id*.). Therefore, for execution witnesses, the condemned body would be the most significant semiotic sign, uniting a signifier—such as the gestures and positioning of the condemned body in the state's hands—with a signified, such as the perception of these behaviors as a manifestation of the state's disciplinary power. Phenomenologically, the condemned body would unite a signifier—an awareness or consciousness of viewing the condemned's body—with the lived experience of that awareness.

It is not a given, however, that these semiotic and phenomenological characteristics are universal properties of each condemned body. Because the person is phenomenological subject in conscious experience, we must look not only at the properties of the condemned body but also at those of other bodies: the execution witnesses (Lanigan 1992).

It is significant that Foucalt's execution witnesses are mere spectators, with no personal connection to the capital crime necessitating execution. Democracy entails a certain level of complicity for the execution witness. Unlike in medieval times, when the condemned was punished in the name of a king ruling by divine right or right of conquest and not by citizen election, citizens of a democratic state who witness an execution are at least implicated in the execution in that the state is punishing the offender in their names by a method authorized by their elected representatives. However, this rather tenuous connection pales beside the intimate connection between murder victims' family members and the execution. Thus, a semiotic phenomenology of the lived experiences of murder victims' family witnesses should yield very different insights than that of Foucalt's "anonymous masses," media representatives, or public officials.

Similarly, in contemporary society media technologies permit condemned bodies to be visible in novel ways. Before photography, the state had to literally produce a prisoner's body in order to make its exact image visible; the only alternative was hand-drawn representations. Today, a photographic image or video of the condemned may be taken, stored, and continually broadcast in a variety of print and electronic mediums. Thus, although the actual body of that prisoner may be incarcerated and invisible, it is still visible in the sense that its exact image may be endlessly produced and reproduced. In addition, condemned bodies themselves might not be as cooperative in maintaining their invisibility. The very same media technologies that enable a condemned prisoner to be visible via photographic representation also may penetrate prison walls and "extract" an inmate through a media interview, or an inmate may reach beyond prison walls through media statements. These types of contacts give rise to textual representations of the condemned body that may not replicate its exact image but nonetheless render it visible by publishing its characteristics, activities, or concerns.

The semiotic dimensions and phenomenological experience of each execution are unique for each individual witness, although there are certainly similarities between witnesses and among executions. An initial investigation into the semiotic phenomenology of executions may properly start with a case study analyzing the lived experiences of many different witnesses to one execution. Thus, this chapter will focus on the execution of Timothy McVeigh, who, in collaboration with Terry Nichols and Michael Fortier, designed, built, and planted a truck bomb that blew up the nine-story Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, on April 19, 1995.

38.4 The Oklahoma City Bombing and McVeigh's Communicative Visibility

The damage from the Oklahoma City bombing was profound. A total of 842 persons were injured or killed as a direct result of this tragedy; 168 were killed, 19 of whom were children (Sitterle and Gurwitch 1999). The blast left 462 homeless

and damaged 312 buildings and businesses (*Id.*). In subsequent trials, Timothy McVeigh and Terry Nichols were indicted and charged with eight counts of first-degree murder for the deaths of federal officials and three other charges, including conspiracy. While McVeigh was convicted in June 1997 on all counts and sentenced to death, the jury in Nichols' trial found him guilty of involuntary manslaughter and conspiracy after deliberating for 41 h, failing to reach a unanimous verdict on whether Nichols planned the bombing "with the intent to kill." After being sentenced to life in prison without the possibility of parole, Nichols was tried and convicted in 2004 of 162 counts of first-degree murder in Oklahoma state court, but again escaped the death penalty.

The legal aftermath of the Oklahoma City bombing culminated in McVeigh's execution. On June 12, 2001, 232 witnesses—10 in the death house at the state penitentiary in Terre Haute, Indiana, and 222 at a remote viewing location in Oklahoma City—gathered for McVeigh's last moments. Whereas "live" witnesses viewed a side profile of McVeigh, "remote" witnesses observed the closed-circuit feed from a camera positioned on the ceiling of the death chamber directly over McVeigh's face.

From the beginning, Timothy McVeigh was a very different type of offender. Shock greeted McVeigh's arrest; few expected to see a white, 27-year-old decorated American veteran charged with the crime, particularly after the 1993 World Trade Center bombing masterminded by Ramzi Yousef, a citizen of Kuwait with ties to Al Qaeda. It did not take long for participants to form impressions of McVeigh; most stated that images of McVeigh being led out of the Noble County courthouse in Perry, OK, were tremendously influential in forming impressions of McVeigh as a defiant, cold, and remorseless individual.

Survivors' and victims' families' lived experiences of McVeigh's execution were heavily influenced by his media visibility. A very outspoken defendant, McVeigh granted numerous media interviews from the time of his arrest to his execution. In 1995, McVeigh was the subject of cover stories in *Newsweek* and *Time* and was a runner-up for *Time*'s Man of the Year. Numerous media interviews followed; this panoply also included one television interview with *60 Minutes* reporter Ed Bradley in February of 2000, which aired that May. Victims' family members and survivors viewed McVeigh as someone with great communicative agency who could manipulate them through the media, but over whom they had little communicative control. Many participants reported that McVeigh was an unwelcome presence in their lives, indicating that their relationship to McVeigh was parasocial in nature, one-sided, and mediated (see Madeira 2008; Madeira 2009). This relationship was pregnant with communicative necessity and perceived obligation; victims very much wanted to hear "why" and how McVeigh carried out the bombing, and many yearned to speak with him in person, but did not want him to enjoy such media access.

McVeigh's high visibility clearly is at odds with the ideal of the invisible condemned body; he was certainly too visible for the federal government's comfort. McVeigh's unprecedented visibility was perceived as threatening to those killed or

injured in the bombing and their families and to American institutions and cultures. Shortly before McVeigh's execution, Attorney General John Ashcroft asked the media to exhibit restraint:

> If the news media conducts an interview with Timothy McVeigh, I would ask them for self-restraint. Please do not help him inject more poison into our culture; he has caused enough senseless damage already…. I would ask that the news media not become Timothy McVeigh's co-conspirators in his assault on America's public safety and upon America itself. (DOJ Press Release)

Additionally, in 2001, upon the request of the Warden at Terra Haute, Indiana, the Director of the Federal Bureau of Prisons revised bureau policies to ban in-person meetings between reporters and all federal death row inmates (most of whom are housed in the Special Confinement Unit in Terre Haute) (see Federal Bureau of Prisons Institution Supplement THA 1480.05A). Many have construed this ban as an attempt to suppress death row inmates. Attorney General Ashcroft announced this new policy change in a public statement regarding McVeigh's execution, stating that "[a]s an American who cares about our culture, I want to restrict a mass murderer's access to the public podium" (Department of Justice 2001). Presumably, the federal government wished to tighten access to its death row inmates so that they might no longer enjoy the same heightened visibility as McVeigh.

McVeigh's refusal to remain quiet and therefore invisible behind prison walls was also a constant irritation to many victims' families and survivors. There was a strong sentiment that murderers such as McVeigh and Nichols should not enjoy any visibility, but should be forced into silence and therefore invisibility. Commenting on a press statement that Nichols had released from prison, one participant compared Nichols to the infamous murderer Charles Manson, stating "he [Nichols] should be dead, he shouldn't be capable of speaking, and I knew that this was something that could happen because Manson is alive. And he's still impacting people and… and that shouldn't happen, and that can't happen for McVeigh, he's gone" (12). This individual stated that even life imprisonment should mean an inability to communicate with others:

> they should not see another living human being, they should not be able to communicate with another human being…. I don't care what they do, it's what they say, if they can impact, affect have any type of bearing on any other human being, it's wrong. And if they're dead, they can't do that. (12)

Similarly, a survivor who did not witness the execution connected McVeigh's high levels of visibility and media access to a need to see him executed:

> it's not so much that he is or isn't alive, it's that his -- here we go again, access to media. See he had access to media and you know maybe that's another thing, maybe that's another type of punishment that needs to bed given is non-access to media because if he wouldn't have been writing people and calling people and giving interviews and making pronouncements and so on, you know, it'd be a lot easier to live with him, being in prison for the rest of his life. (19)
>
> Participants also felt resentment toward the media for their seemingly endless coverage of McVeigh. One survivor who did not witness the execution stated that "I just wanted the media to quit talking about it [the execution]… I just wanted some return to, as much return

> to normalcy as I could have" (3). Another was kept "on edge" by media coverage: "I just felt like, it was kept stirring up, stirred up, stirred up, stirred up… all the time and it just, there was still Terry Nichols to deal with, that all the media and everything, it just -- that kept me toned up… constantly bringing everything up again" (11).

McVeigh's remarks were thought to be harmful and destructive. Participants were overwhelmingly saddened and angered when McVeigh termed the deaths of 19 children in the America's Kids day-care facility within the Murrah building "collateral damage": "that was a very, very painful, when he came out and said the children were collateral damage and it was like, that was so hard on the families" (21) (Michel and Herbeck 2001, 188). McVeigh's willingness to use the media to continue to inflict harm on family members and survivors was one reason why one participant felt McVeigh needed to be executed, in contrast to Nichols, whose quiet prison presence meant that he could "live with" his continued existence:

> McVeigh, even though he knew that he was getting the death sentence, he was defiant all the way up to the point where it actually happened, okay? He would speak out to the media. He would tell the families to grow up, it's collateral damage that we killed your kids, you know. And everything that he did was doing nothing but hurting the family members here in Oklahoma. So the only way for us to have any kind of peace was to execute this man. Now on Nichols, Nichols is a little different because since he's been tried and convicted, you don't hear about him. And so even though he was ninety percent involved… I can live with him being in prison for the rest of his life, for the simple reason that he is not defiant and he's not going out and getting on the news and so forth and trying to hurt the family members. (25)

Thus, for the federal government and for family member and survivor witnesses, McVeigh's execution was not only about the display of disciplinary power but about silencing McVeigh. McVeigh's communicative visibility contributed to family members' and survivors' perceived need for the state to render visible McVeigh's actual body in an event that would lead to his death and consequent invisibility.

38.5 Thematizing the Lived Experience of Witnessing

Phenomenological reduction revealed three thematic categories essential to the lived experience of witnessing McVeigh's execution: the perception of being compelled to witness, a perception of communicative interaction, and a sense of completion.

38.5.1 Being Compelled to Witness the Execution

Participants spoke of being compelled to witness McVeigh's execution because of a perceived need to "see justice done" by being present when McVeigh died. Each word in this phrase will be examined in turn.

With respect to "seeing," McVeigh's execution was the last in a long string of legal proceedings; participants felt it was very important to attend for that reason

alone. In addition, a number of participants had become personally invested with the closed-circuit broadcast of the execution. Though hundreds wished to witness the execution, only 10 could be accommodated in the witness room adjoining the lethal injection chamber in Terre Haute where McVeigh would be executed. Thus, numerous Oklahoma City bombing survivors and victims' families sought to persuade Attorney General John Ashcroft to arrange for a closed-circuit broadcast of the McVeigh execution from Terre Haute to Oklahoma City. On April 10, 2001, Ashcroft visited Oklahoma City and met with 100 survivors and victims' families who asserted that they had a right to witness the execution and explained the importance of witnessing. Two days later, on April 12, 2001, Ashcroft acceded to the request to televise McVeigh's execution via closed-circuit broadcast, citing "closure" as a paramount reason.

Witnessing fulfilled a strongly felt *personal* need to see McVeigh's final moments for one's own self: "At that point it was more for myself. To see justice done. From start to finish" (7). Another participant stated: "I had watched that man and I needed to complete the process. I needed to see it through" (22). It was important to many not to have to imagine what the execution looked like: "I did not want to have nightmares for years to come after the execution about what I thought it must have been like. Again, I wanted to deal with reality" (22).

Personal involvement in the struggle to have McVeigh's execution televised intensified the personal commitment to witnessing: "We had to fight for close circuit. We had to meet with General Ashcroft and talk him into doing close circuit for execution…" (22). Attending was the counterpart to their negotiations with Ashcroft to have the execution televised and demonstrated the strength of their personal commitment: "You know, I had talked the talk. Did I…was I big enough to walk the walk? And I was…." (28). Though viewing via closed circuit was enough for most participants, many also very much wanted to witness the execution live in Terra Haute and were thrilled when they drew a seat through the lottery process: "I think that was the most important thing to me…. I could have viewed it as the FAA center if I had to…. But it was just… complete relief when I found out I was one of the 10 selected… there aren't enough words to describe how important it was for me to do that… I don't know how to say it" (29).

References to "justice" capture participants' feelings that McVeigh's execution was a dialogic response to his involvement in the bombing: "The execution was something I needed to do for myself because I deserved; I believed he needed to be punished because he knew those babies were in that daycare" (15). Participants spoke of "justice" as if it were the same as McVeigh's death sentence.

Finally, it was important to participants that justice was "done," or accomplished. Though the element of completion is a theme in its own right, it must also be noted that the fact that the execution marked the end of McVeigh's life and the culmination of legal proceedings against him had much to do with witnesses' sensation that they were compelled to witness the execution. Finality left participants with no option but to witness: "I have to do this. That's the least I can do is follow it through. I fought a long, long battle to not face, to not see it to the end" (28).

38.5.2 The Execution as a Communicative Interaction

For participants, the lived experience of witnessing McVeigh's execution was that of a communicative event, a specific episode in which someone makes meaning by drawing on enculturated systems of communicative practices, strategically choosing spoken, written, or gestural behaviors. In perceiving the execution to be a communicative event, witnesses found their lived experiences of the execution structured through McVeigh's gazing behaviors and his silence. Witnesses also expected that McVeigh would be impacted by the communicative dynamics of the execution. They had hoped that the execution would be a suitably harsh response to McVeigh's culpability, but were disappointed when they witnessed a death that was "too easy."

Execution witnesses were intensely interested in watching McVeigh's face throughout the procedure. Closed-circuit witnesses felt that the placement of the camera directly over the gurney in Terre Haute was ideal because it allowed them to clearly see McVeigh's facial expressions. The desire to see McVeigh face-to-face fueled some witnesses' desire to view the execution: "I'm glad I saw him that close up and everything cause that way I knew from his eyes and his expression what he was feeling" (5). Seeing McVeigh's face enabled a healing transformation: "I think the face thing is what, really brought it to reality with me… it was a face-to-face thing and I think that's probably what drew me in to what I needed to go through" (21).

McVeigh's gazing behaviors gave rise to an intense perception among closed-circuit witnesses that McVeigh was aware that his death was being witnessed, that he wanted to create a certain image, and that his gazing behavior produced an interactional expectancy for witnesses. Closed-circuit witnesses believed that McVeigh was staring at them through the camera and that he was conscious of their presence: "He knew that people were looking at him, watching him…" (5). When McVeigh's face appeared on the screen, it seemed to closed-circuit witnesses that he was making eye contact with live witnesses in the viewing rooms:

> you almost, you could see him almost like visibly like he's looking at each person in there. Specifically making specific attention of the fact that he's looking at each person in there… It's almost like he's looking at each family member or whoever's there… (7)

Not only did witnesses feel that McVeigh was aware of live and closed-circuit witnesses, but there was a definite perception that he was actually and purposefully *looking at* all witnesses, even those viewing by closed circuit. Three closed-circuit witnesses described McVeigh's gaze as unmediated, despite the closed-circuit feed: "he raised his head up and… it was almost like he was just staring at each person… and it was something he did on purpose… It's almost like it was a face-to-face contact with him" (21). One participant recalled, "there's his face looking at you" (22). Closed-circuit witnesses were struck by a sensation that McVeigh was staring right at them:

> And as he stared at the camera, knowing that we were watching,… he would just stare at that camera. And it was just…like it was just he was just staring right through you. I mean

> absolutely everyone said the same thing. It looked like he was looking right at you, like he was looking right at me. (28)

Witnesses in the death chamber in Terre Haute had a different experience of McVeigh than closed-circuit witnesses. Live witnesses only had seconds of perceived eye contact with McVeigh, but that was enough for McVeigh's behaviors to send the impression that he was trying to see their faces: McVeigh "glared into the room, you know, trying to figure out who was who, who was in there and where we were standing at" (25).

When closed-circuit witnesses locked eyes with McVeigh, the effects were profound.

Witnesses certainly perceived that McVeigh was attempting to send a message. Witnesses described McVeigh's expression as either confrontational ("staring" into the camera), "stern," or "defiant" ("I've seen it a lot in my grandchildren. You know that kind of defiance of ah, you can whip me if you want to but it's not hurting."); overtly malicious (a "go to hell" or "eat sh** and die" expression, one that "just spit on us all some more"); and "evil." For one participant, McVeigh's expression was so defiant that a relaxation in his facial posture signaled his death. Witnesses also stated that McVeigh's face registered pride or arrogance, describing it as "triumphant," a "f*** you all, I won" look, one that said "I did the right thing and I'm not sorry" or "I'm willing to die for my idea." Ironically, witnesses further described McVeigh's expression as registering absence, explaining that it was blank ("nothing"), unremorseful ("no remorse"), uncaring ("didn't give a flip," "didn't care"), and free of suffering ("you're not hurting me," "no sign of discomfort," "showed no pain"). Interpreting McVeigh's gaze as communicative had interpersonal consequences from survivors, from angering them to disappointing them to hurting them further or, in one case, enabling forgiveness. As one participant stated, "he died like he didn't care and I cried because of that, because he did not care" (15).

Live witnesses who viewed the execution in Terre Haute did not sense that McVeigh was attempting to communicate with witnesses. Other than perceiving that McVeigh "glared" into the witness room, witnesses were unsure as to whether McVeigh was trying to send a communicative message or what that message would have been.

Witnesses, whether viewing live or by closed circuit, wanted to respond communicatively in turn to McVeigh's gaze. One participant wanted McVeigh to be able to see her, "[j]ust so that he could see that I'm not a monster. That we are not monsters, we're just people too. You know and all we did was go to work that day. That's it" (7). Another stated:

> I would like for him to look at my face and know the pain that I knew he's caused. And to see, you know, to see my daughter and to know that you know, you killed my daughter and her baby. You killed them. You know, yeah, I wish he could have seen my face, because I saw his, I wish he could have seen mine. (28)

Though live witnesses may not have felt that they had an opportunity to communicate their thoughts to McVeigh, this did not prevent them from wishing they

could have done so. This is evident in the remark of one participant: "I wanted to see him when he was in the chair, like that, and I wanted him to see me. Because I wanted him to know that no matter what he did or didn't do, we were going to survive this thing and we would be better afterwards" (25).

Some live witnesses stated that they actually made communicative gestures toward McVeigh, although they believe that he did not see them. Two of the live witnesses who sat in the front row of the witness room brought in small photographs of their murdered loved ones and held the photographs up against the glass during the execution. This was intended as a communicative gesture that simultaneously signaled witnesses' defiance and served as a summons to invoke the victims' presence. As one of the participants described this experience:

> I got in the front row and [another live witness] and I had both had a picture… She had her [child]'s picture and we put them right up to the window. Not that he could see it. It was more symbolic and we had to do it very discreetly because we had guards behind us. But yeah, stuck a picture up there so [sibling's name] could watch it happen. (29)

The other witness stated that "He [McVeigh] couldn't see them, but our sons were right there and her brother was there, watching."

Perceiving an execution to be the exercise of disciplinary power, many participants believed it appropriate for social censure to be communicated through pain. Some witnesses were disappointed to find that McVeigh appeared to die peacefully, and felt that this diluted the execution's punitive message. For witnesses, the rebuke was not merely delivered by taking the offender's life in turn, but doing so with a certain level of violence. His manner of death and its apparent ease was contrasted with victims' terrible deaths and survivors' years of painful physical and mental suffering and recuperation.

Participants commented frequently on the fact that McVeigh's death, however unnaturally induced, visually resembled a "good" death—a peaceful, rapid, and painless instance of passing away while asleep. Other "outdated" methods of execution, participants opined, would have been more painful. A number of participants who witnessed the execution felt that it was not right that McVeigh's death did not involve more suffering; reactions included statements that McVeigh should have been electrocuted, hanged, or mutilated: "Like I said, it's too peaceful. I was very, very sorry that he didn't get the electric chair, like *The Green Mile* where they forgot to put the sponge. No, it was, hanging would have been great. That would have been [a] good satisfaction and [the] electric chair would have been a nice satisfaction. But for a criminal that's committed so many murders it was way too peaceful" (30). Another participant stated, "I think he should be hanged, you know, and in the public… because you know, injection was too easy. You know, even the electric chair execution to me, was too, too easy. You know. But of course that's been outlawed and that didn't happen of course. That was just my point of view… I wanted something severe… " (28).

Witnesses appeared to have been ready to see McVeigh suffer: "He pissed me off cause he didn't show anything. I wanted him to do a little sufferin'. It upset me because he didn't" (5). Another participant remarked, "I don't think it was a

gruesome enough. I, I think it should have been more painful. I think it should have been the electric chair at the minimum…. He just went to sleep. That's the easy way out" (7). Some even wanted complete parity between the deaths McVeigh had inflicted on his victims and the means by which his own life was taken: "to be honest with you I wanted them to blow him up. I wanted him to be hurt. I think he was actually afraid cause it was the unknown but I wanted him to be mutilated like my friends were" (15).

Witnesses were also disconcerted by the fact that it took McVeigh only moments to die and juxtaposed this brevity to the years of suffering: "I was [angry] cause I thought you know this hasn't taken any time to kill him and you know it took hours to get some people out, some people didn't come out alive. You know I have friends that are still getting glass out of their body" (15).

Thus, participants felt that the two communicative messages that they had hoped to see as execution witnesses—the state's punitive message and McVeigh's response to that message—were both weakened by the apparent ease of McVeigh's death. In this respect, the lived experience of witnessing entailed disappointment: "to me it was a letdown because it didn't last long enough. I wanted him to suffer. I wanted him to hurt you know… people that were hurt had to walk, to endure the pain…" (15). As will be seen, however, the most basic communicative message of the execution—that McVeigh had to pay for the his crimes with his life—was successfully imparted, and as the following section will explain, it was this message that participants deemed most significant.

38.5.3 The Execution as Completion

McVeigh's execution was literally a completion—of legal proceedings against him and of his death sentence. Beyond serving as a conclusion in this explicit sense, however, the execution enabled forms of completion that were less predictable and more personal. Completion was a phenomenological theme for witnesses to McVeigh's execution in two contexts: silencing McVeigh and enabling a healing transition.

The importance of silencing McVeigh stemmed from his communicative visibility, which frustrated and angered victims' families and survivors. It was as if rendering him invisible was as important as holding him accountable for his role in the bombing. Seeing McVeigh stifled was a key reason to witness the execution:

> Seeing it through and to know that he really was silenced. That he really is dead. I saw him die. It can't be any of this - we saw President Kennedy on a yacht or we saw… you know, Elvis Presley working at Burger King or whatever, you know. I mean you hear all this crap. And I mean I know I saw him die and I know he is silenced. And that is what I wanted. I wanted him to be silenced and I saw him being silenced. (28)

The silence—of McVeigh and of the media—following the execution was also transformative, bringing peace and respite to both witnesses and nonwitnesses: "when

those people are executed and you know they're *gone*, there, there is a change for the people that were victims of that crime. It's gotta be better. It was for me" (1). For participants, silence was how a sense of completion announced itself: "You know, after someone is executed you are completely finished with every battle you have to fight in that arena. No more McVeigh battles to fight. Don't have to worry about what's gonna come out in the newspaper that he said to some reporter somewhere" (24). Prior to that time, constant media communications about McVeigh had made it impossible for many participants to heal:

> I think I t[old] you the story about the reporter who asked me about closure and why we kept opening up our wounds and my answer to that was I never closed and I never will. As every time you write a story, every time you, you know, question what happened or who was involved and those kind[s] of things, those lesions were always there, period. (24)

Participants connected this post-execution silence to a sense of peace or relief: "It's still death but yeah there was that relief. We don't have to hear his crap anymore. He can't he can't hurt us. He's gone. He got what he deserved… You know he can't write no [sic] books any more, he can't grant no [sic] interviews…" (8). This sensation also was linked to the realization that they had survived McVeigh and would no longer have to share any social space with him:

> Peace. I mean I felt a real peace. Within my self. And again because I'm not carrying him in my head. He's gone. He's out of my head now. And that's more room for [my brother]. To think I have to share room with that son of a b**** with such a nice guy like my [sibling]. That sucks. (29)

There was a perception that had McVeigh remained alive, the silence would have been broken, bursting any fragile bubble of peace that might have formed: "I think that would have been harder because he would've, you would've heard things. Every now and then I'm sure he would've wrote something or talked to a reporter or you know it would have been in your face for life" (8). Thus, forgiveness or healing was only truly possible "[w]hen his mouth was shut" (8). This sense of relief might even have been a physical catharsis: "when McVeigh was killed I felt a huge sense of relief…. I think physically it was a major uh benefit to me, and uh I think spiritually um he's not making headlines, no one is reading his letters in the newspaper,…" (12). This awareness conferred freedom: "all the media packed up, like you know what, we are free, they will not ever come back in this manner again ever, you know, you will not ever get any more pronouncements from McVeigh on anything" (19).

In addition to realizing that McVeigh was finally silenced, viewing the moment of McVeigh's death could enable other especially intense moments of realization and transition. A closed-circuit witness describes her lived experience of catharsis as follows:

> when I was there viewing him and watching him, it was like, all of sudden he came to me, [I realized that] I don't know what's on the other side and when I get to the other side all of this may mean absolutely nothing. I started to think[] of him as Timothy McVeigh, the soul and not Timothy McVeigh, the man and I started praying for him that this is his last chance, this is his last breath and I prayed for him and it just like overtook me…. Um, I was able to let it go, I guess to me that was the true forgiveness…. (21)

38.6 Visibility as the Hermeneutic Key to Understanding the Lived Experience of McVeigh's Execution

Each of these three phenomenological themes—feeling compelled to witness the execution, the execution as a communicative interaction, and the execution as completion—must now be further reduced to their phenomenological essence: visibility. One participant's comment best exemplifies why visibility is the hermeneutic key to McVeigh's execution:

> McVeigh, even though he knew that he was getting the death sentence, he was defiant all the way up to the point where it actually happened, okay? He would speak out to the media. He would tell the families to grow up, it's collateral damage that we killed your kids, you know. And everything that he did was doing nothing but hurting the family members here in Oklahoma. So the only way for us to have any kind of peace was to execute this man. (25)

Each phenomenological theme encapsulates dimensions of visibility and invisibility, highlighting the semiotic significance of McVeigh's condemned body.

38.6.1 Explicating Visibility

It is admittedly easy to reduce visibility to its most literal meaning, a quality associated with viewing McVeigh's actual, observable body. Visibility, however, also penetrates beneath the skin, extending from a body's corporeal presence to its semiotic dimensions, contributing to a rich lived experience of observation. This lived experience expands and extends the body's corporeal presence in physical and temporal space so that it becomes a visual or textual presence that may be accessed in myriad locales and times. McVeigh's body, therefore, was not restricted to a gurney in the lethal injection chamber at Terra Haute since its presence extended to the remote viewing center in Oklahoma City via the closed-circuit image.

Cultural norms govern the propriety of bodies and their visibility—when it is permissible for a body to be visible and to whom and with what properties. These norms vary by social context. In the execution, for instance, rules proscribe who is to see the condemned body and when. Condemned bodies are to be made visible only to a select population that until recently has been limited to media representatives and public officials. Now, this small group has been expanded to accommodate victims' family members. The state intends for the condemned prisoner to remain invisible behind prison walls until the day of his execution. On that day, he will be made visible to this carefully circumscribed body of witnesses for a very brief time. The visibility of condemned bodies during the execution procedure varies from state to state. Some states, such as Ohio, allow witnesses to view the insertion of IV needles into the prisoner's body before the prisoner even enters the chamber. Others only allow witnesses to see the condemned prisoner after all preliminary preparations are completed and the prisoner is strapped onto

the gurney in the chamber shrouded by a sheet. Significantly, visibility is always on the state's terms; if something goes wrong during the execution, the curtains mounted on the witnessing room window are closed, terminating witnesses' view of the prisoner. Visibility occasionally has its surprises. On September 15, 2009, Ohio's attempts to execute Romell Broom by lethal injection failed after the execution team tried for at least three hours to insert an IV while witnesses viewed via closed-circuit television.

In the context of execution witnessing, visibility has another counterpart: noise. "Noise" here refers to the speech of McVeigh and speech about McVeigh, communications that maintained his pervasive presence between his trial and execution. Similarly, the correlate of invisibility was silence; McVeigh's execution ensured his death, thereby terminating both his access to the media and the media's incentive to regard him as newsworthy.

Visibility as noise could be harmful for family members. As the remarks of participant 25 make clear, a condemned prisoner does not lose his potential to wound victims' families until he is silenced, and family members may long for a communicative prisoner's execution for reasons other than accountability. McVeigh was unorthodox in the sense that he did not accept visibility on the state's terms and continued to give many media interviews in the period between his trial and execution. His codefendant Terry Nichols, however, remained silent, and so any desire that family members and survivors may have felt for his execution was limited to holding him responsible for his role in the bombing.

It comes as no surprise, then, that invisibility as silence could be healing. Participants speak of attaining peace and relief when McVeigh was dead and could no longer communicate. Though the lived experience of McVeigh's execution may have included disappointment over its ease and brevity, what ultimately was most significant is the transition to healing that participants assert his death enabled.

38.6.2 Visibility and Compulsion, Communication, and Completion

Having acquired a deeper understanding of visibility, its properties, and its proprieties, we may better comprehend the link between visibility and each of the three phenomenological themes by posing a series of questions. Why was McVeigh's execution visibly compelling for witnesses? What was the importance of rendering McVeigh's communicative gestures visible, and what was their conscious experience? Finally, what forms of completion did visibility enable?

Feeling compelled to witness the execution meant taking advantage of one last opportunity to see McVeigh's actual body, which for years had been hidden away on death row; this desire was strengthened by witnesses' awareness that McVeigh's eternal invisibility through death was looming in the shadow of his execution.

Witnessing satisfied both physical and symbolic needs: a physical need to actually view his last moments and seize one last opportunity to look upon his body, and a symbolic need to watch the exercise of disciplinary power and to see McVeigh silenced. Justice was construed as a performative exercise of authority over McVeigh that simultaneously held him accountable and rendered him invisible; this is very closely linked to completion as this demonstration of disciplinary power was to be the final legal proceeding. The execution as a ritual would wring justice from McVeigh's life force; family members and survivors were unwilling to leave legal proceedings behind until they knew that his death sentence had been carried out. Until there was justice, there was no healing; accountability for McVeigh enabled a degree of emotional satisfaction for family members and survivors.

Comparing emotion to a phantom limb, phenomenologist Merleau-Ponty once asserted that "the impulses arriving from the stump keep the amputated limb in the circuit of existence. They establish and maintain its place, prevent it from being abolished, and cause it still to count in the organism. They keep empty an area which the subject's history fills,…" (Merleau-Ponty 1962, 86). For participants, the trauma of the bombing highlighted an aching and palpably painful loss which "justice" helped to assuage. Bound up in legal proceedings, it was difficult for participants to move on, partially because they were determined to see proceedings through. According to Merleau-Ponty, "to feel emotion is to be involved in a situation which one is not managing to face and from which, nevertheless, one does not want to escape… the subject, caught in this existential dilemma, breaks in pieces the objective world which stands in his way and seeks symbolic satisfaction in magic acts" (*Id.*). While participants could not face the void caused by the bombing, they did not want to escape it until they were sure that McVeigh had been held accountable through the magic act of the execution ritual.

Regarding McVeigh's execution as a communicative interaction was related to visibility on two levels. First, it signaled interest in McVeigh as a communicative subject, a side of him that was alien to witnesses who had only seen his actual body in a few contexts: continually rebroadcast images from his perp walk, at legal proceedings, and during the *60 Minutes* interview. Interacting with another as a communicative subject ideally entails the opportunity to see that person face-to-face to assess his verbal and nonverbal behavior. Witnesses to McVeigh's execution did not merely feel a need to see his last moments; they felt the need to acquire a lived experience of that time period. They sought not only a record of McVeigh's final behaviors, but an orientation to McVeigh as an individual, a deeper awareness of who he was as a communicative subject. The orientation between one's self and another object is of great phenomenological concern; self and object form a perceptual unity that informs the lived experience of that object. As Merleau-Ponty has noted:

> the normal subject penetrates into the object by perception, assimilating its structure into his substance, and through this body the object directly regulates his movements. This subject-object dialogue, this drawing together, by the subject, of the meaning diffused

> through the object, and by the object, of the subject's intention… arranges round the subject a world which speaks to him of himself, and gives his own thoughts their place in the world. (*Id*. at 132)

Although McVeigh was not an object in the traditional sense, his execution marked his transition from a communicative subject into a body, an inanimate object. Moreover, each of McVeigh's behaviors constituted an object in and of itself. As Merleau-Ponty has explained, "[t]he gesture which I witness outlines an intentional object. This object is genuinely present and fully comprehended when the powers of my body adjust themselves to it and overlap it. The gesture presents itself to me as a question, bringing certain perceptible bits of the world to my notice, and inviting my concurrence in them" (*Id*. at185). Therefore, the execution as a communicative event facilitated a subject-"object" dialogue, enabling revision for witnesses, a reorganization of emotions, priorities, and statuses.

Acquiring a lived experience of the execution necessitated personal presence. According to Merleau-Ponty, "sight and movement are specific ways of entering into relationships with objects and if, through these experiences, some unique function finds its expression, it is the moments of existence [which]… links them to each other,… by guiding them toward the intersensory unity of a 'world.'" (*Id*. at 137). The most efficacious way of acquiring knowledge of others is by observing them in person, as a spectator; only then can a subject-object dialogue occur: "It is through my body that I understand other people, just as it is through my body that I perceive 'things'" (*Id*. at 186). Personal presence is therefore a key element of any subject-object dialogue: "[w]hether it is a question of another's body or my own, I have no means of knowing the human body other than that of living it, which means taking up on my own account the drama which is being played out in it, and losing myself in it" (*Id*. at 198).

To witness a gesture is to form a lived experience of its perception: "expressive behavior is "a certain manner of relating oneself to the world, and correspondingly, a style or shape of experience"" (*Id*. at 191). Some semantic elements are inherent in a gesture's physical movements:

> one can see what there is in common between the gesture and its meaning, for example in the case of emotional expression and the emotions themselves: the smile, the relaxed face, gaiety of gesture really have in them the rhythm of action, the mode of being in the world which are joy itself. (*Id*. at 186)

The act becomes the actor's status; McVeigh's gaze constitutes his defiance, and his death embodies his silence.

In addition, the execution provided visual access to McVeigh in a forum where an entirely different type of communicative interaction was possible. In the courtroom, McVeigh had shared the spotlight with many other legal actors, it was very unlikely that he would take the stand, and many of the behaviors that witnesses most ardently desired (e.g., displays or remorse or apologies) had no legal relevance. In the execution chamber, however, the focus was entirely on McVeigh himself, and apologetic or remorseful expressions were entirely appropriate.

Witnesses could both observe McVeigh's behaviors and figuratively "respond." Witnesses probably knew that literal attempts to communicate with McVeigh would be futile; their communicative desires were not pinned on the hope that McVeigh would actually receive and understand their communicative message. Instead, their personal satisfaction was derived from merely performing certain communicative behaviors—staring at McVeigh or holding a victim's picture up against the glass of the execution chamber. It was making the communicative gesture that mattered.

Finally, witnessing to attain a sense of completion signaled the visual significance of McVeigh's death sentence, the scribing of social censure upon his body. It also accomplished McVeigh's invisibility and enabled a sense of emotional completion in the sense of a closing of that life chapter. Ultimately, the ends accomplished by McVeigh's execution proved more important than its means; although McVeigh's death was more peaceful than many witnesses would have preferred, it mattered most that McVeigh was dead. Significantly, this completion was imperfect; McVeigh's death did not bring loved ones back or make injured survivor bodies whole. As Merleau-Ponty once explained:

> Time in its passage does not carry away with it these impossible projects; it does not close up on traumatic experience; the subject remains open to the same impossible future… New perceptions, new emotions even, replace the old ones, but this process of renewal touches only the content of our experience and not its structure. (Merleau-Ponty 83)

For witnesses, an imperfect sense of completion was preferable to no sense of completion at all; although they could never consign the bombing and McVeigh entirely to the past, they could now compartmentalize these toxic events and personalities and thereby unfreeze personal time.

38.7 Conclusion

In summary, the lived experience of witnessing McVeigh's execution was that of rendering "justice" visible and McVeigh invisible. This phenomenological investigation reveals that one's perception of concepts such as "accountability" and "justice" do not relate only to an offender's crimes but also to his personality and level of visibility before and after trial and sentencing. The semiotics of witnessing a condemned inmate's final moments are not reduced to the mere exercise of disciplinary power, but are replete with other forms of meaning, including dimensions of invisibility and silence. "Closure"—appropriately defined not as absolute finality but as peace or relief—is accomplished by rendering an offender invisible. It is likely that the more defiant and visible the offender, the greater victims' families perceived need to witness "justice." There is an urgent need for additional phenomenological research to document the lived experiences of other executions, particularly those

of offenders who commit less sensational crimes and do not have the media cache of Timothy McVeigh.

This research also highlights the degree to which family members' emotional needs are, for better or for worse, tied to the criminal justice system and certain procedural outcomes. The mere knowledge that an offender has been tried, convicted, sentenced, and executed is often insufficient; family members must form lived experiences of these proceedings for themselves. Significantly, the lived experience of witnessing an execution is informed by the family members' expectations that they will be able to witness executions and that executions will be meaningful in the sense of removing the offender as an unwelcome presence in their lives. The visible exercise of disciplinary power is not only to preserve and enhance state sovereignty but also to assuage victims' families' outrage and sense of loss. More so than ever before, the criminal justice system is no longer merely concerned with crime and its punishment, but also with victims' suffering and therapeutic support for those wronged.

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Chapter 39
A Tale of Many Newspapers: Perversion, Criminality, and Scopophilia in the Edison Chen Scandal

Marco Wan and Janny Leung

Abstract This chapter examines the reportage on the Edison Chen sex photo scandal in Hong Kong. Chen, a popular actor and singer, took pictures of himself and his various sexual partners, and the pictures were leaked onto the internet in late 2007 and early 2008. The incident received widespread coverage in the local media. This article examines the construction of Chen's identities as sexual deviant and criminal in the journalistic discourse of this period. It also argues that this discourse tapped into local readers' scopophilia and epistemophilia in its presentation of the event. It concludes by using the Chen case to highlight the need for cultural-legal scholars to scrutinise media representations of issues relating to sexual identity and behaviour.

39.1 Chen as Pervert and Criminal

In late 2007 and early 2008, a number of salacious photographs mysteriously appeared on the internet in Hong Kong. These images showed Edison Chen, a singer and actor well known in his native city and throughout Asia, in the middle of various sexual activities with his partners, many of whom were local female celebrities. Police efforts to stem the dissemination of these images seemed futile: despite their attempts to trace the people uploading the pictures and to close down websites, the images appeared with increasing frequency. It was subsequently revealed that Chen did indeed take the photos himself and stored them on his personal computer. He then sent his computer for repair at a computer centre, where one of the technicians discovered the files. The scandal culminated a high-profile trial in which the computer technician was found guilty of the offence of obtaining access to a computer with dishonest intent.

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A sex scandal involving Asia's top celebrities unsurprisingly generated intense media attention both locally and internationally. On a local level, the Chen incident dominated the front pages of Hong Kong's newspapers and magazines, and the articles were invariably accompanied by doctored images of Chen and his sexual partners. The international media also recognised that at stake was not only a sensational story involving popular actors but was arguably 'the biggest celebrity sex scandal in the history of the Chinese internet' (Watts 2008).[1] As a result, the press responded with nothing short of a 'media frenzy' (Pedroletti 2008).

The scandal had a major impact on Chen: he fled from Hong Kong to Canada in order to avoid the social censure of his behaviour, and he also made a public apology to Hong Kong society at large, in which he vowed to withdraw from the entertainment industry as proof of his contrition. It is noteworthy that though the scandal was a legal event which raised issues of obscenity, negligence, theft and copyright, amongst others, a strictly legal analysis cannot do justice to the incident in its complexity: Chen was forced to leave Hong Kong and to cut short his promising acting career not because of legal censure, but because of the force of public opinion. His absence from the trial of the computer technician who accessed his files can be read as a reminder of the limits of legal analysis; the court did not require his presence because it recognised that he had committed no crime, and this recognition forms a contrast with the public understanding that culpability should be firmly fixed in the celebrity himself.

Given the widespread media coverage of the incident, one undeniable cause of this public opinion which acted as the final arbiter of Chen's fate was the press, for it constituted the main source of the public's information on the scandal. Indeed, the very designation of the event as a 'scandal' can be said to be the result of the journalistic portrayal of the event. The role of the press in mediating the public's access to the reality of the event is complex: on the one hand, it is the social responsibility of journalists to discover the details of events of public interest, a view defended in an editorial comment of *East Week Magazine*, a popular local Chinese-language magazine: 'the task of the media is to expose the truth of the event, to reveal the true face of our celebrities'.[2] On the other hand, it is apparent to students of semiotics that journalistic discourse is never innocent; it plays a role in determining, perpetuating, and regulating the public's understanding of an incident through its reportage. The latter view is eloquently recapitulated in a recent article by the sociolegal scholar Ummni Khan:

> That the media *makes* news, and does not merely relate facts, has been widely posited among media and criminology experts. Newsmakers are not purely fact-finders disseminating the 'truth' to the public, but are implicated in the for-profit business values and structures

[1] For further articles in international presses which reflect an interest in the scandal, see Joanne Lee-Young. Vancouver media abuzz with trial of Edison Chen. *Vancouver Sun*, 24 February 2008; 'Sexy photo gate' mesmerises Hong Kong, China, and sparks police crackdown, backlash. *Wall Street Journal* 15 February 2008; China arrests over Hong Kong sex scandal. *BBC News* 20 February 2008.

[2] We must not mix up truth and falsehood. *East Week Magazine* 20 February 2008, 1.

> that influence, if not completely overdetermined, a hegemonic social construction of reality. (Khan 2009, 391–392)

Khan not only highlights the way in which the media plays an active role in shaping the public's understanding of the reality of an event such as the Chen scandal, but helpfully reminds us that this construction of reality takes place according to the logic of the marketplace: the events are always represented in such a way as to ensure maximum sales for the newspapers and magazines.

This chapter attempts to shed light on the public reaction to the Chen scandal – a reaction which was more powerful than the reaction of the courts in determining Chen's fate – by examining the dynamic of representation at work in the journalistic discourse. In what ways were Chen's identity and behaviour presented to the public, and what is the logic of visuality at work in the encounter between reader and journalistic text? Though not all the newspapers will be cited, this article is an exhaustive study of the major newspapers and magazines in Hong Kong. It covers publications with different styles of reporting, from more conventional newspapers such as the *Ming Pao Daily* to tabloids such as *The Sun*. It also covers newspapers across the political spectrum. The publications examined include *Apple Daily*; *Ming Pao Daily*; *Oriental Daily News*; *Sing Tao Daily*; *The South China Morning Post*; *The Sun*, *Ta Kung Pao*; and *Wen Wei Po*, as well as *East Week Magazine*; *Ming Pao Weekly*, and *Next Magazine*.

The chapter is divided into two parts. Part I examines the ways in which Chen is constructed as both a pervert and a criminal within the journalistic discourse and argues that such constructions of perversion and criminality are achieved through the press's reliance on the authority of other discourses. Given that the public's main source of information on the scandal was the press, the analysis of such representations contributes to our understanding of why Hong Kongers so readily regarded Chen as a sexual deviant and a law breaker. This section draws on the work of Michel Foucault because the notions of discourse and power most usefully highlight the interplay between journalism, law, medicine, and education in the current context. In particular, it aims to move beyond the traditional canon of Foucault's writings by drawing on his newly translated lectures on abnormality given at the *Collège de France*. Part II deploys Sigmund Freud's notion of scopophilia to investigate the logic of visuality at work in the coverage of the scandal and argues that the press ironically places the readers in the same spectatorial position as the person whom they condemn.

The reportage on the Chen scandal can be said to influence the public perception of the event in two ways: first of all, it presents Chen as a sexual deviant or a pervert, and secondly, it presents him as a criminal who has violated the privacy and the bodily integrity of the female celebrities. Even a rudimentary glance at the Chinese-language newspapers reveals the first dynamic at work: the popular press repeatedly designates him as the 'pervert of his generation' or 'the pervert of a thousand years'. Moreover, there are also calls for him to publicly explain his 'special interest' in the bedroom.[3] Finally, newspaper articles about Chen often associate his penchant for

[3] Voices call for Edison Chen to be arrested. *Apple Daily* 11 February 2008, A1.

taking photos during sex with forms of sexual behaviour conventionally categorised as abnormal, such as bestiality.[4] This insistent journalistic portrayal of Chen's behaviour as a form of perversion is curious because taking pictures of one's sexual partners is emphatically not constructed as a form of abnormal sexual activity in psychiatric discourse. The current definition of paraphilia states that a sexual activity would only be classified as abnormal if it involved nonhuman objects, children or non-consenting persons, or the suffering or humiliation of oneself or a partner, none of which applies to Chen's behaviour (Halgin and Whitbourne 2003, 231). The journalistic discourse is therefore at odds with the construction of perversion in psychiatry.

The assumption that Chen's action is tinged with criminality also underpins the reportage: in the midst of the scandal, the *Apple Daily*, the most popular Chinese-language newspaper in the city, published an article with the headline 'Voices calling for the arrest of Edison Chen', and the article itself is an exposition of various bloggers and protestors who believe that Chen should be imprisoned because of his behaviour. In the words of one protestor, 'If you are aiming to arrest the culprit, why not arrest the one who took the pictures? Why allow him to hide behind his lawyer?'[5] This public reaction is curious if one remembers the exact nature of Chen's action, which was to take pictures of himself with various women of adult age with their consent. Such an activity emphatically – and obviously – does not constitute a criminal offence, and it is strange that the press would portray it as such so readily.

