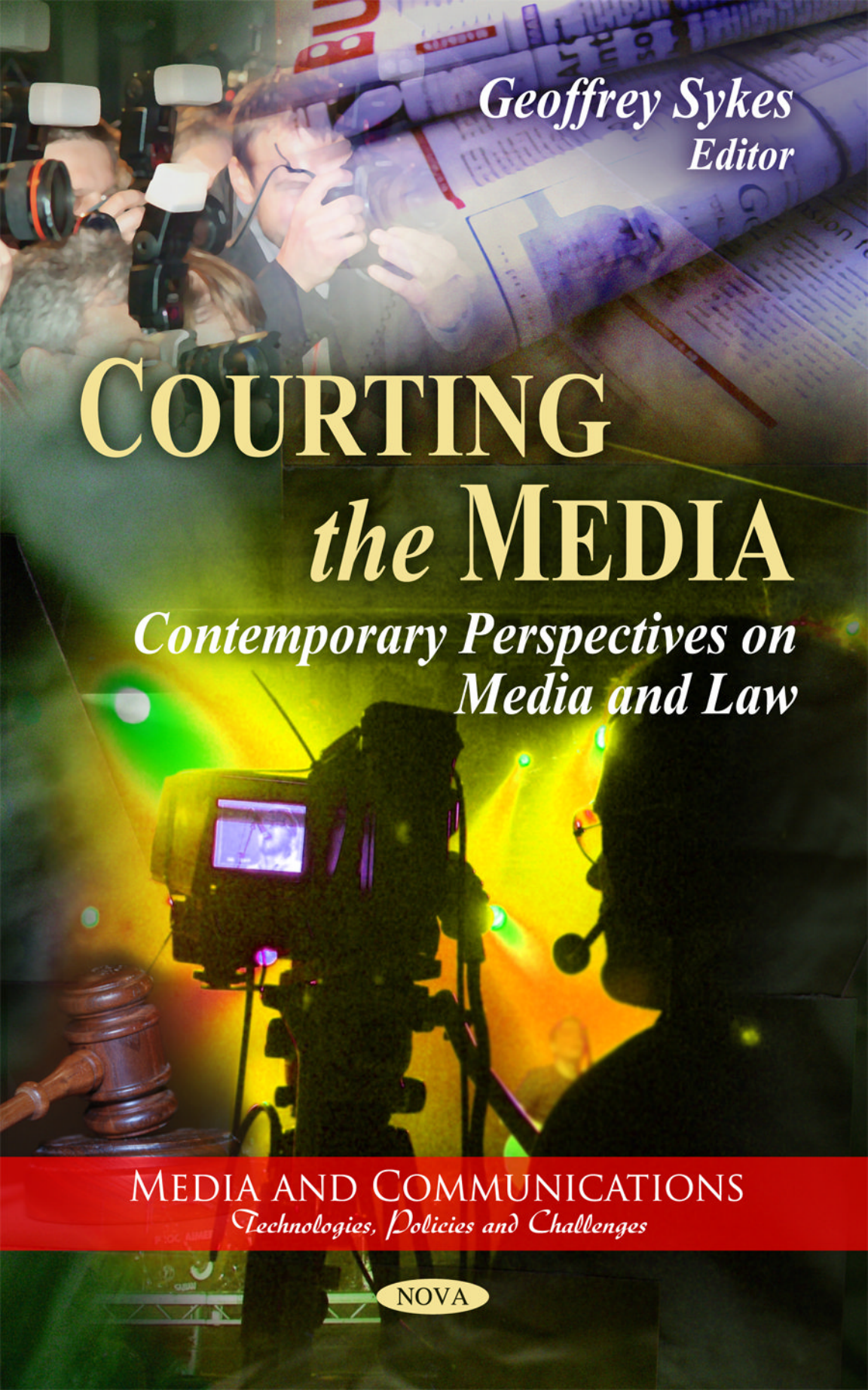
Geoffrey Sykes
Editor
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MEDIA AND COMMUNICATIONS -
TECHNOLOGIES, POLICIES AND CHALLENGES

COURTING THE MEDIA: CONTEMPORARY PERSPECTIVES ON MEDIA AND LAW

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PREFACE

This special anthology of papers investigates the relationship of contemporary mass and communicative media, and legal practice, decision making and regulation. The volume has two main areas: representations of law events in mass media, and use of digital and video media in legal practice. Topics include the use of video and digital tools in courtroom proceedings, and consequent understanding of video as a medium; the use of media technology in court case management; and televised proceedings of court.

A special theme of the volume is how digital and new media, and audiovisual technology generally, can become a tool or accessory in mediating the process and outcome of legal administration and decision-making. The two areas, of mass and new media, are seen as inter-related. Attention is given to the past, present and potential role of media in courtroom, mediation and client settings, and in case administration.