More significantly, the representations of sexual deviancy and criminality are interlinked; the underlying logic seems to be that Chen's behaviour ought to be regarded as illegal because it is perverse. This linkage between the two concepts can be interpreted as a manifestation of the meshing of sexual and criminal identities which Foucault highlights. As he underscores, the discourses between madness and crime, between psychiatry and the law, and between perversion and criminality are always connected, for there exists a dual medical and judicial system which allows the law to draw on expert medical opinion to turn madness into crime. Foucault argues that this dual system leads to a 'power of normalisation' whereby behaviour that does not conform to social conventions is branded not only as a form of perversion, but as a form of illegality (Foucault 2003, 42). When Chen's deviation from sexual behaviour was exposed, it was easy for the press to sensationalise the story as one of illegal behaviour even though Chen's behaviour was permitted by the law. The reportage reflects Foucault's insight that the pervert and the criminal are easily imagined as two faces of the same person.

So how does the press represent Chen as a pervert and a criminal? By what mechanism of power does the journalistic discourse influence the readers' conception of Chen's identity and behaviour? To understand the construction of Chen in the press, it is necessary to deploy an 'analytics' of journalistic power by examining the ways in which this journalistic discourse interacts with other discourses to

[4] Gillian Chung twice attempted to kill herself. *East Week Magazine* 13 February 2008, 38–41.

[5] Voices call for Edison Chen to be arrested. *Apple Daily* 11 February 2008, A1.

determine the means and outcomes of representation (Foucault 1998, 90). When placed within a Foucaultian framework, it becomes evident that one way through which the press constructs Chen as a pervert and a criminal is by *appropriating* other discourses. In other words, the reportage shapes public understanding through a strategic reliance on the authority of other discourses, including those of medicine and education.

An article in *East Week Magazine* provides an illustration of this appropriation of medical discourse. The piece is an interview which the magazine conducted with a professor of psychiatry at a local university. 'Expert says that Edison Chen is sick', runs the headline; it is printed in bold and is accompanied by a subtitle in the form of a Chinese adage cautioning that 'It is best to cure an illness at an early stage' and that 'the male lead [Chen] should take heed!'[6] The prominent headline together with the use of the catchy adage already creates within the mind of the casual reader the impression that Chen's behaviour is indeed a form of sexual illness, and the article exploits this impression to the full by suggesting that Chen exhibits symptoms of narcissistic personality disorder: self-aggrandising behaviour, an obsession with success, an unreasonable belief in one's superiority, a constant need for praise, a constant need for special treatment, a tendency to humiliate other people, disregard for his peers, a strong sense of jealousy, and the demand for gratitude from others.

Foucault cautions against an uncritical reliance on psychiatric or medical opinion because of its complicity with the juridical apparatus's attempt to define abnormality: he notes that our society is caught in 'an immense process that has still not come to an end; the process that enabled psychiatric power centered on illness within the mental asylum to exercise a general jurisdiction, both within and outside the asylum, […] over the abnormal and all abnormal conduct' (Foucault 2003, 134). Foucault's warning is a reminder of the need to treat the authority of medical discourse on purportedly abnormal behaviour – in this instance, an erotic interest in photography – with caution, and this warning is doubly relevant given that the expert opinion is presented to the reader through another layer of discourse, the reportage. A close reading of the article, of the kind which students of semiotics are trained to do but which the causal reader is unlikely to attempt, shows that the news article in fact frames the discourse of the medical expert in a way which recontextualises his words and distorts their meaning to exaggerate the initial impression of Chen's perversity.

The professor of psychiatry says that 'people who derive pleasure or excitement from humiliating other people are in danger of being diagnosed with narcissistic personality disorder'.[7] There is no evidence that the female celebrities depicted in the photographs felt humiliated or debased at the time the pictures were taken. On the contrary, they fully consented to being photographed and at no point in the scandal was their agency questioned. Moreover, the use of the epithet 'in danger of' highlights that the diagnosis is not complete and that it would be premature to

[6] Expert says Edison Chen is sick. *East Week Magazine* 13 February 2008, 50–53.

[7] Expert says Edison Chen is sick. *East Week Magazine* 13 February 2008, 50–53.

designate Chen as a deviant. The incompleteness of the diagnosis is further underscored when he notes that a person would only be regarded as ill in the clinical sense if 'he is focused solely on his own gratification and neglected the feelings of others' (Id, 51). Again, there is no evidence to show that Chen disregarded the pleasure or the feelings of his partners. In fact, when one reviews the factors required to diagnose Chen with narcissistic personality disorder, there is little evidence that they would all apply to Chen. Finally, the expert himself emphasises that 'an exact diagnosis requires an in-depth understanding of the subject's psychological state' (Id, 53). A close reading of the text shows that the psychiatrist is in fact hesitant to characterise Chen as suffering from any form of mental illness; he repeatedly insists on the need for further information on the subject's psychological state and lists symptoms which he does not exhibit. However, the reframing of his words within the article has the effect of removing such crucial self-distancing and recontextualises them as evidence of Chen's sexual deviancy.

A similar tactic is deployed in the left-wing newspaper *Wen Wei Po*: one headline reads: 'Behavioral expert analyses Chen's bizarre interests', and the body of the text paraphrases this expert, who condemns Chen's behaviour by comparing his attitude towards his pictures to a hunter's attitude towards his prey.[8] Over three quarters of the article is devoted to this opinion, and it is not until we reach the end of the article, when the readers have been exposed to prolonged discussions of Chen's apparent perversity, that we get an alternative opinion: another psychologist notes that the desire to capture one's sexual prowess in pictures is 'a very natural thing' and is 'completely understandable', thereby undermining the opinion of the previous expert. However, this latter section is given little narrative space. Even though the tone of the reporting is one of objectivity and neutrality – nowhere is the journalist's own opinion explicitly articulated in the article – the text subtly but effectively portrays the actor's behaviour as abnormal by devoting greater narrative attention to the figure who favours perversity and sidelining the figure who stresses Chen's normalcy.

The press also appropriates medical discourse through the presentation of Chen as a subject with a case history. The politics at work in the construction of a medical case is again highlighted in Foucault's lectures: in his discussion of Henriette Cornier, a woman in nineteenth-century France who was convicted of murder despite an apparent absence of motive, Foucault shows that the law relied on medicine's construction of a case history in order to convict a person on the basis of her identity rather than on the basis of a specific act. In the case of Cornier, the facts of the defendant's life were rearranged and re-presented in the name of objective medical knowledge so that 'symptomatologies, nosographies, prognoses, observations, clinical files, etc.' combined to create the profile of a mentally deranged person who should be removed from society (Foucault 2003, 118). The construction of a case history therefore operates as part of a process which designates a new category of 'abnormal' people as distinct from those who are 'normal'.

[8] Behavioral expert analyses Chen's bizarre interests. *Wen Wei Po* 5 February 2008, A4.

Such a process of categorisation through the establishment of a case history is at work in the reportage on Chen. In the midst of the scandal, a number of newspapers and magazines ran special features on Chen's life, and what is intriguing about these articles is that they almost invariably present his upbringing in teleological terms, so that his childhood and teenage years are revealed as precursors to the final adult perversity, and isolated facts of his family background are put forward as explanations for his supposedly transgressive behaviour. These features in effect present the reader with the complete case history of Chen.

East Week Magazine again serves as a case in point. The headline reads: 'An exposé of Edison Chen's path to perversity', and next to the headline is a picture of Chen which, in context, arguably takes on the quality of a mug shot. The subheading underneath explicitly states that Chen's '"unique behaviour" and his complicated family background are not unrelated'.[9] The article begins by noting that Chen was often teased by his sisters as a child: the readers are told that they repeatedly called him a crybaby when he was little, and their attention is drawn to one particular incident in which one of his sisters refused to allow him to buy an ice cream. Such early encounters with women are described as 'formative of the behavior of "the pervert of a generation"'; the implication is that such teasing by the women of his family as a child constituted the first step towards his objectification of women through photography as an adult (Id, 55). Unremarkable family squabbles are therefore re-presented as the first step towards perversity and criminality. Similarly, his parents' divorce is presented as a form of trauma which purportedly sheds light on Chen's later transgression: 'his parents' separation was the greatest blow to Chen, and even as an adult he never managed to fully recover' (Id, 54). In this quasi-clinical light, Chen's sexual behaviour is recast as a form of working through, the repetitive and persistent act of taking pictures appear as a way for him to come to terms with a childhood trauma. The point to be made is that the divorce is an event which is distinct and unrelated to the behaviour for which he is socially condemned, yet the reportage forges a link between the two and by doing so depicts the latter as a symptom of mental maladjustment. This link is reiterated when the narrator notes that 'as a child who grew up with a group of women around him, Chen is used to dealing with members of the female sex and is well trained in their ways'. His early upbringing as a child is thus retroactively construed as a latent stage of his later perversion.

In addition to his family background, his behaviour as a teenager is also interpreted in a similar light. Chen tells the *Ming Pao Weekly*:

> I've done a lot of bad things, things that upset my parents. I developed some bad habits between the ages of ten and nineteen: I ignored my parents, I played truant at school, and I would come home at five in the morning even though I was told to be back by midnight.[10]

Such acts of teenage rebellion are narrated by Chen himself, and the direct discourse gives the impression of objective reporting. Yet this confession is presented

[9] An exposé of Edison Chen's path to perversity. *East Week Magazine* 13 February 2008, 54–58.

[10] Remembering his wild days: Edison Chen's confession of contrition. *Ming Pao Weekly* 2 February 2008, 82–87.

as a first step towards his final sexual deviancy, so that individual acts become depicted as part of the case history of a type of individual who is likely to become a deviant. The logic is that someone who would play truant at school, go home late, and ignore his parents would unsurprisingly end up as a sexual transgressor. In other words, just as Cornier's past actions were retroactively put together and interpreted as evidence that she was the type of person who would kill, so that 'her act [of murder] is already present in a diffused state in her whole life', so Chen's past actions are seen as developments in the personality type of a sexual deviant, so that *his* act (of taking erotic photographs) was also already present in a diffused state in *his* whole life (Foucault 2003, 124). This is a classic instance of the situation in which 'one is a potential subject for medicalization as soon as one is naughty' (Foucault, Michel 2003, 150).

Chen's love life is also recast as a 'cause' of his sexual deviancy. The readers are told:

> [Chen] had a girlfriend when he was 15, and the relationship was a devastating blow to him [….] All of a sudden the girl said to him that they were only "best friends". *That broke his heart and made him lose all confidence in friendship and in love*. *As a result*, between the ages of 17 and 19 he refused to date. He preferred to hang out in bars, indulged in one night stands after getting drunk, and his sexual attitudes became increasingly lax'.[11] (my italics)

The construction of Chen as deviant takes place through the blurring of fact and speculation here. The end to the relationship is presumably a fact, but the sentence that follows ('That broke his heart and made him lose all confidence in friendship and in love') is nothing but the narrator's speculation of the event's impact on Chen. However, nothing in the text signals this shift from fact to speculation, a signalling which could have been easily achieved by punctuation or by a shift from direct to indirect discourse. Instead, the tone and the style of narration remain constant, so that the break-up's purportedly traumatic impact is presented as part of the actual development of events rather than as a bridge which the narrator himself establishes between Chen's past love life and his current behaviour. The narratorial intervention is particularly apparent in the last sentence of the paragraph cited: the use of 'As a result' represents the point at which the narrator establishes a cause-and-effect relationship between the present and an unrelated event in the past, and the final comment about Chen's increasingly lax sexual attitudes again moves the reader closer to the final sexual behaviour for which Chen is condemned.

Chen's other love interests are presented in a similar way, and the fact that he dated women of different nationalities – an otherwise unremarkably fact – is again set in the context of the erotic photography and presented as a stage towards perversion. The narrator notes:

> His past girlfriends include a black American, a white girl, a Korean girl, as well as Chinese girls living in Vancouver and Hong Kong. Even before he reached adulthood, his relationships were already internationalized, and his "expansive love" spread all over the world (Id).

[11] An exposé of Edison Chen's path to perversity. *East Week Magazine* 13 February 2008: 54–58.

The willingness to enter into relationships with girls of multiple racial backgrounds is here construed as a form of sexual excess, and the implicit stigma in the Chinese expression for 'expansive love' underscores the idea of a lack of restraint (an effect which is perhaps lost in translation). The implication is that non-Asian or Westernised-Asian girls are perverse object choices, and that a person who indulges in his desire for them would unsurprisingly end up engaging in socially unacceptable sexual practices. By reconstructing distinct incidents in Chen's life as a teleological development of the character type of a sexual deviant, the narrator can conclude that, based on his analysis, it is 'obvious' that Chen would end up as an outcast and a transgressor (Id).

The interaction between discourses is not limited to the press's appropriation of the authority of medical discourse. The reportage also makes use of educational discourse in its representation of Chen. Throughout the period of the scandal, the reportage in Hong Kong gave prominent place to educators who were concerned about the impact that the exposure of Chen's behaviour may have on children. As Richard Dyer notes, stars and celebrities are 'supremely figures of identification', and Chen's purported deviancy was regarded as a threat to the psychological development of the younger generation (Dyer 2008, 99). As in the case of the reporting of the views of medical experts, however, the way in which the views of educators were framed and presented was also problematic. There is no transparent window into the minds of the educators. Instead, the press puts the educational discourse to use through the technique of contrast: by juxtaposing the values propounded by educators and schools with values supposedly held by Chen, it sets up a binary opposition between the morality of the former and the immorality of the later, between normalcy and abnormality, between acceptable behaviour and perversion.

A representative from the Society for Family Values makes the following comment: 'There is a need for schools to bolster their moral education, and parents should take note of this incident and give their children proper guidance'.[12] The reporting of the view of someone who unequivocally accepts the ideology of schools as 'moral' has the effect of presenting Chen's values as its opposite, that is, as immoral. Yet this binary opposition is an untenable one: there is nothing immoral about someone who takes pleasure in erotic photography given that the models gave their consent and the pictures were taken in private, and it is questionable at best whether the ideology of family and reproduction which the schools are asked to propound can be regarded as inherently moral (Lee 2004). In a similar vein, one commentator notes that there is a need to 'increase our efforts to strength sex education and instill a sense of ethics in young people'.[13] Once again, given the clear lack of coercion and the private nature of the acts, it is unclear on what basis Chen's behaviour can be described as unethical; yet the call for educators to instil a sense of ethics in schools immediately and reciprocally identifies it to be so. The press thus portrayed the educators as representatives of the 'rule of conduct, informal law, and principle of conformity', and

[12] Educationalists worry scandal will encourage voyeurism. *Wen Wei Po* 12 February 2008, A3.

[13] Chan Chi Si: a major challenge to the education sector. *Ta Kung Pao* 22 February 2008, A2.

reciprocally defined Chen as a symbol of 'irregularity, disorder, strangeness, eccentricity, unevenness, and deviation' (Foucault 2003, 162). Finally, one educator is quoted as saying that 'there are two things that this incident leads us to reflect upon. First of all, we need to lead respectable private lives. Second of all, we shouldn't place other people's private property on the internet, [because] such an action is not only immoral but illegal'.[14] The notion of 'respectable private lives' also functions to set up a contrast: the sexual preferences and behaviour of the educator is presented as respectable, while those of Chen are, by implication, disreputable. Moreover, the association between Chen's act of photo taking and the act of uploading those photos on the internet by the as-yet-unidentified culprit unfairly tinges Chen with criminality; the comment urges the reader to see the two acts as interrelated through their juxtaposition, when in fact the criminal act is the act of uploading the pictures alone, for which Chen is emphatically not legally responsible.

Foucault's lectures show us that psychiatry and the law, madness or perversion, and crime are always interlinked. In his lecture of 5 February 1975, he sets up a dialogue between the two discourses. Law will say to psychiatry: 'Give me grounds for exercising my punitive power or grounds for not exercising my right to punish' (Foucault 2003, 122). Psychiatry will in turn reply: 'I can show you that there is potential crime in all madness'. Medical and juridical knowledge both 'need' and 'desire' one another; behaviour which is designated as mad or perverse is more likely to be deemed criminal. This insight sheds light on the construction of criminality in the reportage on Chen scandal: by depicting Chen as a sexual deviant who has his own case history and who is condemned by psychiatrists and educators alike, the journalistic discourse also plays a crucial part in constructing his identity as a criminal. This link between the discursive construction of Chen as a pervert and the discursive construction of Chen as a criminal can be seen as one explanation of why Hong Kong society so readily identified Chen as a law breaker despite the fact that he has done nothing illegal. Evidence of the public's assumption that Chen is a criminal is everywhere apparent. The lawyer defending the computer technician who was convicted stated that 'the real culprit is the person who took the photos!'[15] The *Apple Daily* quotes one blogger's comment that 'the person who took the pictures must bear the greatest responsibility', and this comment is echoed by another commentator, who notes: 'Chen is trying to shift the blame onto the person who uploaded the pictures – that person should of course be chastised, but who is the real culprit here?'[16] Most disturbingly, even the Commissioner of Police seems to have forgotten that Chen has done nothing illegal by taking the pictures and seems to take Chen's criminality for granted, and a newspaper quotes him as saying that he would not allow the person who took the photos to walk free.[17] Of course, the fact that these comments were reported in the most popular local

[14] Material from sex photo scandal can be used to teach ethics. *Apple Daily* 9 February 2008, A1.

[15] Police demand explanation from Chen. *Apple Daily* 13 February 2008, A1.

[16] Voices call for Edison Chen to be arrested. *Apple Daily* 11 February 2008, A1.

[17] Commissioner of Police: I will not let loose the person who took the photos. *Apple Daily* 14 February 2008, A1.

papers compounded the process through which Chen's identity as a criminal was established in the social imagination: the more these comments were disseminated in the press, the more easily they became ingrained in the minds of the readers. The journalistic appropriation of the authority of medical and educational discourses created Chen's identity as a sexual deviant and as a criminal, and it was the power of the media, more than the force of legal punishment, which dealt the blow to Chen's career and led to his exile from Hong Kong.

39.2 Reportage, Scopophilia, and Epistemophilia

In addition to the uncritical acceptance of Chen's perversity and criminality on the part of the reading public, one further aspect of the local reaction to the reportage of the Chen scandal deserves attention. On the one hand, Hong Kong society purports to be disgusted by Chen's behaviour and by the sexual explicitness of the photographs. Evidence of such disgust is found readily in the ways in which the scandal is described in the popular press, as well as through more anecdotal discussions with the average news reader: Hong Kongers claim that this incident 'makes us vomit', and that the salacious nature of the images force us to 'avert our eyes'.[18,19] On the other hand, the scandal undoubtedly excited the imagination of Hong Kong society, and the newspapers and magazines undoubtedly followed the event closely because it boosted sales. A recent survey identified the Chen incident as the news event which attracted the greatest attention amongst young people in Hong Kong in 2008, and Chen's name has also become the most popular search term on the internet in China that year.[20] Throughout the scandal, the press boldly reprinted Chen's pictures on their front pages, though with certain body parts blacked out to comply with censorship rules, in order to give the reader a glimpse of the private domain of Chen and his partners. These images were often presented as a single enlarged picture of one of the female celebrities in a seductive pose or as a series of images with both Chen and his partner in the midst of sexual activity. In fact, two magazines were brought before the city's Obscene Articles Tribunal because they could allegedly be classified as 'obscene' due to the pictures reproduced.[21] In other words, the press reprinted the pictures precisely because it knows that readers *want to see the photos* despite their vocal disapproval.

This observation leads to a question. If readers were as offended by Chen and his pictures as they purport to be, then there should be very few people buying these newspapers which unabashedly reprint the images. Readers who genuinely believe

[18] Full se t of pictures to be posted online. *Sing Tao Daily* 9 February 2008, A6.

[19] Expert says Edison Chen is sick. *East Week Magazine* 13 February 2008, 53.

[20] Sichuan earthquake takes second place to sex photo scandal in top ten news items of the year. *Ming Pao Daily* 18 December 2008, A25.

[21] Mags in the clear over nude pics. *The Standard* 21 February 2008. http://www.thestandard.com.hk/news_detail.asp?pp_cat=11&art_id=61867&sid=17694181&con_type=1&d_str=20080221&sear_year=2008. Accessed 14 January 2010.

that such images make us 'avert our eyes' would not want to have those images in their living room. However, the sales figures of the papers soared in late 2007 and early 2008, when the Chen story dominated the front pages. So how can we think about the coexistence of the rhetoric of disgust, the explosion of reader interest in the scandal, and the success with which newspapers sold the story? Is this merely collective moral hypocrisy on the part of Hong Kong society? Or is there more at stake to this curious scenario?

One way of thinking about the scenario is to place it within a psychoanalytic framework and to examine it through the Freudian notion of scopophilia and an associated concept, what one feminist critic has termed epistemophilia (Moi 1989). Scopophilia, or the erotic pleasure in looking, is always intertwined with epistemophilia, or the pleasure in knowing. Freud identifies the onset of the desire to know in early childhood, between the ages of three and five:

> At about the same time as the sexual life of children reaches its first peak […] they also begin to show signs of the activity which may be ascribed to the instinct for knowledge or research. […] Its activity corresponds on the one hand to a sublimated manner of obtaining mastery, while on the other hand it makes use of the energy of scopophilia. Its relations to sexual life […] are of particular importance, since we have learnt from psycho-analysis that the instinct for knowledge in children is attracted unexpectedly early and intensively to sexual problems and is in fact possibly first aroused by them. (Freud 1905, 194)

From an early stage in an individual's psychic development, the drive for knowledge is linked with the drive for visual pleasure; the pleasure from looking is in part derived from satisfaction (however partial or imaginary) of the desire to know. Crucially, both drives are structured by the subject's attempt to understand sexual difference and the mysteries of the origin of life. As the literary critic Peter Brooks notes in his study of nineteenth-century realist fiction and painting, 'the erotic investment in seeing is from the outset inextricably bound to the erotic investment in knowing […] the value given to the visual in any realist tradition responds to the desire to know the world: it promotes the gaze as the *inspection* of reality' (Brooks 1993, 99; original italics). In the current context, one could arguably substitute the word 'journalistic' for the word 'realist': the value given to the visual in the journalistic discourse in Hong Kong responds to the twin desires to see and to know in the consumer of news, hence the endless reproductions of Chen's images on the front pages of all the newspapers and magazines. In other words, the pictures are reproduced as a way of tapping into, and eliciting, the collective scopophilia and epistemophilia of the readers.

However, the textual effect of the reproduction of Chen's images in the journalistic discourse is only part of the dynamic of generating reader interest. This is because the images are not reproduced in their entirety. Instead, the editors ensure that certain body parts are either partially blacked out or are entirely cropped from the images, so that the breasts of the women and genitalia of both Chen and his partners cannot be seen. On one level, such alterations are of course made to ensure that the publications conform to the rules of censorship; the press simply cannot show these body parts without being classified as 'obscene' by the OAT. One can, however, move beyond this surface reading of the blacking out or cropping of the images. Given that the readers' drive to see what Chen has seen, and the readers' desire to know what Chen knows, are elicited by the reproduction of the very same

pictures which Chen took, it follows that the removal of what are arguably the most crucial parts of these images – the genitalia, the body parts which aroused the infant's curiosity in the first place – means that the readers' scopophilia and epistemophilia are not fully satisfied; the editorial work of covering parts of the images means that the readers cannot see all that can be seen, that is, the most coveted visual objects are tantalisingly hidden from their field of vision. In other words, the journalistic discourse draws on the readers' drive to see and their desire to know by showing the images, and keeps those drives in motion by refusing to show everything, thereby sustaining reader interest. Since the twin drives for visual pleasure and for knowledge are not fully satisfied, the readers keep returning to the press in an attempt to find out more about the scandal, to see more of what Chen saw, to know more about what Chen knew. In this way, the narrative strategy of the press maximises reader interest and boosts newspaper sales.

An analysis of a few newspaper articles suffices to illuminate the textual strategy at work. The coverage in *The Sun* on 7 February, 2008 reproduces the pictures in the following way: three sets of images, showing Chen with three different women, are displayed for the reader's visual pleasure. These images are arranged side by side, creating the 'comic strip' effect so that the reader whose gaze follows these images left to right is placed in a position not too different from that of the comic-book reader who follows the development of the story in a comic by moving from left to right of the boxes.[22] This journalistic arrangement of the photographs thus draws on the comic-book convention of temporal narrative development: just as the story of a comic moves forward temporally as the reader follows the images from left to right, so the readers of the news article on the Chen scandal follows the progress of the sexual activity as their gaze moves from left to right (Duncan and Smith 2009). The arrangement of the images therefore invites the readers into the private domain of these celebrities and creates the impression that the reader is seeing the events that happened in the order in which they happened. The presentation of images in the press creates a parallel structure between the readers' viewing experience and Chen's own visual experience by mimicking the linear temporal development of the events in the bedroom. However, the press refuses to allow the readers to see everything because parts of the images are blacked out: we see just enough to enable us to identify the female celebrities and to pinpoint that sexual act that is being performed, but not enough to entirely satisfy our drives to witness and to know. These drives are thus kept in motion without being completely satisfied.

A similar tactic is relied upon in the *Apple Daily*'s coverage of the scandal on the same day. The headline reads: 'Some of the images were taken inside a private residence'.[23] Underneath the headline are a number of images in which the women are either seductively posing for the camera or engaging in sexual activities without looking straight at the lens. Since the headline underscores that the images were taken inside a private residence – a domain normally kept outside the readers' field of vision – the images can be read as functioning as a window into this private residence, thereby

[22] Net friends become real friends and thwart police efforts. *The Sun* 7 February 2008, A2.

[23] Several images taken inside private residence. *Apple Daily* 7 February 2008, A2.

providing the readers with a view of the intimate lives of the celebrities. They are almost invited into the interior space of these figures, a point emphasised by headings such as 'Edison's bedroom' above some of the images. However, once again the view is incomplete: not only are the images blacked out or cropped, they are also quite small and provide a limited vision of the interior space of which the readers seem to stand just outside. It is possible to get a glimpse of various objects inside the rooms, such as a teddy bear, posters, or various personal items, but it is impossible to work out the dimensions or the overall layout of this private space. Once again, scopophilic and epistemophilic urges are aroused, only to be incompletely satisfied.

A further variation of the journalistic strategy entails combining a small image with a long descriptive text. In one set of pictures, readers are provided with an image barely large enough to allow them to identify the female celebrity. However, accompanying these images are texts describing the images so that what the readers do not see is made up for by what they read. For example, a text next to one set of image reads: 'she is wearing nothing but white underpants with black stripes on the side. She pulls down the front of her underpants and places her hand over her breasts; in another set she is sitting on the bed wearing a pink bra'.[24] Even though the reprinted image is too small to provide much visual pleasure, the virtually pornographic description next to it has the effect of recreating the image verbally in the mind of the readers, therefore augmenting this visual pleasure. The readers can imagine for themselves the colour and texture of the underwear or the allure of the partially covered breasts.

A second description reads: 'The picture was taken in a hotel room. The woman in the picture is dressed in black satin underwear and gazes seductively at the photographer. She is wearing bright red nail polish, and her hairstyle is the same as Gillian Chung's hairstyle back in the first half of 2006'.[25] The specification that the picture was taken inside a hotel room again functions as an invitation into the private space of the celebrities. The description underscores the salacious nature of the photograph by highlighting details of the women's body which are usually associated with female sexual availability in the male mind: the black satin underwear, the red nail polish, the long flowing hair. However, such a description takes on a fetishistic quality in that it only places isolated objects or body parts within the readers' field of vision and refuses to offer a full view of the female body; the underwear, the fingers with the red nail polish, and the hair ultimately fail to add up to a coherent image of Chen's sexual partner. Finally, we are told that another woman is 'wearing white lace underpants and has pulled her bra down to reveal both of her nipples. She bites her lower lip and strikes a provocative pose' (Id, A1). Once again, the description supplements the visual pleasure elicited by the image. In both cases, however, the erotic pleasure in looking and in obtaining knowledge are stemmed by the imperfect reconstruction of the actual events: even though the words help to recreate the image in the mind of the reader, the verbal description ultimately – and

[24] Edison's girlfriend Vincy caught in scandal. *Apple Daily* 10 February 2008, A1.

[25] Edison Chen's great act. *Apple Daily* 22 February 2008, A2.

inevitably – fails to allow unmediated access to the scene of sexual activity. The words can describe in great detail, they can supplement the images, but the pleasure of reading cannot function as a perfect substitute for the pleasure of seeing.

What conclusion can we draw from analysing the visual aspects of the reportage within a psychoanalytic framework? When we think about the incident through the lens of the twin notions of scopophilia and epistemophilia, it becomes evident that while Hong Kong readers purport to be disgusted by Chen's behaviour and by his photos, they buy the newspapers and the magazines precisely because they desire to see the pictures, because they yearn to know what happened between Edison and the women. It is therefore possible to conclude that, in a sense, the readers' scopophilia parallels Chen's own scopophilia: ultimately, we are enticed by the reprinted photos because we want to see what Chen saw. Despite our vocal condemnation, we as readers want to be placed in the same *spectatorial* position as Chen.

The analysis therefore reveals the irony inherent in the scenario: the social censure which is ultimately responsible for the disruption to Chen's career and to his exile from Hong Kong can be said to be premised on the same drives as those which underpinned Chen's own interest in erotic photography. Such a conclusion does not necessarily mean that there is a collective moral hypocrisy in Hong Kong society, because this would imply that readers are merely saying one thing but consciously doing another. The situation is more complex than a simple difference between public discourse and private action. What is of significance is the way in which the journalistic discourse successfully taps into the instincts of the reading public through its editorial and narrative strategies and integrates such instincts into the capitalist logic of sales and profitability. The interaction between text and reader therefore takes place on two different levels: not only does the press shape the public's understanding of Chen's identity by subtly representing him as a pervert and a criminal, it also operates on a deeper, psychical level to generate and sustain reader interest to ensure its own commercial success.

39.3 Conclusion

This chapter is premised on the insight of semiotics that reportage is rarely, if ever, innocent: since the press functions as a linguistic mediation between readers and real-world events, the figures and incidents presented to the consumer of news will always be subject to representation. In the case of the Chen scandal, the press tapped into the collective scopophilia and epistemophilia of Hong Kong society and also actively shaped this society's view of Chen by portraying him as a sexual deviant and a criminal.

It is worth rereading Chen's open apology to Hong Kong society in light of the above analysis. When one remembers that Chen is neither a pervert, as it is currently defined in psychiatric discourse, nor a criminal as it is currently defined by the law, his apology seems curiously out of place. Chen begins by stating that he would 'apologize to all the people for the suffering that has been caused' (Id, A1).

The use of the passive voice is significant: *he* cannot be said to cause the suffering by any legal test of causation and so the exact identity of the agent remains vague. He then apologises 'to the ladies and to their families, for any harm or hurt they have been feeling' and to his parents for their pain and humiliation. Once again, it is necessary to remember the culprits are the person who stole the pictures and the people who uploaded them; the person who took them did not commit a criminal act. Chen himself points out that the photos 'were never intended to be shown to anyone. These photos were stolen from me illegally and distributed without my consent'. Finally he apologises to Hong Kong society at large for failing to act as a role model to his young fans: 'to all the young people in our community, let this be a lesson for you all. This is not an example to be set for you'. However, if there is one lesson to be learnt from the Chen incident, it is that one must vigilantly scrutinise the ways in which questions relating to sexual behaviour and identity are represented in the media, for the media directly shapes the way such questions are understood by the public. The free press for which Hong Kongers have fought hard to maintain since the handover in 1997 must not become an instrument for the policing of sexual behaviour and identities. Chen stands as a martyr to a social censure which has, to a large extent, been generated by the power of journalistic discourse.

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Part VIII
Law and Popular Visual Media: In Theory

Chapter 40
Make 'em Laugh: Images of Law in Eighteenth Century Popular Culture

Mary Hemmings

Abstract In the eighteenth century, satire was seen as a liberty and could be expressed as visual popular culture. When aimed at power, satire deflected the taint of treason and sedition through the use of public voice in the name of liberty. Law and its actors stood as juxtaposition to the newly found ideals of liberty. Visual satire was instrumental in shaping the move from exemplary punishment to defining new paradigms of justice through the use of visual metaphor.

40.1 Introduction

The lingua franca of cutting satire in the eighteenth century was indisputably the visual representation of society in popular culture. A still-nascent publishing industry was introducing novels and other books for an emerging consumer market. Although vestiges of illiteracy existed, what bridged the gap for political and social commentary were mass-produced illustrations. Offered for sale to a growing middle class with more disposable cash than ever before, the print shop windows attracted all walks of life.

The underlying themes of these satirical representations reflected society about to experience the profound changes of the industrial revolution. The dissonance between what was perceived as the "establishment" and reality of everyday life provided the inspiration for an emerging breed of commercial artist. Needling the professions was a favourite theme, and among them were the esteemed members of the legal profession.

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The eighteenth century styled itself as the "Age of Reason". Law and lawyers were quick to adopt the sobriety of reasonableness, and popular culture was just as quick to counter reason with absurdity. This chapter examines this relationship through the satirical art of the age.

The scope of this study is limited to mass-produced prints distributed in London during the eighteenth century. London is central to this study because it uniquely represented a society moving on after the Reformation (1661), the Great Plague (1665) and the Great Fire (1666). This study is also limited to prints housed and catalogued at the British Museum. Although other fine collections are available throughout the world,[1] it is the extraordinary description and scholarship of the Stephens and George *Catalogue of Prints* that served as a basis for this study as well as the continued work that is today sustained at the British Museum through its web-based catalogue.[2]

40.2 Eighteenth Century Popular Culture

Popular culture is both a commodity and a form of communication. Bought, sold, traded or bartered, it provides transient entertainment and amusement. Because of its populist appeal, it quickly becomes a part of the social fabric and just as quickly is discarded like thousands of Rubik's cubes, pet rocks and comic books. In the eighteenth century, Samuel Johnson wrote: "the true state of every nation is its common life"[3] and nothing reflects everyday life better than its everyday entertainments. Life in the streets, as in the present time, was a source of endless amusement to artists, none more so than William Hogarth who is noted for his outrageously satirical interpretation of social life. When London was rebuilding after the Long Parliament, pestilence and destruction of its infrastructure, there was a strong sense of "anything goes". Theatre came back after Cromwell with a vengeance, allowing women as playwrights and actors. By 1714, a London about one-fifth of its current size, tallied over 3,000 coffee houses (Stephen 1904). Visiting Bedlam, in London was pastime was also reflected in Hogarth's works. When hangings at Tyburn and other public

[1] See Simon Turner (2004). Collections of British and Satirical Prints in England and America. *Journal of the History of Collection*, 16(2), 255–265.

[2] F.G. Stephens, (4 vols, 1870–1883). *Catalogue of Prints and Drawings in the British Museum. Division I: Political and Personal Satires*; and, M.D. George, (7 vol., 1935–1954). *Catalogue of Political and Personal Satires Preserved in the Department of Prints and Drawings…* (All 11 volumes reissued on microfilm in 1978). Prints cited BM refer to entries in this catalogue.

[3] "The true state of nation is the state of common life. The manners of a people are not to be found in the schools of learning, or the palaces greatness, where the national character is obscured or obliterated by travel or instruction, by philosophy or vanity, or is public happiness to be estimated by the assemblies of the gay, or the banquets of the rich. The great mass of peoples is neither rich nor gay: those whose aggregate constitutes the people, are found in the streets, and the villages, in the shops and the farms; and from them collectively considered, must he measure of prosperity be measured" Samuel Johnson, (1775). *A Journey to the Western Islands of Scotland* (London: Strahan, Cadell, 1775) at 45. Accessed 7 Dec 2009. Göttinger Digitalisierungszentrum. http://gdz.sub.uni-goettingen.de/dms/load/img/?IDDOC=22496

punishments drew enthusiastic spectators, courtrooms were also becoming public theatres as civil litigation became almost as exciting as criminal proceeding.

Publishing became industrialized as it relied on new sources of cheap paper and modernized printing presses. They churned out, for the first time, novels written by Daniel Defoe and Henry Fielding. The sensationalism of novels such as *Moll Flanders* and *Tom* Jones was not to be outdone by outrageous "reference" works such as *Harris's List of Covent Garden Ladies* which enjoyed 38 annual editions.[4] Public interest in sensational trials was fuelled by multi-volume works such as *The Bloody Register*.[5] Literacy rates, especially in the cities were growing (Stone 1969, 101–103). The *Icon Libellorum* (1715)[6] noted that print media and pamphlets not only sustained a growing readership, it provided income for the poor who sold them. It goes without saying that these presses were instrumental in the wide distribution of engravings and the growth of shops that dealt only in the sale of prints as well as "knock-off" paintings. Recent writers have argued that visual popular culture may not have had the impact on popular communication because of limited and unverifiable press runs, but contemporary and other historians have also argued that prints were widely sold and even more widely circulated (Nicholson 1996, 5–21). More importantly, London literacy may not have been very sophisticated, but broadsides, printed ballads and prints did indeed sell very well, particularly if they offered sensationalism.[7] Printed images and words were the topics of communal discussions and exchange of opinions. For an increasingly commercial London, there was more coin, more print and more laughs fi.

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[4] One example: *Harris's List of Covent-Garden Ladies, or Man of Pleasure's Kalendar for the year 1793, containing the Histories and some curious Anecdotes of the most celebrated Ladies now on the Town, or in keeping and also many of their Keepers* (London: Ranger, 1793). Eighteenth Century Collections Online. http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&contentSet=ECCOArticles&type=multipage&tabID=T001&prodId=ECCO&docId=CW3325762697&source=gale&userGroupName=ucalgary&version=1.0&docLevel=FASCIMILE. Accessed December 14, 2009.

[5] (1764). *The Bloody Register: A Select and Judicious Collection of the Most Remarkable Trials for Murder, Treason, Rape, Sodomy, Highway Robbery, Pyracy, House-Breaking, Perjury, Forgery and Other High Crimes and Misdemeanors, From the Year 1700 to 1764 Inclusive* (London, Viney). Making of Modern Law, Trials, 1600–1926. http://galenet.galegroup.com.ezproxy.lib.ucalgary.ca/servlet/MMLT?af=RN&ae=Q4201898646&srchtp=a&ste=14. Accessed 12 January, 2010.

[6] Myles Davies, (1715), *Eikon Mikro-Biblike sive icon libellorum, or, a critical history of pamphlets. Tracing out the rise, growth and different views of all sorts of small tracts or writings, both collectively and singly, in a general and gradual Representation of the respective Authors, Collections and their several Editions, &c. Part. I.* (London, Eighteenth Century Collections Online.) at p. 3. http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&contentSet=ECCOArticles&type=multipage&tabID=T001&prodId=ECCO&docId=CW3304802200&source=gale&userGroupName=ucalgary&version=1.0&docLevel=FASCIMILE.

[7] BM 9476 (1799): Part of Rowlandson's series "Cries of London" no. 3: "*Last Dying Speech and Confession of the Unfortunate Malefactors Who Were Executed This Morning"* shows a woman selling copies of popular broadsides. This was a reminiscent print depicting the brisk trade in "dying speeches" from Tyburn gallows. In mid-eighteenth century, these were published exclusively by Thomas Parker and Charles Corbett.

40.3 Visual Representations in Popular Culture

With the commercialization of printing came the popularization of art. Cityscapes featured graphic symbols such as hanging shop signs to indicate availability of goods and services. By the second half of the eighteenth century, printers' shops became a well-established feature of urban life, and display windows attracted the literate as well as the illiterate. Pamphlets, newspapers and broadsides featuring satirical illustrations and caricatures circulated freely among coffee shops. Capable of being rapidly mass-produced, these paper products provided immediate opinions of daily and political events. Middle-class hobbyists took to building private collections of prints as they could afford them and because they offered cheap reproductions of moral tales produced by artists such as William Hogarth (Nenadic 1997, 203–222).

Early in the eighteenth century, the tension between the "high" church (Tory) and the "low" church (Whig)[8] dominated cultural expression, as politics and religion remained interwoven in the fabric of life. Religion lost its dominant position in everyday life and so too lost its appeal in early satirical illustrations (Stephens/George, xv). Commerce and trade became a more important. Society focused on earning money rather than absolutions from purgatory. Financial blowouts rivalling today's Ponzi schemes were topics of newspapers rather than being topics of sermons.[9]

Erupting onto this scene by the mid-1730s, William Hogarth captured the mood of popular protest and opinion. He provided visual political commentary, but he also capitalized on the effects of political and legal landscape on the lives of the man in the street. In 1736, the Gin Act was introduced to curtail and to tax the sale and distribution of gin. Other illustrators besides Hogarth created satires of imaginary public funerals that were held for "Mrs. Gin" or "Mme. Geneva" (BM 2277; 2278; 2279) to mark her death on September 29, 1736. But it was Hogarth's *Gin Lane* in 1751 (BM 3136) that captures the popular imagination even to this day.

Hogarth was a master of self-marketing, purposely deflating the cost of his satirical prints to reach a broader market (Hogarth and Nochols 1833). Indeed, Hogarth's works were quickly assimilated into to consciousness of popular culture.[10] Hogarth himself was prompted to exercise artists' rights by being instrumental in the first copyright laws governing illustrations.

William Hogarth spent his formative years with his family in the penal "liberties" of the Fleet Street prison where his father was imprisoned for debt. It is no coincidence that Hogarth was particularly ruthless in is depiction of the law and lawless society.

By the mid-eighteenth century, other cartoonists joined the printing surge. These included George Townshend, Matthew and Mary Darly. Mat Darly began to publish

[8] Jonathan Swift, 24–31 May, 1711, In Rictor Norton, *Early Eighteenth-Century Newspaper Reports: A Sourcebook*, "Definition of Whig and Tory", 24 April 2002. http://grubstreet.rictornorton.co.uk/whigtory.htm

[9] Mississippi & South Seas Bubble (1717); also, National Lotteries (1730); Excise (1733).

[10] Describing this phenomenon as "heritage-making", this article describes the wide appeal as well as the reproduction of prints on consumer goods such as bowls, snuffboxes and fans: David A. Brewer, (2000) Making Hogarth Heritage, *Representations*. 72 (Autumn), 21–63. at 25.

in 1756 small postcards of original and reproduced caricatures and sold at 6*d*. They also introduced volumes of satire that were quickly re-edited, reissued and otherwise pirated. It was at this time that the distinction between caricature (political statement) was distinguished from caricatura (a person depicted) (George 1959). This period also saw the introduction of coloured prints (the production of the colouring remains a mystery) & were sold as "6*d* plain, 1*s* coloured".[11]

In the late decades of the eighteenth century, clergy were no longer satirized to the degree they had been. Instead it was politicians and other representatives of the established orders that became the focus of satire. Political figures and established institutions were clear targets, but the rise of self-regulated professions provided irresistible subjects for satire. Lawyers, the administration of justice as well as social lawlessness became a fertile field for artists' cynicism. As professions aspired to respectability, so they too became targets. Lawyers were associated with the devil in satirical prints, and the devil and the lawyer often appeared in elegant collusion.[12] Typically, the lawyers' clients were naïve country bumpkins. Lawyers continue to be associated with the devil, and the typical client remained the country bumpkin.[13]

Smarting from an unsatisfactory legal experience, Lord Abington, in a speech to the House of Lords called his lawyer as well as all other lawyers "pettifogging attornies" and "rotten limbs of the law" (Cobbett 1818). Not content to address the House of Lords, Abington paid handsomely to have his speech reprinted in newspapers. He was sued for libel by his "licensed robber". He was fined £100 and sentenced to 3 months in prison and was charmingly portrayed by Isaac Cruikshank.[14] Famous court cases became a matter of public interest as large damages and reputations were at stake. The exploits of Lady Buckinghamshire and her friends, for example, reached metaphorically absurd proportions in the late eighteenth century.[15]

40.4 Semiotics of Satire

In examining visual semiotics from a historical context, it is necessary to remember that a visual signal in the eighteenth century may have specific meaning to that time frame alone. Consider the modern Marlboro man, a symbol of muscular, sensual enjoyment of a good cigarette in the 1960s. Forty years later, it is that man's lungs and poisonous social behaviour that spring foremost to mind.

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[11] George at 118. Put into perspective, a gallon of decent brandy sold at 6*s* in mid-eighteenth century.

[12] BM 8394: Dighton, *A Lawyer and His Agent.*

[13] BM 8393; BM 9486.

[14] BM 8520; "Diogenes alias A.B. in ton Looking for an Honest Lawyer!!!".

[15] (BM 9079: Gillray, Discipline a la Kenyon) Lady Buckinghamshire cashes in by hosting Faro parties at her home. (BM 8075: Gillray, "Modern Hospitality, or a Friendly Party in High Life"). (BM 8876: Gillray, "Exaltation of Faro's Daughters"); (BM 8879: Cruikshank, Faro's Daughters or the Kenyonian blow up to Gamblers); (BM 8880: Gillray "Dividing the Spoils"); (BM 9078: Gillray, The Loss of the Faro bank or the Rooks Pigeon's); (BM 8878: unknown, Cocking the Greeks). The affair resulted in a flurry of increasingly tasteless satires.

There is something very enduring about laughter which can transcend time. It is because laughter is a visceral human reaction. The political joke is funny because it appeals to the immediacy of everyday life. Over time politics loses resonance as it slips into history. Likewise, visual humour, be it on the stage, or in print, or in other visual media appeals to the eternal love of the slapstick. Reflecting on eighteenth century social history, Mary Dorothy George of the British Museum said: "satire was the language of the age" (George 1967).

Eighteenth century jestbooks were produced, plagiarized and reproduced for an eager market.[16] The market may have been for those with disposable incomes for the consumption of popular and "high" culture, but jestbooks and prints could be resold and borrowed. Printed and even visual jokes could be memorized and retold in countless ways and in countless social situations. Jokes capitalized on physical deformities and disabilities as vehicles for humour. Other vehicles of satire included royalty, politicians, the professions or the Welsh[17] as symbols of mortality, greed, lust, pomposity or naiveté. Deformity, disability, death and punishment were common sights in the eighteenth century and therefore they were not unusual vehicles for popular cultural expression.

Post-Reformation London valued its liberty and freedom of speech. By mid-eighteenth century, London boasted a police force unlike any other in Europe. Whereas Parisians were regulated by French guards and other instruments of government intervention, London's police did not interfere in public spectacles or disturbances. Theatres were not only magnets for the staging of entertainments but also as a forum for public protest and direct appeals to the king. British freedom of the press was remarkable by European standards. An Englishman criticizing a foreign regime could be confident that his works would sell, and sell even better if anyone moved to censure his opinions.[18]

Although satirical caricature was not a new invention, the industrialized marketplace and post-Reformation liberty created an environment for the free exchange visual barbs. Above all, satirical prints were displayed daily for the amusement of passersby. With the use of emblematic symbols and recognizable body features, public personas were skewered just for fun. By the late eighteenth century, printers loaned, for a price, popular satirical prints for evening entertainments.[19]

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[16] For an overview of jestbooks and eighteenth century humour, see Simon Dickie (2003), Hilarity and Pitilessness in the Mid-Eighteenth Century: English Jestbook Humor, *Eighteenth Century Studies*, 37(1), 1–22.

[17] Welsh = Irish, Scots, Newfies or any group that can be used for the point of a joke.

[18] Lord Robert Molesworth (1752) *Account of Denmark*, (Glasgow), Eighteenth Century Collections Online, published a critique of the Danish court and politics. The Danish court insisted on action by William against the author. William refused noting that government action against freedom of speech would result in a new edition of the book with a larger audience, see, Pierre Jean Grosley (1772). *A Tour to London, or, New Observations on England and Its Inhabitants*, translated from the French by Thomas Nugent, 2 v. (London, v. 1) at p. 60–61.

[19] "Faro's Daughters" by Cruikshank (BM 8879) was lettered "London Pub May 16 1796 by SW Fores N 50 Piccadilly Folios of caricatures lent out for the evening".

40.5 Law or Liberty in Popular Culture

How do we see the law in the signs around us and what do those signs represent? Is a judge, a courtroom or a lawyer a symbol of justice or a symbol of the law? Deleuze's differentiation between "la loi" and "les lois" is instructive in how we can perceive the enormous gap between what is "justice" (fairness, equity) and what is common law (judicial equity and precedence).[20] Other critics rely on the medium, in this case, popular culture and look for the "intertextual jurisprudence".[21]

Eighteenth century England cherished the notion of justice that could be found in the common law. Inherent in the common law were ideals of sagacity, wisdom and precedence. The essence of liberty was the judicious balance favouring the everyday man. Thus satirical illustrations as juridical instruments mocked the absurdities of imperfect laws. It has been said that "all effective humor is satirical. All satire is juridical. And all law is vulnerable to satire" (Goodrich 2005, 293–319). In the eighteenth century, liberty was a new found freedom. Law (la loi) represented justice: what everyman considered "fair". The laws (les lois) were an ass because they were politicized and therefore imperfect. This distinction resonates in the satirical illustrations of the day.

40.6 Legal Administration

Magistrates, judges and lawyers provided rich fodder for visual satire. There is a distinction between administration of justice (courts, policing) and practitioners (lawyers hired to present legal arguments). The former are appointed as instruments of the state and are held to a standards of behaviour that reflect, even if imperfectly, justice. The latter are hired by clients to press their interests through the courts or through legal argument.

As subjects of satire, legal actors were depicted as immune to the suffering of others. For example, lawyers overload a carriage and are insensitive to the beating of the carriage horse.[22]

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[20] Nathan Moore (2007). Icons of Control: Deleuze, Signs, Laws, *International Journal for the Semiotics of Law*, 20(1) 33–54. Moore makes the distinction between Deleuze's "la loi" (justice) and "les lois" (the administration of justice). He characterizes the administration of justice as "jurisprudence" as a French verb, rather than "jurisprudence" as an English noun denoting the "theory of justice". In this essay, I refer to justice (as the English ideal of equity, common law, and the current philosophical flavour of "natural justice"). The administration of justice refers to the politics of law-making and enforcement: representatives of the crown (judges, magistrates, etc.), the courts and punishment. Practitioners are those who are hired by the crown or by private individuals to represent their own interests: lawyers.

[21] See William P. MacNeill (2007) *Lex Populi: The Jurisprudence of Popular Culture.* (Stanford: Stanford University Press) for a collection of essays legal themes in popular culture.

[22] 1751, BM 3153 Hogarth: Four Stages of Cruelty.

The suggestion of avarice simmered as a subtext whether the subject was dozing on the bench or drawing up a marriage contract. But these characters did not represent "the law". They represented the established system of law. The object of satire was the potential for human weakness within the established order. Pinpricking the pomposity of representatives of the establishment, whether by the Marx brothers or by Hogarth reveals the failure of the human character to uphold the ideals of the administration of justice and of legal representation.

By the eighteenth century, the privacy of ecclesiastical courts was replaced by the public spectacle of criminal courts. There, administrators of justice emulated the clergy in dress and behaviour. Directly appointed by order of the king, judicial ministers consisted of judges, sheriffs, coroners, magistrates and constables. Judges, by virtue of lifelong tenure exercised judicial prerogative and dispensed mercy in public arenas. Judges were expected to be experts in civil and criminal law but unlike the clergy, judges could be challenged by any one in a courtroom on a point of law as *Amicus Curiae.*[23] Magistrates were required to be resident landowners in counties or city precincts and were able to hear and pass sentence on petty issues as Sessions judges. Their powers were specific to many legislated topics such as alehouses, bastards, candles, coffee, drunkenness, gaming, goals, papists, pewter, riots, swearing and other typical eighteenth century activities.

There were two types of constable: high constables and petty constables for "every hundred" and were by empowered statute. The historical relationship of constables to magistrates was murky even in 1730s. Women were permitted to serve as constables "by virtue of a custom". Constables were required to keep the peace, apprehend robbers and rioters make a "hue and cry" to apprehend felons and ensure that laws against rogues and vagrants were applied. Like everyday police officers, they were also expected to prevent unlawful "gaming, 'tippling', drunkenness, bloodshed, affrays & c" (Giles, 411–421). Petty constables had the power to put into stocks peace-breakers as long as it took to get them to a magistrate or a goal. The Parliamentary Rewards Act of 1692[24] provided £40 to informants and, by the eighteenth century, extended to urban criminals. In addition to private grants, Henry Fielding's Bow Street Runners benefitted from this occasional allowance.

Judges, particularly famous ones, were obliquely used as "studies" in Hogarth's discourse on "caricature". Slyly satirizing the boredom of four courtroom adjudicators, Hogarth used devices such as the Order of the Garter motto in the illustration. He cuts off the second part of the motto to read "shame on him". He also reproduces a favourite Elizabethan motto "always the same"[25] Hogarth's print, styled after his

[23] Jacob Giles (1791) *Every Man his own Lawyer: or, a Summary of the Laws of England in a New and Instructive Method, ….* Dublin: James Moore, at 393. Eighteenth Century Collections Online. Accessed 4 Dec 2012. http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&contentSet=ECCOArticles&type=multipage&tabID=T001&prodId=ECCO&docId=CW3325307559&source=gale&userGroupName=ucalgary&version=1.0&docLevel=FASCIMILE

[24] 4&5 W&M, c. 8.

[25] BM Cat 3662 ; Index v. 3b, p. 1187 "The publication of this print is noticed in "Payne's Universal Chronicle", Sept. 2–9, 1758, p. 182, col. 3, thus, among new works".

painting sold for 1s6d in 1758. The print was noticed by a visiting Frenchman at the time as an example of the audacity of England's popular culture. He commented that caricatures of easily recognized high court persons would not easily be tolerated by government-sponsored policing in other European countries (Grosley 1772). Overzealous judges were also satirized. Judge Elijah Impey was considered for impeachment for having single-mindedly prosecuted a Maharaja while serving as chief justice in India.[26]

Magistrates in the latter half of the eighteenth century were often portrayed as "just ass". For example, caricaturized as a man with the long ears of an ass (BM 6120), the imagery was duplicated in other caricatures and was so popular, it features as paintings within other illustrations.[27]

BM 6122 Judge Thumb; BM 6124 Mr. Justice Thumb in the Act of Flagellation (Ramblers Magazine)

Judicial opinion forms the backbone of the common law, and when that opinion borders on the absurd, satirical cartoons were there to milk the situation for the

[26] BM 7265 Elijah fed by the Ravens (1787). Coincidentally tied to the impeachment proceedings brought at the same time against Warren Hastings by Edmund Burke.7 *(Description and comment from M. Dorothy George, "Catalogue of Political and Personal Satires in the British Museum", VI, 1938) On 12 Dec. 1787 Sir Gilbert Elliot moved six charges against Impey, the first being the "deliberate murder" of Nandakumar. Impey's triumphant defence was made on 4 Feb. 1788 at the bar of the House; on 9 May the House divided against the first charge, and the impeachment was dropped. "Parl. Hist." xxvi. 1335 ff., xxvii. 35 ff., 292 ff., 416 ff. Sir G. Elliot, "Life and Letters", i. 119, 121, 199 ff. Wraxall, "Memoirs", 1884, v. 48–51, 57–63, 100–12. P. E. Roberts in "Camb. Hist. of India", v. 246–7. See BMSat 7285.*

[27] BM 8910, 1796 The Bosky (drunk) magistrate.

benefit of popular amusement. A flurry of satirical prints emerged after Sir Francis Buller pronounced that it was permissible for a husband to beat a wife with a stick no bigger than the width of a man's thumb. The first was published on November 21, 1782, and depicted "Judge Thumb" as street merchant selling thumb-like rods "Here's amusement for a married gentleman". One week later, James Gillray produced the engraving that was reprinted both in colour and uncoloured versions for E. D'Achery, St. James Street.[28] This time, the judge sells his rods "Who wants a cure for a Rusty [sic] Wife? Here's you nice Family Amusement for Winter Evenings!" Finally, another version of the print appears in the *Rambler's Magazine.* This time, Judge Buller takes an active role against a woman (thereby eliminating the husband altogether and dispensing justice/punishment directly against a disobedient wife). He says, "This is no bigger than my thumb". She says, "Would I have known of this before Marriage?" The morale of the story is that beating a woman within the confines of marriage and your own home is acceptable. This time, legal context is shown because a rolled copy of legal commentary (Coke) lies as a roll on the floor: "A Husband may Chastize his wife with a Stick the Size of his thumb".[29] There's no evidence that Buller made the comment at trial nor that early English law commentators made such pronouncements. Public interest was captivated. The satirical aspects of these illustrations suggest that wife beating was not behaviour that was widely condoned.

The *Midnight Magistrate* (BM 3275) illustrates the role of a magistrate in everyday legal administration to negotiate peace rather than secure prosecution (Morgan and Rushton 2003, 54–77). First published in 1754, it depicts a scene in a "night court". It shows that the administration of justice could be done within minutes of apprehension. It also shows that justice isn't always what it seems. The magistrate (or "hireling constable" – "constable of the ward")[30] is a monkey. A lady cat with a broken bottle stands before him and coming into the room is a well-to-do monkey gentleman showing great respect for the assembly. Verses explain that the gentlemen had been accused of breaking lanterns and must pay for the property damage. The cat lady is excused but it was clear that there is some sort of conspiracy between the court and the cat to draw in unsuspecting revellers to pay for already damaged public property.

The office of judge could also represent justice for social good. An honourable judge works for the public good and protects the public interest from financial scams. Chief Justice Kenyon is portrayed by Isaac Cruikshank as a giant with a thresher subduing a rabble of profiteers.[31]

Whereas in the past, freedom of speech during wartime was sacrosanct, by the late eighteenth century, parliamentary legislation sought to limit public opinion on

[28] BM 6123.

[29] More likely attributable to Bracton, see De Legibus et Consuetudinibus Angliae, ed. Travers Twiss, 1878, v. 1 at 47.

[30] Stephens/George, vol. 3b at 922.

[31] An artisan is shown to say "Thank God there is an upright Judge on Earth who will plead the cause of the poor and prevent rich villains from feeding luxuriously at the expense of the lives of the industrious poor" BM 9545.

the grounds that information could be transmitted too easily to the French enemy. The spectre of foreign enemies was used as a toll to erode post-Reformation freedoms. Criticism of parliament was increasingly characterized as libellous, but finding printers and publishers in order to prosecute them met with its own brand of satire.[32] Nonetheless, common law traditions governing the Englishman's right to lawlessness were giving way to laws that would be implemented by the courts.

40.7 Legal Argument: Lawyers

In *Progress of a Lawyer*, the profession of law was seen as a respectable pathway into political life and prosperity. The education and career of a lawyer was depicted as an instructional comic strip in 1795 for young men considering legal and political careers.[33] In order to become politically respected, a young man (recognizable as the former chancellor Lord Thurlow) ought to participate in a debating society, publicly declare that the law and the state are the same and become a respected and vocal member of better coffee houses. Having made an early impression, a young lawyer would debate the reasonableness of the law over the church (by shouting at a local parson). Recognizing that law must be learned, the young man is expected to read the law until he was "stupefied" and, after requisite study, be called to the bar. Once a degree of professional standing is achieved, the world of politics will beckon. The best way to achieve political recognition is to create relationships with those who are well established in the legal and political arenas. As a first step, the young lawyer should "make love to an attorney's wife" and "be sure to tell her you are an Irishman". Then he is to declare to her that her husband is the only honest man on the roll. Once acquainted with the powerful attorney, a

[32] BM 9194 "Legal Mistake or Honest Men Mistaken for Cospiritors" (1798): *Description and comment from M. Dorothy George, 'Catalogue of Political and Personal Satires in the British Museum', VII, 1942.* On 4 Apr., the Attorney-General brought in a bill for the regulation of newspapers, it having been found that prosecutions failed on account of difficulty in identifying proprietor, printer or publisher, instancing the case of the "courier", whose printer was not to be found, while the registered proprietor had severed his connection with the paper. Tierney defended the editor of the paper ("courier") which, Pitt said, "was giving information and advice to the Directory of France". "Parl. Hist." xxxiii. 1415–21. Before 26 Apr., Dundas had received information from France: "The courier is regularly brought over, carried first to the Minister of Marine, … it is then sent to the Central Bureau, and then the paragraphs allowed to be translated into French papers, which are distributed among the coffee houses". "Navy Records Soc., Spencer Papers", ii, 1915, pp. 325–6. The "anti-Jacobin Review and Magazine", Aug. 1798, published a facsimile of the "courier" (for 23 Nov. 1797) directed to the "Ministre de la Marine, à Paris", with the columns containing a report of Moira's speech (see BMSat 9184) inscribed 'à lire' (cf. BMSat 9240). Eight men were arrested in Manchester on 8 Apr. and brought to London, as part of a Committee of United Irishmen, Englishmen and Scotchmen. "Lond. Chron.", 14 Apr., 4 May. See BMSats 8500, 9227, 9240, 9345, 9370, 9434, 9522. Listed by Broadley (attributed to I. Cruikshank).

[33] British Museum. Not described in Stephens/George. 1795. Reg'n 2001,0520.24, print by Richard Newton; pub'd Wm. Holland.

young lawyer ought to be both obsequious and self-promoting to his principle benefactor. An appearance at Westminster Hall provides the opportunity to plead passionately for his first client as well as a public opportunity to support liberal causes such as freedom of the press. Modesty should prevent the young lawyer from accepting accolades for any courtroom victories; and it is important to properly thank the jury for such victories. A good lawyer must be known beyond the confines of the city and working circuit courts that provide opportunities to become acquainted with leading gentry, to plead the causes of oppressive landlords and to rely on their support to first enter Parliament. At this point, it is understood that the young politician can forget all his old friends. Parliamentary success depends on similar balances of pandering, brow beating and gracious acceptance of bribes and offices. Eventually, the prize is at hand, and the legal career is rewarded by a position on the king's bench and the opportunity to "sit down comfortably on the Woolsack".

Yet, not all lawyers could be as successful as this idealized career progression. Many lawyers were reduced to accepting dead animals and farm produce for payment.[34]

Nonetheless the lawyer, like other professions, was subjected to countless satirical jabs. In *The First Day of Term* (BM 3764), there stands a sympathetic working man in his Sunday clothes. He is dropping coins into the gloved hand of a bewigged lawyer holding a case brief in the other hand. The case brief reads: "Gaffer …. vs Ralph Clodpole". On the floor between them, a lies ribboned case file "Began in 1699…". Behind them, the devil throws case files among grasping lawyers. Some are labelled: "Putting off from term to term to Increase Costs"; "So do away by Bullying … Mr. Bother'em"; "Bring Witnesses to Prove What Never Happened"; "Proving an Entire Stranger Heir at Law, £100." One lawyer has a book tucked under his arm: "Practice of Petty Fogging".

In the earlier part of the century, criminals represented themselves at trial, but as the profession expanded, a new breed of criminal barrister appeared. Then, as now, their morality and ethics was suspect in the popular mind. Resembling Archibald Macdonald in judicial robes, he carries a bag of coins, a legal roll titles "Insinuation Against Truth" he carries a reprieved thief on his back and tramples over the prostrate form of lady justice.[35]

Seen as co-conspirators with crooked bailiffs and gaolers, lawyers were shown as unethical participants in the administration of justice.[36] Eventually, crooked lawyers did get caught and were publicly punished as one G. Aylett was pilloried on November 21, 1786 (BM 7071).

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[34] BM 3766, *A Country Lawyer and His Clients*, c. 1776.

[35] BM 7593 *The Old Bailey Advocate,* 1789.

[36] BM 3767 *A Bailiff and Attorney*, c. 1780; BM Undescribed, Reg. 1948,0214.369, *Destruction: A Wicked Attorney's Coat of Arms*, 1794. This is an extremely large poster-size coloured print. The printer made a special note on the poster "It is not Mr. Holland's intention in publishing this print to cast a general stigma on a profession". On a musical note, there are several variations of *A Flat Between Two Sharps* and *A Sharp Between Two Flats* (BM 7259).

40.8 Liberty or Law

Once introduced, in 1715, the Riot Act[37] removed mob action from the sphere of treason into that of a lesser felony of civil misdemeanour. Public protest was no longer an act against the crown, and protest was permitted insofar as private property laws were observed. Thus, we witness the astonishing development of property laws in the period leading to the French Revolution when treasonous sedition became a concern again in England. It was not until after the French Revolution that street protest became severely limited.[38] Paul Langford observed "…one of the greatest ironies of the eighteenth century was the reluctance to impose legal restraints on liberty…The law was supposed to deter by unpredictable example rather than by certainty of detection or punishment" (Langford 1989).

The eighteenth century mob delighted in anarchy regardless of the cause. In the summer of 1749, mobs assembled over two nights in support of sailors who had been robbed in bawdy houses. The mob's fury centred on the home of Peter Wood, where it was believed some rioters were being held against their will. A series of satirical and "factual" illustrations depicts the riots that destroyed the property of Peter Wood in the Strand. Sentenced to death were Bazavern Penlez and John Wilson. Wilson was reprieved, but Penlez was hanged despite strong public condemnation of the sentence.

BM 3036 "The Tars Triumph, or Bawdy House Battery" Charles Mosley, 1749

[37] Act for Preventing Tumults and Riotous Assemblies, 1 Geo. I, stat 2, c. 5.

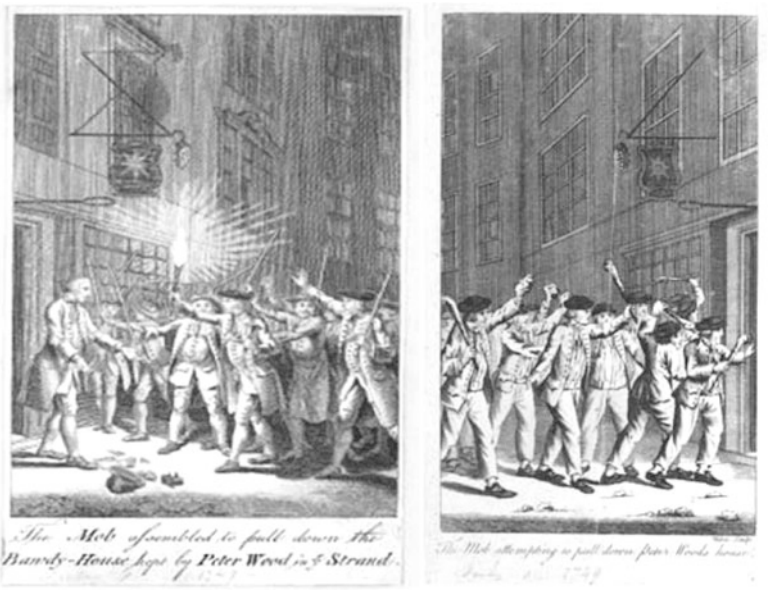
[38] 1795, Act for the More Effectually Preventing Seditious Meetings and Assemblies (36 Geo. III, cap. 8) see Penelope J, Corfield, (1990). Walking the City Streets: The Urban Odyssey in Eighteenth Century England, *Journal of Urban History*, 16:2, 132–174.

A satirical print by Mosley captures the sense of public outrage over the mistreatment of sailors at the hands of unscrupulous prostitutes. In his essay, Peter Linbaugh characterizes the riots as a public protest against bawdy houses (Linbaugh 1975). Looking at the satirized version of events, the crowd is not particularly upset by the idea of brothels in the neighbourhood. Prostitutes stand in their midst unmolested. A central figure in three of these illustrations is Peter Wood. He is a proprietor of the Star in the Strand, but not the owner. At trial, a witness testified that he and his wife were completely untrustworthy. At issue in these events was the theft from the nation's sailors with no view of legal recourse. The inability for sailors to appeal to the law and provide justice underscored the frustration of "honest" citizens. The incident provided the opportunity to voice frustration at laws that, for the most part, was unfair and unjust. The celebratory mood of the crowd enhances the case that liberty was more fun than the law.

In the foreground, we see a young man tearing a bedsheet from a prostitute. This may be a depiction of Penlez whose trial underscored the fact that he had stolen linens from the house. To the left, we see a tall, thin gentleman skulking back into the house, presumably the owner, Peter Wood. It was Peter Wood's questionable testimony at trial before Magistrate Henry Fielding that led to the sentencing. Lying on the ground in front of Wood is an advertisement for Dr. Rock's venereal disease remedy. Being tossed out the window are used condoms, a birch, cosmetics, a cat, a chamber pot, furniture and other bawdy house items.

BM 3035 "The Sailor's Revenge or the Strand in an Uproar" Louis Philippe Boitard

This satirical print shows a more elaborate scene. Several bawdy houses are being relieved of their contents. The mob, still satirized, has much more to say with the benefit of cartoon balloons: "These beds won't wag again in haste" as pickpockets work the carnival crowd. An old woman in the forefront examines a box marked "letters" suggesting a conspiratorial aspect between the proprietor and the rightful owner of the house. The artistic representation of the Strand in this particular illustration attempts to portray the new expansive boulevard. The size of the crowd and obvious mayhem makes this the most believable of the four illustrations.



AN704591001 (not described in Stephens/George) "The Mob Assembled to Pull Down the Bawdy House Kept by Peter Wood in the Strand" Anonymous, 1749. British Museum Reg'n 1880,113.2921. (Crace Collection)

This non-satirical print depicts a more constrained and respectable scene. The mob consists of men wearing good outfits (suggesting the mark of good citizens). Peter Wood has come out of the house, hands outstretched in appeal. There is no sign of looting or burglary. In fact, it is characterized as an assembly, rather than a riot. It depicts a scene of men in liberty begging to differ. Some litter represents disorder but not at the scale of real as well as satirized and real events. There are no flying cats or wigs. There is a discourse here between aggrieved parties. This illustration represents an ideal of liberty. Citizens are capable of settling differences without the intrusion of the law.

AN704594001 (not described in Stephens/George) "A Mob Attempting to Pull Down Peter Woods House". Anonymous. 1740. Reg'n 1880,1113.2922. (Crace Collection)

In this non-satirical print, the men wear sailors' clothes and carrying clubs threateningly approach the bawdy house. They appear justifiably irate. There is no sign of Peter Wood, prostitutes, citizens, cats, chamber pots or bonfires. A sanitized scene, only bits of rolled up paper litter the street. From this scene, we sense that the dispute centred on the sailors' complaints. They appeal directly to the house of the Star in the Strand. Although they menace, there is no sign of a mob or the proprietor. This illustration serves to show that the injustice was the sailors' to carry. They appear menacing, but by virtue of their tidy and identifiable dress, they have every right to demand justice for their cause.

The Penlez riot served as a flashpoint for the discourse between the liberty of communal interests and the presumption of the law as an arbiter of public order. The conflicting images of what really happened on July 2, 1749 show the law as being inherently hostile to the expression of liberty. As magistrate, Henry Fielding found Penlez guilty. Reacting to public criticism, he published a pamphlet in support of exemplary punishment in October 1749. At first, he reiterated that the 1715 Riot Act was not "cruel and oppressive" as described in newspapers and not a danger to liberty: "…and where is the Danger to Liberty which can arise from this Statue?" (Fielding 1749, 3). Nothing in reality was ever more fallacious or wicked than this suggestion: "The Public Peace and the Safety of the Individual, are indeed much secured by this Law; but the Government itself, is their Interest must be or can be considered as distinct from, and indeed in Opposition to that of the People, acquires not by it the least Strength or Security" (Fielding 1749, 26). Fielding's published rationalizations drew the scathing remarks of "Argus Centoculi"[39] in the satirical newspaper *Old England.* Centoculi accuses the dramatist-cum-legalist of using the Penlez case as a publicity stunt for his recent career move as a novelist of that "foundling" book (*Tom Jones*).[40]

The anti-Papist Gordon riots shook London in 1780 gave cause to reconsider the jubilant public embrace of liberty and free expression.[41]

Thus, the ability to drink oneself to death or to slide into degeneracy was the subject of moralized satire. As a society incapable of self-regulating morality, satirists such as Hogarth took on the task of criticizing social excesses. Hogarth's *Gin Lane* provides an enduring commentary on the dangers of liberty without law.

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[39] The identity of Argus Centoculi has never been established; see, Ruthe R. Battestin, (1989). *Henry Fielding: A Life* (London: Routledge) at 429.

[40] Argus Centoculi, (1749). *Old England* (London) November 25, Issue 290.

[41] See George Rude, (1956). The Gordon Riots: A Study of the Rioters and their Victims. *Transactions of the Royal Historical Society*. 6, p. 93–114; and George Rude, (1971). *Hanoverian London, 1714–1808*. (Berkeley: University of California).

40.9 Legal Consequences: Humiliation, Death or a Bit of Both

In *Discipline and Punish*, Foucault characterizes the eighteenth and nineteenth century penal reforms as a shift from the punishment of the body to the punishment of the soul or spirit.[42] Foucault's argument relies on power relationships rather than top-down administrative power. The move to abandon the gallows in favour of disciplinary imprisonment has some resonance in the England of the eighteenth century. Writers such as Henry Fielding questioned the need for unrestrained state sanction of the death penalty favouring the judicious application of exemplary punishment. Visual satirists of the eighteenth century still enjoyed depicting the humiliation of nonlethal public punishment and used the concept of satirical punishment in their work as metaphor.

Foucault relied on French social reality. For him, the scaffold represented the power of the *Ancien Regime* to punish any crime whatsoever because any crime was seen to be an assault against the power of the crown. But in Restoration England, neither the crown nor the judiciary presumed that level of social control. By the time the Tyburn gallows were moved away in 1783, depictions of punishment had become the profitable language of eighteenth century illustration, and metaphors of punishment became the subject of satire.

According to Douglas Hay, law's purpose after the Glorious Revolution was to preserve property and not the rights of man (Hay 1975).

Public punishment was meant to deter similar crimes. It was also meant to increase moral awareness from witnessing suffering of others (Portman 2000). It was enduring entertainment value of punishment that was a subject near and dear to the eighteenth century psyche.[43]

40.10 Public Humiliation

Like a Punch and Judy show, judicially sanctioned public discipline drew crowds for the fun of watching slapstick, discomfort, humiliation and just desserts. Judge Kenyon is once again featured as the avenging judge.[44] His pronouncement that aristocratic

[42] See Michel Foucault, (1977). *Discipline and Punish: The Birth of the Prison*, (New York: Pantheon).

[43] Bernard Mandeville, *An Enquiry into the Causes of the Frequent Executions at Tyburn, and a Proposal for Some Regulations Concerning Felons in Prison, and the Good Effects That Could be Expected from Them* Eighteenth Century Collections Online (London: Roberts, 1725). http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&contentSet=ECCOArticles&type=multipage&tabID=T001&prodId=ECCO&docId=CW105769247&source=gale&userGroupName=ucalgary&version=1.0&docLevel=FASCIMILE>

[44] See previous: Whereas he had been described as an "upright judge" for disciplining profiteers (BM 9545).

gambling ladies ought to be publicly flogged produced a flurry of satirical prints by James Gillray[45] and Isaac Cruikshank.[46] Even though the exhibition never occurred, the conjured satirical imagery proved to be an extremely popular metaphor.

Public punishment was not limited to petty thieves. The pillorying of MP Christopher Atkinson was not only satirized as an event (BM 7070, *Rambler's Magazine*; BM 6838), but it was also much anticipated and satirized before the event (BM 6667 "Anticipation of an Intended Exhibition" December, 1784 by Thomas Rowlandson. Atkinson was actually pilloried 25 November 1785). Both the anticipated event and the actual event depict a subdued approach to the punishment. Christopher Atkinson was indeed guilty of trying to monopolize supply contracts to the Victualling Board during the American Revolution. His actions, however, were not inconsistent with business practices at that time, nor was it inconsistent with the bribery rampant at the Board. In this case, Atkinson, although a convicted perjurer, was also seen as a scapegoat for the dishonest practices of the Board (Syrett 1996, 129–142).

Public punishment was not necessarily total humiliation of the victim. It also represented public protest by honouring the actions of the accused. John Williams, a bookseller was pilloried for distributing a banned John Wilkes publication. An affront to the liberty of free speech, Williams is surrounded by people of quality discussing freedoms as a jack boot hovers incongruously in the sky.[47]

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[45] BM 9079, *Discipline a la Kenyon* (1797). Gillray depicts Judge Kenyon flogging a rather fat and comical Lady Buckinghampshire towards a pillory where two other women are already confined. Following up on his threat (BM 8876) on the information of two dismissed footmen (BM 9078 & 9080). Following up on his threat.

[46] BM 8879, *Faro's Daughters*, three ladies stand in three pillories, two on small low platforms, the third resting the tips of her toes on a pair of stocks, straddling across Fox (see BMSat 8877), who sits between the legs of the prisoner which he holds firmly, his own feet projecting through the stocks, one shoeless and in a ragged stocking; his expression is melancholy. In the foreground (left), Lord Kenyon in wig and gown, seated on the ground, crouches over a bonfire of implements of gaming: a broken table, dice boxes and cards. The three pillories are marked with letters to indicate their occupants. [In another impression these letters have been scraped out] On the left "S" indicates Mrs. Sturt, a middle-aged woman, her head in profile to the right. In the centre, "A" for Lady Archer whose vulture profile is unmistakable. On the right, "C." indicates Mrs. Concannon, a pretty young woman, full face, with bare breasts, who indecorously bestraddles Fox. In the background, a fourth pilloried lady stands in back view, her petticoats looped up and attached to the pillory, exposing her bare posteriors. (Perhaps Lady Buckinghamshire, but not resembling her in figure.) A crowd of spectators is indicated. On the extreme left stands another judge; his profile suggests Loughborough. 16 May 1796 Hand-coloured etching inscription content: Lettered with title and publication line: "London Pub May 16 1796 by S W Fores N 50 Piccadilly Folios of caricatures lent out for the evening"; illegible annotation in ink on the recto at bottom right, on verso: "p: s [?or j]".

[47] BM 4115 "The Pillory Triumphant": *"A broadside on the public support of John Williams, bookseller, who was put in the pillory in Palace Yard, Westminster, for re-publishing number 45 of John Wilkes's 'North Briton'; with an etching showing a open square crowded with people, in the centre, raised on a platform, Williams in the pillory, holding a laurel branch, on the left a scaffolding with a jack boot (representing Lord Bute) and a bonnet, in the right background a coach with the number 45, in the foreground a man holding a money purse; with engraved title, inscriptions, and speech-bubbles, and with letterpress title and verses in five columns, and with four vertical segments of type ornaments". ([London], Sumpter: [1765]). Inscription Content: Price 6d plain or 1s. coloured.*

40.11 Public Death

The eighteenth century witnessed a surge in street theatre. Liberty took on the dimensions of Mardi Gras as they pulled down anonymously owned bawdy houses in defence of their nation's sailors. Mobs also flocked to the spectacle of exemplary punishment. In fact, the procession from Newgate to Tyburn's hanging stage could best be characterized as the song "I love a parade". In his diary, Samuel Pepys was aggravated because he missed a particularly interesting one. Some good parades lasted 3 h. Small businesses arose to sell choice seats on elevated steps for better viewing.

Execution satire lacked the comic flair of the pillory. Whereas humiliation could be stretched into a form of ridicule, the consequences of an execution were hardly a topic of mirth. Execution for treason could be the subject of prints and illustration because they depicted a state acting to preserve itself and its citizens. Therefore, the depiction of decapitated heads at Temple Bar were more instructive than side-splitting.[48]

Hogarth's use of execution enters the realm of exemplary punishment. Illustrating a moral story, the "Idle Prentice" dies, (BM 2989: *Idle Prentice Executed at Tyburn*) while the Industrious Prentice goes on to lead a promising life.

Punishment was theatre even when there was no one to hang. On April 5, 1771, a mob dragged a cart to Tower Hill with seven life-size cardboard cutouts of persons connected to a dispute between Wilkes and the City of London. The cardboard cutouts were torched and a crude drawing of the event was published as a broadside on April 10, 1771. The busy drawing depicts the persons, hands folded in supplication. Around them, the crowd shouts balloon-shaped invectives: "Remember St. George's Fields" (occasion of a mob action); "I think the lawyer becomes a Cart and Halter". Their satirized "dying speeches" were later sold in the streets.[49]

40.12 Public Humiliation after Death

Seen as carnival and street theatre, elements of religious superstition remained in the forefront. The new practice of retrieving bodies for anatomy classes met with popular resentment and eventually led to riots in 1747. In a utilitarian age, dissection was not seen by the authorities as further exemplary punishment but rather as a useful way to advance scientific inquiry. By 1752, the Murder Act was passed to permit the practice of post-mortem dissection and coincided with Hogarth's *Four Stages of Cruelty*. In the dissection scene, the surgeon takes on the appearance of a magistrate overseeing proceedings. Depictions of prisoners carted to prison, or hanged at the

[48] BM 2799, *Satire on the executions of Townley and Fletcher after the Jacobite rebellion, with a view of Temple Bar seen through an arch.*

[49] Stephens/George, v. 5 at 9–11.

Tyburn tree (Hogarth's *Industry and Ideleness*), or having their entrails draped over tables (Hogarth's *Four Stages of Cruelty*) were his subjects, but lacked satirical treatment. Punishment was a solemn and instructional form of entertainment and did not require the razors of a satirist to make a point.[50] Hogarth's final plate, Four Stages of Cruelty (1751) depicts the dissection of dead man with judge overlooking.

40.13 Conclusion

Schopenhauer defined *schadenfreude* as what people found funny about the suffering of others. This could be a pie in the face or a body dancing at the end of a rope. Portman defines this as a form of moral development because the individual takes instruction from the spectacle. In her essay on Hogarth's treatment of capital punishment, Jaffe (2003) focuses on the final two tableaus of Industry and Idleness. The idle apprentice is hanged, and finally the idle apprentice is eviscerated. The eighteenth century is a time when reason, scientific curiosity and utility converge. Criminal bodies can now serve two purposes: public theatre and medical advancement.

But Hogarth's overt moral lessons are restricted to only some of his production. Lacking in the moralizing prints and paintings is the overtly comic or satirical. What Rake's Progress; Four Stages of Cruelty and other morality stories produced by Hogarth did was to humanize the conditions leading to criminal behaviour. The punished body had a story. Thus, by sensitizing the audience, popular culture was used to begin the process of removing the punished body from the sphere of the public spectacle.

Where satire was most effectively instructive was in the skewering of representatives of "legality": politicians, professions and the upper class. Whereas satire could be used to report on a public event such as the pillory, it was not used for in depictions of death sentences. Instead, the gallows were used as metaphor for condemnation and punishment.

Eighteenth century satirists understood that pushing the envelope of law was a form of liberty. For themselves, they insisted on copyright laws even though they regularly and unashamedly pirated each others' work.[51] They became bolder in exploiting tits and bums for better sales and wider (ahem) exposure.

England enjoyed a dichotomy between public and private law unparalleled to anything on the Continent. Public laws ruled the sphere of crimes against the state and crimes against legislated social morals. Theft and larceny were considered a branch of social morals rather than being a crime against the state. Increasingly, the

[50] See Ronald Paulson (1975). *The Art of Hogarth*. (London: Phaidon); and, F. Antal (1952), The Moral Purpose of Hogarth's Art, *Journal of the Warburg and Courtauld Institutes,* 15:3/4, p. 169–197.

[51] For a description of the culture of copying, pirating or otherwise disseminating the artistic work of others, see David A. Brewer (2000), Making Hogarth Heritage, *Representations,* 72 p. 21–63.

state was expected to play a larger role in the protection of personal property as more Englishmen and some Englishwomen claimed more property interests in moveable and immovable's.

Administrative justice was held up to ridicule in popular culture media when it failed to serve and protect the consumers of that culture. In the eighteenth century, that cultural base had become more strident and powerful. The protest ballads of the Middle Ages did not reach far enough or fast enough, unlike the protest ballads of the 1960s. Not every citizen was a brilliant reader. But all could relate to visual images depicting real or metaphorical events. When judges stood for popular interests (Judge Kenyon and the Corn Laws, and to a lesser degree, the upper-class Faro ladies), legal administration received support. On other occasions, state-sanctioned moral laws supporting "reasonable" wife beating were held up to ridicule. Magistrates were sometimes fair, but for the most part, their human greed shone through. Their relationship with lawyers representing the interests state or the private individual were suspect as legal rituals became more complex towards the end of the century.

This was supported throughout this time by depictions of country bumpkins being fleeced by lawyers schooled in the art of pettifogging and courtroom delay tactics. A lawyer was more apt to pocket coin than to successfully represent the bumpkin.

Returning to the tools of legal administration, the rift between "law" and "justice" was a complex subject and relied on innate cultural values of "fairness" in the common law. Visual satire used the law to underscore these cultural values and to uphold the principles of liberty.

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Chapter 41
Judge Dredd: Dreaming of Instant Justice

Alexander V. Kozin

Abstract This chapter explores the phenomenon of "instant justice" at the site of possible worlds. The context that accommodates this task is the English science-fiction comic *Judge Dredd 2000 AD* created by John Wagner and Carlos Ezquerra in the 1970s. The main character of the comic strip is action hero *Judge Dredd*, an officer of the law from a distant postapocalyptic future. Unlike other superheroes who act in the name of justice, *Judge Dredd* has justice in his name. His character is a singular embodiment of police officer, detective, judge, jailer, and executioner. Situated at the imaginary edge between text and image, the comic discloses the symbolic meaning of law and justice as "instant justice." After a preliminary elaboration of this phenomenon with Gilles Deleuze, I offer two additional illustrations of instant justice with Franz Kafka and Fridrich Dürrenmatt. In the last part of this chapter, I theorize instant justice further with Plato, Sigmund Freud, and Jacques Lacan. The main objective of this theorizing is to disclose the relationship between the idea of instant justice and its semiotic phenomenality.

41.1 Introduction

I would like to begin by suggesting that the relationship between comics and dreaming serves as a form of transcendence for law. In turn, this relationship is based on aggression and manifests itself in violence. According to Kunzle, in comics, "the resolution of aggression takes place instantly, by way of symbolic representation, through the figure that embodies the Law" (2001, 8). Furthermore, with Lacan, "The symbol becomes a symbolic object when, in its evanescent being, it finds the

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permanence of the figure. Absence must give itself a name, and when this name is being given, it becomes possible to read the law in its original symbolism, that is, original violence" (Lacan 1989, 72).

As embodiment of the original symbolism, a comic superhero is necessarily an embodiment of the original violence. As such, he or she is also a servant of the law, let it be *Shadow* or *Batman* or *Superman*. Even a supervillain is but a mirror image of a lawman. The superhero chosen for this investigation is *Judge Dredd*, the protagonist of the comic strip with the same name. Before engaging with his character, however, I would like to make a short digression on the language of comics. The need for this aside is stipulated by the main theme of this study, that is, the relation between dream imagery and comic imagery. I elaborate on this relation with Gilles Deleuze.

41.2 The Language of Comics

It is traditionally assumed that comics belong to sequential art (cf. Eisner 1985). Its way of situating images encourages the viewer to read rather than view them. For the comics published as books and journals, the larger sequential order is that of pagination. Pages help organize visual narratives in terms of larger sequential frames. Thematically, these frames can be associated with complete episodes or long stretches of action. Unlike singular comic strips represented as horizontal sequences, reading a page of comics makes one attend to both horizontally and vertically situated strata, proceeding from left to right and then downward and back to the beginning of the page. In contrast to the graphic way of representing text by modern European languages, the preference of imagery over text in comics presupposes an additional narrative strategy. Due to a variety of sizes and shapes, images can be positioned in a stratified manner (see Fig. 41.1). Consider also partially framed images which blend in with the white of the background or "sticker" images which overlap with framed images (see Fig. 41.2).

The direction of reading imagery in comics is zigzag-like, with each individual image presenting a separate point of focus. This technique creates an impression of depth, an effect observable in artistic collages, for example, in those of Max Ernst and Georges Braque. Like dreams, surreal art is fragmented art. So are comics. They seek after an extra dimension and succeed in finding it in self-interruption which arranges imagery in three-dimensional visual patterns.

These surrealist patterns and portrays are reminiscent of those we encounter in dreams. Consider, for example, a particular spatiotemporal organization of dreaming that provides the condition for the rise of symbolic imagery: fragmentation (spatial category) and compression (temporal category). The former is achieved by selecting most relevant images for assembly. The selection adheres to the general principles of thematic coherence and visual cohesion. The simplest way to align selected images on a page is horizontal. More complex kinds of alignment include vertical, diagonal, as well mosaic and collage-like arrangements. In *Judge*

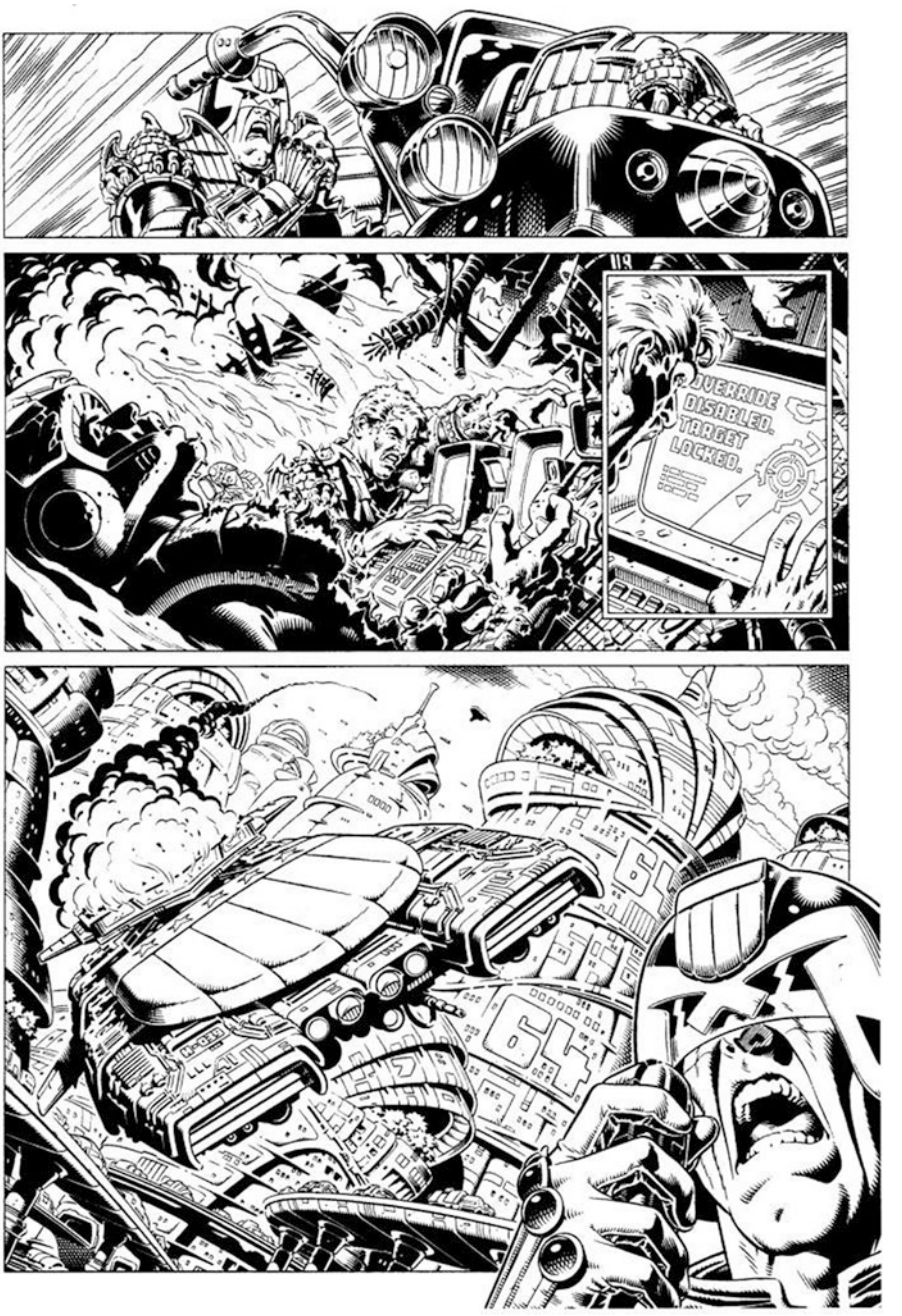

Fig. 41.1 *Judge Dredd*, fragment

Fig. 41.2 *Judge Dredd*, fragment

Dredd, John Wagner prefers to employ mixed imagery. For example, in Fig. 41.1, we can see three vertical columns and an additional insert into the second column. In turn, Fig. 41.2 shows a more complex mosaic-like pattern where the first image

is rectangular, tending downward, while the second, third, and fourth images in the upper part of the sheet do not only have different shapes but also perform different functions, providing an elaboration on the first image and then another one on each other.