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Editors: Geoffrey Sykes

Chapter 1

INTRODUCTION – "MEDIATING MEDIATION"

The theme of this anthology could broadly be tagged or summarised by two terms: media and law. However speculative it might seem to combine two terms, each of which is already conceptually broad, even vague in its own right, for the past decades there has been a general understanding about particular issues that are relevant to any relationship of law and media. Two main perspectives initially spring to mind: the access of mass media, in particular television, to court and legal processes, and the representation and depiction of court and legal processes by the mass media, in particular television. The relationship between the two terms can be seen quickly as reflecting a public relationship between two powerful and significant institutions in the public sphere – that of broadcast television, and legal practice.

These two sectors can be regarded as fundamentally distinct yet also inter-related. The problematic issue of allowing television cameras and journalists direct access to court proceedings, for example, remains largely unresolved in many jurisdictions, yet longstanding restrictions or outright prohibition by news or current affairs programs has not stopped a plethora of court, detection, current affairs, forensic and drama programs from capitalising on public interest in the same subject matter that is not available in real time broadcasts. It is possible to argue that issues of confidentiality, probity and regulation of crime and legal processes (the media term is gate-keeping or exclusion of subjects from media attention) has in part motivated the fictional depictions of the same processes. Such negative motivation – to depict indirectly what cannot be positively permitted or seen - of course only in part explains the

nature and appeal of detection, litigation and court genres. One would assume that however open courts were to all forms of mass media, there would still be substantial interest by audiences and readers in fictionalised and behavioural accounts of crime, judgment, conflict and disputes.

In terms of research, a quantum of literature and studies has emerged on both issues – into the terms, questions and regulation of access of cameras to courts, for example, and also to the structure, style and meaning of genres of literature and media shows with legal subject matter. The resolution of both of these long standing and inter-related issues, this volume will argue, resides very much in the contemporary technology and practices of legal and media domains.

THE TELEVISED COURT (I)

Shaeda Isani and Geoffrey Sykes ("Forensic Mediation") present an unusual case study about the representation of a coroner's court, as received and interpreted by French law students. The contrast, however, is not between non-recorded actual proceedings and media programs, but that which arises when in-house court video can be compared to produced works. The subject of inquiry is why law students seem more analytic and comfortable with scripted coronial events, yet adverse to and apparently detached from footage of actual professional activities. The study is complicated by the lack of familiarity of French students with the coronial court, that is not present in their country. The subject of inquiry opens up a discourse about the status and production values associated with mass media representations, compared with the actuality of court events and their more informal video recording.

However clear and researched these decades-long issues of law and media might appear, the implications of any study of media and law in recent years cannot be identified or simplified so readily. The inter-relation of representational and presentational depictions of legal subject matters, has become more fluid, in terms of genres of program, media technology, changes in access by selected jurisdictions, and in particular by the use of media within legal processes and courts, for purposes such as administration, interview and evidence.

One explanation of the boundary that seems to prevail between courts and television can be in terms of an incommensurability of media forms. However theatrical aspects of court performance might appear, its fundamental structure can be regarded as being rhetorical, linguistic and logical, and different to

cinemagraphic or televisual language. The perception can be made tacitly and quickly by both legal and media practitioners, and can be elaborated theoretically, in terms of theories of language, signs and medium – for example, law is mainly verbal in its expository style, while television is mainly non-verbal or visual. The contrast can be evaluated, with the court seen to have a sobriety and dignity lacking in the messages of media. This evaluation can be part of a law reform agenda – that by identifying and appraising non-verbal aspects of legal processes one might begin to change and reform traditional ways of legal practice.

Nevertheless, the traditional, rhetorical way of regarding the business of law, by its practitioners, has certainly resulted in a fundamental distrust of methods of narration, production, presentation, argument and audience reception of mass media messages, that from the legal aspects can be responsible for the substitution of entertainment and visual effects in place of the precise rhetorical practice of legal argument. The suspicion is increased when media broadcasters do not only seek to represent legal process, but to substitute and compete in decision-making roles. Investigative and current affairs programs can readily assume quasi-legal roles of arbitration that can rival and even interrupt those of formal judicial domains. The relationship between law and media can be said to be inter-jurisdictional.

Metaphorically and pragmatically, one can speak of a boundary or wall that has been built between the main activities of mass media and legal practice, across which participants on either side gaze, compete, envy, criticise, suspect and reproduce each other. Yet if one can speak of a wall in the past tense, then increasingly that membrane has become pervious, more a transition zone for dynamic interdependent relations and hybrid practices.