In selecting an appropriate alignment strategy, essential is the main theme. The theme determines the degree of fragmentation, compression, and variability of images. Such criteria as intensity of action, interactions between and among characters, and complexity of their biographies help the viewer distinguish between dramatic action, as in pursuing an act which is meaningful in itself and pure action that does not have a clear *telos*. Superheroes in comics incline to pure action. With this emphasis, the storyline is not as important for this subgenre as the presentability of this story in action. The comparison to dreams is apparent. The more vibrant is a particular action, the greater is the degree of its fragmentation. Compression assists the artist by saturating partial images with a surplus of meaning. Likewise, the symbolic of dream imagery fills it with extra meaning. As we can see in Fig. 41.1, partiality and fragmentation are responsible for such features as temporal depth: in reading comics, one must imagine the hidden aspects of this and other images; otherwise, there is going to be little integrity between image sequences. As the smallest unit of the comics, image in comics holds a relatively independent status, especially nowadays when, due to technological advances, colored images have almost ousted black and white imagery and can be viewed separately, for a particular manner of coloration, for example.

The relationship between reading and viewing does not only expose but problematizes the relationship between text and image (cf. Varnum and Gibbons 2001). This relationship is visibly asymmetrical, with the primacy being given to pure image. Indeed, people rarely dream in text, and although when we dream we can hear voices on occasion, these voices often appear as discrete and therefore prophetic, thus carrying a symbolic meaning by and in themselves. Other less outstanding utterances fuse together with the visual imagery in a supporting capacity, giving this imagery a thematic direction. As in other action comics, the relationship between text and image in *Judge Dredd* is organized in favor of image. Here, text bears several functions: (a) representing human speech, (b) producing sound effects, and (c) providing commentary on a particular arrangement of images. From this perspective, we can distinguish among different kinds of text, beginning with the meta text that orients the reader to the spatiotemporal aspects of an unfolding story (e.g., "then," "next morning," "he is in his apartment," "in the meantime," "on the island," "over the next two days"). These comments appear in square frames; they are marked as special text that provides images with several levels of cohesion: personality ("after that, he passed out…"), context ("Judge Dredd was on patrol, when…"), and history ("soon he will meet Draco again"). The next kind of text belongs to the characters; it appears as separate dialogical units (speech turns) delivered by the characters themselves. Dialogical speech is commonly represented by "speech balloons" (see Fig. 41.3).

Due to the scarcity of space, in contrast to the image proper, dialogical speech in comics is compact and densely figurative; the idioms it utilizes tend toward being

Fig. 41.3 *Judge Dredd*, fragment

trite and connotation poor, for example, “Come to papa!” or “Show me what you’ve got, you §$/(%&)!” This tendency also privileges speech not as a dialogue but as performance of basic speech acts, such as threats (“you will never see the light of day, basta!”), commands (“get off my face!”), pleas, and requests (“could you help me, please, please, officer”). Inner speech (“what if these scoundrels never show up? What if this is a trap?”) is also marked by speech balloons. With the help of this feature, the artist updates the viewer on the shifts and turns of events and states of affairs from the characters’ perspective. There are also third-person narrative accounts that expose emotional states by clarifying their relevance for the event (“angry, he drew his weapon” or “she was terrified, but decided to fight”). The final mode of speech represented by comics is transliteration of exclamations (“Wow!”, “Noooo…”, “Whaaaah”). Sound effects are widely employed and can also be of several kinds. Some represent sounds made by animals and other living entities, including aliens (“Grtzra…krkra…”). The other kind delivers ambient noise, for example,

"Whoooosh!" A sound effect can be given by way of a verbal description: "Explosion!" In depicting loud noise, a clear preference is given to homonyms: "Crash!" or "Boom!" A special category is formed to include the sounds of hitting, kicking, falling, cracking, and striking, for example, "Whap!", "Pow!", and "Zok!".

All the techniques utilized for the production of action in comics emphasize the essential element of the medium itself: action. Therefore, reading comics presupposes that special attention be given to certain technical and original features of representing action. Action can be represented within one image or connect images in a series, from the instance of a specific action, such as a spit on the face, to its resolution, such as a dismembered body. The key rhetorical figure for action is synecdoche which can manifest itself in a particular facial expression, body position, or body part that appears to stand for the whole of the unrolling action. Visually, we recognize action when we see movement, that is, receive a graphic sign showing that an action, for example, a falling body or object, is going on right now before our eyes or has just been completed. Consider, for example, an image of a plane which is taking a nosedive. It can be represented by a vertical downfall—unnatural for this kind of a machine—position, as if having lost control, but also, or in conjunction and/or together, by the terrified look on the pilot's face, or in the moment of impact and destruction. The aircraft can also be depicted in full, as if from a distance, or, more often, as an airplane cabin or salon. The background for action in comics is depicted by single and grouped lines, swirls, shades, and other retouching effects. See Fig. 41.4, for example. In this figure, the effect of explosion is depicted by showing an automobile jumping high up in the air with visible signs of destruction caused by explosion: overlapping centrifugal clouds raising up in the air together with the debris of the destroyed vehicle.

It is therefore in action that comics invite us to find the Law.[1] *How shall we understand law-in-action semiotically?* With Gilles Deleuze, I would like to consider action as a virtual object. Virtual object is a sum of the artist's thoughts, ideas, and images that characterizes a phenomenon expressed as an essential theme, in other words, the kind of signification that does not come up to the surface to signify but shows itself in a number of oppositely vectored operations: fragmentation and uniformity, division and consolidation, expression and repression. These dialectical pairs manifest themselves on every level of consciousness, whether real, imaginary, or symbolic. The symbolic level however holds a special place in the work of art as it organizes and presents a coherent composition, a whole that, despite its self- and other-imposed delimitations, such as a frame or printed format, signifies a coherence of motive beyond the real and the imaginary. Some of these collectively assembled significations come prefigured; others emerge from a complex intertextual web that incorporates differently structured signifying elements, including the author's psychological dispositions and personal communication patterns. Regardless of their origin, these should be approached as contributions to the

[1] It must be emphasized that not all comics privilege action to the same extent. For the "heroica" comics considered in this study, this emphasis is however indisputable.

Fig. 41.4 *Judge Dredd*, fragment

constitution of polymorphous objects of art or fiction which, to put it in Deleuze's words, "form the background for the virtual figure to appear and continue as the improbable itself" (1986, 94).

In his study of the semiotic medium of film, Deleuze argued that visual medium were a symbolic system of disclosure *par excellence*.[2] Indeed, it has the capacity to show fundamental structures of experience, such as the originary time, for example. The main function of a symbolic system is production of virtual objects. Here, the originary time appears as a virtual object. The horizon for the appearance of virtual objects is secured by symbolic worlds. These worlds are bound by coherent schemes that bring together different values and lifestyles, in sum, cultural modes of perception and expression. Typically, a symbolic world is a configuration that allows one to make sense of the actual world in the absence of the real. Focusing on the key mode of appearance for symbolic worlds, Deleuze suggests that it should not be manifestation but rather displacement that lets symbolic worlds be given to us. By virtue of the operation of displacement, symbolic worlds have an obscure relational structure; it is indicative: "Symbol does not refer to any present" (Deleuze 1994, 105). Displacement occurs at the intersection between two convergent series, the real and the imaginary, instigating transformations of both historical terms and imaginary relations. From this perspective, law is a quintessential symbolic world. Moreover, it always appears as incomplete and therefore unfulfilled: "Law lacks identity. It is always partial. It is always a past and a part" (Deleuze 1994, 102). In other words, it is a world that does not stop dreaming.

I would like to take the above theoretic for a focused reading of *Judge Dredd*. At the end of the analysis, I hope to be able to (a) describe "instant justice" as a semiotic phenomenon, that is, "dream of law"; (b) identify the role of image in creating this phenomenon; and (c) show the place of instant justice in a semiotic theory of law. In the next section, I would like to describe instant justice in terms of the three realms designated by Lacan: the imaginary (whole series), the symbolic (episodic series), and the real (actual series). The direction of the reading is therefore from the absent presence to the presentifying absence.

41.2.1 Instant Justice: The Imaginary

> For almost thirty years, one man has dominated the British comic scene. He is judge, jury, and executioner, a merciless far-future lawman delivering justice with an iron fist on the mean streets of Mega-City One. He is Judge Dredd (*Judge Dredd. The Complete Case Files 01. 2000AD. Year: 2099–2100*, Back Page).

"Judge Dredd" is an imaginary entity created by John Wagner (1949–) and Carlos Ezquerra as a science-fiction comic strip. Originally published in 1977 in an annual,

[2] The same can be said about comics whose modes of "graphiation" resemble those of cinema as is argued by Baetens (1996).

the comic was syndicated by the *Daily Star* (1981–1988) and then by *Metro* (2004–2005). In 1990, *Judge Dredd* appeared under the heading of *The Judge Dredd Megazine*. In 1995, the comic strip was turned into a film starring Sylvester Stalone.[3] During recent years, *Judge Dredd* has experienced a revival with the first complete edition of the original series published by Gutenberg Press between 1999 and 2008. The main character of the comic strip is action hero known only as *Judge Dredd*. He lives in the distant postapocalyptic future in Mega-City One, where he polices, apprehends, judges, and executes criminals. The city of the future is depicted as a period fantasy. Its architecture is a mixture of wasteland, elevated highways, and gated residences. *Judge Dredd* has an apartment in such a residence. Surrounded by various gadgets of the future (electronic arms chair, TV wall, and food generator), Judge spends his free time studying law and contemplating cases. Even at home, he does not have much rest. Emergency dispatches find him there at all times. Perhaps, it is for that reason that he never changes his appearance, whether at home or work. The reader always sees him dressed up in the uniform of the judges of the future: a long tightly fit helmet with dark glasses attached to the radio headset and a full bullet-proof body costume. Importantly, he almost never takes his helmet off, thus remaining faceless. Just like the law itself, he symbolizes the blind hand of justice (it is quite hard not to read irony in that association). He is clad as both a knight and an athlete, and in addition to his natural abilities (strength, agility, stamina, and speed), he possesses various weaponry of mass destruction which is attached to his body (e.g., poison darts, titanium nets, and rocket launchers, as well as more conventional laser and taser guns). This uniform makes *Judge Dredd* look like a mechanicon, a cyborg of sorts. He also reminds us of an earlier superhero *Rocketeer*, the predecessor of *Superman* and *Spiderman*.[4]

When patrolling the streets on his futuristic motorcycle (which does not only possess weapons of mass destruction but is equipped with a complicated system of person identification), *Judge Dredd* spends time fighting crime, dealing with personal vendettas, bringing evil characters down, exposing conspiracies against the state, and protecting the weak and the innocent. In these responsibilities, he reminds of many similar superheroes. However, there is an irreconcilable difference between *Judge Dredd* and *Superman*, for example. Not only because one is a hero by profession, and the other is an amateur vigilante, but also because they have different powers: magic is not in *Judge Dredd*'s arsenal. Judge Dredd is an official superhero and a superhero official. His powers are not fantastic and therefore impossible; rather, they are quite probable but, at the same time, supreme. Delimited to the probable realm, his supreme powers nonetheless connote excess. *Dredd* is obsessed, impatient, creative, and intelligent. At the same time, Wagner makes it clear that his

[3] It could be significant for the above argument if we trace out the intersemiotic relation between the two media; here, I would like to note only that the film functions as a simulacrum of the comic.

[4] For a concise description of *Judge Dredd* as fictional character, his history, life, and adventures, see Barett (1995).

character is not a thinking cop but an actor. Action defines and motivates his character as the primary, defining, and only characteristic.

Unlike *Wolverine* or *Shadow* or *Batman*, *Dredd* is not called on to do someone else's job. Nor does he have a secret life. He is not torn between two or more identities. He does not have to hide his true self that would otherwise contradict if not negate his fictional personae. If anything, his one and only identity is way too obvious, too direct, and unequivocal. Moreover, he makes sure that people take him literally, albeit predominantly in a command mode. His actions do not betray ambiguity or hesitation. In comparison to the aforementioned counterparts (*Angello* or *Hellboy*), *Judge Dredd* is legitimately the Law and therefore morality. He does not need to justify his actions. He performs them for the public, not unlike at an actual trial whose efficacy is founded on explicit presence. A faithful servant of law, *Judge Dredd* is presented and presents himself as an uncompromising presence of the Law. He does not chase criminals in order to capture them and then pass them on into the hands of justice. His kind of justice is held firmly in his own hands. It is conducted amidst the ordinary, and it is carried out instantly on the spot. The badge that says "Judge" indicates an open disposition for the necessary actions, and those might include a wide range of possibilities typically united between and among other servants of law. In the comic, the idea of instant justice is pushed to the extreme, creating a possible world where the detective, the judge, and the executioner come together to deny the possibility of due process and, with it, the ground condition for justice. The decision that cuts through the legal process from the point of investigation to the point of sentencing leaves the defendant no possibility for defense and thus no justice. The dream of instant justice is the dream of no justice. Without justice, the Law reigns supreme, unhindered by meddlesome processuality.

Bordering upon the impossible, the world of *Judge Dredd* provides a commentary on the cultural meaning of law and justice. In the next section, I would like to draw this meaning out by turning to a specific case that illustrates instant justice in action, as it were.

41.2.2 Instant Justice: The Symbolic

For illustration, I suggest Case 4 from the first volume of the series. The case is remarkable for several reasons. First, it is the first mystery case (the first three episodes of the series introduce the main character and the general context, e.g., the character of the judge, the city in which he lives and works, some of his colleagues); second, Case 4 instigates a new function for *Judge Dredd*: in addition to chasing, catching, and sending dangerous and murderous criminals to the Devil's Island, which is a self-controlled prison, with Case 4, the judge gets involved in investigating, adjudicating, and executing cases. Thus, we may say that, starting from this case, the comic received a narrative, and its history begins in a proper sense. Allegedly, the story for the case was inspired by the 1976 remake of *King Kong*. This story also contains the first appearance of Maria, the judge's Italian housemaid. Although her

Fig. 41.5 *Judge Dredd*, fragment

official status is that of a cleaning lady, in the comic, Maria serves more as a mother figure for the Judge, nagging him about his ascetic life, complaining about his diet, and even proffering unwarranted advice on his cases.

Case 4 takes place in the year 2099. It opens when *Judge Dredd* receives a home visit from Mr. Kevin O'Neill, who presents himself as a salesman from Sensor-Round, a virtual world maker (see Fig. 41.5). At the time of the visit, *Judge Dredd*

is depicted relaxing in his high-tech armchair, leafing through a book aptly titled "LAW." Maria makes the following comment in that regard, "You never enjoy yourself, Judge. All you think of is law, law, law." There is little doubt that *Judge Dredd* is indeed obsessed about his work. Even his dreams are reflective of that obsession. Unsurprisingly, he does not care about the products offered by Sensor-Round: projections of dreams created at the company's studios. In order to control and modify these dreams, the company offers "a simple control." *Judge Dredd* detests this offer (just like he despises any control that does not have anything to do with the law) and commands the salesman to turn it off. Then he throws the pestering man out. There is irony in that rejection because Judge's major responsibility is to exert control over the order at a place that can only project one: John Wagner's future world is beyond repair; it will never be orderly. The opening of the Sensor-Round case sets up the mood for the upcoming work of justice: violence in the name of law.

This formula is definitional for *Judge Dredd* who did not have to resort to violence as a means of communication, not in this case, anyway: the salesman would have walked out by himself after having been asked to do so. The same aggressive attitude manifests itself in the discursive counterpart of action: *Judge Dredd* regularly makes sarcastic quips, stylized as police jargon. This jargon is a typical marker for certain fictional action heroes, especially those in the roles of police detectives, such as *Dick Tracy* or *Don Blech*, for example. With this behavior, *Judge Dredd* emphasizes a particular feature of his professional orientation: unceremonious arbitrary force can be enacted as both discourse and physical action. Violence is also inscribed in his fictional self as an interactional and problem-solving preference. He is designed to be forceful, to communicate force, just like the actual Law, although in reality, law never does it as nearly as quickly or as effectively. Procedural safeguards prevent law from getting out of hand. In contrast, in the face of *Judge Dredd*, law is not just forceful and crude; albeit quick thinking, it is expressly non-empathetic. As a way to relate to other human beings, empathy must be excluded by law that desires a pure signifier, a neutralizer of horrible dreams.

The second frame page introduces the actual murder case for this file. The murder is that of the president of Sensor-Round. The peculiarity of the murder is indicated in the mode of the murder: "the body is ripped apart…as if by some kind of monster" (see Fig. 41.6). The theme of violent dismemberment bodes well to dream imagery. Dreams are not just partial, as was indicated by both Freud and Lacan; their edge is jagged. Then, two more murders are committed: two other top executives of Sensor-Round are brutally killed in a similar manner and also by some "ferocious monsters." A few sequences later, the reader sees these monsters in action: they are an enormous flesh-eating plant and a gigantic octopus. Time passes by, 4 days to be exact, when Judge Dredd receives a transmission indicating a positive voiceprint recorded at all the three murder scenes: the main suspect turns out to be the curator of the Special Effects Museum, O'Neill, who allegedly programmed robotic monsters from the museum for murder. At the museum, amidst the destruction caused by the mechanicons, *Judge Dredd* finds the curator. During a face-off at the museum, O'Neill reveals that he hates Sensor-Round for bringing "stupid dream

Fig. 41.6 *Judge Dredd*, fragment

worlds into stupid apartments." His grudge is nostalgic: people must have real nightmares, no matter how violent and destructive. By reality, the perpetrator means interactive materiality of the dream, its allure by the actual world, the world of action, and therefore finitude.

In the meantime, O'Neill sends his favorite pet *Krong* onto *Judge Dredd*. Another standoff ensues. After running his motorbike into *Krong*'s mouth, thereby destroying both the monster and its master, *Judge Dredd* makes the following conclusion: "All your dreams were crushed, O'Neill, but with dreams like yours…who needs nightmares?" The meaning of this epitaph is intentionally ambiguous. *Is Dredd saying that O'Neill made the best nightmare by making the imaginary nightmare real? Or is he saying that O'Neill did not have dreams? Isn't O'Neill simply another tragic figure who attempts murder to protest the effects of his nostalgia?* The juxtaposition between the killing monsters and the imaginary dreams made by Sensor-Round is essential for the understanding of the uncanny which can be by far more fatal than the fantastic.[5] Dreamworlds do not break into people's homes; if anything, they make their way into our conscious lives by offering a substitute for the everyday

[5] "The fantastic lasts only as long as a certain hesitation," according to Todorov (1973, 41). It includes two genre modalities, the marvelous and the uncanny. The difference between the uncanny and the marvelous is articulated by Todorov as follows: "the uncanny can be explained by rational means while the marvellous cannot be explained by any means known" (ibid.).

perceptual realities. Mechanized monsters too substitute for the reality, yet they are not supposed to act on it. When they do, however, they too, just like dreams, are being controlled by the uncanny. The literal and the metaphoric line up in a semantic juxtaposition that symbolizes a decisive victory of the dreamless law over bad dreams and their reality.

As represented by *Judge Dredd*, the Law is exceptionally narrow-minded yet superbly efficient. This combination, the simplified procedure and the effectiveness of execution, endows the law with the kind of prowess that it wishes to accomplish in its regular course. The law that makes itself accessible and at the same time announces that its main pursuit is a speedy trial follows the same dream. In this dream, *Judge Dredd* appears as a metonymic figure brought from the unconscious by the operation of condensation; as a result, all the roles of the legal apparatus coincide in a single person. In this configuration, the distance between investigation, decision, and execution is minimal as it is performed by the same actor. Such a symbol of justice cannot help but be single-minded, that is, its efficiency is not omnipresent but is contingent on the point of view. In Case 4, this point of view gives us the Law as an event and activity of destruction, where destroyed are the nightmares and their instruments in the real world. *Dredd* does not just kill O'Neill, he destroys him. Here, destruction reveals its dual meaning: literal and metaphoric. Destroyed is the murderer, his mechanized accomplices, and, with them, past memories and anticipations of a certain future. In Case 4, instant justice demonstrates that, at the time of exception (e.g., monsters attacking humans), it executes by violence (e.g., destroying the monsters and their mastermind). This point brings us to the real place of instant justice.

41.2.3 Instant Justice: The Real

Where can we find a place that approximates the real world of O'Neill? Is there indeed the kind of dreams that supercedes the fantastic and emerges as a symbolic reality. According to Tzvetan Todorov, we find these worlds "at the edge of the extreme" (1997, 23). And although, in his case, the justice of concentration camps can only be called the suspension of justice, it points to an essentially same phenomenon: the imaginary real becomes symbolic when the three realms no longer collaborate, but push the symbolic forward and designate it as the primary mode for interpreting existence. The juridical language defines this mode as the state of exception. Unbeknownst to ourselves, we encounter this state at all times, but tend to associate it with a particular constellation of events. An airplane that crash lands on an uninhabited island, wiping out an entire adult crew and leaving only a handful of teenage boys alive, spawns a primitive social order, as it was created and described by William Golding in *The Lord of the Flies*; this order is reflected in the dream of the Law that collects itself on the basis of the most primitive human desires. This tribal organization emerges as a state of exception, although its creation is nothing but arbitrary. The first and most natural instrument of law on that island is spear, a primordial symbol of violence.

This clearly indicates the key condition for an imaginary world to become real: there are exceptional circumstances when the previous state of order does not hold or, as is the case with Golding, does not exist yet, but it has already been dreamt as a state of exception which is declared immediately and finitely by way of force, which means suspending all the taken-for-granted rights and privileges, including the moral and ethical ones. One does not have to turn to fiction for similar examples: the history of colonialism is replete with the instances of legal exceptionalism (e.g., in the early nineteenth century, the Indian territories were officially proclaimed by President Jefferson to be the place—by that time largely explored—outside of the reach of justice as the law of the growing nation conceived of it). The horrifying scenario by Golding is not that much different from the state of exception that can be encountered in a confined space of a socially sanctioned incarceration, for example, Devil's Island (a maximum security prison) or it can be realized externally, even voluntarily, for example, at the request of a disaster-hit country, as was the case most recently with the US troops providing law and order in the wake of the January 2010 earthquake in Haiti.

Reterritorialization or remapping is another process that invites instant justice. A liminal territory, where the legal procedure does not hold, is a fertile ground for the suspended law. It is sufficient to note the armed conflicts in Yugoslavia, Moldavia, Tadzhikistan, Sudan, Abkhazia, Mozambique, Kosovo, and some other contested grounds that emerged in the post-Soviet space. All of them realized the dream of instant justice by eradicating the undesirables (a lot of times their own former neighbors) with immediate and deadly consequences. Importantly, instant justice does not have to be maintained by a super power or be conducted in an arbitrary fashion by a drug lord or a group of rebels. Martial law is a most common symbol of instant justice under extreme but still regular circumstances such as the time of a civil war or a social breakdown, as was the case of "military communism" in the postrevolutionary Russia. Importantly, instituted on temporary grounds, martial law does not replace regular legal processes; it runs its course in a parallel fashion with the so-called regular courts. In that case, the state of exception would apply only to some criminal acts. For example, similarly to the crimes listed in the infamous Major Crimes Act instituted by the US Federal Government on the Indian Territory in 1885, the first Soviet Government identified specific acts that would be administered only under the jurisdiction of Special Executive Committees. Those included murder of Soviet officials, kidnapping, sabotage, banditism, concealment of food and firearms, theft of common property, etc., all finite, decided on the spot, without any exception and without any possibility of postponement or appeal.

By bringing the imaginary world of *Judge Dredd* to the real state of exception, albeit in different facets, the comic discloses the sliding of the signifier under the signified. The latter emerges later at the edge of the apocalyptic extreme, that is, the end of time as we know it, on the margins of the central order. There the dream of performing justice accepts violence as the preferred tool for exercising the Law over any other legal practice, showing violence as its essence, regardless of its executor: the ordinary, the judiciary, the military, or the criminal. On the margins of legality, the law is not just a simulacrum. It still belongs to a community, and there is still the dividing decision involved. However, when shrunk to the point of instant determination of guilt or innocence,

the Law becomes another, that is to say, the primitive self. At this point we should shift our focus and inquire into the foundational status of instant justice. Two examples, Franz Kafka's *The Trial* and Fridrich Dürrenmatt's *Traps*, should solidify the notion of instant justice at the site of literature. In turn, Plato, Sigmund Freud, and Jacques Lacan should provide this phenomenon with a proper theoretic.

41.3 Dreaming of the Law

> Someone must have been telling lies about Joseph K., for without having done anything wrong, he was arrested one morning (Kafka 1925, 1).

In his novel *The Trial*, Franz Kafka confronts us with a phantasmagoric experience of the Law.[6] At first sight, it seems that this experience belongs only to the novel's protagonist, Joseph K., who becomes a subject of the Law without having committed any illegal act; he is apprehended either by mistake or by association: the exact reasons will never be known. The legal process confuses and mystifies K. Instead of the courtroom, attorney's office, or jail, he is sent to seek justice in closets, kitchens, and attics. In response to his queries, K. receives a standard explanation: "Our officials, so far as we know them, never go hunting for crime in the populace, but, as the Law decrees, are drawn toward the guilty and then must send us out as warders. That is the Law" (Kafka 1925, 6). This kind of law does not summon the would-be-guilty in order to establish the facts of their wrongdoings in the court of law; instead, the legal procedure is transferred onto the every day, abandoning the safety of its elevated privilege. There, in the midst of the ordinary, the Law seems at a loss, habitually breaking every rule of its own, sinking deeper and deeper into the mundane world of seduction and lies, dark backrooms, and dusty corners, where it hides, swarming and rustling, making itself at home "in the absence of reason" amidst "imbecility and travesty" (ibid., 72).

The juxtaposition between sense (rationality) and nonsense (madness) in the novel points to another divide which is drawn between the conscious and the unconscious. It is at the border between the two regions that Kafka sets up a meeting point that brings together the delirium of the Law and the shadows of K.'s consciousness. Of course, as a normative structure, law never lurks in the shadows. Its very essence, as Plato explained it qua the myth of Prometheus, lies in escaping the darkness cast upon the natural world by reaching out to the light of day. In *Prometheus*, Plato explains how the weak and naked people, who got deceived by Epimetheus, moved Prometheus to give them the gift of fire which he stole from Athena and Hephaestus, his divine patrons. Stealing fire for the people was only half a gift—Prometheus understood that in order to become properly human, the earthlings had to possess "the ability of living together by community" (Plato 1997, 321d).

[6] When referring to law as an object of this examination, I use Kafka's capitalization, "the Law." More generally, I use either "law" or "the law," depending on the immediate context or cited material.

Yet, he failed to steal that gift for the people and, as a result, was severely punished by Zeus, who made him witness a slow demise of the humans. Although still able of hunting and cooking and surviving in caves, they did not live well: "as soon as they got together, they began to trouble each other because they did not know how to live together" (Plato 1997, 322b). Finally, Zeus himself took pity on the human race; he sent Hermes to give people what they needed most to survive and prosper: goodness (*agathon*). However, the divine goodness could not be granted to the humans in its pure form, for, once separated from its divine origin, it would be deprived of its original potency. And so Zeus gave the humans justice (*dikē*) and shame (*aidos*). Shame made men stand upright and thus distinguish themselves from animals. In order to maintain themselves in that position, however, the humans had to create a legal institution, a symbol of their newly acquired posture. As an edifice designed to uphold human dignity, law itself had to be elevated in order to exert a certain force upon the ordinary, giving it a particular structure and order, such as rules, courts, and procedures, but most importantly, the judiciary who were entrusted by the Law to shape the ordinary in its own image.

In his 1996 essay "The Force of Law: The 'Mystical Foundation of Authority'," Jacques Derrida attempts to deconstruct Plato by launching two claims against his "community of the just": (a) we do not experience law as truth but as force, and (b) force is neither good nor bad, but only effective. In order to support his claims, Derrida elaborates on Kafka's short text "Before the Law," which originally supplemented *The Trial*. According to Derrida, the story addresses "the undecidable, the incommensurable, the incalculable […] discourse on justice" (1996, 926). Thus, Derrida suggests that force shall not to be understood as "purposeful and unbridled destruction" but rather as "differentiation" as in differentiating between form and formation, persuasive and rhetorical forces, and acts of affirmation and disconfirmation (ibid.). He subsequently asks, *What does it mean to have force as the ground condition for law?* His answer invites us to consider the possibility that law has no foundation. The force of law is possible only under the conditions of continuous self-reconstitution that takes place by way of reenactment; therefore, law can be experienced only as a repetition of itself. This is the first premise for the concept of force; hence, Derrida's correction to the positivist rendition of law, which tends to mistaken legal rules for the essence of law as justice. The second premise dovetails into the first one: law cannot survive in any other fashion but by reaching out for the matters that do not belong to it, invading the ordinary, creating a semblance of permanence amidst the every day. According to Derrida, it is between the right and justice as the two dialectically related concepts, orders, and practices that law attempts to present its work. The significance of the legal process lies in binding the right (*droit*) and justice (*justice*) into a judicial decision: "Justice as law is never exercised without a decision that cuts, that divides" (ibid., 963).

The uncanny peculiarity of *The Trial* implodes this scenario by refusing to deliver any judicial decision.[7] When it finally comes, there is no need for it any

[7] According to Freud himself, the "uncanny explores the aesthetics of anxiety" (2003, xxliii).

longer: K. has already been doomed; as a matter of fact, the decision on his case was made long before his first encounter with the Law. Potentially comical, this situation does not provoke laughter.[8] A judicial system without a decision is neither inept nor ridiculous. Rather, in the words of Derrida, "it is more frightening and fantastic, *unheimlich* or uncanny, than if it emanated from pure reason" (1992, 199). The uncanny law does not reveal its intentions. It does not have to. In this refusal to announce itself, it resembles a work of art whose meaning exceeds both its structure and its intentions, propelling the reader to the limit where the experience of the self becomes inalienable from the experience of the other. From this perspective, literature and law are both phenomena of transcendence.

Their commonality is characterized by Maurice Blanchot as follows: "the space of literature is bottomless; it swallows whole" (1982, 99). This quote invites us to dwell a little bit longer in the realm of literature; this time, I suggest that we take time with Friedrich Dürrenmatt's novella *Traps*. The reason for complicating this examination with yet another literary exemplar stems from the sheer complexity of the direct encounter between the Law and its subjects. According to Derrida, "the Law is neither a manifold, nor a universal generality […] but always an idiom" (1992, 210). Decoding this idiom is a complicated matter: the Law that hides and sneaks around cannot help but appear defaced, or phenomenologically speaking defaceted. I expect that with the help of our next resource, we will be able if not to give the Law a face but then at least to lift its mask somewhat more.

There is a complementary relation between *Traps* and *The Trial*, and it sits on several suppositions. First, there is a complementarity of genres: novella is not just a smaller or lesser work than a novel; it has its own being. Yuri Lotman traces the genealogy of novella to "a piece of news, or something that is considered as novel"; there is a functional similarity as well: "like a piece of news, novella always deals with abnormality and excess" (1996, 209; *translation mine*). Importantly, novella can be incorporated into a novel without having its identity dissolve. To put it in the Gremasian terms, their relation can be defined as that of *collaborative apposition*. From this perspective, the difference between the two genres turns into a benefit: "novel organizes the world of the reader, while novella adds essential details to his world" (ibid., 210). A close thematic link reinforces the familial relation. Both works approach law from aside, as it were. Both demonstrate that even in that position, law executes its will with the mechanical efficiency. However, the crucial similarity between the two works lies in the mode which conditions the appearance of the Law: whether the Law walks in the slums or shows up at the dining table, it is always a guest of the ordinary. And although in *Traps* the law is not as intrusive as in *The Trial*, it is no less consequential.

The events described by Dürrenmatt take place in the Swiss Alps in a small village where a group of ex-lawmen happens to host a stranded textile salesman

[8] Todorov suggests that in *The Trial*, the supernatural event no longer provokes surprise, as a condition for laughter, for the entire world described by Kafka is utterly bizarre, "as abnormal as the very event to which it affords the background" (1973, 173).

named Traps. After the late dinner, they offer him a game of justice, a mock trial, where the guest receives the role of the defendant. In the course of the game, the salesman reveals certain biographical facts about himself (e.g., it transpires that he seemingly unintentionally set up his former boss for a heart attack by way of having an affair with the boss's wife), and, on the basis of those, he is pronounced guilty and sentenced to death. The atmosphere is still that of a game: much fine wine and food are consumed, and everyone goes to bed in great spirits: "Traps was in seventh heaven, all his desires satiated as they had never been before in all his uneventful life" (Dürrenmatt 1960, 118). The next day in the morning, he is found hanging from the window frame of his bedroom. Dürrenmatt leaves much ambiguity as to the question about what or who could kill the salesman. *Was it a suicide prompted by guilt?* Or perhaps justice caught up with Traps in an extraordinary way after his uncanny judges awakened his conscience, making him realize his utter worthlessness.

However, these questions are much less important than the idea suggested by both works, namely, that justice can strike instantly and inconspicuously, deritualizing and deformalizing criminal procedure to the extent that the line between a crime and the subsequent trial and between the defendant and his or her executioner becomes indistinguishable. The same strike of fantasy erases the taken-for-granted border between the ordinary and the extraordinary: the conscious movement of the mature law to the decision that cuts and divides and the unconscious confusion of the law that does not want to show itself and prefers to hide until it exhausts itself situate the law precisely "in-between." As important for the "in-between" is the mode of presentation: in both works, instantaneous law appears as a dreamlike fantasy. And while Kafka's novel presents us with the dreaming law, Durrenmatt's novella enters to elaborate on the dream of law. In the novel, Joseph K. dreams about justice; in the novella, the same dream becomes Traps' reality, adding drama to an otherwise playful face of the Law. It is this phenomenon that I have defined as "instant justice." So far, it has been theorized only in a preliminary fashion. I therefore wish to theorize it further with Jacques Lacan.

41.4 The Dreaming Law

There are several reasons for turning to Lacan for an interpretation of instant justice. First, according to de Certeau and Logan, "except from Freud's writings (and especially, the most literary among them […] Lacan comments particularly on literary masterpieces […]) the discipline he created remains colored by the 'authority of the poet'" (1983, 25). In other words, Lacan's psychoanalytic inquiry is inclusive of the poetic mode, making his contribution particularly fitting to this examination. Second, Lacan managed to advance or meaningfully and effectively alter all the main ideas of his teacher, Sigmund Freud, particularly, the interpretation of dreams, the role of language for understanding the relation between the conscious and the unconscious, and the significance of symbols for the constitution of an individual

consciousness in both modes, normal and abnormal.[9] The greatest advancement as far as this study is concerned lies in a successful attempt to transfer Freud's key ideas for the subsequent application from a strictly psychoanalytic treatment-oriented domain into the domain of culture at large: "for Lacan, psychoanalysis […] is a theory and practice that confronts individuals with the most radical dimension of human existence" (Žižek 2006, 3). At the same time, Lacan's reformulations of Freud do not eliminate the original discoveries but elaborate and refine them so that they could shed light on a much more complex world than the world of the psyche, namely, the lifeworld. Finally, Lacan introduces a useful corrective to the theme of this project. Not only does he make such notions as "dream," "symbol," and "law" his main themes, he also fuses them into a coherent semiotic system (cf. Chaitin 1988, 39–40). Following the order of exposition established by Lacan in his essays gathered under the title *Écrits*, I would like to begin the recovery of this system with a discussion of dreams and dreaming. With the help of this discussion, I hope to show the symbolic place of instant justice in the social world, in general, and the world of the Law, in particular.

According to Lacan, Freud's major discovery was not the division between the conscious state and the unconscious state but rather his assertion that (a) this division does not replicate the Saussurean division between the signifier and the signified, (b) the unconscious has its own order of signification, and (c) this order is a properly symbolic one: "the symbolic is articulated nowhere better than in the structure of the unconscious itself" (Lacan 1989, 203). In order to understand the making of symbols, one must redefine the topography of the unconscious and thus reconsider the Saussurean algorithm. For the new model, Lacan suggests the traditional Freudian three-partite typology (*the Ego, the Id,* and *the Super Ego*); however, he does not simply recycle this classic triad but reformulates it, insisting on a different relationality between the subject and the world (cf. Thom 1981). This relationality encompasses three realms: the imaginary, the symbolic, and the real. The real is the objective correlate of consciousness or what is and can be experienced in the mode of "there is." The imaginary is what stands for the events that have not happened and are merely posited by consciousness. In other words, the imaginary is given in the mode of "could be." The symbolic realm is the world of communally bestowed meaningfulness. Ordinarily, this world is locked in the unconscious. However, when the state of consciousness manifests itself qua dreams, it also deals with symbols. Jammed between the conscious and the unconscious, dreams compress the imaginary and the real into an interpretative (symbolic) scheme of its own.[10]

This scheme differs from the ones that allows for two other fundamental experiences, memory and fantasy, in that it does not belong to either; yet, according to Edmund Husserl, it has the elements of both: "…memory places an absent reality

[9] In this respect, it might be noteworthy to examine Monique David-Menard and Brian Massumi who argue that Lacan salvaged the dying legacy of Freud after World War II by "bringing it out of the psychologizing rut in which it was vegetating" (1982, 91).

[10] Note in that regard the effects of digital technologies on law, which privilege the moving image to the extent of turning the actual law into a dreamlike manifold of simulated reality (cf. Sherwin 2011).

before our eyes […] phantasy on the other hand lacks the consciousness of reality in relation to what is phantasied" (Husserl 2005, 4). Differentiating between and among these forms is the direct task of psychoanalysis, which, on the basis of the source of the patient's speech, or vocalization, helps the analyst design an appropriate method of intrusion into the unconscious along the path of some deviant manifestation. The path to the unconscious is coded, and dream serves as the main decoder. "Dream is a rebus; it must be understood quite literally" (Lacan 1989, 176). Thus, suggests Lacan, one should approach dreams on the basis of what they are, namely, as symbols. *Traumdeutung* is symbolic interpretation in a sense that it shows how the signifiers are combined in *Entstellung*, or "distortion," "transposition," and a reversal, in other words. *Entstellung* is the necessary condition for dreaming; more importantly, it helps establish "the effect of the signifier on the signified" (ibid., 177). This is to say that dreams incorporate the laws that govern both realms, the realm of presence and the realm of absence, but in a manner of distorted reflection, concealing certain inner aspects of one order, while exaggerating the backbone of the other. Lacan describes the final effect of *Entstellung* as "sliding of the signified under the signifier" (ibid.). Dreams' partiality and temporal lapses, their polymorphous imagery, simultaneity of surface and depth, repeatability and cross sequentiality, the operations of fading in and out, and all their means, in other words, point to the work of this reversal. Unlike memory or fantasy that can be described as incomplete, the partiality of dreams is not a deficiency but an essence. We always experience dreams in the mo de of fragmentation; for an awakened consciousness, they are never complete.

If fragmentation is the syntax of the dream, its subject is a trope, or rhetorical figure that rises, paraphrasing Lacan, to uphold a symbolic meaning produced as a result of sliding of the signified under the signifier. Metaphor and metonymy are the most basic rhetorical figures.[11] They are directly associated with Jakobson's transcendental structures of meaning-production: (a) syntagmatic axis, which is responsible for combining structural elements, and (b) paradigmatic axis, which is responsible for selecting these elements: "Signification is always dependent on the participation of both axes and therefore both figures" (Lacan 1989, 181). The two figures complement each other: metaphor evokes the promise of desire, while metonymy reveals its lack.[12] What one desires hides in the shadows; never fully exposed, it is always rendered only partially. Although definitional for the process of meaning-production, metonymy and metaphor are not the only figures that participate in generating symbols however. In addition to the basic pair of symbols, symbol-making is traced in "periphrasis, hyperbole, ellipsis, suspension, anticipation, retraction, negation, digression, irony […] the figures of style (Quintillian's *figurae sententiarum*); but also catacheresis, litotes, antonomasia, hypotyposis" (ibid., 186). In dreams, these figures

[11] Considering Lacan's emphasis on partiality as programmatic for his entire project allows de Certeau and Logan to suggest that for Lacan metonymy is "more fundamental than metaphor" (1983, 23).

[12] Another way of designating the difference between the two figures is to reference Caudill, who associates "Freud's operation of 'displacement' with metonymy and the operation of 'condensation' with metaphor" (1997, 55).

often appear as actors whose actions help form fantastic plots, ensuring intensity and memorability of dreams. The sum of these figures forms a paradigm that provides interpretation with the nexus point and a frame of reference, explaining all other figures in terms of their positions in dream sequences.

Lacan calls this paradigm "the big other." The big other is the first signifier, the Law. Standing behind the imaginary, the symbolic, and the real, as it were, the big other provides the connection to all the three realms.[13] Originally conceived by Freud on the basis of the mythological figure of King Oedipus, for Lacan, the big other designates radical alterity, an otherness that transcends the illusory otherness of the imaginary because it cannot be assimilated through any kind of identification. Unequivocally, Lacan equates the big other with the laws of language; more specifically, the big other is inscribed in the symbolic order that divides, separates, polarizes, and otherwise diminishes all other orders. The big other is also an operation that mediates the relationship between the self and other subjects. As a result of this function, the Law connects the desires that operate in the unconscious with their symptomatic expressions, and having arisen in this manner, it stands up high, hovering over the ordinary and the every day. From this position, its main tasks are indeed upholding, arbitrating, and reconciling the relationship between the Self and the other. This is what constitutes both the morality of a person, but also the collective Law that rules over the mundane sociality. In order to bring its rule to the sensible, the big other must exercise violence. Here we find another parallel with Freud, whose idea of law is necessarily tied to aggression and death.

Elaborating on the ways the Law conducts its governance, Lacan refers to the "superimposition of the kingdom of culture in marriage rituals on the laws of mating that stay with the nature" (1989, 73). He thus differentiates between the primordial Law before the big other, so to speak, and the Law which is a modification of the primordial exchange. The big other is organized in the manner of language: "They say that none should be ignorant of the law, but actually none is ignorant of it since the law of man has been the law of language since the first words of recognition presided over the first gifts" (ibid., 67–68). The big other as the language is not the gift giver because the symbols it produces do not presuppose exchange but are forced upon the self and the other. Expressed in and by legal procedures, documents, activities, discourses, and verdicts, these symbols always involve an act of superimposition, that is, they bestow violence on the person and his or her biography, just as it was described by Derrida earlier. As a logic, as a system of rules and operations, language is designed to open speech to violence.[14] It hampers expression by subsuming sense and its infinite ways under the constraints of the finite grammar and the expressive limits of specialized lexicons. The prison house of language signifies the impossibility of "free speech."

[13] According to Chaitin, "The 'law' that symbolic father represents is first the advent of desire, the manqué-a-etre, the law of the functioning of the signifier before any particular signification is attached to it: not some specific, historically defined, social order, but all such orders" (1988, 52).

[14] See Lecercle (1990) for an elaboration of the relationship between violence and language in literature.

The significance of this scheme for the present study lies in the assumption that the big other that represents the unconscious by standing behind every dream and every interpretation can nonetheless be accessed through its own dreams. The dreams that are suppressed are also the dreams of suppression, "an act of homage to missed reality" (Lacan 1989, 58). Their content implies violence as the condition for the beginning of an order, whether social or natural: "Aggressivity helps us understand all the atypicalities that contribute to the notion of coming-into-being (*devenir*) of the primordial justice" (ibid., 23). The dreams of the Law come from the place where violence is applied to the matter, shaping it in the form of symbolic consciousness. The origin of violence can be traced to the beginning of symbol, the fact of birth that deals with an extraction, a forced appearance of the other to the self: "The division that alienates oneself from one's self founds man's aggressivity" (ibid., 21). All other forms of violence refer to this primordial severance, division, separation. In dreams, symbolic figures serve to deliver violence. In doing so, they evoke the Law that demystifies and traumatizes its subjects, shaping their identities as rhetorical figures.

There are a few peculiarities of symbolic interpretation that Lacan underscores. Among them is the problem of representing violence in terms of dream imagery. Following the distinction between perception images, memory images, and dream images, as it was elaborated by Husserl earlier, one can say that it is the relationship between word and image that singles out dreams as the only medium capable of fusing the two in a properly synthetic way. In dreams, images and utterances form a symbiotic whole while allowing them to transcend their origin on a higher plane of meaning. The surreal art provides a fertile ground for the work of transcendence. In this sense, instant justice is neither abnormal nor supreme, but precisely mundane, a paradigmatic instantiation of the ordinary which requires only a fitting figure to turn the nightmare of instant justice into a horrifying reality.

41.5 Conclusion

In this chapter, I have attempted an examination of instant justice. The examination was situated at the site of John Wagner's comics *Judge Dredd*. My findings have shown that the comic conveys the desire for instant justice through violence. In other words, violence is law's primary mode of givenness. The desire for violence can never be satisfied because it is immanent to the unconscious state and manifests in dreams only. When the desire for instant justice is brought into the conscious state, however, it is capable of eliminating the border between the law as a normative structure of the social order and lawless relativism, a virtual object of violent action. In the primitive state, this object does not depend on the state of exception, for it is a state-in-becoming, a condition for both the preservation and the negation of any social order.

In the second part of this chapter, two works of literature, Franz Kafka's novel *The Trial* and Fridrich Dürrenmatt's novella *Traps*, elaborate this thesis in a different aesthetic mode, showing instant justice to be a liminal phenomenon of the in-between, as the in-between the conscious and the unconscious, the imaginary and the real, the

self and the other. To put it forcefully, bringing the Law into the ordinary helped reveal the symbolic structure of legal consciousness. Most broadly, this structure appeared to replicate that of dreaming. This connection demanded an in-depth investigation of the relation between law and dreaming, and Jacques Lacan provided the study with the frame for understanding the emergence of the dream-driven legal symbology. The imagery in the production of dreams pointed to the importance of the imaginary not just for instant justice but for the law. Finally, the journey from the imaginary to the real through the symbolic demonstrates potential applicability of Lacan's theory of the symbolic to the study of various sociocultural phenomena and especially legal ones.

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Chapter 42
Oil and Water Do Not Mix: Constitutional Law and American Popular Culture

David Ray Papke

Abstract One might assume that the American cinema and television would be comfortable homes for constitutional deliberation and discussion, but that is decidedly not the case. Only a handful of films and television series contemplate the Constitution, and as a consideration of *First Monday in October* (1981), *The Pelican Brief* (1993), and short-lived television series from 2002 illustrates, constitutional deliberation in those films and series is stunted. Some suggest this phenomenon derives from the real-life Supreme Court's determination to preserve the secrecy of its workings and from the inherently "talky" and therefore boring nature of constitutional deliberation. In addition, the paucity of works with rich constitutional deliberation derives from the production processes of the culture industry. In particular, the culture industry's use of stock characters, devotion to familiar conventions, and reliance on established genres virtually preclude meaningful constitutional deliberation and discussion in cinema and television.

42.1 Introduction

The framers of the US Constitution might not have anticipated the development, but by the early decades of the nineteenth century, the Constitution had become a vehicle for discussing great national issues (Papke 1998, 6–8, 19–21). Was slavery to be protected? Should business concentrations be limited? Must different races be treated equally? Members of the appellate federal courts and especially the US Supreme Court employed the Constitution in sophisticated ways to consider these questions, and average citizens as well debated the question of whether a law,

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procedure, or social practice was "constitutional." Deliberation and discussion of the Constitution became one of the richest parts of American political life.

In the present, one might expect that constitutional deliberation and discussion would make their way into the cinema and television, the preeminent commodities and experiences produced by the culture industry for mass audiences. Scholars have underscored the way the consumption of popular culture has become the most important cultural experience for a majority of Americans, and the titles of their works refer to popular culture as "the art of democracy" and dub the contemporary United States "the republic of mass culture" (Cullen 1996; Baughman 1992). Furthermore, Hollywood as the paradigmatic producer of popular culture has hardly shied away from bringing timely political concerns into the movies, albeit in dramatized and often reductive ways. "While Hollywood has traditionally defined its product as entertainment and has pooh-poohed 'message filmmaking,' in practice the industry has consistently relied on topicality as a crucial ingredient of box-office success" (Prince 2000, 65). The cinema and television as well, one might assume, would and should be comfortable homes for constitutional deliberation and discussion.

But this is decidedly not the case. Only a handful of mainstream films and television series consider the Constitution and its relationship to contemporary issues, and the constitutional deliberation and discussion in those films and television series are stunted. For this reason and others, what we might call "constitutional law films and television series" have for the most part been artistic and commercial failures. Indeed, these works are so unsuccessful as to discourage filmmakers and television producers from undertaking comparable projects. They are almost reminders that undertaking a film or television series in which constitutional deliberation and discussion are central would be foolhardy.

What explains the failure of Hollywood and the culture industry to produce successful works including constitutional deliberation and discussion? One might consider for starters the Supreme Court's dogged efforts to protect its anonymity and to preserve a near-invisibility (Burton 2004, 67). In their best-selling book concerning the Burger Court of the early 1970s, Bob Woodward and Scott Armstrong underscored the way the Supreme Court has not only refused to allow television cameras but also consciously devised rules and approaches designed to preserve the secrecy of its workings. According to Woodward and Armstrong:

> No American institution has so completely controlled the way it is viewed by the public. The Court's deliberative process – its internal debates, the tentative positions taken by the Justices, the preliminary votes, the various drafts of written opinions, the negotiations, confrontations, and compromises – is hidden from public view. (Woodward and Armstrong 1976, 1)

Laura Krugman Ray has also underscored the remote and mysterious workings of the Supreme Court and the veritable seclusion of the justices: "They emerge from behind their red velvet curtains for carefully rational oral arguments before voting in the perfect privacy of their conference room and writing their opinions in chambers" (Ray 1997, 151). With such little public exposure, the public has no operating image of the members of the Supreme Court. Hollywood, the argument goes, is

denied a referent, and this limits attempts to produce pop cultural works featuring the members of the Supreme Court deliberating and discussing the Constitution.

More generally, it could be argued that constitutional deliberation and discussion primarily take the form of talking about the Constitution, its meanings, and its relevance and that popular culture would presumably take a comparable form. However, "talky" films or series, the argument goes, are not what consumers want. A place exists for this type of programming on American public television, but when Americans drive to the cineplex or turn on their family room television sets during primetime, they want to be entertained. By tradition, this entertainment is to be visual rather than wordy. Constitutional deliberation and discussion from this perspective seem lousy materials for the cinema or television.

There is of course some truth to these arguments, but the arguments look too much to the potential subject matter, themes, and meanings of the works. They treat films and television series almost as if they were literary works. In reality, films and television series are the material products of a sophisticated culture industry. The paucity of works and attenuated character of constitutional deliberation and discussion in those works may derive less from a lack of creativity and imagination and more from the ways such works are produced.

In particular, I am prepared to argue that the culture industry's use of stock characters, devotion to familiar conventions, and reliance on established genres preclude meaningful constitutional deliberation and discussion in cinema and television. These aspects of pop cultural production are virtually industrial imperatives. They are main cogs in the culture industry's system of signifying and portraying reality. Stock characters, familiar conventions, and established genres limit most films and television series, but the limitations are especially pronounced when consideration of the Constitution is a possibility.

In the discussion that follows, I consider narratival fictional works and focus in order on *First Monday in October* (1981), *The Pelican Brief* (1993), and *The Court* and *First Monday*, two short-lived American television series from 2002. The producers of these works included some variety of constitutional deliberation and discussion, and the works at first seem promising in that regard. With further scrutiny, though, we see that the general norms and standard components of popular cinema and television preclude any meaningful engagement with the Constitution and constitutional issues. Oil and water cannot be made to mix.

42.2 Romantic Comedy at the Supreme Court?

The film *First Monday in October* (1981) illustrates superbly well the way the culture industry's reliance on stock characters, familiar conventions, and established genres destroys any hope for serious constitutional deliberation and discussion. Written by Jerome Lawrence and Robert E. Lee and starring Jane Alexander and Henry Fonda, the theatrical version of *First Monday in October* ran on Broadway in

the fall of 1978. The Hollywood adaptation of the play, starring Jill Clayburgh and Walter Matthau, appeared in 1981. Alexander on Broadway and Clayburgh in the film played fictional Justice Ruth Loomis, the first woman appointed to the US Supreme Court. Interestingly enough, between the end of the Broadway production's run and the completion of film production, Sandra Day O'Connor became the first actual woman nominated to the Supreme Court. In order to capitalize on the fortuitous correspondence between fact and fiction, Paramount scrambled to move up the film's release date from October to August, 1981.

First Monday in October was not the first film to portray the exploits of fictional Supreme Court justices. The World War II-era classic *The Talk of the Town* (1942), for example, featured law professor Michael Lightcap. While awaiting his confirmation as a member of the Supreme Court, Lightcap comes to the assistance of a factory worker falsely accused of arson, and at the end of the film the factory worker and his girlfriend travel to Washington, DC, to see Lightcap assume his duties on the nation's highest court. In *A Stranger in Town* (1943), fictional Supreme Court Justice Jospehus Grant is dismayed by the corruption he discovers during a duck-hunting trip to what he thought was idyllic rural America. An upstanding citizen even while on vacation, Grant puts an end to the wrongdoing. Unlike these earlier films, meanwhile, *First Monday in October* emphasizes the exploits of fictional justices while they are in the midst of considering and deciding appeals to the Supreme Court.

Although *First Monday in October* underscores the appointment of Loomis to the Supreme Court, complete with stylized confirmation hearings and fusty awkwardness among the male justices when Loomis arrives, Loomis' first-of-a-kind appointment does not provide the primary dramatic tension in the film. Instead, the film's dramatic tension derives from the friction between Loomis, a conservative jurist from California, and Justice Dan Snow, a wooly liberal played by Walter Matthau. Snow dubs Loomis "the Mother Superior of Orange County," the latter being a politically conservative part of California, and Loomis suggests Snow "may want the absolute freedom to go straight to Hell." Fellow justices, eager law clerks, and assorted spouses and friends listen and sometimes flinch as Loomis and Snow hurl witty verbal barbs at one another.

A good portion of the bantering involves two cases that have supposedly come before the Supreme Court. One involves a company named Omnitech, whose owner bought up all the patents to a potential new engine and then buried them, prompting stockholders to demand an accounting. The case comes to the Supreme Court on a petition for certiorari, and that could perhaps explain the limited discussion vis-à-vis the Constitution. In essence, Loomis and the other conservatives on the Supreme Court do not want to grant cert because big business might suffer, and Snow and his liberal colleagues see the case as one which could limit misconduct by businessmen. The second case involves a pornographic film titled *The Naked Nymphomaniac*, and it at least raises a recognizable First Amendment issue. As is apparently true for real-life justices called upon to determine if a work is pornographic, the members of the fictional Supreme Court (minus Snow, who has already made up his mind that the film cannot be censored) adjourn to a private screening room. Viewers of *First Monday in October* then join the justices to watch a surprisingly lengthy and sexually

graphic part of the proverbial film within the film. Subsequent arguments among the justices about whether *The Naked Nymphomaniac* might be censored are animated, with Snow and Loomis sometimes pretending to make oral arguments before one another. Loomis asks Snow: "Doesn't your celluloid poison offend all human dignity and decency and beauty?" For his own part, Snow declares: "So it's crap. What if it is crap? That's not the point. Crap's got the right to be crap." Chief Justice Crawford, played by Barnard Hughes, has the unenviable task of keeping Loomis and Snow going directly for the jugular.

The verbal repartee involving these cases might conceivably have involved more constitutional deliberations and discussions, but the screenwriters and director were more interested in shaping Snow and Loomis into stock characters who happen to be Supreme Court justices than as Supreme Court justices who as such could be particularly interesting characters. Stock characters, Hollywood sometimes assumes, have a familiarity about them for moviegoers. They are like old friends who provide pleasant company but make few demands and rarely surprise.

To be more specific, Snow and Loomis take shape as older-than-average embodiments of the oblivious professional man and the spunky sexual object, respectively. The former has meandered across the big screen from the 1930s to the present, from Gary Grant's distracted paleontologist David Huxley in the classic *Bringing Up Baby* (1938) to Hugh Grant's confused bookstore owner William Thacker in *Notting Hill* (1999). In *First Monday in October*, Snow's obliviousness is present in a comical way during an ill-fated meal in a Chinese restaurant, in which Snow's dumplings successfully elude his chopsticks. Less comically, Snow cannot answer his wife's question about the pattern in their wallpaper. He might sit on the nation's highest court and wrestle with the most sophisticated of appellate briefs, but he has no clue what is on the walls of his home. His wife decides ultimately to divorce him, although her grounds are his general interpersonal inattentiveness rather than wallpaper ignorance per se.

The stock character stable into which Loomis is led is an even older and more troubling one. Unbelievable as it might seem, Loomis, a widow and Supreme Court justice, is portrayed as not only sexy but also on occasion a sexual object. Early in the film, viewers watch the frisky and remarkably fit Loomis charge the net in a skimpy and rather tight tennis outfit. Toward the end of the film, viewers get to peek at a naked Loomis through her steamy shower door, and then, when she steps out of the shower, viewers catch a glimpse of her breast.

Laura Mulvey, in what has become one of the classic articles in feminist film criticism, has pointed out how clearly shots of this sort reflect the power of patriarchy. Continuing in the footsteps of printed pinups and live striptease and also of vaudeville and nickelodeon shows, Hollywood films routinely display women as sexual objects and in the process play to male desire. "In their traditional exhibitionist role," Mulvey argued, "women are simultaneously looked at and displayed, with their appearance coded for strong visual and erotic impact so that they can be said to connote 'to-be-looked-at-ness'" (Mulvey 1975, 11). The sight of Loomis' buttocks smart-wrapped in tennis shorts or her still-wet breast as she leaves the shower momentarily trumps the saga of her dramatic ascent to the nation's highest court.

The cinema, Mulvey underscores, is especially adept at facilitating patriarchal voyeurism. Mainstream films often portray a private, sealed-off place and, seemingly unaware of an audience, allow that very audience to peek at that place. "Moreover, the extreme contrast between the darkness in the auditorium (which also isolates the spectators from one another) and the brilliance of shifting patterns of light and shade on the screen helps promote the illusion of voyeuristic separation" (Mulvey 1975, 9). Viewers of *First Monday in October* visually enter Justice Loomis' bathroom and even her shower stall, and the good jurist, as sexual object, has no idea we are watching.

While the displays of Loomis, like the displays of countless women in many other Hollywood films, has the effect of virtually pausing the narrative, viewers have no trouble relocating themselves in the narrative once Loomis leaves the tennis court or the bathroom. The chief reason is that the narrative is essentially generic, that is, it has a recognizable general design. Hollywood can and frequently does refer to established genres in tailoring individual films, and genre is an important source of meaning and direction for film audiences. Genre becomes an important mode of exchange between the film industry and the audience (Grant 1977; Graves and Engle 2006; Schatz 1981).

Hollywood's generic choice for *First Monday in October* was the romantic or screwball comedy. The genre appeared during the Great Depression of the 1930s, and according to film historian Georges Sadoul, *It Happened One Night*, released in 1934 and starring Clark Gable and Claudette Colbert, was something of a generic exemplar (Sadoul 1972, 160). Romantic comedies continued to appear during the 1940s and 1950s, with films pairing Spencer Tracy and Katharine Hepburn constituting something of a benchmark for romantic comedy achievement. In more recent years, immensely popular films such as *Pretty Woman* (1990), *As Good as It Gets* (1997), *You've Got Mail* (1998), *Runaway Bride* (1999), and *Two Weeks Notice* (2002) have continued the tradition. In all of these works and in many others, a seemingly mismatched man and woman meet in an unusual setting, frequently argue with one another, and then realize what the audience has already come to appreciate, namely, that the pair is a wonderful match. Romantic comedies in the end suggest a peaceful world in which effusive and subdued, black and white, rich and poor can close the gaps between them and live in loving harmony. Couples in romantic comedies symbolize worlds without continuing conflict. The generic process of romantic comedy is not so much repetitive Hollywood propaganda as it is the capturing and marketing of a popular fantasy time and again.

Although their age and positions on the Supreme Court make Justices Loomis and Snow unusual partners for a romantic comedy, the writers and director pushed them as far as possible in that direction. They are, as already noted, inveterate quipsters forever tossing pointed barbs at one another. They also are conveniently eligible for romance since Loomis is a widow and Snow's wife leaves him early in the film. When late in the film Snow suffers a heart attack, there are surprisingly tender scenes involving them, including one with a chaste kiss. The writers and director had the good sense to stop short of unbridled passion and physical lovemaking, but the film ends with coded love. Loomis and Snow are rushing to a meeting with fellow justices. Briefly holding hands, they ascend the front steps of the Supreme Court

Building, soaring not only to equal justice under law, as the top of the building says, but also to some variety of sublime personal partnership. Loomis tells Snow, "You and I make each other possible," and Snow says, "Damn right we do."

Are they talking about their contrasting political philosophies or about their feelings for one another? The answer is both, but by using stock characters and especially by utilizing the romantic comedy genre, the Hollywood production process eliminated *First Monday in October* as a model for constitutional deliberation and discussion. The love interest in a romantic comedy, David R. Shumway has argued, is effective as a mechanism for narrative displacement (Shumway 1991, 7). The personal displaces the political. Love and affection overwhelm pointedly contrasting philosophies of constitutional interpretation. As the credits scroll on the screen and audience members leave the theater, they perhaps feel warm and happy, but they hardly head for home discussing the First Amendment.

42.3 A Supreme Court Thriller

The *Pelican Brief* (1993) also offers promise as a film with constitutional deliberation and discussion, but it, too, succumbs to the conventional characterization and reliance on genre likely to preclude such exchanges. The film is an adaptation of a novel with the same title by John Grisham, America's best-selling writer of fiction during the 1990s, and Grisham managed to sell the film rights for the novel even before he had finished writing it. The columnist Dave Barry once lightheartedly speculated that there must be a Federal Aviation Administration rule requiring all airplane passengers to carry a Grisham novel (Pringle 1997, 6), but perhaps the quip, like many others concerning Grisham's work, is sour grapes. Even if Grisham is something other than a fine prose stylist, it might still be said that his novels evidence a lively cinematic imagination. As one reads *The Pelican Brief* or any of Grisham's novels from the 1990s, one frequently finds film scenes darting through one's mind.

A major writer/director and accomplished actors assumed central roles in the production of *The Pelican Brief*, and, as a result, the film's weaknesses and failures cannot be dismissed as beginners' mistakes. The chief writer and director was Alan Pakula. He had previously directed the likes of *The Sterile Cuckoo* (1969), *Klute* (1971), *All the President's Men* (1976), and *Sophie's Choice* (1982), and he even had experience adapting a law-related novel, Scott Turow's *Presumed Innocent* (1987) for the screen. Before his death in a freak car accident in 1998, Pakula had earned respect and admiration for his ability to create suspenseful feelings of paranoia.

The most prominent actors in *The Pelican Brief* were Julia Roberts and Denzel Washington. The former played law student Darby Shaw, whose freelance memorandum came dangerously close to figuring out why two Supreme Court justices had been assassinated. Roberts' acclaim and recognition have fallen off in more recent years, but a 2001 Harris Poll found she reigned at that point as Hollywood's

biggest "star." The latter designation, while wholly subjective, refers to those especially well-recognized actors who are in themselves marketable commodities. Their presence in a film can be used to publicize and market a film, and consumers might actually choose to see a film not because of its type or theme but rather because of the presence of a "star" such as Julia Roberts.[1] "Star power" is one feature of Hollywood's general production process, that is, the way the film industry generates its material products. On occasion, Hollywood even produces films that are little more than "star vehicles."

Denzel Washington, who played courageous Washington, DC, journalist Gary Grantham in *The Pelican Brief*, was a "star" almost equal in recognition to Julia Roberts. Washington, an African American, had earlier distinguished himself by playing real-life political figures of African descent such as Steve Biko in *Cry Freedom* (1987) and Malcolm X in *Malcolm X* (1992), but in *The Pelican Brief* race has no particular significance in Washington's role. Indeed, the original Gray Grantham character, as imagined by John Grisham in the novel on which the film is based, is a heroic white, and when it came to casting the film, Washington's heroic demeanor easily outweighed consideration of race. The "star power" of Roberts and Washington was probably the chief factor in making *The Pelican Brief* the number one box office film in the United States during the lucrative Christmas week of 1993 and the number one box office film in the United Kingdom in March 1994.

Discussions related to the Constitution appear in two parts of the film, but both are limited. One part features Darby Shaw's activities as a student at the Tulane University Law School. Indeed, there is an engaging scene in which Shaw makes valuable contributions to a surprisingly thoughtful classroom discussion of the Supreme Court's decision in *Bowers v. Hardwick*.[2] Any inclination to think of Shaw as a budding constitutional scholar is nipped in the bud, meanwhile, when we realize that the professor with whom Shaw is discussing constitutional law is also her lover. The professor, Thomas Callahan played by Sam Shepard, lustily kisses and gropes Shaw in other scenes. The constitutional law discussion in the classroom, it seems, was designed primarily to enhance the surprise and titillation of an attractive law student sleeping with her older professor. In real-life law schools such liaisons are suspect, and the randy Professor Callahan might have anticipated a conversation with his dean or perhaps even the ominous "letter in your file." However, sex involving a student and her professor plays to viewers' unreflective fantasies and suspicions.

[1] This is perhaps even clearer in later films "starring" Roberts such as *Runaway Bride* (1998), *Notting Hill* (1999), and especially *Erin Brockovich* (2000). In *Notting Hill* Roberts actually plays the part of Anna Scott, a fictional Hollywood "star," whose fame greatly complicates her life and love affairs.

[2] In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court found that a Georgia law criminalizing same-sex sodomy was constitutional, but this decision was later reversed in *Lawrence v. Texas*, 539 U.S. 558 (2003). One ambitious scholar has interpreted *Lawrence* as a makeover of *Bowers* in the style of the reality television series *Queer Eye for the Straight Guy* (Burgess 2008, 3).

The second part of the film that hinted at constitutional deliberation and discussion involved ill-fated Supreme Court Justices Abraham Rosenberg and Glenn Jensen. The two had judicial philosophies almost as antithetical as those of Justices Loomis and Snow in *First Monday in October*, contributing to the type of depoliticizing balancing effect so common in law-related film and television. Judicial philosophies notwithstanding, both Justices were concerned about destruction of the environment and inclined to uphold a US Court of Appeals decision protecting Louisiana wetlands and the pelicans living there from development. This likelihood alarmed Victor Mattiece, the owner of an oil company more interested in lucrative development than the wetlands as a wildlife habitat. Mattiece decided to hire a professional assassin to kill Justices Rosenberg and Jensen, his thinking being that their replacements would be less concerned about the environment and inclined to discount the pelicans and their wetlands when the case came before the Supreme Court on appeal. The admittedly far-fetched promise of constitutional deliberation and discussion is broken when the nefarious assassin shot Justice Rosenberg as he slept in his bed and strangled Justice Jensen while he was watching a film in a gay pornography theater.

With Professor Callahan, himself a former law clerk to Justice Rosenberg, blown to smithereens by a bomb placed in his car and two-ninths of the Supreme Court dead and buried, the deck is cleared for a generic combination dear to Hollywood's heart. *The Pelican Brief* becomes in small part a murder mystery and in much larger part a suspense thriller. We should not be surprised that *The Pelican Brief* becomes predominately the latter. Many of Grisham's novels, after all, are at least in part suspense thrillers, and Pakula's métier as a screenwriter and director was also the thriller.

The thriller is an especially common and intriguing genre. In the typical thriller, characters are repeatedly terrorized, and sustained tension and excitement result. Phrases such as "an edge-of-your-seat drama" or "a genuine nail-biter" are often used to describe thrillers, and consumers of popular culture turn to thrillers in hopes of being scared. Their fright, in turn, affords a few moments of unadulterated escape.

One can find thrillers in novels as well as in the cinema, and when Grisham attempted to capture the spate of legal novels written by lawyer-authors that began appearing in large numbers in the United states in the late 1980s, he actually characterized these novels as "legal thrillers" (Grisham 1992, 33). However, as Gordon Gow argued in *Suspense in the Cinema*, film is the medium that can most induce the kind of suspense that one expects from a thriller:

> For no matter how deep a spell the written word may cast, none but the recluse can surrender completely. Any number of things will intervene: conversation, telephone, food, and even work, will demand that the thread be snapped repeatedly. The same goes for television and for movies viewed at home. (Gow 1968, 13)

Skilled film directors can use unsteady handheld cameras and a predictable set of techniques to leave viewers of thrillers literally breathless. Close-ups of panicked characters, short takes, and rapid physical movement abound. The hero, often an innocent and average person drawn into the fray, needs all of his or her personal resources to escape the villainous foe.

In *The Pelican Brief*, Darby Shaw realizes the bomb that blew up Professor Callahan was intended for her, and she scrambles desperately to escape those determined to kill her. Her flight affords a special opportunity to employ the "male gaze" discussed in conjunction with Justice Loomis' sexual objectification in *First Monday in October*. Unlike Loomis, Shaw is fully clothed, but the eroticism relates to her peril. Hollywood has long delighted in the spectacle of imperiled women, and instead of merely leering at the female form, viewers have ample opportunities to watch threatened, endangered women. Shaw herself is fit and agile, but sometimes the culture industry adds to the titillation even more by making the imperiled woman handicapped. Examples include but are not limited to the bedridden woman in *Sorry, Wrong Number* (1948) or the blind women in *Wait Until Dark* (1967) and *See No Evil* (1971) (Graves and Engle, 196).

Darby Shaw eventually makes her way to Washington, DC, where the journalist Gray Grantham is also investigating the murders and has developed several promising leads. Shaw joins forces with Grantham, and they pursue the killers at the same time they flee them. Disguises, bombed cars, and dead bodies litter the turf, and "stars" of course manage to prevail. The CIA provides Shaw with a flight out of the country to a mysterious location, and at the end we see her watching Grantham being interviewed and commended on television. He refuses to identify her, and she smiles with satisfaction at a job well done and perhaps in anticipation of a future liaison.

How successful is the film as a star-studded thriller? Film critic Richard Schickel said, "Mostly this is a movie about people getting in and out of cars, which do or do not blow up when they turn on the ignition" (Schickel 1993, 62). How successful is the film as a model for constitutional deliberation and discussion? The film industry's reliance on its "stars" and on the thriller genre made sense in the industry's overall production process, but consideration of important issues vis-à-vis the Constitution drops out of the picture, assuming it was even there in the first place.

42.4 The Supreme Court on Primetime Television

Attempts to portray constitutional deliberation and discussion in television series have been even more striking failures than the failures in the Hollywood cinema. In 2002, two series – *The Court* (ABC) and *First Monday* (CBS) – embarrassingly flopped. Both had well established writers and producers and also popular actors. However, each series doggedly aped earlier television styles and formats, and this approach precluded meaningful constitutional deliberation and discussion.

The Court counted Oliver Goldstick and Tom Schulman as its chief writers and Sally Field as its biggest star. Prior to launching *The Court*, Goldstick had written and produced numerous episodes of series such as *Coach*, *Baby Talk*, and *Caroline in the City*. Schulman was also a culture industry insider, having written the screenplay for the surprisingly successful *Honey, I Shrunk the Kids* (1989) and produced *Indecent Proposal* (1993) and *Me, Myself & Irene* (2000). Sally Field meanwhile has long been one of America's favorite actresses. She won Oscars for Best Actress

for her performances in *Norma Rae* (1979) and *Places in the Heart* (1984), and she starred on primetime television in *Gidget*, *The Flying Nun*, and *ER*. Her lengthy career continued into the twenty-first century with the popular primetime series *Brothers and Sisters*. In *The Court*, Field donned the robe of the fictional Kate Nolan, the Supreme Court's newest justice.

The set for Nolan's Supreme Court was a relatively realistic version of the actual Supreme Court Building in Washington, DC – a remarkable and self-conscious temple of the law with just one courtroom and various hallways, offices, and conference rooms in its two wings. An apparently permanent 4-4 split left Nolan as the inevitable swing vote, and her inherently tortured position functioned as the fulcrum of the series' drama. On Justice Nolan's first day on the Supreme Court, another Justice told Nolan, "There's no middle ground here. The fifth vote has to take sides." Poor Nolan was forever swapping votes and brokering compromises, an assignment that would understandably have worn her down had the series somehow continued.

Critics fairly saw *The Court* as attempting to replicate the extremely successful *West Wing*, a series concerning a fictional president and the fictional workings of the executive branch of the federal government. Virtually all the reviewers and critics made the connection. According to Caryn James, reviewing *The Court* for the *New York Times*:

> Fast and smart, "The Court" has other "West Wing" trademarks, including heavily packed dialogue and a certain amount of zooming along corridors. (The characters running frantically here are reporters; the justices are more dignified so they just walk fast.) (James 2002, E6)

Dahlia Lithwick, writing in *Slate*, said of *The Court*:

> Brought to you by the same folks who give you "West Wing." So, there's lots of quickety-quick dialogue, and everyone is very Washington – well-briefed, on the make, wearing pressed Khakis. We hurtle from confirmation hearings to airports to Ohio prisons to TV studios to judges' chambers, to courtrooms, to hotel rooms, and all the while we're talk-talk-talking about the law. (Lithwick 2002, n.p.)

The problem is that all the talking *about* the law was no more than that. The dialogue was fast and smart, but it lacked depth and seriousness. "The law talk is particularly quick: Eighth Amendment… Ninth Amendment… First Amendment… penumbral privacy rights… strict scrutiny," Lithwick said. "You'd best find your *Con. Law for Dummies* before next week's episode because no one is going to explain what the cases are about." The goal seemed to be to draw viewers into the purported frenetic-ism of the Supreme Court rather than to draw out the characters' thoughts on the Constitution and its relevance to contested social issues. Stated bluntly, the dialogue did not really amount to constitutional deliberation and discussion.

Like *The Court*, *First Monday* rode on the shoulders of experienced television producers and established acting talent. The show's creator was Donald Bellisario, a one-time officer in the US Marine Corps who worked in advertising before making his way to Hollywood. He created a number of successful primetime television series before imagining a fictional Supreme Court; the series included *Magnum, P.I.*, *Quantum Leap*,

and *JAG*. Since the failure of *First Monday* to attract either viewers or critical approval, Bellisario has found immense commercial success with *NCIS*. As the list of Bellisario's series suggests, he has a special fondness for characters in law enforcement and/or the military. His series routinely include a jocular masculinity, one winning for some but off-putting for others. One senses it in *First Monday*, especially in the scene before each oral argument in which the fictional Thomas Brankin gathers his fellow justices in a football-style huddle. The image of the chief justice literally saying to his colleagues "Let's go out there and make history" hardly inspires confidence that rich and rewarding constitutional deliberation and discussion will follow.

Justice Brankin was played by James Garner, the best-known actor in the cast. As was the case with Sally Field, the star of *The Court*, Garner had long struck American viewers as a warm and congenial actor, one who had on one level earned the right to play himself. Before taking the role of Justice Brankin, Garner appeared on primetime as Bret Maverick in *Maverick* and as Jim Rockford in *The Rockford Files*. In 1985 Garner received an Oscar nomination for his performance in *Murphy's Romance*, a film in which Sally Field, who played his fellow fictional chief justice in *The Court*, also appeared.

Garner's Brankin was a sports-obsessed conservative, whose Supreme Court was as evenly divided as Justice Nolan's in *The Court*. Having an equal division of this sort helps create dramatic tension, but it also is depoliticizing. When there are always two evenly balanced sides, an unaligned centrist position seems always to emerge as the correct one. *First Monday in October*, the film discussed in the first section of this article, also depoliticizes with its dogged determination to balance the two political sides. As previously noted, that film ends with the crotchety liberal Justice Snow and the flippant conservative Justice Loomis striding together up the great white steps of the US Supreme Court Building.

First Monday forfeits its opportunity to portray constitutional deliberation and discussion on the joint altar of personal story lines and general cuteness. Dating back to at least *Hill Street Blues* in the early 1980s, American primetime legal drama has coupled the tales of police investigations and courtroom cases with stories concerning the private dilemmas of the major characters. While the former in most cases wrap up within a single episode, the latter tend to carry over from one episode to the next, sometimes even stretching through an entire television season. Hence, in *First Monday* we were invited to worry about Justice Szwark, played by Gail Strickland, and her family living in a neighborhood with a registered sex offender. Or then there's the tale of the daughter of Justice Norelli, played by Joe Mantegna, refusing on principle to take the mandatory drug test for her high school soccer team.

First Monday's cuteness manifested in not just these personal story lines but also in some of the fictional cases that supposedly came before the Supreme Court for oral argument. To be sure, certain of the cases had some constitutional heft to them, but many others most certainly did not. In the pilot for the series that aired on January 15, 2002, for example, a Mexican transsexual seeks asylum in the United States, but the justices rule against the transsexual when they figure out the transsexual is "only" a transvestite. In the episode of January 25, 2002, a dwarf lawyer charges his law firm that discriminated against him when it installed and assigned him to a mini-office,

but the justices rule against the dwarf lawyer because the mini-office was a "reasonable accommodation" under the Americans with Disabilities Act.

The Court and *First Monday* each lasted much less than a season, and the television branch of the culture industry has not attempted to revisit the Supreme Court since the series' demise.[3] The series' lack of meaningful constitutional deliberation and discussion was hardly the reason for their failure to attract viewers. The series' truncated and sometimes ridiculous attempts to discuss the Constitution and its relationship to public policy might actually have reduced its appeal for the apolitical viewers of primetime television.

42.5 Conclusion

The films and television series discussed in this article are fictional narratives, but other types of law-related films and television series in which one might anticipate finding constitutional deliberation and discussion are also disappointing. For example, biographical films and series about actual Supreme Court justices are also limited when it comes to constitutional deliberation and discussion. The most noted case in point is the film *The Magnificent Yankee* (1950) concerning Justice Oliver Wendell Holmes. The film was adapted by Robert Hartung from the Emmet Lavery play with the same title, which had previously been adapted from Francis Biddle's book *Mr. Justice Holmes* (Biddle 1942). The accomplished John Sturges served as the director. The film tours the 27 years Holmes spent in Washington, DC, and although there are a few scenes of the great jurist on the bench delivering opinions orally, the narrative primarily concerns the home life of Holmes and his wife Fanny Bowditch Holmes. Often maudlin, the film conveys the Holmes' sadness over having no children and the way Holmes' clerks were surrogate children of a sort. Despite the real-life Holmes' acerbic brilliance, the cinematic Holmes emerges as the stereotypical old codger. The film was remade in 1965 for the *Hallmark Hall of Fame* television series, but the remake included no more constitutional deliberation and discussion than did the original.

Hollywood has also produced films tracing individual important cases from their origins to the Supreme Court, but these films as well for the most part fail to engage in sustained consideration of constitutional issues. The *Hallmark Hall of Fame* production of *Gideon's Trumpet* (1980), for example, dramatized the case that prompted the Supreme Court opinion *Gideon v. Wainwright* (Gideon 1963). Henry Fonda played the drifter Clarence Earl Gideon, who demanded a right to legal representation at trial, and Jose Ferrar played Abe Fortas, the distinguished Washington, DC, lawyer who represented Gideon before the Supreme Court. *Separate But Equal* (1991), a television miniseries, portrayed the events and personalities in the case leading finally to the decision in *Brown v. Board of Education of Topeka*, which found

[3] I refer here only to primetime fictional narrative. There have been successful educational and informational series about the actual Supreme Court on American public television. For example, the series *The Supreme Court*, produced by Thirteen/WNET, appeared on PBS stations in early 2007.

segregated public school systems to be fundamentally unequal and therefore unconstitutional (Brown 1954). The actor Sidney Portier played the great civil rights attorney Thurgood Marshall with convincing aplomb. *The People vs. Larry Flynt* (1996), a major Columbia Pictures release directed by Milos Foreman, dramatized the case resulting in the Supreme Court decision in *Hustler Magazine v. Falwell* (1988) (Hustler Magazine 1988). Starring Woody Harrelson, the film told the story of pornography publisher Larry Flynt's life, stretching from his impoverished youth through many twists and turns to the Supreme Court's reversal of a lower court's finding that Flynt's parody of minister Jerry Falwell was libelous. Like most mainstream works of popular culture, these works are character-driven, and the trials and tribulations of the litigants and lawyers take center stage. The films' characters claim and seek constitutional rights, and to the extent the characters obtain those rights, we can see the power of the Constitution. However, little emerges with regard to the rights' foundations and meanings. Once again, constitutional deliberation and discussion are superficial bordering on nonexistent.

In general, the culture industry's reliance on stock characters, familiar conventions, and established genres virtually precludes constitutional deliberation and discussion. The market for the culture industry's products is an uncertain one, with some films and television series reaping tremendous profits but many more losing money. The industry, as a result, tries always to make its products "familiar" for viewers. Sequels, prequels, and spin-offs are common, and, more generally, innovation takes place within that which has demonstrated popular appeal. Stock characters, familiar conventions, and established genres are virtually required components and aspects of cultural products.

In fact, it would not be misguided to think of characterization, convention, and genre as mainstays in the figurative pop cultural assembly line. References to genre are also often used after production is complete for purposes of advertising films or even for placing films in desirable sections in video rental stores (Grant 1977, 2). Something similar happens in automobile assembly lines with makes and models being comparably required. While assembly lines, be they figurative or literal, might function smoothly and produce marketable commodities efficiently, mass production on a day-in and day-out basis is bereft of significant variations and innovations. Rarely does anyone find something particularly new.

Furthermore, the Hollywood films and television series that roll off the culture industry's assembly line tend to be supportive of the dominant myths and ideologies that serve as foundations for stock characters, familiar conventions, and established genres. As Barry Grant has argued, the traditional western "offers a series of mythic endorsements of American individualism, colonialism and racism" (Grant 1977, 33). Horror films feature the elimination of symbolic challenges to the bourgeois society, and both the musical and the previously discussed romantic comedy glorify heterosexual partnering. American law-related films, meanwhile, tend to condemn lawbreaking and also in direct and indirect ways endorse the dominant ideological belief in a rule of law. This stance, as copasetic as it is for most viewers, does not amount to critical reflection on the law, be it the Constitution or some other variety.

None of this is to suggest that Hollywood films and primetime series are devoid of good writing, directing, and acting or that this body of cultural work is merely a huge

mélange of system-supporting propaganda. Playfulness and irony are possible, and some films and television series even gently tweak the norms. In addition, different viewers or even the same viewer at different points in his or her life can take different meanings from a film or television series. But still, mainstream films and television series are more likely to provide easy answers than to pose difficult questions. The portrayal of genuine deliberation and discussion would be the opposite of this type of closure. In the end, we should not really expect to find constitutional deliberation and discussion in the Hollywood film or the primetime television series.

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Chapter 43
Where There Is No Need to Screen Local Justice: Law and Film in Israel

Shulamit Almog

Abstract This chapter describes the minor representation of law in Israeli feature films and demonstrates it by pointing at various films that deal with issues that pertain directly to legal proceedings or legal matters, yet bear merely marginal reference to the legal domain, or avoid it altogether. Possible explications for the relative absence of law in Israeli cinema will be reviewed. One is the Israeli legal tradition, which refrains from visualizing justice. The other draws from the differences between Israeli and American cultures and the dissimilar perceptions of lawyers and their role in society, as well as the differences in legal procedure. The chapter concludes by suggesting that the current scarcity of legal representation in Israeli feature films is a meaningful signifier in the Israeli societal context. The lack of interest in law in Israeli films, compared with the central function of law in Israeli life, might reflect a gap between the ardent legal rhetoric of Israeli courts and the perception of the public, who views law mostly as an instrumental option of providing practical answers to specific cases.

43.1 Introduction

Israeli cinematic industry, though rather modest in terms of production data,[1] is lively and thriving and has gained considerable scholarly attention.[2] However, cinematic law and film discourse is just emerging in Israel and has not yet seriously

[1] Roughly about 12–14 new features are created each year, getting about two thirds of their budgets funded by the Israeli Film Fund, according to the new Cinema Law. The Cinema Law, established in 1999, specifies the targets of the Israeli Cinema Council which mainly supports and promotes the Israeli film industry. Significant commercial investments are not common.

[2] See, for example, Kronish (1996), Kronish and Safirman (2003), Loshitzky (2002), Ben (1993), Ne'eman (1995), and Shohat (1989).

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touched Israeli films.[3] A primary reason is probably that Israeli films that deal directly with legal proceedings as their main theme or Israeli cinematic courtroom dramas hardly exist. If relevance to law is present in Israeli cinema, it is usually unobtrusive. It can be derived from the main subject matter of the films, but it is not a central topic.

In contrary, many Israeli documentaries focus upon legal issues and deal directly, sometimes blatantly, with individual cases and with some ensuing questions pertaining to the rule of law. Yet, law remains almost absent from Israeli feature films. The relative absence of law in Israeli feature films stands out due to two reasons. The first reason is the traditional interest of cinema in law. Trials, lawyers, and legal proceedings are recurrent subjects in movies and appeal both to moviemakers and audiences worldwide. American courtroom dramas, for instance, won popularity all over the world.[4] The second reason is the central standing of law in Israeli public life. Almost every controversial social or public issue is brought to court, and legal issues are daily part of public discourse. Yet, generally speaking, the film industry did not choose to represent or to depict legal events.

This chapter departs from the fairly conventional focus of law and film scholarship on discussing cinematic representations of actual legal processes or legal issues. The absence of law is taken here as an object of observation and preliminary analysis. This stand stems from the belief that law and film scholarship (and probably the cultural study of law at large) can achieve significant insights about the place law captures in the collective consciousness, by theorizing not only law's presence in popular culture but also its relative absence. Such absence is particularly significant when traced in cultural texts which represent situations in which law could be expected to appear.

In the following, the absence of law in Israeli cinema will be demonstrated by mentioning various films that deal with issues that pertain directly to legal proceedings or legal matters. In spite of that, these films bear some marginal reference to the legal domain or avoid it altogether. This minimization of legal reference will be enhanced by describing some examples of Israeli legal documentaries, which deal directly and uncompromisingly with legal issues.

I will conclude by suggesting three possible explanations on why Israel's cinematic industry does not follow the popular cultural trend of producing fiction legal films, though plenty of legal documentaries are being produced.

[3] In 2005 I was guest editor of an issue of Bar-Ilan Law Studies Journal that was dedicated to law and film. The contributors dealt with interesting compilation of films [*Festen*, directed by Thomas Vinterberg (1998); *Délits Flagrants*, directed by Raymond Depardon (1994); *Rashomon*, directed by Akira Kurosawa (1950); *Death and the Maiden*, directed by Roman Polanski (1994)], none of which are Israeli.

[4] See Machura and Ulbrich (2001).

43.2 Feature Films with Implicit Legal Relevance

43.2.1 From Collective Narrative Toward Personal Stories

As in many other cultures, Israeli cinema reflects shifts and changes that take place in society. It seems that the primary societal shift that Israeli films resonate is the gradual move in Israel from intense pursuit of collective, national issues toward expanding focus upon personal and individual points of view. Uri Klein, one of Israel's leading film critics, aptly describes this progression:

> One of the main questions that guided the history of Israeli cinema was whether to discuss only questions that concern the collective, or is it legitimate to deal with questions that concern the individual within this collective; is it its duty to deal with historic, social and political questions that distinguish the Israeli existence, or is it appropriate to discuss the personal or what is referred to as universal. Certainly, best films combine both. Contemporary Israeli films find it difficult to handle existing reality, maybe similarly to Israeli society at large, and this is perhaps why many films center upon describing individual families and their troubles. In the best films of that genre…, the creators manage, by depicting the plot of one family, to say something relevant to the entire society.[5]

Let me elaborate on this shift, focusing on Israeli cinema since the state of Israel was established, in 1948.[6] The films that were created during the first years of Israel generally represented what could be referred to as Israeli national narrative. This narrative was derived, for the most part, from the collective need to heal from the holocaust dark legacies and to secure the collective existence in the new founded homeland. Alongside the holocaust, the pivotal events that shaped the collective identity of Israeli society were the wars Israel went through. Again, this is sharply reflected in Israeli cinema. Many films focused upon Israeli army, depicting heroic accomplishment of a military mission, while confirming and verifying themes of national identity and collective solidarity.[7] The salient ideological orientation of such films was linked to a wide consensus about the constant threat to its existence Israel faces, and the need to address this threat by maintaining military power and supporting the army, and by expressing the collective solidarity with its actions.

Two examples are *Pillar of Fire* (1958), which tells about the war of kibbutz members in the Negev against the Egyptians attacking their kibbutz during the War of Independence, and *Exodus* (1960), which despite being a Hollywood product, became the ultimate model of the heroic-Zionist cinema. The absence of law from such films is hardly surprising. The pattern of the national-heroic narratives usually did not leave any space to legal diversions.

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[5] See Klien (2009).

[6] It should be noted, however, that Israeli cinema was born in the twentieth century. For description and discussion of the first cinematic production in Israel, see Feldstein (2009).

[7] See Talmon (2001).

Israeli early cinema refrained from dealing with political or social controversies. That, together with the fact that the practice of law in the new state was merely emerging, contributed to the minimum reference to law and legal matters. During the 1960s, more and more films illustrating the daily realities of Israeli life were produced, including melodramas, comedies, and even "author" films, influenced by the new wave in French cinema. However, the new and exciting diversity of the 1960s did not motivate any significant concern with law, although indirect or marginal relevance of law could be detected in some films created during that period.

Films that carry implicit or embedded legal relevance became even more common during the 1970s. Many have regarded the Israeli films created in the 1970s as fundamentally different from earliest production. Renan Shor writes that by the end of the 1970s, normalization of the Israeli cinema had begun; a period of "shattering of pseudo-myths" and of normalization of Israeli cinema has begun.[8] Numerous films deal with sociopolitical issues, and even more do so during the 1980s, following the First Lebanon War.

From the late 1980s, films start overtly deconstructing the collective solidarity narrative and critically scrutinize it, in a way that sometimes ensues implicit legal meaning. The legal relevance, however, is usually secondary to the main themes of the films. Let me specify, by focusing upon three categorizations: human rights films, social drama films, and war films. Though the borders are not sharp, and often war films and human rights films touch conflict of values, the suggested categorization is useful in order to enhance the implicit legal relevance and the lack of actual concern with legal issues in all categories.

43.2.2 Human Rights Films

Starting in the 1980s, Israeli films present new heroes – illegal immigrants and foreign workers, orthodox Jews, Arabs, and minorities. Collective issues that were dealt with in earlier movies are being replaced with issues concerning individuals and their dire circumstances. While some films are all about the self-indulgent, materialistic way of life in contemporary Israel or about stories of individual artistic or romantic fulfillment,[9] there are many films that reflect commitment to social injustice issues.

Numerous films deal with social and human rights issues, sometimes uncompromisingly tackling some of the most acute ailments of Israeli society. Such issues usually carry legal bearing, even if what they reveal is merely law's failure and impotence. These films bring up problems that could and should be addressed by law, but in actual reality, law is exposed through them as a largely inadequate or impotent tool or, even worse, a tool that supports the exploitive nature of society.