Some examples of hybrid events that transgress any neat separation of law and media can be found. Television crews with portable equipment are finding practical access to police and detection events, crime scenes and out of court street interviews. Programs such as *Judge Judy* and *Divorce Court* site actual sitting courts in the broadcast studio, or else transform a courtroom into a studio. Given selected jurisdictional precedents and participant permissions, and the role of actual judges as arbitrators, it is possible to replicate, or stylistically cannibalise and appropriate, entire court proceedings, for unedited real time broadcast, inside a television studio. The boundary of law and media is shifted and collapsed by television producers, entirely on their own terms.

The staging of television courts invites wider comparison of courts and studios. Put to a broadcast crunch, a conceptual synchrony of court and studio emerges and apparent differences between the main arenas of media and law

performance seem based in part on misunderstanding. The judge fits easily into the seat of the studio presenter: the courtroom audience into that of the studio: the witnesses and parties into the social actors who appear from out of the audience or on cue, in games, variety and panel television shows. Having made all these brief if salient points, one needs to be careful not to ignore those elements of entertainment, glamour, sensationalism and acting, that mould and shape court proceedings, as they are produced for reception by a mass audience. The white lights of studio courts can serve both to blur and reinforce, and not clarify, the traditional boundary of law and media: so much and no further, one can hear the judiciary murmur at the antics of *Judge Judy*.

On the other hand, legal practice has shifted the boundary on its own terms, and stolen the gun on the near monopoly on production exercised by broadcasters. Despite initial reticence, the teleconference facility has grown many times for court evidence and examinations of distant or sensitive subjects: evidence captured on video by police, forensic and expert authorities is being admitted; students are getting video feedback of their moot court appearances. The 'in house' adoption of video as a tool or device within courts might be one factor for the increase in selective permission by television cameras to court proceedings. Permission for access is increasingly a matter for the discretion of individual jurisdictions, courts and judges, rather than binding, general procedural rules. The search for new subject matters for the so-called "reality TV" genres of television has enabled selected permissions for crews to accompany police patrols and, without consent of parties, follow selected cases from first investigation to court appearance and judgment. The genres of reality television offer more fluid, hybrid shows to accommodate expectations of media and law professionals in ways not always met by the narrative modes of television drama.

THE TELEVISED COURT (II)

Brian White ("The Man in the Gallery with the Writing on His Face") provides a case study of a hearing that has been virtually transformed in a television event. The level of media and public interest in the inquest into Lady Diana's death provided grounds for discretion, in permitting full coverage not only of proceedings but also of public bystanders and audience. The study discusses one of the possible consequences of allowing multiple cameras into court, with consequent online editing, as fixtures, faces and events that might not attract interest in a traditional proceeding but gain

attention through the close up camera lens. Regular public attendees become 'social actors', or de facto media performers, much as audience members can become players in a game or questioners for a panel, in a television studio. Does this focus on the audience, normally passively secreted and partitioned in a court, contribute to or diminish the hearing? The subject matter seems distinct yet entirely relevant to any query about discretionary access of media to courts: how many cameras, what kind of production values, how much director's control? White employs a variety of interdisciplinary communication methodologies to address these innovative questions.

The chapter raises the historical and theoretical status and role of the public audience to a court proceeding, as spectators, witnesses or collaborators in the event. The chapter can be seen as inviting wider, historically based inquiry into the changed role of the public in a hearing, due to the effects of media. However reticent one might feel about some directions of this example, the example does illustrate some of the remarkable if unexpected similarities between a court and a television studio, and how effortlessly one can be transformed into the other.

The visual/verbal dichotomy that might have separated the two arenas overlooks the quite verbal qualities of presenters, actors, anchors, readers, promoters, in the artificial and hermetic space of a studio. The intimate yet formal qualities of conversation and delivery in this space can be configured quite readily as television drama or performance, as *Judge Judy* readily reminds.

To some extent, televised events such as the Diana hearing follow on from and help resolve the long-standing problematic nature of media-law relations. They are not distinct, but typify developments within their professional practices. However, a new factor has emerged that has the potential to transform the professional practice of both media and law, and the fundamental relations between them. This factor is media technology. The so-called digital revolution, commencing in the mid 90's, has produced a new generation of affordable, portable and efficient equipment and methods, to enable the capture, storage, editing and transmission of messages.

In retrospect, it can seem that for several decades the issues of law and media practice were very much determined by the nature of the technology of media as much as its genres, professional expectation and industry needs. Studio equipment (camera, editing, tapes) was expensive, and was based on linear, real time capture or copying of events directly onto analogue recording material (videotape or film). The transmission of produced programs required access and licensing of a finite public resource – aerial broadcast bandwidth.