[8] See Shor (1984, 39–40).

[9] See Talmon (2001, 241). For example, see *Song of the Siren* (directed by Eytan Fox, 1994) and *Shuru* (directed by Savi Gabizon, 1990). See Kaufman (2006).

A fine example is Uri Barbash's 1983 film *Beyond the Walls*. The film describes Jewish and Arab prisoners who overcome the initial antagonism and even racist hatred and unite forces to rebel against the cruel and unjust prison administration. The denial of basic human rights affects all men and bridges, at least temporarily, the cultural, religious, and national gap between them.

Another Example is Eran Riklis' 2004 film *The Syrian Bride*. Mona is an Arab Israeli woman who is about to cross the border between Israel and Syria to marry a Syrian TV star and never be allowed back to her family in Majdal Shams, a Druze village in Israel. The legal norms, applied in similar harshness by both sides, the Israeli and the Syrian, are perceived in the film as an infuriating and unnecessary infringement of human rights. The uncompromising security considerations used by both sides appear unconvincing and hypocrite. However, human solidarity and empathy succeed in overcoming the obstacles and alleviating the tyranny of arbitrary legal rules. It is worth noting that while in everyday Israeli reality, such issues are rushed to court, *The Syrian Bride* conspicuously ignores the legal path that does exist in reality.

Some films deal with the severe problem of trafficking women to Israel. Amos Gitai's *Promised Land* (2004) depicts the smuggling of Eastern European women to be prostitutes in Eilat and Haifa. The film depicts a cruel reality of exploitation and sufferance that Israeli authorities are unable to prevent. Human trafficking is a legal matter per se, and Israel did address the issue legally during the last years,[10] but in the film law is clamorously absent.

Some films critically examine the contemporary situation of foreign workers in Israel. *James Journey to Jerusalem* (2003), directed by Ra'anan Alexandrowicz, is a sad, somewhat funny story about a young man from a village in Africa who sets out on a religious pilgrimage to Israel. When in Israel, James is immediately arrested by the immigration police. An Israeli who hires illegal immigrants pays James' bail and makes him work for him. A blend of strict immigration laws, social injustices, and cultural gaps make James' life in Israel an experience that shatters his naivety.[11] However, James legal escapades are depicted by using a humoristic light tone that conceals rather than criticizes social injustice and legal incompetence.

The last example is *Noodle* (directed by Ayelet Menahemi, 2007). A Chinese illegal immigrant leaves her 6-year-old son at the house of an El-Al flight attendant she works for. She says she is going out for an hour but does not return, because the authorities arrest her and send her back to China. The only legal aspect of the movie is a short discussion of unavailability of legal solutions to reunite the mother and son. If that movie was made in Hollywood, the pro-bono-hero-immigration-lawyer would show up and reunite the mother and her son. In the Israeli version, the solution is smuggling the child from Israel to China. Again, the humoristic, generally humanistic tone evades seriously tackling human rights infringements and ensuing legal issues.

[10] See Penal Law (Amendment no. 56), 2007.

[11] Another film that deals with foreign workers in Israel is *What a Wonderful Place* (directed by Eyal Halfon, 2005). The film depicts the life of a Ukraine "sex worker," Filipino caretaker, and Thai worker. For additional examples, see *Janem Janem* (directed by Haim Bouzaglo, 2005) and *Foreign Sister* (directed by Dan Wolman, 2005).

43.2.3 Social Drama Films

The following social dramas depict pivotal situations that are highly relevant to law, and in all of them, law is perceived irrelevant or immaterial to the core of the narrative. The first is *Walk on Water*, Eytan Fox's 2003 internationally successful film that brings together Eyal, an Israeli Mossad agent, the son of holocaust survivors, and a brother and sister from Germany, who are the grandchildren of a notorious Nazi who escaped justice. Unexpected close friendship develops between the three. Eyal, however, has a mission – to find and kill the grandfather of his new friends. But when he finally reaches the old man, he must face one of these eternal, almost clichéd questions – the conflict between the rule of law and the urge for revenge.

The law-against-revenge conflict is treated in the film in an ancillary way, and it is almost veiled by the dominant presence of profusion of other heavy subjects, such as sexual politics and homophobia, global terrorism, and Israeli-Palestinian relations. The result is a rather interesting film, which reflects some aspects of the societal shift from the collective narrative toward personal fulfillment. Eyal experiences a partial deliverance from the heavy, demandingly suffocating historical burden represented in the old collective narrative and advances toward new possibilities of personal fulfillment and choice. However, this story of personal liberation renders the legal elements of the narrative marginal and unimportant.

Eytan Fox's next film, *The Bubble* (2006), further pursues the blurring borders between individual circumstances and collective issues. Again, legal relevance is indirectly present. It is a story of three young Israelis who share an apartment in the heart of Tel Aviv. They manifest indifference to the political situation and lead hedonist life. The situation changes when one of them falls in love with a Palestinian he briefly meets while doing his reserve duty at a checkpoint in the West Bank. When the Palestinian comes to Tel Aviv, the three Israelis decide to illegally hide him in their apartment. The uncompromising realities of Israeli existence penetrate their hedonistic existence and shake it. However, and in spite the somber ending, the tone of the film, which depicts the heavy political difficulties as part of a mesh of contemporary popular culture, love, prejudice, and whatnot, remains lighthearted.

The next example is *Campfire* (2004) directed by Joseph Cedar. The film tells the story of a young widow who dreams to join with her two daughters a religious settlement in the beginning of the 1980s. In one of the scenes, one daughter is sexually attacked (maybe even raped) by youngsters of her community. The leader of the community tries and succeeds in covering up the event. The mother cooperates with him. The criminal act, despite its gravity, remains devoid of any legal consequences and, again, is overtoned and overshadowed by other narrative developments.

The last example is *Ajami* (directed by Scandar Copti and Yaron Shani, 2009). *Ajami* is an impoverished, crime-infected Arab Christian and Muslim neighborhood which is part of the Jaffa/Tel Aviv metropolis. The characters, most of them Arabs and some Jews, are caught in a tragic chain of events that creates a forceful portrait of life in Jaffa. Family obligations and feuds alongside national and religious

hostilities and hatreds constantly demand victims, which are involuntarily drawn into impossible situations. Turning to the protection of the formal law enforcement institutions is not even an option. *Ajami* resembles in this sense the Wild West, a territory with its own norms, not fully annexed to the law and order existence outside its borders. However, in *Ajami* the lawless present is not a temporary phase, as it is in westerns; it is the past, present, and desperate future altogether. The absence of law gains a particularly powerful meaning in *Ajami*. The characters do exist in a normative universe. However, it is an opposite of the conventional one. As the plot proceeds, the gap between "the law of *Ajami*" to "the law of Tel Aviv" becomes wider and eventually unbridgeable. That leaves *Ajami* as an enclave abandoned by the law.

The absence of law in *Ajami* is not accidental, as it is in previous films. It is pivotal. It is the heart of this important film, created together by an Arab (Copti) and Jewish (Shani) directors. The absence of law represents here a deep wound in Israeli society that demands immediate attention.

43.2.4 War Films

War films, which have a prominent place in Israeli cinema, are almost innocent of law, although most of them raise issues with clear legal relevance.[12] Here are several examples. *Paratroopers* (directed by Yehuda Ne'eman, 1977) is a film that depicts a death of a soldier in unclear circumstances during training. The focus of the film is far-off from the sphere of law, even though its central event – death in circumstances that demand clarification – is clearly a legal subject and requires a full legal investigation. However, engagement in the practicalities of legal investigation is easily shunted aside.

The film does not present the exclusion of law as connected with a significant conflict between the demands of law and the experience of "good soldiery" or as the result of a struggle between security needs and what the rule of law demands. In the world of the regiment, the absence of law is portrayed as clearly understood and as natural. The film represents the army as an enclave that forcefully and determinedly shoves law away, a perception which is repeated in many Israeli war films.

Another example is Uri Barbash's 1989 film *One of Us*, which deals with the unique solidarity that exists within a group of soldiers. According to Israeli ethos, such groups are characterized by loyalty and total commitment that reigns supreme between comrades in arms.[13] Reoccurring theme that carries legal application is

[12] See Almog (2009).

[13] Other examples for army films are *Two Fingers from Sidon* (directed by Eli Cohen, 1986), *Wooden Gun* (directed by Ilan Moshenzon, 1979), *Paratroopers* (directed by Yehuda Ne'eman, 1977), and *Repeat Dive* (directed by Shimon Dotan, 1980). Avanti Popolo, Bukai's 1987 film, goes even further and tells the war story from the perspective of two Egyptian soldiers stranded in the Sinai Desert during the 1967 war.

whether a warrior should give up the solidarity to the group members in order to make place for other values or put the loyalty to comrades in arms in the first place. *One of Us* deals with such conflict and with the enormous personal price an officer that decides to be loyal to his conscience and in the same time to the rule of law must pay. Not surprisingly, the hero succumbs to the prevailing convention and eventually destroys evidence pertaining to the killing without trial of Arab prisoner that was involved in killing his best friend.[14]

The last example is Ari Folman's 2008 film *Waltz with Bashir*. The film, classified as a "documentary animation," describes the first months of the First Lebanon War, at the end of 1982, and focuses upon the massacre at the Sabra and Shatila refugee camps that took place on September 1982. *Waltz with Bashir* is different from most other Israeli war films. It is certainly not a "law film." Yet, acts of judgment are central to it – the judgment that the author-narrator of the film activates against himself, against his friends, and against the decision-makers of that time. Folman does ask questions of accountability and blame but suggests that answers could be found only by personal soul search and not by legal tools.

To sum up, in spite of *Waltz with Bashir* atypical occupation with some questions of accountability and responsibility and perhaps some additional examples that may be available, Israeli war films generally avoid legal issues or legal themes. The avoidance is striking when placed alongside the declarations of Israeli Supreme Court, that every Israeli soldier carries with in his or her knapsack not only army equipment but also all the norms of Israeli law.[15] Yet the films insist on describing the army as an enclave from which law is absent.

43.3 Legal Documentaries

What is sometimes referred to as the *documentary trend* in cinema has not skipped Israel.[16] The making of documentaries dates to the birth of Israeli cinema,[17] but recent years reveal a real breakthrough of the genre. Many documentaries choose legal proceedings as their main theme. Again, one could detect a move from documentaries that treat national issues and employ consensual, confirmative tone, to documentaries that choose a personal, sometimes controversial perspective.

An interesting example is Eyal Sivan's *Specialist – Portrait of a Modern Criminal* (1999). The film deals with Eichman trial. Adolf Eichmann, Nazi officer who was

[14] See Talmon (2001, 244–252).

[15] See HCJ 1661/05, Regional Council of Gaza Coast and Co. vs. Knesset Israel and Co. (2005).

[16] For description of the documentary trend in American culture and cinema, see Silbey (2006, 109). As Silbey describes, there is a "trend in contemporary film and television that combines a developing taste for documentary –like form with fiction-like content. Indeed, the surge in documentary films going mainstream confirms that the excitement for documentary-like films has reached 'far beyond the art house crowd."

[17] See Zimmerman (2002, 33–42).

in charge of the expulsion of Jews and other minorities from the Reich and then of their deportation from Europe to the death camps, was captured in Argentina by Israel in 1960. His trial in Jerusalem took place the following year and was one of the first public events entirely recorded on video in the world. Sivan uses the historic recordings in order to create a provocative reading of the seminal trial. He uses abrupt, rapid editing of images taken from the trial in order to emphasize the contrast between the monstrosity of the crime and the mediocrity of the man that committed them. The film was influenced by Hannah Arendt's famous depiction of the trial, *Eichmann in Jerusalem*,[18] which was perceived in Israel as insensitive and failing to capture the meaning and significance of the event for the survivors and for Israel's collective historical memory.[19]

Another example is Yoav Shamir's *Checkpoint* (2003), which is a critical depiction of a journey between the various Israeli checkpoints in the West Bank and Gaza. The film, which is now being used by the Israeli army to prevent abusive and illegal behaviors, was shot between 2001 and 2003, in the midst of the second Intifada. It concentrates on revealing the mood and action of a checkpoint, forming a subtle and intricate narrative of the absurd and tragic checkpoints reality.[20]

There is a thriving production of documentaries that deal directly with actual legal cases. Such documentaries are sometimes prompted by legal proceedings that leave issues that are perceived by the Israeli public as unresolved.[21] One of the notable examples is Yitzhak Rubin's *Murder for Life* (2002). The film is a documentary drama, tracing the events surrounding the one of the most disturbing murder cases in Israel's legal history. Amos Baranes, a young man from the northern city of Akko, was convicted of the murder of a young woman soldier. After claiming his innocence during 28 years of legal battles, Baranes finally became the first man in Israel to win an acquittal after a sensational retrial. The film depicts the police efforts to point the finger to someone as the murderer at any price, the overzealous efforts made by the police and the prosecution that lead to perhaps false confession, and problematic evidence that was used in order to convict Baranes. The hero of the film, besides Amos Baranes himself, is the late defense lawyer, Dr. David Weiner. David Weiner killed himself shortly after the film was completed, after getting involved in a lurid police investigation concerning another client that was convicted in murder, to whom Weiner was trying to help in getting a retrial. Rubin has just completed another documentary, titled *The Defende*r, that describes this tragic

[18] See Arendt (1979).

[19] Perhaps this is the reason that only 27 years after its publication, the book was translated to Hebrew. See Arendt (2000). For analysis of the film, see Raz (2005).

[20] For analyses of the film, see Zanger (2005) and Avila (2006).

[21] Perhaps one could detect a universal trend of creating documentaries that critically reveal the shortcomings and failures of legal systems by reexamining cases that expose allegedly faulty legal proceedings. Such are, for example, the films of Jean-xavier De Lestrade, *Murder on A Sunday Morning* (2001), and *Soupçons* (*The Staircase*, 2004). See also Raymond Depardon's *Delits Flagrants* (1994) and Ofra Bikel's *Burden of Innocence* (2003) and *An Ordinary Crime* (2002).

affair.[22] *The Defender* (2005) reveals the sordid "behind the scenes" of Israeli legal system. The hero of the film – David Weiner – is caught in an impossible situation that involves the contradictory interests of the police, the court, the state attorney's office, and his client. Rubin's most recent documentary is *Murdering a Judge* (2010), which focuses on the murder of the Israeli Tel Aviv District Court judge Adi Azar, who was assassinated in a drive-by shooting in 2004, marking the first judicial assassination in the history of Israel. Rubin's film reenacts the trial, in which two people were convicted of committing this murder, and raises doubts as to the soundness of the conviction.

A legal documentary that focuses on the army is the 2003 *Clear Conscience*, by Uri Barbash (who directed the feature film *One of Us*). This is the story of five Israeli teenagers who claimed their conscience does not allow them to serve in the Israeli army. The film presents them as heroes, quite contrary to Israeli common perception in this matter that tends to treat such behavior as deplorable. The film includes interviews with the five teenagers and the lawyers involved, as well as reenacted parts of their trial. Oppositely to the feature films that deal with army matters, it is replete with actual legal proceedings.

To sum up, unlike fiction films, many Israeli legal documentaries suggest a direct and clear legal significance. It is often highly critical, emphasizing law's failures and incompetence. Yitzhak Rubin's documentaries, for example, depict Israeli courts and the investigating authorities in a most unattractive light.

This phenomenon could be perhaps linked to the observation mentioned before about the instrumental perception of law that prevails in parts of Israeli society. On one hand, the tendency to intensively scrutinize and criticize the legal system, as well as its performances, achievements, and failures, leads toward abundance of legal documentaries. On the other hand, the same pragmatic, mundane approach toward law leads toward lack of artistic interest in it, which is represented in the absence from Israeli fiction films.

43.4 Why Is Law Absent from Israeli Feature Films

As elaborated, there are very few Israeli films that deal directly with fictional trials or legal cases. While the absence of law in Israeli cinema until the 1980s seems to be in accord with the other indications of a dominant anti-legalistic trend in Israeli

[22] Many documentaries on legal cases are made for television and sometimes are being screened in movie theaters. Here are some examples: Nili Tal's movie *Mighty as Death* (1997) tells the story of a young woman who was murdered by her partner and follows his appeal on his conviction. It is the first time that an Israeli movie includes real footages of a trial. Limor Pinchasov's film *4.7 Million* (2005) tells the story of a man who worked as a security guard in one of the biggest security transportation companies in Israel and robbed a truck with 4.7 million NIS. The director interviews the friends (who were suspected for helping him) and brings exclusive footages from the police's investigation.

society and in the political establishment during those years, the minor representation of law in films since the 1980s can be perceived as somewhat surprising in view of the status of the Israeli Court as a central forum to which Israeli society addresses almost any significant issue.

At the present time, law is very prominent in Israel and salient in everyday life. Israel does not have formal constitution yet, but all major and sometimes trivial issues find their way to the Israeli Supreme Court and to lower courts. Courts dealt with the legitimacy of settlements, with political feuds, with election issues, with government budget, and with almost every aspect of public life. It seems though that the constitutional substance that continuously occupies the media and public attention is not very inspiring for fiction films. Even if they easily sustain long discussions in law faculties and conferences, the lengthy texts produced by Israeli judges are not enticing sources for movies.

In the following, I will suggest three possible approaches that might explain the poor presence in law from Israeli feature films.

Firstly, Israeli and perhaps Jewish culture in general never emphasized the formal, external, and visual dimensions of law. There are no visual historic traditions of trials being held in specific familiar locations (like Westminster Hall or any other collectively recognized judicial site) or of robed and wigged judges in Jewish tradition, in spite of the clear legal orientation of this tradition.[23]

Ceremonial and visual aspects of the law, which are common fare in cinematic representation of law, and are prominent features in the Anglo-American and some Continental systems of law, are also notably missing from Israeli law, which has never emphasized visibility.

Israeli legal system is also devoid of jurors, who contribute an important dimension to the public appeal of the legal proceedings. The only noticeable element of the legal attire of Israeli Judges and lawyers is a black robe. Colorful adornments such as wigs or ribbons, which are common in other systems, are absent from the Israeli one. An interesting query raised by Ella Shohat is what would have been the cinematic implications of the traditional Hebraic love for listening, in contrast with the Greek preference for seeing. Indeed, In Jewish tradition, there is no need to see justice, but to listen to it; it is important to hear the commandment, to interpret its meaning, and to tell stories about it, but it was never essential to create a visual realization of it.

Secondly, Israeli legal culture is very different from the American one. As Yoram Shachar maintains, in the American cultural and cinematic tradition, it seems that the community produces heroes as jurors and lawyers, in order to become, through them, a judging and redeeming community. Many scenes of metaphoric collective and personal redemption take place in the court of law and during legal proceedings.[24]

[23] Jewish law is perceived as an autonomic system that governs all the aspects of relationship between people and between people to God. Most of the huge corpus of Jewish scripture is what might be referred to as legal debates between sages as to the accurate meaning of norms.

[24] See Shachar (2007).

American courtroom dramas and other legal genres reflect this tendency,[25] which in many ways turned global and influenced the public concept of justice far beyond American borders.[26] The adversarial proceedings in American courts resemble battling or competing sides. In this aspect the lawyers are comparable to competing athletes.[27] The public witnesses an exciting match and looks forward to the formal announcement of winners. The admiration grows if the winners happen to be human rights heroes or conglomerates defeaters. The judges' roles in such spectacular legal performances are typically secondary to the roles of the lawyers or jury. Most films focus indeed on the stories of lawyers and jury that save the day and redeem the public by paving the way for justice.

In Israel, in contrast, the scenes of collective redemption and courage take place or used to take place in battlefields and wars. Israeli heroes used to be soldiers and generals, not lawyers. Ethical, personal, and legal dilemmas took place during wars. That was faithfully reflected in films. True enough, it seems that soldiers and generals passed their glory in Israeli society (*Clear Conscience* is one example for that), but lawyers or judges did not replace them yet, neither at society at large nor on theaters screens. The Atticus Finch-like figure of a lawyer as a hero does not have Israeli parallel, and the legal chronicles of Israel seem to inspire only documentary film makes.

Thirdly, the Israeli legal system is a young one and a mixed one.[28] While deriving in many ways from old, even ancient, systems like the Jewish law, the common law, and Continental law, it operates as an independent system only from 1948. The young Israeli legal system reflects years of national and ideological intensity that characterized the first decades of Israel existence as an independent state; it is perhaps too early to anticipate the creation of variety of legal narratives that typically derive from density of history and experience. Israeli courts do confront major conflicts, but the public discourse around such confrontations is still active and far from being resolved, and thus, they cannot readily set off cinematic inspiration.

Additionally, the mixed Israeli system became more and more inquisitorial throughout the years, which means that judges became more involved and the roles they play during the legal proceedings gradually became more significant. In this sense the Israeli legal system resembles Continental legal systems, where mostly inquisitorial proceedings are being practiced, and thus the role of lawyers is less central, and less likely to serve as a rich cinematic source as it is in America.

All these possible reasons for the minor representation of law in fiction films are less relevant to documentaries. Israeli legal documentaries are usually not inspired by legal visual grandeur or by past achievements of famous lawyers or judges.

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[25] For the centrality of the courtroom dramas in American culture, see Rafter (2001), Papke (1998–1999), Kuzina (2001).

[26] See Machura and Ulbrich (2001).

[27] Sports films are also a popular genre, perhaps because of the element of competition and victory that also characterizes many legal dramas.

[28] See Barak (1992).

Typically they draw from materials created by reality and offer a critical gaze upon certain legal proceedings. Often they aim to promote or deliver a definite message, as Yitzhak Rubin does in his legal documentaries that highly criticize the ability of the legal institutions to reach justice. Thus, many documentaries criticize alleged failure of law enforcement in Israel, by using mainly footage from actual legal proceedings and investigations.

An interesting example, alongside the documentaries that were mentioned already, is documentary films that focus on the murder of a 12-year-old girl named Tair Rada in 2006 and the 2010 conviction of Roman Zadorov as the murderer. Although the case stands now before the Supreme Court, the affair had already ensued three documentaries that analyze or vehemently criticize the legal proceedings and the conviction by the district court.[29]

Legal documentaries, then, derive from existing materials and from real-life issues and usually offer comments that are part of the Israeli public discourse pertaining to these issues. Causes that hinder the production of legal feature films usually do not apply to legal documentaries, which are abundant.

As much as there is a need or even attraction in Israel for fictional representations of legal practices and trials, and I believe there certainly are such need and attraction, it looks as if the American industry fully caters for it. Hollywood courtroom dramas and television legal thrillers such as *Law & Order* are as popular in Israel as anywhere and perhaps saturate the public appetite for cinematic trials while making redundant the need to produce local legal films.[30] Consequently, documentaries take hold of the vacant space, often aim a critical gaze toward legal institutions, and evoke lively public debate.

43.5 Conclusion

This chapter described the minor representation of law in Israeli fiction films and, in attempt to map out the reasons the absence of law from Israeli cinema, suggested three possible explanations. The first is the legal tradition in Israel that is derived from the Jewish law, where there is no desire to visualize justice. Furthermore, the visual reality of the Israeli legal system lacks adornments that create visual interest in law. The second explanation draws from the differences between Israeli and

[29] The films are *Only Tair Knows* (directed by Sharon Gal, 2008), *Nailing an Innocent Man* (directed by Haim Sadovsky and Doron Baldinger, 2011), and *Who Murdered Tair Rada?* (directed by Michal Kafra, 2011).

[30] It should be mentioned, however, that few legal series were produced for Israeli television. One example is *Siton*, a series about the legal and personal adventures of a Jerusalem lawyer, and another is *Franco and Spector*, a series which combines both courtrooms drama with familiar personal life dilemmas. Such legal series are scarce, though. I believe that in this context as well, American TV products such as *Law & Order* and *The Practice* meet most of the public demand for "legal television."

American cultures and the dissimilar perceptions of lawyers and their role in society, as well as the differences in the legal procedure. The third explanation suggests that the 60-year-old legal tradition in Israel is not rich or laden enough to challenge feature filmmakers and to trigger cinematic representations.

It is hard to forecast what shifts are about to happen and which themes will be dominant in future films. Since there is an obvious gap between the eminence of law in the public eye, to its peripheral place in Israeli culture, it may well be that Israeli legal films will evolve. Or, perhaps, the unique characteristics of Israeli society and legal system will continue to resonate in the thriving of legal documentaries, the scarcity of Israeli legal feature films, and the intense consumption of American court dramas.

In any event, the current scarcity of legal representation in Israeli fiction films is a meaningful signifier in the Israeli societal context. It can lead toward an exposure of the cultural and political assumptions which account for the absence and thus deserve careful attention. The lack of interest in law in Israeli films, compared with the central function of law in Israeli life, might reflect a gap between the festive legal rhetoric of Israeli courts and the instrumental approach of the public, who associates law not so much with higher values and celebratory statements but merely with the instrumental option of providing practical answers to specific cases.

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Chapter 44
Influence of Public Perceptions of Media Legality on Making Biopic Films

Betty L. Hart

Abstract The symbolic presence of the law in everyday life influences the actions and beliefs of the general public. This perception of the law is carried into our daily lives, leading us often to act or not to act on a belief that something is or is not "legal." Thus, the law determines a kind of "truth" in the sense that if it is allowed, then it must be legal and therefore provable, or true. This awareness includes our belief that information delivered via the public media has an obligation to be truthful and free from malicious or deceitful intent. This is especially true for information regarding the lives of individuals, including those who must live their lives in the public view. Thus, if we hear about famous and public figures on television or see their stories at the movies, we assume that, unless there is a strong disclaimer preceding the information, what we see and hear is true. This philosophical understanding of how the law draws boundaries around what can and cannot be included in a filmed biography greatly shapes the trust of viewers that filmmakers will present truthful and accurate portrayals of subjects of biopic films.

44.1 Introduction

The world of lawyers, courtrooms, and the law as depicted in films is often the subject of scholarly consideration, but the matter of the abstract presence of the law as part of the context for validity in narrative films is less investigated. Viewers bring to the film certain assumptions about the law that condition their ability to imagine cinematic reality and ultimately truth. This is particularly true in biopic films, specifically unauthorized narrative biographies in which some creative license for truth and accuracy is necessitated by cinematic form. Screenwriters must often select from only a few segments of a person's life to illustrate a significant point

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while also conveying a believable universe and character to the viewer. If the character is well known, the screenwriter must also respect the public's prior knowledge of the character, both in behavior and motivation. Of specific relevance to these films are laws concerning defamation, privacy rights, and rights to publicity. The public's sense of these legal areas determines, to a large extent, how likely viewers of biopic films are willing to accept the story as authentic.

Given the ability of film to represent abstractions of reality through the semiotics of the visual medium, most viewers are all too willing to believe that what they're watching is actually and unequivocally true. Consequently, filmmakers must find paths around these expectations and potential legal consequences. Both the writer and the production personnel have to anticipate the response of the viewer to the final product in which the viewer is involved by all sorts of sensory signs—sights, sounds, and even touch and smell in some movie theaters. In rendering a believable biographical story, filmmakers must pay attention to such obvious variables of biography as the integrity of background research, factual accuracy, and respect for whatever character myths may exist in the public domain. The writers must consider how else to truthfully represent the defining episodes of the character's life with respect to audiences' expectations for accuracy. Encoding the meanings and values inherent in the character's life—especially any controversial sensibilities of the subject's character or events of questionable accuracy—within a compressed system of semiotic manipulations (election, emphasis, preference, and privilege of visual images) will allow filmmakers to reconcile the need for artistic freedom and the constraints of film form to the audience's concept of the legal limitations on the need for the media to be truthful in regard to the telling about the private and public lives of others.

Examining media renditions of courtroom culture, I will investigate the sources and bases for the public's perception of legal parameters assumed in biopic productions. I will establish that most Americans have acquired a notion of law and justice that translates as an expectation for truthful accounts of lives presented in public media. I will then consider how the idea of law as logical truth constructs what viewers are willing to accept as biographical (and perhaps artistic) truth. I will consider how this knowledge is socially and systemically affirmed culturally. Finally, I will look at the overall impact these expectations have on filmmakers and the limitations imposed on their ability to render an artistic account of a life. As part of that consideration, I will discuss the semiotic detours that filmmakers employ to increase the boundaries in which they construct the biographical representation of a person's life. My specific concern in this chapter is how ordinary citizens, untrained in the law, are influenced by their sense of legal sanction and restriction in interpreting representations of the "truth" in biopic films.

44.2 The Legal Imperative for Truth

Those who work within the realm of film biography are constantly picking their way through issues of truth, interpretation, and embellishment. The screenwriter, the actors, the director, the camera person, the film editors, and all those involved in

the creation and production of a biographical film are all involved in the business of constructing a sense of historical accuracy, and the key is that it must only be a *sense* of accuracy. If the final product inspires a sense of belief that the story is a true representation of the subject's life and if the viewers are convinced that the essential events and character are revealed in the film, then the film is deemed a "true story." Most of what people are willing to accept as the truth of a portrayed life is defined by what details they may already know about the subject, their notions of what represents typical human behavior and motivation, and their desire to see certain public values affirmed and validated in the stories they witness. Filmmakers, they believe, have a responsibility to tell the truth, an obligation that is substantiated by the parameters of what they believe the law allows. Public perceptions of the legal boundaries of libel and slander, along with the notion of one's legal right to privacy, convince most viewers that the law allows only the verifiable and demonstrable facts of a person's life to be used for public examination.

The sense that there is a legal imperative for truth in representing the life and the reputation of another is further supported by the tradition of popular courtroom drama. With nearly a century of television and cinematic films sensationalizing the drama of trial law, most Americans believe that they are informed with at least a semblance of common legal knowledge. Armed with media cases "ripped from the headlines," and whole networks devoted to court procedures, we not only know that truth really means logical reality and "the letter of the law," but we have acquired a whole literacy and language for how the law determines the rules for social behavior.

This procedural and philosophical understanding of how the law draws boundaries around what can and cannot be included in a filmed biography greatly shapes the trust of viewers that filmmakers will not cross those boundaries with excessive embellishment or lies. In the case of popular cultural heroes, the public also expects a certain degree of reverence or care not to defame these public figures. The viewing public has little tolerance for violating its myths. In biopic films, cultural heroes, despite their human flaws and fallibility, must be redeemed by film's end. Even tragic heroes must survive their downfall and inevitably allow viewers the catharsis of judgment. When a rough spot in the life of a respected public figure does not have a good outcome, viewers are likely to adopt the cinematic version as a true account of events in that person's life, revising whatever prior knowledge they may have had of that character. Viewers, however, are not naïve. They understand the genre of film and its limitations, yet they also understand the legal allowances in treating the facts of a person's life for public entertainment.

Cases in point are two recent presidential biographies: *W* and *Frost and Nixon*. A flurry of attention surrounds the "controversial" cinematic versions of the lives of both George W. Bush and Richard M. Nixon—controversial because there are arguments about how true (though truth *is* an absolute!) these film versions are and can be. Both film biographies are unflattering and reveal all too human fallibilities of the subjects. When asked how he manages to get by with such a damaging portrayal of the current President, director Oliver Stone claims that "it's all true; nothing in the film did not happen" (Svetkey 2008). He was only asked that question because his interviewer, as well as those listening to the talk show interview, expected that

Stone would be subject to suit for libel, infringement of the president's right to privacy, or some form of character defamation for telling anything but the truth. Writer Paddy Briggs sees Stone's use of "the known facts" as his not just avoiding any possible libel suit but as making an even more chilling film" (2008).

44.3 The Presence of the Law in Social Experiences

The venues which contribute to the viewer's idea of the truth are ubiquitous throughout media. Examples abound for the contexts in which popular culture acquires a general knowledge and understanding of what the law is and how it works. There is a certain amount of journalistic integrity we expect when we are watching purely informative genres of news and biography. News programs, reality shows, and documentaries on educational channels are virtually unchallenged in their authority to present accurate and true information, because we, as a society, assume that responsible journalism requires honesty and truth. However, when we watch shows about the same issues, subject to creative treatment—fictionalized accounts of actual lives and events—we extend the standard of truth, include the possibility of truth, and sustain our beliefs by this trust in the media and by our understanding of the law as defined by popular culture. Law school is in session everyday for the average citizen.

Early one morning, I awoke to hear a local news story about an Illinois statute which bans hanging ornaments from one's rearview mirror. According to the reporter, it is the officer's prerogative to enforce this ordinance, which is most likely to be invoked as a means to stop suspicious, or perhaps annoying, drivers. My immediate response was that the statute represented an infringement of First Amendment rights. Prohibiting these hanging ornaments, often a symbol or emblem of one's personal identity, disallows free expression of one's self. I wondered if anyone had challenged the law in court.

Not long after that, the news broke of golf "phenom" Tiger Woods' splashy driveway accident. It was the lead story on the NBC Today show (Bell 2009a). Amidst the speculation of what a domestic altercation had provoked, the incident was the rumor that the Woods' marital problems might possibly explain Mrs. Woods' incidental possession of a nine iron at the scene of the accident. This story took precedence over war and economic news: "Still not talking!!!" headlined the story—Tiger asserted his right not to talk to the police. Something was not right. As the details unfolded via media venues, the story mushroomed into a public scandal, delving into the private life of Woods and leaving his "squeaky-clean" image tarnished and subject to late-night humor. News stations claimed that Woods' initial reluctance to address the incident earned him the public's curiosity and media attention.

His life, public and private, was fair game for news making. As the news coverage advanced deeper into Woods' private life, the matter of his privacy seemed a nonissue. The details of Woods' private life were accepted as true because the public had a tendency to trust broadcast news to report truth. The public has learned to assume

that, if the news media has erred in its accuracy, either a legal suit for libel or an aired apology will follow. In other words, most of us assume that the news wouldn't report the information if it were not true. Our concept of the legal definition of the right to privacy exists somewhere between constitutional amendments and the notion that individuals are entitled to keep their personal business private. We make no distinction between famous and ordinary individuals.

My thoughts about what is legal, what is right, and what is allowable in regard to a person's privacy and right to free expression are typical of most Americans. Most of us claim a working knowledge of the law, assuming that what we know can be practically applied to situations and contexts in our actual lives. Our rudimentary understanding of the law informs our sense of legality in terms of protection of our individual rights and definitions of permissible civic behavior. We carry this perception of the law into our everyday lives, often acting or not acting on our belief that something is or is not "legal." Thus, the law determines a kind of "truth" in the sense that if it is allowed, then it must be legal and therefore provable, or true. This awareness includes our belief that information delivered via the public media has an obligation to be truthful and free from malicious or deceitful intent. This is especially true for information regarding the lives of individuals, including those who must live their lives in the public view. Thus, if we hear about famous and public figures on television or see their stories at the movies, we assume that unless there is a strong disclaimer preceding the information, that what we see and hear is true.

Such a disclaimer is often aired preceding episodes of the popular detective and court drama, *Law & Order,* which often advertises its upcoming episodes as "ripped from the headlines." One disclaimer reads, "The following story is fictional and does not depict any actual person or event." Another, earlier disclaimer reads, "Although inspired in part by a true incident, the following story is fictional and does not depict any actual person or event." Viewers will probably construe these disclaimers as NBC's effort to avoid being sued for the libelous exploitation of public persons or events. In one episode, "Political Animal" (Slack et al. 2008), for example, Detectives Green and Lupo investigate a triple homicide that appears to be tied to a politician. This episode alludes to at least three persons and events in the news at the time. The plot suggests political subterfuge, as the politician suspected of murdering another politician takes desperate measures to keep his freedom by fleeing from the country. The politician's murder was reminiscent of the suspicious death of Vince Foster, Deputy White House Counsel during Bill Clinton's presidency, and the flight of the politician was suggestive of the 2007 scandal involving Norman Hsu, who had gained notoriety for his suspicious campaign contributions to the Democratic Party and questionable business activities. Inserted in the story is a scene in which Detective Lupo, assigned to a stall in the men's bathroom at the airport, nabs the local politician for sexual misconduct. The politician's play of footsies under the stall was not unlike those attributed to US Senator Larry Craig in his Minnesota airport tryst.

Although viewers may be aware that the melding of all these individual events is a ploy to create an engaging story, they are generally familiar with the details of the real life, disclaimed events, and principals involved, and despite this awareness,

they may not be aware that they are being subtly swayed by the media portrayal to make those associations and temporarily suspend values for truth and accuracy. A sophisticated understanding of cinematic reality acknowledges that the ability to imagine possibility rather than to demand actuality is essential in constructing film narratives. Beyond suggesting "it could have happened this way," such presentations make powerful use of visual images to instill in viewers a conceivable version of what actually happened. In other words, the acted out scene, because it must adhere to our accepted knowledge and expectations of human behavior, is a logical argument for the possibility of truth and accuracy.

The disclaimer endorses this sensibility as it affirms our belief that such shows are not legally allowed to flagrantly abuse the reputations of public figures. The public holds a sense that laws exist which can determine how much truth and accuracy viewers are entitled to in being told about the lives of others. All of this, however, depends on the viewers' concept of privacy and libel laws, which may or may not be accurate.

Despite *Law & Order's* standard disclaimer, TV commentator Bill O'Reilly saw enough of himself in an episode ("Anchor") of the crime drama that he publicly lambasted the series as "despicable" and "out of control" (Green et al. 2009). O'Reilly's objection was primarily to a scene which referred to him and two other conservative news commentators as "like a cancer spreading ignorance and hate" (Dykes 2009). He called the scene "defamatory and outrageous." In concluding, O'Reilly threw out a few epitaphs of his own, calling producer Dick Wolf a "coward" and a "liar." O'Reilly's use of the words "defamatory" and "outrageous" seems to nullify the legitimacy of his claim. A defamatory statement is false and harmful to the subject's reputation. Such conditions may be difficult to prove, especially as the claim of defamation does not include hurt feelings or harsh opinions. Hyperbolic or inflammatory statements, such as the reference to cancer, tend to be regarded by the courts as mere opinion and not defamation (Crowell 2007, 280). The majority of the public, as demonstrated in the online comments of viewers, did not know the particulars of libel laws. Their remarks concerned the fairness of the implied reference and its tackiness. At no time did their comments refer to any potential legal ramifications for the use of likeness or reference to O'Reilly. According to viewers, the show, though tacky, was entitled to such portrayals, especially since the show flashed the disclaimer at the start.

44.4 A Public Understanding of the Law

Considering the lay public gleans its legal knowledge most likely from the media itself—through news programs, courtroom dramas, and perhaps a few residual facts from high school civics—the public's understanding of the law is, at best, a pragmatic and powerful social contract that allows us to process the events of everyday life in terms of fairness and justice, and belief and question. The network news coverage of the child custody dispute between Levi Johnston and Bristol Palin, daughter

of celebrity politician Sarah Palin, illustrates how we acquire a kind of public understanding of the law and matters of privacy and publicity (Bell 2009a). The news interview was fraught with allusions to privacy laws and laws governing the public's access to the private lives of celebrities. The aura of live news and ticker captions running across the bottom of the screen added to the authority of the report and the lawyers being interviewed. The discussion, a heated debate, however, did little to clear up confusion about guaranteed constitutional rights to privacy and the distinction between privacy laws and publicity laws. Nonetheless, the segment engaged the viewer's attention as it involved a juicy story and piqued the viewer's curiosity about the lives of famous people and how the law restrains their tendency to live above the laws of common people.

Palin and Johnston were arguing for sole custody of their child, born out of wedlock. The network news report focused on the judge's decision to deny the Palins' request for a closed trial, which meant that the judge decided to allow media presence. Levi's lawyers claimed the necessity for an open trial on the basis of Levi's fear of Sarah Palin's potential to negatively influence court proceedings. The Palins counterclaimed that Levi, who had recently posed nude for *Playgirl* magazine, was simply using the trial publicity to promote himself for a role in a future reality show. The superior court judge ruled that the Palins had failed to prove that the anticipated publicity would harm the child, and the presiding judge for the district also denied the Palins' request to use pseudonyms. Following the report, the host interviewed the two legal experts, one of whom argued that the judge had been influenced by the celebrity status of the parties and had made an unwise ruling. She said, "The legal standard is to balance the public's right to know against the private interest of the parties." Her comments were followed by a volley of heated opinions between the two lawyers on media privilege versus legal allowances, which included, on the part of one of the lawyers, a near case of the dozens and name calling. Ironically, in an obvious "huff" over the matter, she capped off her comments by saying that, if Johnston were truly concerned that Sarah Palin might harm his reputation or say something damaging and untruthful about him, "he could sue her for slander or something." Though the other lawyer emphasized that it was ridiculous to think that the judge could ignore the public lives of the Palins and Levi Johnston, the first expert shot back, "You don't allow people to exploit public proceedings!"

This entire conversation is a notable example of the ways in which the public becomes informed about the law's relation to media and public lives. The reference to "the public's right to know versus the private interest of the parties" suggests that the public does indeed have legal rights to the lives of public persons, and in fact, though most people believe that the right to privacy is constitutionally guaranteed, they also believe that public people give up those rights when they become celebrities. That lawyers reference these rights gives credence to the idea that such laws exist. As one of the interviewees commented, it does not really matter if the stories are true or not; the public has a right to know. In this case, it doesn't matter if the law exists or not; the public will take what information it can get, and sometimes what it gets is a good story.

44.5 Constructing Legal Reality in Visual Media

The difficulty in writing a biopic screenplay lies in straddling the line between creativity and reality. The point of creativity, some critics would say, is to create things that reflect or mirror life; that is to say that the idea is to create something that will seem believably real, in the sense that it demonstrates the qualities of life itself. Hence, the goal is to create something that is realistic and, perhaps, also realistic in a beautiful or pleasing way. Certainly, the expectation for viewers of biographical films is to experience a truthful, insightful, and reasonably unexpurgated representation of the subject's important life events. A biography, then, is more than a story. It is a means for judging culture and for understanding ourselves ultimately as agents in an imagined universe, and in doing so, absolute truth is not such a critical factor. It is sufficient to accept that the law restrains flagrant exaggeration and misrepresentation of a person's life for public entertainment.

So viewers may assume, when viewing biopic films, that filmmakers are presenting a reasonably factual account of the subject's life. Understanding that it would be impossible to cover every detail and nuance of a person's life within the time limits given for the genre of screenplays, viewers are willing to accept that the episodes and conversations observed represent the screenwriter's choice of defining moments of the subject's life or at least the key events that lead up to a single turning point in the subject's life. Biographer Meryle Secrest calls these moments "pivotal moments or primal episodes" (Menand 2007). Secrest notes one necessary factor in biography—viewers come to biography with an image of the subject already preconceived, an image which is most considerable when the subject's life is well known or a matter of public record or myth. That is, viewers expect to see, occurring in the life of the subject, certain events and behaviors that are associated with the subject's story. Constrained by these expectations, the biopic film writer's choices for additional scenes may seem somewhat arbitrary, as Secrest suggests, but she resolves that "biography is a tool for imagining another person, to be used along with other tools. It is not a window or a mirror." In that biography is not a window or mirror, the condition of accuracy or factual image is not a necessity.

Film reality is a kind of virtual reality in which the field of imagination occurs between the mind and the screen. Much as we do in reading text, we engage a medium with literacy for the genre. For example, the standard length of feature films is 2 h. It would be absurd to think that, given 2 h or 120 pages of written script, any one could possibly tell the complete, unabridged story of a person's life, let alone the story of anyone who has lived above the level of most mediocre lives, but still we will watch a 2-h biographic movie and feel as if we have experienced the life of the main character. We do not interrupt our viewing with questions of whether or not the characters actually had those conversations or if the relationships between characters are accurate or even documented. What we expect is not a documentary, but a believable and concentrated presentation of the events and influences that drove the character to a particular point in life. We are aware of and appreciate the artistic license used to both entertain and inform us. As long as

the presentation is logically consistent with whatever preconceptions we had about the character and with what we believe the law allows for accuracy, we are satisfied.

Because of necessary limitations of time and accuracy, screenwriters use tools and methods to assimilate real-time and irretrievable dialogue. The viewer's preconceptions and expectations factor critically into the "tools" that the screenwriter may use in creating the milieu of the biography. For example, in the film *Amelia*, the ambiance of 1930s America and the social climate of hope have likely been established prior to the movie through shared cultural knowledge and lore of the depression era. This understanding of the "times" supplies the desired respect for the cultural values and trends that backdrop the events and characters of the film. Sebastian Mahfood, a researcher of intercultural trends, argues that the means for conveying these sensibilities in film requires a different language than that used in literary representations (Mahfood 2000). The language of film, he says, as opposed to the written word, is conveyed through various camera angles and speeds, time shifts, vocalization of words, and visual images. Another aspect of film language, he continues, is its semiological nature—its ability to represent cultural and countercultural values. The language is necessarily semiotic in that it takes advantage of imagery, signs, and cultural understandings preexisting in the social psychology of viewers.

Unlike documentaries, which persistently interrupt the presentation of information with documentation of authorities, references and allusions, and analytic commentary, feature film biographies simply tell the story, assuming that the concentration of events will sustain an understanding and presumption of what may have happened. The entire script is somewhat a large and extended metaphor in which a life is semiotically conveyed through the writer's choice of words, actions, and cinematic method. The use of a single episode in a character's life, for example, may become representative of several similar events in the person's life, and often the scene may be actually a composite of events and persons from those other events. Although the time and actual event may be embellished or changed to reflect a particular point or aspect of the character's life, it still maintains a truth in that it signals the reality of the context to the sum total of the character's life. However, the elusive nature of signs and metaphors make it all the more difficult to constrain truth within the limitations of the law.

The movie, *Blind Side*, is the story of Michael Oher's incredible rise from the Memphis slums to a professional football career with the Baltimore Ravens. Initially avoiding interviews about the movie (Alpour 2009), Oher allowed the reporters of ABC's *20/20* news show to interview him about his life and the movie (Neufeld 2009). Oher commented that one particular aspect of his popular biographical movie was simply not true. It was rather, he said, an effort to embellish the facts to enhance the plot. He was referring to scenes in which he appears to need instruction on how to play football and encouragement to be more aggressive and mean. Oher said that he had always known how to play the game and when and how to be aggressive and intimidating on the field. "But," he said, "It's all right. It's Hollywood, I mean at the end of the day—it's still a good story."

44.6 The Limits and Allowances of Privacy Law

Whenever a writer chooses to dramatize a subject's life story, she has a choice to make—whether to acquire permission to tell some else's life story or whether to take her chances in composing an unauthorized biography, shielded, hopefully, within the sympathies of the law. Getting prior permission is the less risky approach, as a Life Rights Consensus Agreement can help the writer avoid all sorts of claims that can be filed against the writer or filmmaker. Such an agreement typically grants the writer the right to portray the subject's life in whole or in part and to fictionalize parts of that person's story. Sometimes the agreement will indicate whether the use of pseudonyms would be necessary or required. A life rights agreement may also contain waivers and releases that will protect the filmmaker from a number of intellectual property and privacy claims. The grantor of the life rights agreement promises that the life story of the subject is true and accurate. Securing permission to film a biography through the life rights agreement clears the way for whatever adaptations and creative revisions a filmmaker may need to make for the cinematic genre, not to mention that the agreement helps the filmmaker avoid potential lawsuits (Crowell 2007).

As clear cut as this arrangement sounds, many filmmakers must choose another route. For low-budget or independent films, high fees for prominent subjects may be prohibitive. Understandably, some subjects of biography, or representatives of a deceased subject's estate, may not wish to have their life stories filmed. For whatever reason, filmmakers who produce unauthorized biopic films must work around substantial legal risks, including libel, infringement of intellectual property rights, violation of the right to publicity, and invasion of privacy.

However, filmmakers receive some protection through limited interpretations of their First Amendment rights. For media cases, especially those involving celebrities, the courts usually defer to the First Amendment in protecting free speech rights. Biographers, as a rule, can write an unauthorized biography if the story is accurate, respects the subject's privacy, and does not infringe upon the subject's right to publicity (Crowell 2007). This allowance pertains as well to honoring copyright terms and other intellectual property rights. The courts generally favor the media writers in behalf of preventing encroachment on basic First Amendment rights. The law argues that those who place themselves in the eye of the public are subject to its scrutiny. Thus politicians, film celebrities, professional athletes, and the popular performing artists are fair game for the tabloids and biographers—though, such public persons are not totally unprotected from the pen or curiosity of their public. The right of publicity at least entitles celebrities ownership to their name and likeness, specifically, the use of the celebrity's name or likeness for commercial gain. Lloyd Rich, at the Publishing Law Center (Rich 2000), claims that the name and likeness of public persons, to a large degree, have an "intrinsic value … as a symbol of their identity," a symbol that can be construed as a "form of property" that can be sold or passed on to third parties. Yet, if the biographer can prove that the famous person's name and likeness were not used for commercial

purposes, the right of publicity does prevent the writer from using either, and certainly, a writer may argue that the public's right to have a truthful accounting of a public person's life justifies telling a potentially controversial story, as long as the story is told without malice or intentional falsity.

However, authorized or not, most viewers are unaware of the many legal agreements and interpretations that surround the writing of a biopic screenplay. They just assume that the legalities have been taken care of and that they are viewing the required standard of truth and accuracy in portraying a person's life story.

A good case in point is Oliver Stone's 2008 movie, *W.* Prior to the movie's release, Stone was interviewed by *Entertainment Weekly*. Stone insisted that every scene in the movie was based on truth derived from his and cowriter Stanley Weaver's extensive research with published biographies and perhaps based upon information from "a few disgruntled former staffers." Interestingly, Stone admits to having to alter the timing and order of certain events, as well as speculating on possible dialogue for most of the movie: "You take all the facts and take the spirit of the scene and make it accurate to what you think happened … but if you take one scene from Cincinnati and one speech from the U.N. and then turn them into one scene, who cares?" (Svetkey 2008).

Moviegoers are certainly sophisticated enough to understand the need to invent dialogue, and they can even sustain a kind of coherence to merged scenes. However, many viewers claimed that Stone had gone too far in representing the serendipitous life of Bush, often showing him as misdirected, insecure, and downright "goofy." Some were suspicious that he had subordinated accuracy to political motives, as the movie was released in October of an election year. Given the controversial nature of some of Stone's prior films—dramas like *JFK* (1991) and *Nixon* (1995)—few viewers and critics were surprised that Stone had taken such risks.

At a chat site, Askville.com, maintained by Amazon.com, users weighed in on their impressions of the accuracy of Stone's portrayal of the president and their responses to the legality of Stone's actions (Moody 2008). The discussion began with a simple question, "How did Oliver Stone manage to make the film, "*W.*" without getting sued?" The comments revealed that viewers have some understanding of legal restrictions on biopic screenwriters, but the comments also reveal that, though film goers may not be exactly sure what the laws allows, they believe that those who make films are aware of their legal limitations and do not violate them:

- Analee: "His films are protected by the First Amendment Rights! Look at the trailer … that disclaimer is all he needs to set the First Amendment into play."
- Yellowdog: "Public figures do not have the right to privacy that private citizens have. You can delve into any public figure—or celebrity's private life, even lie about them."
- PamPerdue: "I assume Stone has a legal department that allows him to keep precisely to the legal side of libel. I imagine there is nothing completely fictional in it … And Bush probably doesn't want to make any of the more embarrassing unknown incidents part of the public conversation, because I assume that Stone has at least enough supporting material to avoid a libel charge."

Within these comments lies reference to the most common issues of privacy and publicity: First Amendment rights, privacy, and right to publicity. Though only partially correct, the comments reveal that viewers assume that writers are not allowed to or should not be malicious in their intent in portraying episodes of the subject's life. These assumptions are the basis for the presence in films of legal boundaries which act as a kind of assurance for viewers that filmmakers will not abuse their ability to craft the truth of a person's life story. The representation of these legal restrictions allows viewers to believe in the accuracy of the details presented in the biopic film. They suggest the law as an abstract concept, a concept that is semiotically conveyed by a general, common public sense of the influence of these laws have upon the filmmaker's creative prerogatives.

44.7 Semiotic Uses of the Law in Films

The question ultimately is if a construct—the abstraction of the law as a presence—can be signified semiotically in biopic films. The answer may, at first, seem obvious: of course, it can. The point of a symbol is to act as a concrete metaphor for the abstract, the inexpressible. It would seem, then, that this abstraction of the law as a restrictor can be construed as simply a metaphor for a socially contracted value and expectation for truth. This, however, requires that we regard the essence of the law as symbolic, not so difficult a feat if you can conjure up the image of a blindfolded Lady Justice toting the scales of justice. The question, however, is not about symbols or metaphors but about signs, and since the presence of the law in these films is more a perception on the part of viewers, it is more a sense than a thing.

Social critic and rhetorician Kenneth D. Burke (1966, p. 5) defines humankind as "a symbol using animal" that manipulates its symbols to construct reality, a reality that helps people deal with and make sense of the world they operate in. Peter Berger and Thomas Luckman, in their book *The Social Construction of Reality* (1966), contend that symbol building systems are determined by socially shared understandings. First as individuals and then as communities, we interpret the phenomenal world through symbols which signify meaning through association. In order to have this cultural or community understanding of certain kinds of reality, the social dimension of the sign or convention is necessary (Shank 1995).

The law, as signified in social groups, is one such social construction. Nineteenth-century philosopher and pragmatist Charles Sanders Peirce had recognized earlier that cultures–socially shared sensibilities of impinging values and norms. He set up a triadic model, identifying three kinds of signs, one category of which he calls "thirdness." Peirce defined "thirdness" as those aspects of reality that deal with "such issues as rules, laws, and habits" (Shank 1995). Our sense of the law and its presence in our lives are systemically instantiated through our social institutions, primarily religious and educational systems. School lessons, beginning with those featuring early European immigrants, teach children the sense of the law as a socially controlling and shaping presence in their lives.

Consider, for example, the ideas explicit in our most revered documents: the Mayflower Compact and the US Constitution. We are presented with the Mayflower Compact as an agreement among the Pilgrims to subordinate the rights of an individual for the common welfare of the whole community. The Preamble to the US Constitution defines a legal system by which citizens agree to be governed, based on a desire to "form a more perfect union." We respect the character of our law and its roots in European political philosophy, acknowledging the restrictive influence of the law on our behaviors. The notion that the law restricts the instincts of individuals for the betterment of societies is solidly grounded in our European cultural heritage. Its evolution into an assumed attribute of democratic societies allows us to presume its presence, signified in our perceptions of its ability to determine civic rules and often extended to include moral aspects of fairness and protection in our human interactions.

This sense of the law's presence is sustained by the various cases that challenge its validity and extent. In the case of libel and privacy, occasional cases, such as Carol Burnett's 1981 case against the tabloid newspaper, *The Enquirer*, and her 2007 suit against Twentieth Century Fox over infringement of her intellectual property rights reaffirm our faith that the courts are keeping an eye on media makers and keeping them honest (Jones 2005). The New York Times, Company. vs. Sullivan Case ended in the Supreme Court's determination of libel law boundaries. All of this goes to establish that when screenwriters are composing scripts and producers are making films, they have both an awareness of the limitations and the allowances of the law that permits them to use, perhaps exploit, the viewing public's trust that filmmakers will render truthful and accurate versions of life.

44.8 Scripting a Life: Real and Imagined

The fact that the public believes that blatant lies and damaging characterizations are prohibited by law can be used by filmmakers to enhance the credibility of their cinematic presentation of a person's life story. Viewers will think that, obviously, if the story makes it to the screen, it must be mostly true. They will allow some room for creative embellishment, but not in the essential facts of a person's life. Too much accuracy and not enough creative interpretation would make "a good story" perhaps too much like a documentary and far less entertaining. This was the situation for my writing of a biopic screenplay, *Zora*, based on the life of Harlem Renaissance writer and personality, Zora Neale Hurston.

When I set out to write biopic script, I wanted to present a coherent story about a person who lived a larger life than most people. There was no need to make up events; rather, the problem was in deciding which events would most efficiently characterize her life. Hurston had written her own biography, and there were several scholarly biographies written about her, two of which were standard references on the details of her life (Boyd 2003; Hemenway 1980). I had done extensive research

on her life, including visiting her hometown, Eatonville, Florida, which holds an annual festival in her honor; attending conferences; writing scholarly articles on her life and its interpretation; and reading all of her literary works, including a volume of her letters. I watched a filmed version of a stage play written about her life, and I studied three recently filmed documentaries on her life. For the most recent, I was fortunate enough to interview the writer/producer who advised me to secure the rights to tell the Hurston story, though the process might not be easy.

One of the difficulties in telling the Zora Neale Hurston story is that biographers have discovered that Hurston often altered the facts of her life, most notably her age (Boyd 2003, 347). Though actually born around 1891, Hurston claimed that she was at least 10 years younger (and more on some occasions). Regarding writing her autobiography, "Dust Tracks on a Road," Hurston was not particularly supportive of the project; her publisher had strongly suggested that she write it though. Much of the material turns up in other publications, some of which are her collection of local folktales and cultural anecdotes. Her embellishment and performance of these stories were often the height of entertainment at the parties she attended in Harlem and made her very popular, but there was always that gnawing suspicion and criticism from her own people that fed her doubt about her acceptance among them. In short, there were few who knew the "real" Zora behind the fun and performances.

There are those who would argue that the outward life of Zora Neale Hurston is an elaborate façade, a covering for a character whose interior life is characterized more by her disassociation from those closest to her, by her odyssey away from home, and by her inexhaustible need for experience and acceptance. The "real" Zora might be a worthy candidate for the same kind of aching pathos rendered to President Bush in Oliver Stone's "W." There is, after all, a kind of forgiveness in humiliation.

Hurston died in near obscurity in 1960 in Florida. A resurgence of interest in her life was generated by the writer Alice Walker's discovery of her work and Walker's identification of Hurston's grave site in Ft. Pierce, Florida. Walker proclaimed Hurston "a genius of the South." From then on, research on the body of her works and her life has grown substantially. Societies have sprung up, documentaries have been made, and her work has been canonized in literary anthologies. Her life is well known, and her work highly publicized.

Because Hurston's life is so scrutinized by critics, it is difficult to be less than accurate in relating her story. Her name and likeness are heavily protected by the Zora Neale Hurston Trust which is represented by Victoria Sanders & Associates [n.d.]. This agency handles all property rights with the exception of those books published by HarperCollins. The Hurston Trust would have to sign a life rights agreement for the script if the screenplay is to be authorized; otherwise, though Hurston is deceased, the screenplay would carefully have to avoid those hazards that could lead to large property rights suits. The problem of rights is further compounded in that Hurston hung out with a number of well-known celebrities and artists from that era—the early 1900s. For example, in the script, there is a scene in which she and poet Langston Hughes are in a Georgia bar, listening to blues singer Bessie Smith. Hurston, Hughes, and Smith are all famous enough (and infamous, as well) to

require permission authorizing their appearance in this script. Hurston and Hughes did, in fact, run into each other in the South and travel through Georgia, stopping at a bar and hearing Bessie Smith. Working with a script consultant, I was encouraged to include a glitzy night scene from one of Harlem's night clubs of the period. This would surely have made for some fine entertainment, but the truth is that it would have been unlikely that Hurston or any of her friends would hang out at the more famous clubs (often depicted in period movies of the Roaring Twenties). More than likely, they would have attended a rent party, a much more colorful and riotous affair. Whether they did or not, or which specific party they attended, is not important, I think, to the story. What are important and truly entertaining are the wild and festive atmosphere and the characters interacting in that environment. I wrote in the scene and featured several famous musicians and artists of the times, including Count Basie and Louis Armstrong. Both men would have, at some time or another, been at such a party, and it is also likely that Zora Neale Hurston would have been at one, too. I speculated on how such a gathering might play out, and I wrote the scene. There is no account in any of her biographical material that would substantiate this event, but Hurston mentions her active social life and being on the party scene frequently. Does this speculative truth matter if it "could have happened that way"?

Some of the stories are conflicting. Though the scholarship on Hurston traditionally has her becoming mysteriously ill in Haiti following a foray into voodoo, a relative, speaking at the Hurston Festival declared that the family knew that she was really incarcerated in Haiti for criticizing the Haitian government too heavily. The public, being more familiar with the likelihood that Hurston was the victim of some voodoo potion, will probably want to believe the voodoo version (more entertaining) over the jail story (more accurate).

One of the major concerns in portraying the life of Hurston was in deciding which of many episodes would best represent her life. The facts of these events were not in question. Most of her personal writing and her biographies substantiated the major line of the stories. The problem had more to do with the genre of screenplays which only allows an average of 120 pages per script. This is the equivalent of 2 h of run time for a film. Any choices I made would be an editorializing of her life. What I chose to show and what I chose not to show would form its own reality of her life. Originally, I exceeded the recommended length of the play because I just couldn't decide which events were major and which might be less important in shaping the character. My assumption was that the majority of my intended viewers would care to know as much about her as I could give. It didn't occur to me until later that, for the type of script I was writing, viewers might not care to know so much. I was advised that a focus on a central event in the life of the subject to show a single facet of the character's personality would be sufficient and would maintain the ultimate purpose of feature films—to entertain the viewer.

Once I had untangled my confusion of purpose—that is, whether I was doing scholarly work, which demands a thorough hunt for truth and accuracy, or creative work, which makes only superficial demands on accuracy—I thought about the sort of composite reality that could be achieved by combining certain events and by

rearranging the time line of occurrences within the story. Some creative decisions were made with regard to whether or not a particular scene made logical and consistent sense with other parts of the story; others were made with an eye toward entertaining the viewer with lively people doing lively things. In the latter case, the consistency of the truth and the logistics of people, places, and time did not matter as much as the opportunity for a colorful and entertaining scene. In the end, the concern was not with absolute truth. I'd leave that to the scholars. The concern was with simply telling a good story.

If you were to compare the screenplay with some of the documentaries on Hurston, you would find out that the documentaries are much more concerned with accuracy and maintaining Hurston's reputation as a writer. Few of those documentaries mention her weak points, her sexual adventurousness, her dubious status with the black community, and her Communist leanings. Only her biographies, with careful documentation, dare breach these areas of her life. To present them in the public arena of movie house is to expose and create a new value for her life and her accomplishments. Doing so would challenge the accepted version of her life, yet depicting a different, possibly negative, side of a famous person such as Hurston would only have validity in the wake of people's expectation that the law only allows what is fair and true about a person to be presented.

Writer James Baldwin once commented that "society is governed by hidden laws, by unspoken but profound assumptions on the part of the people. That the law is not visibly present does not deny its power" (Baldwin 2009).

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Chapter 45
Film and the Reconstruction of Memory

Farid Samir Benavides Vanegas

Abstract In this chapter, I want to introduce the discussion on memory and memorials as part of the process of transition to democracy. After presenting the theoretical arguments, I wish to tell a brief account of the transition to democracy and the path that led to the *Pacto del Olvido* to finally analyze three movies that have introduced the discussion on the civil warrant the dictatorship, namely, Soldados de Salamina (David Trueba 2002), Las Trece Rosas (Emilio Martínez-Lázaro 2007), and Salvador Puig Antich (Manuel Huerga 2006).

45.1 The Field of Transitional Justice

In 1939, after a bloody civil war, Francisco Franco became Spain's dictator. The war and the dictatorship were characterized by the constant violation of the laws of war and of people's human rights. With Franco's authoritarian regime, a legitimate republican government was overthrown, and during the long dictatorship, all traces of liberalism and human rights were almost eliminated. On November 20th 1975, Franco died after a long illness and Spain began a process of transition that culminated in the passing of 1978 Constitution and the establishment of democracy. The consolidation of this process was achieved when the new democratic regime managed to stop the attempt of coup d'etat on February 23, 1981, led by some members of the military who disagreed with the transition to democracy. People still remember the moment when Spanish Parliament gathered to elect Leopoldo Calvo Sotelo, and the long hours before the coup was aborted (Cercas 2009). The beginning of Felipe Gonzalez' government, the first

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socialist government in more than 40 years, marked the end of the transition and the beginning of a solid and stable democracy (Aguilar 2008).[1]

The Spanish transition to democracy was considered to be one model to be exported, given that the elites in power negotiated their way out with members of the opposition, including the communist and the socialist parties, changing in that way a view of Spanish politics and Spanish transition that was common during the 1940s and 1950s. Indeed, the idea of a government of transition was not new in Spanish politics; what was new was the willingness to negotiate with all political forces and the recognition of the Communist Party and his leader, Santiago Carrillo, as legitimate parties in the talks to bring about democracy in the country (Juliá, n.d.). The fact that the Socialist Party PSOE and the Communist Party took part in the elections and in the process of drafting a new constitution is seen as a model of openness and political participation. However, a price had to be paid: one of forgiveness and most of all of oblivion.

The Spanish transition to democracy is presented as the result of a Pact of Forgetting (Pacto del Olvido), where all political forces aware of their crimes in the civil war were willing to forget the past in order to achieve democracy (Tusell 2005; Davis 2005). From another point of view, some authors argue that the pact was the result of precisely the memory of the civil war, given that the measures taken during the Second Republic (1931–1936/1939) led to the civil war, because of the opposition traditional elites had with regard to the egalitarian policies that were established (Preston 2008). In this sense, as Tusell and Julia argue, the transition of democracy was not a politics of forgetting, as if they did not remember what had happened, but a politics of throwing into oblivion, because they did remember very well what had happened and decided to avoid bringing it into light, precisely because they remembered very well the crimes that were committed and the ever possibility of a new civil war and a new military dictatorship. In this sense, the current politics of memory is not a politics that is supposed to remember some forgotten past; on the contrary, according to Julia and Tusell, the elites knew very well their past and decided to forget. The question is more about knowledge – given that the new generations know nothing about the war and the authoritarian regime – and about reparations, given that the victims of the war and the dictatorship are still waiting for compensations and for the recognition of their suffering (Juliá 2003, 2006a, b; Tusell 2005). However, as I will show later, the question is more complex, because memory and discussion is not present in the public sphere, in spite of the fact that there is a huge and increasing amount of publications on this topic (Juliá 1996).

According to some authors, the younger generations have the duty to know, and to do so they have the possibility to read what has been published since the very beginning of democracy. The number of specialized publications is huge, and the amount is still growing. From specialized articles to dissertations and books, the question of the period between 1930 and 1978 is very present in Spanish

[1] It is important to remember that the Spanish Civil War began because a faction of the military was against the reforms established by a socialist government. See Preston (2008).

historiography. The past has been very present in those books since the very beginning of democracy, waiting to be caught, to be remembered. However, does this mean that the public knows about the transition? Or that they even have a space to discuss freely about the civil war, the crimes committed, and the responsibility of the perpetrators? As I will show later, public discussion is limited, and there is always an attack against those that attempt to bring it into light, as the persecution against Baltasar Garzón shows (Tusell 2005; Juliá 2003; Cercas 2009; Dewey 1996).[2]

The question that remains is what is the politics of memory about? In fact there are two things that need to be taken into account: first, the politics of oblivion was about forgetting the civil war, and therefore what was thrown into oblivion were the crimes committed during the civil war, but in the process, elites took advantage of the transition and threw into oblivion the crimes committed during the dictatorship as well. Thus, the politics of oblivion is about the civil war and the dictatorship, and for that reason the politics of memory is about the crimes of the civil war and the crimes committed during the dictatorship. In any case, we need to take into account that the crimes committed by the republican side during the civil war cannot be compared to the crimes committed by the nationalist (Francoist) side, mainly because on the former there were attempts at trying the culprits and limit the excesses, whereas on the latter the strategy was one of total elimination of the enemy (Julia 2003; Vinyes 2009; Capellá and Ginard 2009).

But, at the same time, we need to take seriously what Spanish historian Santos Juliá has held in different writings: the civil war has not be forgotten; historians have written many books where the crimes, the conditions of the civil war, the dictatorship, the crimes committed by each side, all of that has been described profusely in those books and people can have access to that information any time they like (Juliá 2006a, b). But at the same time, in the public discussion, there seems to be a fear to talk about these topics, the current response to attempts to talk about the civil war or the dictatorship is that this is the field of historians, not the field of public opinion.

In spite of the fact that, as Juliá holds, historians have written about this important period of Spain's history, public discussion on these topics is still very limited. Members of the Popular Party have been connected to the dictatorship, and they have not been denounced as such. Public discussion on their participation in the dictatorship is simply avoided. Leaders like Manuel Fraga Iribarne, Franco's minister of information, still hold positions of power in his party; former president José María Aznar's grandfather supported Franco's regime, but this fact seems not to call the attention about the adamant opposition of the Popular Party to talk about the war and the dictatorship; there are accounts that publications have been affected because they talk about the participation in acts of repression of members of the Popular

[2] In the last months, two extreme right wing associations, Manos Limpias and the Spanisf falange, have denounced Garzón before the Supreme Court. They hold that persecuting the crimes committed during the dictatorship is a clear violation of the law. What is even more surprising is that a sector of the Supreme Court – a very conservative one – considers that Garzón did commit a crime. For all the news on these questions, see www.elpais.com and www.publico.es

Party or their relatives. In sum, public discussion on the civil war and the dictatorship is almost nonexistent, and it is considered an exclusive field for historians. To say it in other words, the past is very present in the books, but it has not reached the field of public opinion. The question is not only about ignorance, as Juliá holds, but rather about access in the public discussion about a past that is very present in the lives and history of Spain's right wing.[3]

Since the transition many novels and films have been written on the civil war. Even books that were written during the dictatorship but censured by the regime have seen light again and have been read widely by an educated and non-educated population. But it is film the space where public discussion on the civil war, and the dictatorship has circumvented the limitations imposed by the *Pacto del Olvido.* Film has become a sort of memorial that brings into light past abuses; it shows them directly in the public sphere and calls our attention to what "really" happened. In this sense is more effective than books and academic articles in bringing memory from oblivion, in dignifying the victims. However, as I will show in this chapter, films are no objective evidence that document the past, but it does not pretend to do so. Film shows us a version of the story, a version untold in the public sphere until now, and leaves the discussion for the public sphere. I will concentrate on three films in order to argument my case.[4]

In this chapter, I want to introduce the discussion on memory and memorials as part of the process of transition to democracy. After presenting the theoretical arguments, I wish to tell a brief account of the transition to democracy and the path that led to the *Pacto del Olvido* to finally analyze three movies that have introduced the discussion on the civil war and the dictatorship, namely, Soldados de Salamina (David Trueba 2002), Las Trece Rosas (Emilio Martínez-Lázaro 2007), and Salvador Puig Antich (Manuel Huerga 2006).

Transitional Justice is an academic field and a space of public policies that is still growing. In different parts of the world, transitional justice policies have been applied in order to face a past of authoritarian governments and of grave violations of international human rights and international humanitarian law (Bell 2009). Originally the idea of transitional justice was concerned with the criminal prosecution and sanction of those responsible of grave crimes, and for that reason criminal law discourse dominated the field. Nowadays it is a field that covers different disciplines and goals.

The idea of transitional justice as a field emerges with the processes of transition in Central Europe and Central America. It is true that before these processes

[3] Spanish scholar Francisco Muñoz wrote a book on Mezger's participation in the Nazi regime. This book provoked a strong reaction, mainly because of the intellectual influence Mezger had in Spanish law, especially during the dictatorship (Muñoz Conde 2002; Benavides 2008).

[4] This text is part of a broader project wherein I analyze different transitional justice problems and show alternative views to them. I assume that justice – social and criminal – is necessary in processes of transitional justice, but I also think that other instruments must be used in order to dignify the victims and open the way for reconciliation and stable democracy (Benavides 2009).

people talked about transition to democracy, as in Spain and Argentina, but the idea of exercising a justice of transition is new. These debates focus on the need of facing the crimes of the past with a process wherein criminal justice played a central role (Arthur 2009). The term and the concept of transitional justice found a place with the collection edited by Kritz and published by the United States Institute for Peace (Kritz 1995). At the beginning, transitional justice was identified with criminal justice, but in 2000 Ruti Teitel published a book where she summarized the main debates and showed that transitional justice covers different disciplines and aspects, such as memory and memorialization, truth and reconciliation, and institutional transformation (Teitel 2000).

The current framework of international law makes almost impossible to establish policies of amnesties and forgiveness. However, during the Spanish transition such policies were common coin and were considered to be the only way to deal with the past (Hayner 1994). But Spanish involvement in the field of transitional justice, with the prosecution of the crimes committed during Argentinean and Chilean dictatorships, has made the eyes turned onto their own situation, and now we see attempts to prosecute the crimes committed during the Francoist authoritarian regime (Diario El País, 17th October 2008).

According to a study of the dynamics of transitional justice, all the mechanisms of transitional justice, be it truth commissions, memorials, criminal trials, and vetting, all of them introduce questions about the truth and about national identity, history, human rights, cultural practices, and good governance (Fletcher et al. 2009). For that reason, the question is not about which mechanism is the best in general, but rather which mechanism is better to improve the lives of those who have been affected by violence. In these cases, a context sensitivity approach is important in order to avoid undesired effects, such as more victimization and violence (Leonhardt and Gaigals 2001; Leonhardt 2008).

Transitional justice poses questions about the nature of the rule of law during times of transition. If the law is supposed to be permanent and stable, how is it that it can be used during exceptional times, like transitions to peace or transitions to democracy? In the first wave of transitions to democracy, criminal law was used as part of a strategy of revenge, as in Portugal, but in most cases elites decided to erase the past and to have a fresh start. Justice, reconciliation, and even acknowledgment of the victims were considered to be goals too high to sacrifice peace or democracy. Peace and democracy became high goals that legitimized a politics of oblivion and forgiveness (Barahona et al. 2002).

The paradigmatic case of oblivion is the Argentinean and Chilean cases, where the trials against the culprits were stopped due to laws of due obedience and final full stop, in the former, and auto amnesties, in the latter. But the prosecution that was brought to Spanish judges, mainly Judge Baltasar Garzon, led to the constitution of a new situation for former dictators. If they were not going to be tried in their own countries, international or transnational justice was ready to do their job. Not surprisingly, both the Argentinean Junta and members of the Chilean dictatorship now face trials in their own countries for the grave crimes they committed during their regimes (Aguilar 2008).

The old debates between justice and legality or between justice and peace or democracy seem to be overcome, because current international law mandates that those who are responsible for human rights violations or war crimes need to be tried and amnesty or forgiveness cannot be granted in those cases. Transitional justice cannot be identified simply with policies that grant amnesties to authoritarian regimes, but neither can it be identified with criminal law and criminal trials. According to a Human Rights Watch study on the impact of international justice, justice and democracy or peace cannot be seen as opposite, and overall justice cannot be sacrificed in peace processes or transitions to democracy (Human Rights Watch 2009). The discussion on transitional justice has moved from a discussion on the importance of criminal trials, to a discussion on the necessity or political possibility of having criminal trials, given the conditions of the transition and its relative strength. The field of transitional justice is a complex field where questions of memory, truth, institutional transformation, and memorialization enter the public arena to be discussed in a democratic manner.

45.2 Memory and Memorialization

Traditionally the idea of justice in transitional times was identified with criminal trials against those responsible of grave crimes. The criminal justice system was vested with a symbolic power to deal with the past and to mark the beginning of the process of transition. The model of Nuremberg symbolizes this conception, because it sets the end of European war and the beginning of peace. At the same time the memory of the conflict is built within the criminal process. What we knew from the war was related to the trials against members of the Nazi dictatorship. More than novels and films, the criminal trial and its final account seemed to give the "real" story about the war and the regime. It is later that films take the lead in the presentation of the story, but they usually did it based on the main facts as they were presented in the trial. "Judgment at Nuremberg" (1961) is a film that dramatizes the Nuremberg Trial and even shows us some footage of the concentration camps that were actually shown during the trials. The fact that the story is told around the trial aims at having the viewer know that what is told there really happened, that the memory of the war and the memory of the victims are what were told in those trials, and that the site for memory is the criminal trial.

However, in times where criminal law and criminal justice are not the only transitional justice instruments, there is a peril in assuming that the criminal trial is the site for memory. We are brutally reminded of this fact by Eyal Sivan's film "The Specialist: Portrait of a Modern Criminal" (1999), where we see actual footage of Adolf Eichmann's trail. In fact, the film is a sort of documentary of the trial, everything we watch is taken from the trial, nothing is created, except that the kind of edition the film is given lets us with a different sense of the person Adolf Eichmann was. From viewing the film, we get the impression that Eichmann was a mediocre officer that simply followed orders and that the trial had a sort of illegal sense of

revenge against someone who just limited himself to obey the law. Historians has taught that this is not the case, but as in the Spanish case, public discussion on the topic is necessary in order to reconstruct memory and not limit it to trials or films. A recent film, Tarantino's "Inglorious Basterds" (sic) (2009) gives us a different, nonhistorical, account of the war. Human rights violations are presented there as if they were justified only because of the identity of the perpetrators. It seems to be a justification of violations of the laws of war only because the soldiers led by Brad Pitt were fighting the war on the American side, by definition, the good one.

In the literature on transitional justice, there is a discussion on criminal justice's retributive role and its importance vis a vis other goals such as democracy and peace. Truth and reconciliation commissions are debated because a part of the literature sees them as instruments to construct a nonjudicial memory in order to have reconciliation without punishment and to have a symbolic memory that deals with some parts of the past, those that do not endanger the agreements elites have reached. In other words, some instruments of the politics of memory are criticized because they reconstruct a partial memory of the past, one that closes it and that does not leave space for constant reconstruction. Democratic memory is usually seen as a substitute of criminal justice that avoids calling elites before justice to respond for their crimes and that reconstructs memory in a way that is authorized by the same elites (Turner 2008; Bell 2009; Kritz 1995).

Memory has traditionally been reconstructed in sites such as trials and truth commissions. But memory can also be reconstructed through nonofficial truth commissions or memorials and artistic productions, like films or theater performances (Bickford 1999a, b, 2007). Memory is an important part of peace building processes and a way to understand conflicts. Memory allows communities to have a common sense of belonging and common identity. As Anderson has put it, national and collective identities are built upon remembering and forgetting (Anderson 1991). Memory can be perpetuated through processes like memorialization and the construction of monuments honoring the victims. This kind of transitional justice instruments allows societies to rewrite their history and to recover narrations from the past. It is also used to help victims to start their process of symbolic recovery and a process of reconciliation by recognizing traditionally oppressed and forgotten groups (Naidu 2006). However, this process requires the agreement of both parties; they have to be willing to rewrite history and to recognize past crimes. In the Spanish case, such recognition did not emerge during the transition. The elites negotiated the political participation of the Communist Party, but it was recognition of their importance for the transition, not the recognition of the need to have a more open approach to the past, or of the persecution member of the Communist Party were victims during the Francoist regime (Juliá 2006a, b, n.d.). But past crimes were not recognized; there was a common understanding that the past was not going to be revisited, at least not publicly; this was going to be the field of historians.

In spite of the attempts of governments to erase memory or to hide it, it emerges in a way or another. The challenge is to have memory emerge in a positive way, that is to say, allow victims to remember their past and prevent those crimes from happening again in the future. Memory and memorialization satisfies the

desire to be recognized, but at the same time it dignifies victims of crimes through a reexamination of the past. Memory and memorialization became a field of symbolic dispute; meanings and interpretations about the past are part of the discussion. Debates about the meaning of the past pose different hermeneutical circles into the discussion (Gadamer 2006). It is not a matter of who has the objective truth, but how democratically that truth and that memory have been reconstructed. Memory and truth are the result, or should be the result, of a participatory process where all the voices, especially those from the victims, are heard. As a final result the reconstructed memory helps in the construction of a new nation, a new community, or a new ethnic identity. According to Mneimneh, remembering the past is in itself transformative, it changes the past that is remembered, it puts it under a new light.

However, the past can be transformed, or it can be confiscated, becoming the exclusive property of one group or one political party. But, what about that event where the past is simply forgotten in the public discussion? By leaving the past to historians, there is a process of confiscation, because, in a sort of neoliberal nightmare, what we are and who we are as a community is left to the expert opinion of historians, the past they reconstruct becomes the past *per excellence* (Bickford 1999a, b; Naidu 2006). Thus, memory represents a complex link between politics, trauma, collective memory, and public art (Weisntein as in Barsalou and Baxter 2007, 4).

Monument building to remember victims is usually the product of the recommendations truth commissions make, as it was the case in El Salvador and Chile. It can also be the product of processes that emerge in countries that are mature enough to face a past that is painful and that is often the cause of divisions between the parties. In 2007, in Catalunya (Law 13/October 31, 2007) and in Spain (Law 52/December 26, 2007), laws of memory were approved as a result of pressures social movements exercised to face the past. However, it is often questioned how mature Spanish democracy was to face memory and to go back to the past and discussed in a public forum, not just in the expert site of historians. Commemorating particular dates, building public spaces to remember victims of grave crimes, giving new names to streets or recovering old names, all of this actions help in the construction of a new memory, one wherein the victims of the past are included (Aguilar 2008).

But memorials have been object of criticism, because some people see them as mere symbolic reparations that have the effect of diverting the attention from the material side of reparations. However, it is important to take into account that victims do not fight only for money or material goods, they also fight for recognition, for memory, and for a symbolic transformation of their world. Unlike the formal reconstruction of memory that is made in criminal trials, memorials and public reconstruction of memory is a more detailed process that is expressly aimed at facilitating processes of remembering and recognition of victims. In such a way, memorialization is not a substitution of material reparations or a simple symbolic compensation for the crime committed in the past. On the contrary, memorialization has a variety of purposes that point at the process of building a culture of peace and to deal with issues such as dignity, human relations, and collective identity. In that way the collective construction of memory contributes to human development and to the regeneration of human capital that is often destroyed during times of conflict and oppression. Memorials need to be collectively and democratically built, because

in that way they help to dignify the victims, but they also need to be continuously resignified, because the passing of time will alter their meaning and could become meaningless to new generations (Barsalou and Baxter 2007).

But memory is not only about remembering. People remember because they need to be recognized, to be dignified. At the same time, one of the purposes of memory and memorials is reconciliation between the parties. In any case, as it was mentioned earlier, memory and memorialization are not substitute of trials or other mechanisms of transitional justice; they are a complement to the search of justice by other means. Memorialization has the following purposes:

- To construct truth or to document specific human rights violations
- To build a specific place to allow victims and their families to grieve for the lost ones
- To offer symbolic reparations to honor the victims of violence and to reestablish their reputation
- To be a symbol of the commitment of a community with some values, such as democracy and the respect of human rights
- To promote reconciliation by rebuilding national identity and to be a means to repair the damaged relations between groups
- To promote the civic commitment and education programs that deal with the past and that establish a dialogue within the community to talk about that past and, in such a way, to promote more discussions within the group to reach sustainable peace
- To have a new curriculum to allow new generations to have a more precise knowledge of the past and where there is a space for victims and their stories
- To facilitate the conservation of places that are symbolically important to different groups in society, as long as they respect cultural differences and other groups' history

There are different kinds of memorialization, and they varied according to the kind of conflict. In cases of genocide, memorialization usually gravitates around the exhibition of human remains, in order to show that the genocide happened and who they victims were. In some cases these remains are left in the site where they were found, with the purpose of avoiding attempts to deny the facts of the genocide. In cases of forced disappearance, the body of the victims is missing, and what is left is their pictures or the places where they were tortured and killed. For this reason, in Argentina the building where the ESMA (Escuela de Mecánica de la Armada) was, known as the place where many crimes were committed, has been transformed into a museum, with the purpose of remembering the victims, and most important, given the high level of impunity in this country, to make explicit the institution that is responsible for their deaths and disappearances.

National projects of memorialization reflect the goals of communities, rather than the realities of those countries that are in a process of transition. Memorials allow the consolidation of new ways of imagining the nation. Memorials seek a symbolic reconstruction of the past, and in that way they eliminate cultural violence and contribute in the process of building a culture of peace. Through the documentation of the past, or by bringing the past into the present, memorials contribute to

the imagination of a new future. That is the reason why they take a long time in showing their results. Memorials show the community we want to imagine; it is open to debate and discussion, making evident the divisions between people. They represent a challenge to imagine what unites people and what divides them and call to their imagination to overcome those differences. It is interesting to note that in Bosnia, a country that is coming out of war and genocide, there has not been agreement on how to depict the past. In a public square in this country, they only could reach an agreement on the construction of a statute of karate B movies Bruce Lee, someone foreign to their country and who represents precisely the precarious unity that characterizes this country (Kgalema 1999; Benavides 2010). To conclude, it is important to take into account the following elements:

- Memorialization is a process that is politically charged and that can even bring to light the worst side of a community.
- The process of building memorials should be local or national initiatives, because those that are promoted from abroad are doomed to fail.
- The importance of community cannot be over emphasized, because they know which sites are important as a contribution to memory. Outsiders do not perceive the importance of identity in the community.
- Memorials should be dynamic, because memorials that are not connected to a process of education for peace or the process of construction of a culture of peace lose their meaning with the passing of time.

Archival preservation is an important task that is promoted after a period of authoritarian rule or an armed conflict. Archives help in documenting human rights violations and in determining victim's identities. Film as such is not part of the archival imperative. In some cases, as the footage we saw in the Nuremberg Trial that was shown in the film "Judgment at Nuremberg," film preserves the past and shows us images that otherwise would be unknown to us. It gives a dramatic sense of reality that words cannot have. However, as Bickford holds, history demonstrates that it takes a generation or more until people are able to process the trauma of earlier periods (Bickford 1999a, b). Films usually open the path to talk about the past; by fictionalizing the past and showing some aspects of it, they introduce in the public discussion aspects of the past that otherwise would remain in history books. I agree with Santos Juliá that remembering the past does not mean to uncover what has always been in the dark. During the Spanish transition people decided to forget, they made a pact to forget what they remembered. They took the past from public discussion and left it for historians' books. Film uncovers that past, taking them from the history books and puts it in the public discussion.[5]

[5] Film can also be used to cover reality, to show a different side of the story. One interesting use of film is Vladimir Montesino's strategy in Peru. He released several videos in order to show how he corrupted members of the government and the legislature, in an attempt to show that if everyone was corrupt, then no one was corrupt. These videos became known as the vladivideos (Vich 2004).

In the next section, I will show how Spain arrived to a pact of forgetting, and then I will analyze three movies that uncover that past. I must stress that these films do not bring to light a past that was unknown, but rather they bring into the public discussion a past that because it was known was thrown into oblivion.

45.3 Spain and the Pacto del Olvido

The civil war lasted almost 3 years; some people even called it the war of a 1,000 days and ended with about 600,000 dead and numbers of injured people from both parties. Republicans – the side of the legitimate government – lost the war and had to live in an internal exile or to run away to France or to Latin America. After the end of the war in 1939, Franco consolidated his power and made approaches to Italy and Germany, which had helped him fight the war against Republicans. Republicans believed that by fighting against Germany and Italy in WWII, they would get support from the allies, especially England and France. But post WWI is a story of betrayals against the Republican side, because the allies did not help fight the war in Spain against Franco's dictatorship. In the 1950s, as a result of the Cold War and the new balance of world power, the United States, during Eisenhower's administration, ended Spain's isolation and gave new legitimacy to Franco's power. American and European recognition brought legitimacy and stability to the dictatorship and helped the consolidation of the regime. The 1960s showed progress in economic matters and allowed the beginning of a sort of liberal thought within Franco's culture (Tusell 2005, 266). As Tusell shows it, Franco's long agony also meant the long agony of a decadent regime. In November 1975, Franco finally died and people – especially younger generations – realized that with his dead significant transformations were about to happen. But no one imagined the radical change that Spain was going to experience during the last part of the 1970s and the early 1980s. With Franco's death, a long and complex process of negotiation between the elites and the opposition began.

There are at least three figures in the transition to democracy. King Juan Carlos I had been appointed King of Spain, following Franco's instructions. However, the role he had to play during the transition was different from the one he assigned to himself. King Juan Carlos I saw himself as the King of Spain and not only as the king of one of the sides in the country. He wanted to overcome the idea of the two Spains that characterized the civil war. With the strong commitment to democracy, as the only way to save monarchy, King Juan Carlos played an important role in the transition and in the process of negotiation between the parties. In his task he had the help of Adolfo Suarez', former secretary of the Movimiento Falangista, and a person that seemed to be very close to Franco and to his legacy. But Suarez understood very well Spain's position in Europe and the importance of having a democracy in order to be part of Europe. Surprisingly, those – like Fraga Iribarne – who wanted to have some reforms but within the dictatorship did not have much support and could not become strong enemies to the opening of the system. And the last one

is Santiago Carrillo, head of the Spanish Communist Party, who was intelligent enough to recognize that democracy was the only way his party could be part of Spain's politics and who help in keeping things within the limits of democracy even after strong attacks from right wing extremists. Carrillo accepted that the Communist Party broke his links to the Soviet Union and in that way helped in the transition to make it a European Communist Party, which meant a party compromised to democracy and to peaceful transformation in politics (Cercas 2009; Tusell 2005; Aguilar 2008).

Spanish transition to democracy is characterized by a total lack of criminal trials or any kind of accountability. The memory of the civil war, the bloody repression during the first part and the last part of the dictatorship, made advisable that the transition be negotiated and that a broad amnesty was granted to members of the government and perpetrators of grave crimes. A strong critic of the transition has written that the pact between Franco's supporters and anti-Francoists was in benefit of the members of the authoritarian regime. By appealing to the motto national reconciliation, members of the government took advantage of the process of transition and made sure that no trial or truth commission or revision of the past was made. In the words of Franco himself, everything in this field was tied and very well tied (Colomer 1998).

Spanish transition has been presented as a peaceful transition, but Paloma Aguilar shows that it was not the case. Between 1975 and 1980, there were more than 460 deaths, and in a period of 6 years, there were more than 40,000 people killed in terrorist attacks (Aguilar in Barahona et al. 2002: 147). The Pact of Forgetting was made in a context of extreme confrontation, especially between members of ETA and members of the military, and moderation, especially on the part of parties like the PSOE and the Communist Party and the faction led by Adolfo Suarez in the government. The reformism approach and the pact of forgetting is the result of memory but also of the extreme radicalization of some sectors and the existing tension in Spanish society. Parties in the opposition feared that the military took power again and that democracy was not reached. They moved from demanding a radical transformation and retrospective justice to a more humble reform, one wherein Spain could have democracy and in exchange the past was going to be thrown into oblivion. Unlike other transitions, "never again" meant the non-repetition of atrocities, in Spain this "never again" pointed at the civil war, and the transition was made to never again have another civil war or another dictatorship. As a result, critics stress the limitations of Spanish democracies and the permanence of violence due to unresolved issues such as the Basque question and the presence of different nations within the Spanish state. Spanish Congress passed a law granting amnesty to those who took part in the civil war, in order to consolidate what they saw as a process of reconciliation with the past and with those who fought on the opposite side. But the law granted amnesty to perpetrators of grave abuses and human rights violations. In that way, the Pact of Forgetting threw into oblivion the crimes committed during the civil war and during the dictatorship. Historians could do research on these topics, but public discussion on these topics was closed; the pact granted that the public would not know about the past and that only experts would be able to talk about it. But film, as a different field, showed that public discussion was still possible, that

the past could be fictionalized in order to make it real, and that remembering what did not necessarily happened would help us to remember what really happened.

In the past years, Spain and Catalunya have passed laws of memory, in order to open public discussion on the legacy of the war and the dictatorship. In spite of the fact of this commitment, the fact remains that Spanish society in general is unable to deal with the past. When Baltasar Garzón tried to bring Franco and his supporters to justice, right wing critics mocked him for bringing to trial dead people or for even attempting to bring into public discussion Spain's past of torture and human rights violations. Extreme right wing groups have made attempts to impede the search into the past. They have accused Garzón of violating the law or of politicizing justice; the only charge they make is Garzón attempts to bring the past into public life, to finally have a discussion about the legacy of violence and torture that many members of the right share. So far he has failed, and the pact of forgetting is still very much alive (against this position see Davis 2005). In the legal and judicial persecution against Judge Baltasar Garzón, one of the accusers, the Falangista Movement, has event held that Garzón is responsible of libel because of his statements about the commission of crimes against humanity during Franco's dictatorship (Diario El País, February 14th, 2010).

45.4 Film and the Recovery of Memory

In an analysis of Spanish cinema after the end of Francoism, John Hopewell holds that the civil war has been a central topic in Spanish films. The long postwar determined that the generation that lived the war tried to go back to prewar times, in an attempt to reach a sort of dreamland moment where the war was not present (Hopewell 1989). Spanish films tried to reproduce the war and to show its ferocity, but they did not question the transition to democracy, they did not make calls for the sanction of those who were responsible of the war, and they just showed what happened, without making accusations. As Hopewell shows, Spanish films used to depict extreme acts of violence, as a sort of psychological escape to the real acts of violence that were suffered during the war.

Films like *Las bicicletas son para el verano* (Jaime Chavarri 1984; based on Fernando Fernan-Gomez play) and *La lengua de las mariposas* (José Luis Cuerda 1999; based on Manuel Rivas short story) show a Spain that was trying to survive before the war, but at the same time they show a world of hope during the Republican government that was brutally shattered by the war. The last scene of Chavarri's film is very telling in this respect, a little boy running from the bombardments in a metaphor of a world of freedom that the war and the regime to come ended or the little kid, in *La lengua de las mariposas,* who was very close to his republican teacher but who is forced by the circumstances to commit an act of betrayal, because of the logic of the enemy that existed at the beginning and during the war.

In 2001, Spanish writer Javier Cercas published a novel about the failed execution of one of the founders of the Falangista Movement. Rafael Sánchez Maza was

captured in Barcelona – then under republican control – when he was trying to escape to France. Given his importance he was about to be executed by the political police, as it was the case with José Antonio Primo de Rivera on November 20th, 1936, apparently abandoned by Franco (Preston 2008). But facing the moment of the execution, Sánchez Maza managed to escape, and when soldiers were sent to find him and take him back for the execution, he managed to escape death. According to Sanchez Maza's account, a soldier saw him but for unknown reasons let him escape. The book begins trying to account for this moment, and it seems a praise of this Falangista writer. However, the novel is more about the writer's search and how she has to face the act of creation. But at the same time is a story of redemption and humanity. In the novel Cercas finds the soldier, Antoni Miralles, and when he asks him why he decided not to kill Sánchez Maza, Miralles just answers asking him why. That very moment, when the war is lost, when it makes no sense to kill someone, Miralles a republican soldier finds humanity in himself to not kill that defeated person. At the same time, the book shows the big difference between Republicans and Francoist, because after the war it began the worst repression, against defenseless people, people who were defeated, whose deaths made no sense, and nevertheless were killed.

Cercas' book became a success, and people started talking about the past, about the crimes committed, and about the difference between Republicans and Francoists. Film director David Trueba adapted the novel and made it into a film. The main character became a woman, but most of the characters were the people who actually took part in the events that are narrated in the novel and that Cercas tries to investigate. The main character, played by Ariadna Gil, is a journalist who is trying to do research for a real story. And the story and the persons showed in the film and in the novel are real.

The film takes from the novel the main point, which is the character of the soldier who decides not to kill. Some people read the book as a defense of a Falangist writer, but a more precise approach is to read it as a defense of virtue. In this way was read in the film, and the film is more about what Trueba and Cerca call the instinct of virtue. According to them, the fact that Miralles, a person who has been fighting in the war for almost 3 years decided not to kill, is a mysterious question that could only be explained by appealing to an instinct, one of virtue (Cercas and Trueba 2003).

The film introduces in a clear way a very central aspect of Spanish transition to democracy, which is the difference between the Republican side and the nationalist (Francoist) one. Right wing defenders of the pact of forgetting hold that Republicans and nationalist committed horrible crimes and, in order to avoid confrontation, it is necessary to forget the past and to forgive those crimes that were committed. But as Cercas holds, the republican government was a legitimate one; they were defending a legitimate system, whereas Francos' troops were the rebellious side, one that finally imposed an authoritarian regime and that was against workers' rights. Moreover, as I mentioned earlier, the crimes committed during the dictatorship show a lack of virtue and the more pure sense of meaningless revenge.

The war ended with the total victory of the nationalist side. Franco did not want just to win the war, but wanted total defeat of the enemy. As Preston shows, at times,

his strategy appeared strange, because he took too much time in moving from one position to another, just for the sake of having a total victory, of exterminating the enemy (Preston 2008). One of the questions forgiven during the transition was the massive executions occurred after the war. One case that was part of the oral tradition of the civil war and the postwar period was the execution of 13 women in Madrid on August 5th, 1939. This case became known as Las Trece Rosas or Las Menores, because many of the executed were under age.

In 1985 Jacobo García Blanco-Cicerón had brought to light this case, but it was published in a history review – though for the general public – and for that reason it remained relatively unknown. In 2004, journalist Carlos Fonseca wrote a book on the case and told a complete story of the execution of the *Trece Rosas.* The book was discussed, and there was some public discussion on the topic. However, it was with the film *Las Trece Rosas* that the case reached the general public, and more open discussion on the topic occurred.

As Fonseca shows, with the defeat of the Republicans in Madrid and the fact that many leaders had to run away to France or to Latin America, some young people were in charge of reorganizing the Socialist Youth, with the hope of recovering democracy in Spain. But these women did not represent any danger for the new regime. Nevertheless, Franco's regime launched a persecution against those who had a leftist past; some of them were arrested, some turned themselves in, and all of them were sent to prison. Political police tortured them and commit grave crimes against those women who were sent to prison.

While being in prison, two men killed a member of the Guardia Civil, his daughter, and his driver. This crime provoked the regime's bloody revenge. As a response to the crime, 15 women and 43 men – who were already in prison when the crimes were committed – were tried and sentenced, with two exceptions, to death as accomplices in the assassination of the members of the Guardia Civil and his daughter and driver. Finally, on the night of August 5th, 1939, they were executed.

Fonseca's book brought about discussion on the acts of revenge during the first days of Franco's regime. The book was followed by a documentary, entitled *Que mi nombre no se borre de la historia*, the last words in the letter one of the executed wrote to her mother, wherein some of the victims of the repression and some of the relatives of the executed were interviewed. In 2007 a new film based on Fonseca's book was released. In this film the story of the *Trece Rosas* is told for the public. The most important effect of the movie, in spite of its melodramatic character, is the fact that brings into the public discussion the repression against the youth after the end of the war. This kind of movies shows to the public some facts that were evident during the transition but that because of the need of having democracy were thrown into oblivion.

Salvador Puig Antich was a Catalan adolescent who took part in the Movimiento Ibérico de Liberaciòn MIL, an anarchist guerrilla that wanted to end the dictatorship and that appealed to armed violence to reach their goals. The movement tried to finance itself by committing rob attacks against banks in Barcelona. One of these attacks went terribly wrong, and the police had leads that finally ended with the imprisonment of some of the members of the group. When Puig Antich was going

to be arrested, he resisted and killed one police officer. Witness accounts proved that the officer's death was not intentional, but the regime nevertheless prosecuted and asked for him the death penalty. In a military trial, with violation of due process of law, as it was common during the dictatorship, Puig Antich was sentenced to death. His only resource was appealing to an official pardon granted by Franco himself, but ETA's assassination of Carrero Blanco's – Franco's supposed successor – made this alternative impossible. Puig Antich was executed on March 2nd, 1974, with the general outrage of parties in the opposition (Escribano 2001).

The final part of Franco's regime was characterized by an increase in repression. However, death penalties were rarely executed, and when Puig Antich was sentenced to death, people thought that he was going to be pardoned and his sentenced exchanged for prison. But Carrero's death brought about revenge from the government, and, as in the first years of the dictatorship, needless acts of revenge were very common. In 2006 Manuel Huerga directed a film based on the life and execution of Puig Antich. The film brought about discussion not only because it showed a regime that was eager to kill even when that was unnecessary, showing the complete lack of what Cercas calls the instinct of virtue, but at the same time it showed the responsibility that the left had in not stopping the execution with the same eagerness that they showed in other cases, mainly because they did not want to be associated with a group like MIL.

The film and the script was done with Puig Antich's sister's assistance, and it shows their point of view about the events. One of the points they stressed is the need to revise Puig Antich's case, because he was sentenced by an illegal regime, with violation of the due process. However, the case reached Spanish Supreme Court, but given the power of the conservative side in the Court, the case was not revised, and Puig Antich's sentence is considered, for Spanish courts of law, a legal and valid sentence to death. The film shows precisely the fact that he did not deserve the death penalty, that he was killed only because ETA killed Franco's closest allied, Carrero Blanco, that military trials were a mock of justice, and that the transition should deal with this fact. But the Supreme Court's answer shows the vitality of the pact.

45.5 Conclusion

Spanish transition was the result of a pact wherein elites decided to throw the past into oblivion. Crimes committed during and after the civil war were granted amnesty, and perpetrators benefitted from this pact of oblivion. Research on the past did not reach public discussion, people did not know what happened, and those who did decided or were forced to forget it. According to this pact, memory is the job of historians, and for that reason they are the ones in charge of investigating and bringing the past into light, but a light that is limited to the historian's field.

Novels and films represent a new way to bring to the general public the discussion about the civil war. The right criticized every attempt to bring the past into

light, accusing the left of provoking revenge and putting democracy in danger. However, the success of the movies analyzed in this chapter shows that memory is still an important and unresolved past of Spanish transition. So far, only movies and novels have been able to circumvent the pact of oblivion, but it is film, because of its language and the impact of its images, the one that has reached the general public.

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Chapter 46
The Impact of Film and Television on Perceptions of Law and Justice: Towards a Realisable Methodology

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Abstract This chapter examines an issue which has attracted only limited attention in the literature on law and popular culture – namely, the impact of popular culture on public perceptions of law and justice. It examines the context in which the study of popular culture in relation to law has developed and its principal goals and the working assumptions of those engaged in this work. It examines work that has been carried out specifically on how perceptions of law and justice seem to be affected by popular culture. It notes some of the methodological issues that have emerged in these studies and goes on to look at what kinds of limitations are inherent in such kinds of work and how these might be addressed.

46.1 Introduction

For the law, film and television are of significant contemporary importance. Writing about film, Reichmann (2007–2008, 457) noted that cinema is now perceived as far more than mere entertainment and that 'cinema – fiction, documentary and other genres – is perceived not only as an instrument for the expression of thoughts and reflections, but also as a sufficiently rich practice from which it is possible to learn about other practices, and, specifically, about law'. Whilst cinema is undoubtedly important, it would be a mistake to overlook the role of television; '…while the law

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has always been what we as society have created, it has also become something else – what we see on TV' (Salzmann and Dunwoody 2005, 412). This chapter seeks to further explore the importance of these areas of popular culture. Whilst noting that it is notoriously difficult to define exactly what we mean by popular culture, and recognising the highly nuanced and often subjective use of the term, we use the same working definition as given by Papke (2007, 3) of '…cultural commodities and experiences produced by the culture industry and marketed to mass audiences'.

Our own interests in the area have been documented in some detail elsewhere (most recently, Greenfield et al. 2010), but this chapter seeks to go further by charting developments which have begun to examine the impact of these depictions. Before we turn to these methodological developments and shifts, it is important to reconsider what makes law such an attractive medium for film and television. In our discussions of the attraction of the law, much has been made of the geographical, physical and emotional characteristics of the law and how this can be utilised by a variety of media. Perhaps most crucially for this, the visual attractions of the law are writ large. Both television and film necessarily play upon our preoccupation with the visual, and the law itself is in many ways ocularcentric (Greenfield et al. 2010; Douzinas and Nead 1999; Jay 1999). The symbols of the law are such a constant factor in the lives of citizens that there hardly seems a time when people do not identify with a given range of 'justice' signifiers. The wig and the gavel are recognised by schoolchildren (Machura and Ulbrich 2001, 118) and the scales of justice feature to indicate that any narrative is moving into the adjudicative phase of the legal process (Greenfield et al. 2007, 385–389), so these visual depictions can be seen to have a wider resonance.

Much work in the area has stemmed from use of this visual material in teaching, and film and TV have been used as vehicles to illustrate key issues and problems. Moving into the wider sphere of how justice in general has been portrayed, critics have always operated on the assumption that these various images and cultural perspectives have been somehow influential. Indeed, in one of the first collections of essays on law and film, much of the volume consists of essays that were influential in shaping the careers and lives of the contributors to that volume, (Denvir 1996) and we have similarly found that the visual has impacted upon us. For example, in the preface to *Film and Law: The Cinema of Justice*, we detail the films and visual media that have personally inspired us (Greenfield et al. 2010, Preface). Using this notion of personal impact and individual perception as a point of departure, this allowed us to construct a working hypothesis that this may be universal, or at least that it needed further exploration. Whilst it would be perfectly acceptable to leave these influences as broad markers of transition from one set of social norms and values to another, we have found this to be somewhat unsatisfactory. Our response was that these films had influenced the ways in which lawyers' roles were perceived for both the public and practitioners. There was, however, a need for greater precision. Why had one film been taken on board and formed part of the legal consciousness and others not? We have in our subsequent writing and teaching sought to make this a core element. If, for instance, a film such as *To Kill a Mockingbird,*

or a television programme such as *LA Law*, is claimed to have influenced a generation, we need to go beyond the descriptive or impressionistic and illustrate or demonstrate this.

On the basis that we need to go beyond the purely descriptive, we need to have some tools of analysis to enable us to provide this. The key issue is also why we are looking at these phenomena. Whilst it is of archaeological interest how representations have changed over time, this in itself does not provide justification for further inquiry. What is vital is to seek to identify not only how and in what ways these portrayals have changed but why these changes are significant. In simple terms, how have they influenced members of society? Our initial focus has been on those actors with whom we have most direct contact – law students. Whilst this is a valuable and worthwhile focus, we are conscious of the need for scholarship to range well beyond this group. What follows in this chapter is an attempt to locate this trajectory of work within the developments in education that we have observed, as well as offer some thoughts on the problems facing those of us who want to provide a clearer picture than currently exists at the end of the first decade of the twenty-first century. By their very nature, the narrow concerns of legal scholars have often meant that similar interests in cognate areas have been either underappreciated or ignored. Hence, when one looks into areas exploring the nature and rationale for decision-making in general terms, one finds psychologists carrying out work on precisely the issues with which legal scholars have an interest (Pennington and Hastie 1988). In order to address the possibilities of empirical work looking at impact, we first review developments in law and popular culture more generally.

46.2 Developments in the Scholarship on Law, Film and Television

The scholarship in these areas of law and popular culture has been divergent and diverse, emerging as it has from the work of scholars operating in a variety of disciplines. Sometimes, the scholars have been working largely in isolation. Here we are thinking particularly of historians such as Norman Rosenberg and comparative cultural studies specialists like Carol Clover. Whilst much of the scholarship emanates from writers in Anglo-American jurisdictions, the contributions and developments elsewhere are noteworthy (Robson 2009), if currently somewhat sparse. There has, for instance, been great interest from Italian scholars but a more limited textual output.[1] In addition, other areas like Spain enjoy a flourishing literature, but the scholarship operates within a context of highly professionalised legal education,

[1] Major international conferences have been organised in Bologna – *Rappresentazione della Giustizia nel Cine* (January 2004) and in Palermo *Mafiosi nel Cinema: Eroi o Criminali? La rappresentazione della Mafia nel cinema e nella fiction* (June 2009) – contact authors for details of the papers presented.

focusing on the vocational rather than the social scientific (Rivaya 2006). The German scholarship is well developed, although paradoxically is perhaps less visible as 'German' on one level as a result of the tendency of German language scholars to make their contributions available in English (Machura and Ulbrich 2001; Drexler 2001; Böhnke 2001; Kuzina 2001, 2005; Machura 2005 – but see Machura 2006, 2007 for work in German). Publications in France have also featured where the focus has been both general (Puaux 2002) as well as on the judiciary (Guery 2007).

The relationship between early work on law and literature, and subsequent books and essays on law and film, is perhaps surprisingly limited and tangential. Both areas seem to have developed an extensive separate literature, and links between the two have only been encountered in a few essays that look at how books have ended up on screen. This focus on adaptation has not produced a thriving literature despite its mutual appeal to both literature and film/TV scholarship (Meyer 2001; Robson 2001; Bartlett 2002), and, hitherto, there has been a relative paucity of work on law and television. Film has dominated, certainly in the recent scholarship. The emphasis of scholars has differed as between those with a practical, social policy or theoretical focus. This ties in with the specific context in which the scholars have been working. A large number of those engaged in law and popular culture operate within law schools, and a major component of the work of these institutions is to provide vocationally orientated education to proto-lawyers in a range of different offerings. We ourselves have used observations on popular culture representations of law in teaching both of substantive law classes like property law, discrimination law, housing law and labour law as well as in theoretical modules like law and society, sociology of law and legal theory. Not surprisingly, much interest has been located on the question of the accuracy of the portrayals of the legal process. This is clearly of significance where film is being used to supplement and highlight issues of both procedural and substantive legal issues. This is expressed most clearly in the pioneering text of Bergman and Asimow where they specifically focus on the question of accuracy (Bergman and Asimow 1996, 2006). In addition, Richard Sherwin's groundbreaking work on the interpenetration of legal practice and the representation of practice has affected the way lawyers operate their businesses through, for instance, utilising visually appealing presentations before juries (Sherwin 2000; Sherwin et al. 2006).

The use of film in the scholarship varies. Particularly in the early stages, some writing was principally centred on offering a guide to the material in the field (Nevins 1996), whilst limited theoretically, studies of this type were very useful in terms of mapping the terrain and provided great benefit for subsequent scholarship, where more elaborate theoretical analyses have emerged. This has created some controversy. It is perhaps hardly surprising that there have been conflicts given the divergent approaches and backgrounds of the scholars and where the area has been in search of a guiding thread. One complaint, from some writers, has been the failure of other scholars to engage with the same concerns as themselves. Hence, for example, we find those interested in the ways in which different effects and techniques are

used in film to be disappointed that others focus on the narrative frameworks and on issues like adaptation theory. For our own part, one critic expressed regret that our book *Film and the Law* (Greenfield et al. 2001) did not cover television. Whilst we acknowledge the importance of television and have sought to develop scholarship in that area in its own right (Robson and Silbey, 2012), this charge was perhaps symptomatic of an individualised approach that privileges one's own areas of scholarship and 'hobby horses'.

Significant overarching themes which can be traced in the scholarship include the ways the law has operated in support of male-centred law (Kamir 2005; Lucia 2005). In addition, film has provided rich material for those working in the area of discrimination. Hence, anyone seeking to illustrate social policy themes has not only many films to draw on but a striking literature (Russell 1991, 1996). The broader question, too, of the nature of law and its relationship with those in whose service it is supposed to operate has attracted extensive attention (Spelman and Minow 1996; Ryan 1996).

Within law scholarship, television does not, of course, measure up to film in terms of academic kudos, and the academic output is, as noted above, relatively meagre. *LA Law* was the focus of early attention (Smith-Khan 1998; Gillers 1989; Friedman 1989; Rosen 1989; Rosenberg 1989), and two more populist overviews have been published (Jarvis and Joseph 1998; Asimow 2009). Some studies focussing upon crime do cover the two mediums in single studies (Brown 2003; Lenz 2003), but the different nature of the viewing experience and the distinct nature of the product would seem to militate against this kind of conjoined approach. It is interesting that in one of the books which purports to look at the representation of law in both cinema and television, there is, in fact, a strong emphasis on film. Lenz notes some 57 films in his bibliography of which 6 focus on the adjudication phase of the justice system (see more broadly here Greenfield et al. 2010). Only 7 TV drama series are mentioned of which 1.5 relate to this lawyer phase – *LA Law* and *Law and Order*. This emphasis is reflected in the text which, in fact, only looks at *Law and Order*.

There is, though, a further interesting paradox about legal scholarship within film and television. Much of the early work focused on television rather than film (Stark 1987; Rosen 1989), and commentators made little distinction between images in the different formats (Macaulay 1987; Friedman 1989). In the 1990s, however, the scholarship shifted almost completely to film. There have of course been a handful of significant exceptions such as those of Jarvis and Joseph (1998), Rapping (Rapping 2003) and Villez (2005/2010). Seven of the papers emanating from the 2003 Law and Popular Culture International Symposium in London (Freeman 2005) were on literature, fourteen on film and only three covered television. None of the television material was actually about TV lawyers (Robson 2007a). The early individual essays have been discussed elsewhere (Robson 2007a, 334–337, b), but it is worth reviewing, briefly, the sustained scholarship on law and TV here. Jarvis and Joseph (1998) provided an early examination of TV. It consisted of some 17 essays written by a combination of academic lawyers, historians and specialists in

the media. There are 11 essays on individual shows. These are arranged alphabetically and range over four decades.[2] There are also two essays on specialist subthemes – women lawyers and young lawyers. These provided the opportunity for a perspective on how these portrayals had altered over the years. In the longest essay in the collection, Corcos ranges over the years covering almost all types of shows and appearances by women lawyers. She even makes brief mention of the principal British women lawyers in *Rumpole of the Bailey*, Phyllida Trant and Rosie Probert.[3] The main thrust of her analysis back in the late 1990s, not surprisingly, was that women had enjoyed few roles in the vast array of legal dramas aired on US television (Corcos 1998, 223). Where they did feature, they were generally weak and containing some kind of character defect. Looking at the newly aired Ally McBeal, on the evidence of that first series, she judged that Ally's character confirmed 'the stereotypes of the professional woman as insecure in her work, desperate for male attention, overly concerned with her appearance and the impression she makes on others, and unable to put aside her emotional reaction to a situation in order to develop a rational response'(Corcos 248). Whilst the subsequent 6 series did not alter this trajectory, the relegation of the emotional to a defect is, it has to be said, controversial (Kamir 2000). The essay on young lawyers deals with the trope within legal dramas of the mentor-apprentice and how that was developed, particularly in *Storefront Lawyers* and *The Young Lawyers*. These aired in 1969 but have, according to Epstein's assessment, 'faded into obscurity' (Epstein 1998, 254). Finally, there are 4 essays describing the subgenres within which lawyers are portrayed – science fiction, situation comedies, soap operas and Westerns.

Interest in the field was stimulated with Elayne Rapping's polemic *Law and Justice: As Seen on TV* (2003), a vigorous and trenchant critique of what has occurred with both fictional and reality TV law issues. There is a limited focus on the development of the fictional TV lawyer. There are two big themes that Rapping develops. One is of particular interest, whilst the other has less resonance outwith the United States focusing as it does on court TV and the filming of actual trials. Rapping adopts a *zeitgeist* explanation to account for the political congruence between the drift to the right in American politics and the perceived shift away from a 'liberal' politics in the *Law and Order* series. Villez (2005, 37) suggests that there

[2] There was *Perry Mason* and *The Defenders* from the 1960s; *Paper Chase* and *Rumpole of the Bailey* from the 1970s; *Matlock, LA Law* and *Hill Street Blues* from the 1980s; *NYPD Blue, Murder One, Picket Fences* and *Law and Order* from the 1990s. Of these, three series are police procedurals in which lawyers make very limited appearances – *Hill Street Blues, NYPD Blue* and *Murder One*. The styles and subjects varied significantly from the social themes and issues found in *The Defenders* and *LA Law* to the simple triumph of good over evil in *Perry Mason* and *Matlock*. The pioneering work of individual essays on individual programmes was limited in its analysis of the changes over time of the programmes. Denvir, for instance, chooses to write about Rumpole in terms of how he measures up to the iconic figure of Atticus Finch.

[3] Regrettably, the unavailability on video of many early programmes means there is no assessment of the first woman lawyer as a major protagonist – Margaret Lockwood's Harriet Peterson in *Justice* in 1972.

has been a development from the individual case-focused dramas of the 1960s and 1970s with the 'Guardian Angel of the Law' style of lawyer. She indicated the next phase of the office-centred drama on the model of *LA Law* emerged in the 1980s where the focus is as much on the relationships between the lawyers and paralegals as much as the case (Villez 2005, 48). The final 'third generation of television lawyer' centres around the personal and professional lives of female lawyers encountered in *Ally McBeal* and *Judging Amy* – and one might now add Patty Hewes' *Damages*. This assessment, whilst it deserves further consideration in the American context, does not describe a universal development. It does not translate satisfactorily into a British context where whilst we had an early female lead protagonist, subsequent series have been male centred (Robson 2007a, 340) and neither does it reflect developments in the rest of the world (Robson 2009).

Most recently, there has been a contribution to the writing on fictional TV lawyers in the volume *Lawyers in your Living Room* (Asimow 2009). The style is lighthearted but the conclusions worthy of consideration. This collection of essays looks at individual shows for their significance in the wider world. The essays are wide ranging, including both well-known and more obscure examples, and divided into a number of categories. These essays provide a useful update of the Jarvis and Joseph approach. However, like Jarvis and Joseph, their aim is to provide a guide and overview rather than in-depth scholarly analysis. Asimow's collection was in fact published by the American Bar Association, who stated that 'The book is intended to be a trade book that would be sold primarily as a gift item. It should treat the subject in an entertaining but informative way. It is not intended to be a scholarly work'.[4] The purpose, then, of these essays was to introduce people to some familiar favourites and reintroduce them to other less well-known figures.

There is, then, no sound intellectual reason for the minor status of television lawyers. Insofar as law and popular culture concerns itself with the nature and impact of the image of justice, there would seem to be more reason for scholars with these interests to examine the ubiquitous television lawyer at least as much as the much less popular forms of films or books. There are, though, as we have noted, signs that there may be a fresh surge of work in this area. Having outlined the developments in the field, we turn to an analysis of the methodological approaches and challenges and in particular, to look at the impact and future direction of the area.

The focus of much of the early scholarship was unashamedly on legal education itself, although as we identify above, much recent attention has looked at establishing links with other disciplines, and as such, research has taken a theoretical turn. Such shifts necessarily need to be located in the context of the goals and aims of the scholars engaged in this work and the attendant shifts of emphases. These assumptions

[4] Asimow wrote in his brief to authors, 'I want rather short chapters that will run about 10 pages (15 tops) and are directed to the general public (not to academics). Thus they should be readable, non-theoretical, not footnoted, and preferably humorous. The organizing principle is that we're mainly talking about the character of the lawyers – personally and professionally – although anything else about the particular series is fine also'.

shape the work that has been carried out. They draw their inspiration from the early observations of scholars such as Tony Chase, Lawrence Friedman and Stewart Macaulay. Writing as early as 1986, Chase urged legal scholars, dissatisfied with both a narrow professional approach to legal education and the political agenda of critical legal studies, to turn their attention to cultural phenomena (Chase 1986). By the same token, Macaulay (1987) and Friedman (1989) both identified the possibilities of popular culture and the symbiotic relationship between popular consciousness and popular legal consciousness. In any event, these different strands have produced a bifurcated scholarship where we estimate about half of the work can best be described as strongly professionally orientated in its focus. Most of the rest of the work is more theoretical and literary in its style. The cultural products, whether the cinema of justice or TV series centring on or featuring lawyers, were perceived to be important and influential by their nature and volume. This underlying approach was perhaps best summed up in one of the earliest pieces of scholarship in this field by Steven Stark (1987, 231) when he set the context for his examination of TV cop and lawyers shows by stressing the importance of volume:

> …Americans receive ninety-five of their information about crime from the mass media.... researchers have shown that viewers take what they see on television to be the real thing.... seventy-three per cent of those children surveyed could not cite any differences between judge depicted on television shows and those in real life.

What is absent from the vast majority of the scholarship on film and TV justice is an explicit interest in exactly how one might assess the impact of popular culture on perceptions of law (Gies 2008). We now look at what has been done and the problems facing those seeking to explore this dimension of law's interface with popular culture.

46.3 The Impact Question: Empirical Work and Emerging Methodologies

In addition to the implications of scholars that impact was self-evident and did not require to be specifically demonstrated, there has been work that has emerged within the field of law and popular culture and outside this narrow area. The question of impact has been directly addressed in a limited number of pieces of empirical work on film, television and literature. This includes research by the authors, both published and unpublished on TV and fiction. The findings of this work are examined and assessed in terms of their significance.

We look first at work which has raised the issue of impact directly. In the empirical work carried out on what law students think about law and lawyers, television was the sole focus of one of the studies by Saltzmann and Dunwoody (2005) and featured alongside film in the other Asimow et al. (2005). One factor which might drive the focus on film is the perception that it has a greater impact on the consciousness of members of the public. The evidence of the extent to which that filmic law and justice portrayals impact on the perspectives of those involved as proto-lawyers

is mixed. Salzmann and Dunwoody found that students were not simply sponges who unquestioningly assumed that the lives and work of lawyers as shown on TV were an accurate portrayal of their likely lives as lawyers (Saltzmann and Dunwoody 2005). Looking at somewhat different factors, the Asimow study (Asimow et al. 2005) uncovered evidence of media impact. In this transnational study conducted in Argentina, Australia, England, Germany, Scotland and the United States, we looked at the sources of students' perspectives on various aspects of justice (Asimow et al. 2005). The students, to whom we administered questionnaires in relation to their views on the status of lawyers in the justice system, reported that the sources of their views were more strongly sourced in the media than in family, the education system or peers. We were very conscious in carrying out this research of the difficulties in seeking to compare students from very different backgrounds in different jurisdictions whilst carrying out the research. The thinking that led to this method was pragmatic. We were keen to establish some sort of basic benchmark, however crude, against which we could develop more detailed studies within and across the individual jurisdictions. At the same time, we were keen to avoid the tendency to focus on the United States and to a lesser extent Britain. We found that the more legally themed television and films that law students consumed, the higher their opinions of lawyers. Overall we concluded that the media, including TV and film, did indeed have an effect in terms of students forming their opinions about lawyers (Asimow et al. 2005, 429).

The same simple questionnaire methodology was adopted by ourselves in Britain to make a series of inquiries of first year law students as to their knowledge of the cinema of justice, TV lawyers and role models in film, TV and fiction. We also looked in a later study at the recollections of 1st year law students as to what were the names of the lawyers who had appeared on television in the recent past that they could recollect. The purpose of this was to assess whether or not the common-sense notion that seemed to underpin much discourse between scholars as to the major shifts in style between law shows was likely to have any significance for viewers. If some shows were seen as emblematic, one might expect these to be broadly remembered across a wide spectrum of the population as opposed to the most recently aired shows. In the series of surveys we conducted of all 1st year law students right at the start of their law course, there were a number of interesting findings. Firstly, there was limited recollection of any TV lawyers. Some 50% of students could recall no lawyer shows at all. Of those who did recall, there was a significant number who recalled a show which had ceased transmission some 10 years previously and also two other recent shows. There was almost no memory of 'lesser' shows amongst this group despite their having 'stars' in them and extensive promotion. Knowledge of American TV shows outweighed British series despite being approximately equal in terms of prominence on British TV in the past two decades. Subsequently, we asked students about the influence of TV/film lawyers, family member lawyers and local legal celebrities on their decisions to study law and become lawyers. TV/film lawyer figures figured more prominently than either local legal celebrities or family member lawyers (Robson, forthcoming). Cassandra Sharp, working within the ethnographic tradition stressing the context

and frame of reference participants, has also focused on the student experience of the educational process and how it socialises them into thinking like lawyers (Sharp 2002, 2004, 2005).

Moving away from students to television viewers, interviews have been used by Podlas in the United States to look at the impact of watching reality TV shows like Judge Judy on people's attitude to the justice system (Podlas 2005; Podlas 2006a) and on perceptions of judicial behaviour (Podlas 2006a). Frequent viewers reported themselves more likely to engage in litigation than nonviewers. More broadly, she noted that the media had an important role to play in terms of our understanding of the law and that popular culture presents our prime window on the law, as whilst few have stepped inside a courtroom, many will have experienced it via the lens of TV. 'Empirical evidence shows that most people learn about law from the media, and specifically, television. Ninety-eight percent of Americans have at least one television set, and watch at least 25 h of television programming per week' (Podlas 2005–2006, 444). Actual intake of knowledge of the law, though, does not appear to be as effective as earlier writers assumed with knowledge scores of heavy legal show viewers in tests no higher than viewers who did not watch such shows (Podlas 2006b, 50). Superficial changes such as modes of address in court are recorded, however (Villez 2005, 275).

A common perception in practice, though, assumes a media impact. Papke, writing in 2007, gave an interesting example of a US judge who, concerned that works of popular culture might influence and affect those in her courtroom, took steps to try and remove this influence but then saw an Internet posting from a prospective juror noting that he was doing his preparation for his civic duty by watching a series of judge-focussed law films such as *12 Angry Men* and *Trial by Jury*:

> Do the commodities and experiences produced by the culture industry have an impact on their audiences? Commentators have long assumed that the answer to that question is yes. At the end of the nineteenth century moralistic reformers including…Anthony Comstock worried that popular adventure stories and romance novels were corrupting readers, especially young ones. (Papke 2007, 5)

This ties into other work that has attempted to look at media impact upon jurors for example (Greene 1990; Cole and Dioso-Villa 2006–2007). It is, however, difficult to gauge the impact, or the effect of any specific work of culture. There are in addition key legal questions concerning apportioning blame and establishing liability, beyond the purview of this specific piece, but which has been the subject of significant debate particularly around films such as *Natural Born Killers* and music such as *Judas Priest* and the difficulties of ascribing legal liability (Franklyn 2000; Linneman 2000; Wood and Hirokawa 2000). In terms of trying to get some idea of impact and effect, cultivation theory has been one way of dealing with this. This is the notion that consumers of popular culture view social reality differently, as the consumer's conception of reality will be affected by a prolonged and significant viewing. This applies primarily to television although this could equally apply to material on the Internet. The notion of genre is particularly important within this context as repeated ideas, notions and conventions at the heart of a genre may help inculcate specific norms. A genre-specific cultivation

effect within law has been noted particularly with the role and function of the judge (Podlas 2005; Podlas 2006a).

The next stage of this argument is that somehow these depictions might have some direct impact upon how people act when engaging with the justice system in real life. A number of the studies on this have focussed upon the so-called CSI effect (Podlas 2006/7; 2006b; Cole and Dioso-Villa 2006–2007, 2009). At its most basic formulation, real-life jurors are alleged to now expect the same approach and sophisticated take on evidence as they have seen in the CSI programmes, as the programmes have created such expectations. Podlas, whilst introducing a more nuanced appreciation of different levels of the CSI effect, including potential positive benefits, notes that there is anecdotal support for an argument of audience (over)expectation but that there is little in the way of empirical evidence to back it up; 'Although the media warns that a CSI Effect is seducing jurors into legally-unjustifiable "not guilty" verdicts and unwarranted demands for proof of guilt beyond any and all doubt, the empirical results here suggest otherwise' (Podlas 2005–2006, 429). There has also been interesting work which seeks to explore the different assumptions about how people make judgments in courts and the impact of television on these decisions. Podlas (2008) has also looked at how television versions of 'cross-examination' impact on how jurors assess the 'truth'. She notes that audiences familiar with the 'scripts' from fiction are more ready to accept the real-life versions of these 'scripts' when lawyers seek to couch their arguments using these narrative devices.

Papke brings us back to the broad context within which much work was carried out. Looking specifically at the courts, he notes how depictions of the courtroom have an important place in the psyche of Americans, but that many people inside the system have a problem with such popular culture portrayals, and indeed do not enjoy their exaggeration or over-dramatisation (Papke 2007). Thus, whilst noting that it is difficult to evaluate impact, and also to isolate 'cause' within the cause and effect rubric, goes on to consider whether we should limit the potential impact of popular culture. He couches his response largely in terms of responsibility and public education, focussing on the impact in 'the courthouse, the community, and in the den and family room' (Papke 2007, 18). He sees the potential impact on the *voir dire* and jury selection and conduct as in need of some protection against popular culture impact. On the wider level, he sees the need for a more systematic approach to teaching what goes on in the courtroom, going as far as suggesting that public education should be a formal duty of members of the bench and related officials, and on the individual level, he asks for more of the audience and our role as scholars:

> Educators should teach us how to challenge our popular culture, and we should take these lessons to heart. When we are watching a television show or a DVD in our dens and family rooms, we should intellectually wrestle with what we are watching. Popular culture can actually be more entertaining and edifying if we critically examine it. (Papke 2007, 19)

The operative assumptions, then, underlying much of the scholarship on both the professional and the theoretical/literary studies share a common starting point of the assumed significance of popular culture for society. In discussing the significance of

the existing limited empirical work, the question of methodology naturally emerges. A fundamental issue which connects this specialist area of academic endeavour with the sociology of law is the rather broader issue of the public legal consciousness. The whole question of identifying the public attitude and understanding of legal phenomena has a rich history. The developments have been different in different jurisdictions, and this perspective is based principally on what occurred in Anglo-American systems. An interest in levels of knowledge and understanding of the law formed a central part of the early scholarship of sociolegal studies in the 1970s (Podgorecki 1973). The early work was based on national surveys. These looked at a range of issues across Europe. These included material on the connection between the content of the law and people's perception of justice. Moving from local and national perceptions of specific laws and institutions is what is central here. Wrestling with the elusive concept of popular legal consciousness in a precise rather than very broad way continues to be a major preoccupation of the social-legal community, and we hope our work may contribute to this debate (Ewick and Silbey 1998).[5]

46.4 New and Competing Methodologies

The methods deployed in extant studies have been relatively straightforward. They have been based on a range of different surveys. The issue of how researchers can devise a satisfactory and appropriate methodology in relation to assessing public perceptions continues to provide problems. Scholars are seeking to assess the impact of popular culture on as broad a section of the public as possible. Hence, the questions of the nature and size of samples are crucial. Thus, far in the field of law and popular culture, reliance has been placed on very small-scale work with 'captive' student audiences or on the findings of much broader pieces of empirical work commissioned to find out public opinion on such general topics as confidence in the police, capital punishment or sentencing policy (Asimow et al. 2005). The nearest we get to detailed information which centres on images of justice and the operation of the legal system are polls on the general reputation of lawyers. In addition, though, to there being a reliable sample from which to extrapolate, there is this issue of population segmentation. Our work suggests to us shifts in perceptions between and within different year groups of students over a 5-year period. Hence, from this it seems to us vital to explore whether there is a difference between how justice issues are perceived as between young and old, rich and poor as well as between ethnic groups. Gender too might be expected to play a crucial role. Hence, the need and desire to explore the perspectives of groups differentiated in these ways.

[5] In 2009, Susan Silbey announced a major transnational project to take forward the disparate and disconnected national work on precisely this theme – Research Committee on Sociology of Law Meeting, July 2009, Oñati, Spain.

Whilst familiar territory to the social scientist, some of these issues have not figured heavily in the background of legal or cultural studies where most of the scholarship on law and popular has developed. That has been, however, by no means an insurmountable obstacle. With sound advice, it has been possible to develop studies which allow conclusions to be drawn – albeit relatively modest ones (Asimow et al. 2005; Salzmann & Dunwoody 2005). With cultural products, however, even allowing for differentiation between different populations, the issue of changed perceptions of time of the same phenomena is an important issue. In simple terms, we have the issue of not only how different age groups might view vigilante movies and the issue of self-administered justice but how the films are viewed over time. Firstly, the films and the issues within them subtly alter. Sherwin (1996) suggested that we can identify major shifts in the national mood by examining films on similar topics over time. Asimow goes along with this approach in relation to how lawyers have generally been portrayed (Asimow 2000). In another area of the portrayal of justice, we find interesting shifts over time within the subgenre of the vigilante film where the broad theme of the distressed individual avenging the failures of the justice system to bring a personal justice to bear on wrongdoers has subtly shifted over the years. From being a simple unadorned message of justified revenge, the most recent examples of the vigilante have cast doubt on the effectiveness of this simple revenge narrative. The simple certainties of Paul Kersey have been replaced by a nuanced ambivalence and downright rejection of vigilantism with Nick Hume and Walt Kowalski (Robson 2010).

Our initial hypothesis, based on our work with first year law students, was that each year group drew on a different pool of film and television version of images of justice. Looking at the British television lawyer series, students had a limited familiarity with presentations of justice which were outwith their viewing spectrum. There was, in reality, no 'folk memory' of Horace Rumpole or Perry Mason. Cultural reference points like Atticus Finch simply did not exist. These initial findings led us to think that this kind of generational segmentation had serious implications for our desire to pin down public legal consciousness in relation to the impact of popular culture. In addition to this issue, there is how a film's meaning(s) is viewed in different time frames and periods. Since the arrival of television in the 1950s, and the development of new technologies and specific dedicated film channels, there has been the possibility of viewing and reviewing cultural products. Many films and some television series now have an almost endless life. In essence, this changes the way films and television can be experienced and our relationship to them and has implications for any work seeking to assess impact on legal consciousness. New generations now have the opportunity to evaluate figures, such as Ben Matlock when they appear on DVD (Greenfield et al. 2009). When law and popular culture emerged as a focus for study in the 1980s, this would have been impossible. What would have been difficult to access is often now available, and the potential for a richer picture emerges. This does, however, raise problematic questions. Hitherto, 'captive' student audiences have been the preferred option for reasons of cost and feasibility. Whilst interesting, these offer a distinctly limited picture of 'public' perceptions. The rather broader issue of data reliability and the

extent to which surveys provide a useful source is one of the central issues within social science.

This chapter recognises that the problems in the area of assessing the impact of culture are considerable. Some banal practical problems are also worth pointing up. The reasons for this relative neglect by scholars of the images of law and justice on television and the possible reasons for this are discussed in greater depth elsewhere (Robson 2007a, b). Briefly, this is attributed, in the past, at least to the practical problems involved in assembling the material. As has been noted above, and elsewhere, scholars have frequently worked on individual films. These have become more easily accessible through video and DVD. TV programmes have, however, become more available in the DVD era, and there is now a greater possibility of accessing recently shown series. Much valuable TV material has, however, been permanently wiped. Availability is, therefore, patchy. On the other hand, it is now possible to obtain examples of a number of jurisdictions outwith the Anglo-American.[6]

As far as British and American series are concerned, there has been, up to the present, limited easy access to material. Only 3 of the pre 2000 British fictional shows appeared in video/DVD format although such release now appears to be standard even when the series in not recommissioned.[7] Tapes of the vast majority of the programmes from 1958 to the present, however, have been wiped or are only available at considerable cost. The same appears to be the case in the United States. At the time of writing, there appears to be no availability of such path-breaking programmes as *The Defenders, LA Law* or *Petrocelli*. Although these are not insuperable obstacles (Robson 2007a), they reinforce the unarticulated hierarchy in cultural products in which television comes well below literature and film. There is also the question of volume. The sheer quantity of material, even in the most modest series, is perhaps trivial seeming but is a serious barrier to research. Typically, even a modest run of a series involves a dozen 1-h episodes. The attractions of looking at a single 90/120 min film as opposed to at least 12 and up to 40 h of television programming are obvious for all but the dedicated Stakhanovite. Anyone wishing to undertake a serious study of any series requires to do more than watch a couple of sample episodes, however tempting that option may be.

In addition, there are the issues emerging from the context of law and popular culture scholarship. This has produced a scholarship with an interest in both professional and literary meaning. The changes, identified in the scholarship, have been at the broad level of the *zeitgeist* and generational and epochal significance. The need is to provide a rather richer and more specific picture of culture's impact. This must be done bearing in mind that what can be drawn from extant studies is limited.

[6] See, for example, in France – *Avocats et Associés*; Spain – *Anillos de Oro*, *Turno de Oficio* and *Al Filo de la Ley*; South Korea – *The Lawyers*; Japan – *Common Lawyer; and* Australia – *The Circuit.*

[7] *Rumpole*, *Kavanagh QC* and most recently *Sutherland's Law* from the 1970s. By contrast, 5 of the post 2000 shows have gone to DVD – *Judge John Deed*, *Outlaws*, *The Brief*, *New Street Law* and *Kingdom*. The pioneering series *Law and Order* (1978) (no relation in any way to the American series) is also now available. This looked at a single investigation into a crime from four perspectives – a corrupt police officer, a career criminal, a prisoner and a 'shady' lawyer.

Whilst the reasons for these limitations have been acknowledged, the difficulties facing researchers in this area are recognised and laid out in this chapter. The prospects of funding for extensive studies which satisfactorily address the methodological issues identified are one practical issue beyond the scope of this piece. We would want to conclude by suggesting that to continue with scholarship in the dominant cultural and literary modes of the recent past limits, the potential for law and popular culture to make a major contribution to our understanding of the interaction of these phenomena and that further extensive empirical work is vital for the health of the film and television scholarship in this field.

This expansion into a more nuanced understanding of the impact of cultural products on specific segments of the market over time can most profitably be combined with another of our research strategies. This has started to look at how it is that the films and television programmes emerge in the form and with the stylistic and narrative conventions that abound in the cinema of justice and small screen justice. We are currently engaged in researching the process of commissioning of films and television programmes and what limits and constraints producers of popular culture on justice operate under. By combining these two explorations into the production and consumption of culture, we feel this gives an opportunity to provide more than our own particular interpretations of the meanings of film and TV, which whilst of some interest, might be seen as no more valid than those of any other commentators. As Rosen (1990, 517) noted, when discussing the links between psychology and law, and the possibilities of legal research that examines the use of law for the media and media for the law:

> …the legal process incorporates, shapes, and transforms cultural behaviors and attitudes. That there is a complex dependency between law and culture is not just a consequence of citizens bringing to the law their cultural baggage and the law seeking a legitimacy that speaks to citizens. Social justice (or at least a morally rich pluralism) depends not only on the autonomy of law but also on the interdependencies of law and culture. Interdependence is normatively required, at least in part, because not only must the law morally matter to a culturally heterogeneous population, but also the law ought to be able to speak to those whose claims it does not currently recognize.

Engaging beyond the narrow confines of the legal paradigm is what law and popular culture has always sought to do. It is now more important than ever that in seeking to get a better purchase on the relationship between these phenomena that we pay serious attention to developing methodologies that encompass both structural and attitudinal factors.

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