Sometimes licences and production funding was given to public broadcasters, but generally, in America and Australia at least, television developed on a quite commercial basis – based on the financial investment required to establish and run stations. Mass audiences, entertainment, networkings, scheduling, advertising, production values and genres – the hallmarks of mass media, that can be the subject of distrust by legal practitioners, were very much predicated and in part determined by the nature and costs of broadcast technology.

The history and development of television technology is fascinating, from black and white to colour, through video tape and editing, improvements in image quality, and development of external and portable equipment. The technology of media has continually, over the past six decades, established parameters that have in part determined the content and style of programming.

Unlike analogue technology, which literally reproduces and records events onto expensive, material medium such as film, digital media encodes moving images as mathematical and electronic signals, ensuring faster, cheaper and more efficient equipment and methods for all stages of production and transmission. The term digital is ubiquitous, and to a large extent its popular commercial and public usage remains vague as to its precise technical meaning. The digitisation of the fundamental processes and features of technical engineering is also Janus-like in its application in industry and consumer domains. To a large extent digital technology can reproduce, conserve and extend the existing services of the television industry, such as in digital TV, with improved quality, quantity and audience appeal. The mathematisation of processes is not always transparent to audiences, who see more and even better of the same. Yet the same technology that produces more glamorous high definition images can also produce mobile, portable and high quality "prosumer" equipment that can be used to subvert and supplement the services of mass media.

While an earlier generation of portable, analogue portapak equipment existed, along with earlier versions of videoconference and ubiquitous surveillance security cameras, the results were typically inferior compared to the production quality of broadcast television. The poorer quality did not serve to promote their adoption in legal domains. That boundary, of production and equipment quality, has now very much been blurred. A courtroom videoconference can produce large screen, high definition quality that rivals broadcast programs. Police and security videos can often be in colour with a marked improvement in quality and definition.

If there have been issues based on the uneven distribution of resources, then this has most certainly changed. One pragmatic reason for excluding cameras from court was their obtrusive nature, how even a small crew would provide distraction from proceedings. This is no longer the case. Digital cameras can be relatively discreet in use, and courts can maintain their own in-house systems as part of their regular architecture. Instead of being reactive or passive to the media system, the court can become a producer in its own right. Whereas earlier media-law relations were based on a disparity or unequal distribution of media resources within the public domain, with the broadcast and film industry maintaining a virtual monopoly on high quality equipment, the nature of media ownership and production has changed. The concept of active, co production by the legal institution, can produce radical solutions to the long standing problematic of media access. The idea of shared or pooled material, supplied by one media operator but available to competitors, or supplied by the court system itself, is a radical renegotiation of law/ media relations.

One can speak of a new contractual or regulatory framework between differing professional sectors in the public sphere. The commercial practice of the broadcast industry was always framed by regulation – of program and commercial content, of licence, of censorship, of ownership. The law has always had a foot in the backdoor of media industries, through the maintenance of substantive or media law. The regulation of access to courts, and concerns about interference with proceedings, contempt and defamation linked to the proceeding of cases, was but one part of a plethora of interventions and regulatory practices exercised by law in regard to media.

TASERS AND THE STATE OF VIDEO TECHNOLOGY

Christina Spiesel ("The Fate of the Iconic Sign") shows the opportunity to define and respond to digital media forms. One presumption made about the nature and function of media, and video in particular, that helped justify and determine the regulatory regimes of the past, in particular the use of video in court, and access of television to court, can also be seen to be changing, or at least needful of change. That presumption was that video could be understood as an essentially passive and realist medium that at best provided a literal copy of its subject. This presumption helps understand the range and function of video in areas such as videoconference and interview, that have been seminal in the use of video in court environments. Video is a convenient tool for visual

transcription, or on occasion for evidence, that can be used in a controlled way when effective or required. However, as a medium it might not contribute to the main rhetorical strategies of argument and exposition that are fundamental in case development. Video is a relatively natural and secondary means for recording, rather than a primary tool of exposition, discovery and argument.

Spiesel's study of video as a tool in detection and generally in legal domains is invaluable in addressing the potential and challenge of mobile equipment introduced as a tool to formal decision-making. Her paper reveals the fundamental conceptual and research shifts required to keep pace with contemporary application of media in legal practice. Her inquiry into communication and language researches the status of non-verbal imagery, and interpretation of events, and reality and authenticity as mediated by point of view (POV) video capture. Her chapter shows a determined and serious attempt to see video as an expressive field in its own right, even in its most fixed and direct form, and often quite distinct from cinemagraphic language.

While issues of mass and public media could at least be addressed within a regulatory and jurisprudential framework, of generalised and public effects and issues of representation, the shift from mass to new media, and from broadcast to interpersonal transmission, has made sudden and unexpected inroads on the use of media tools, for example in the presentation of evidence. When multiple perspectives of a crime scene are captured both by news media, as well as bystanders and a collection of phone and portable cameras, in still and video, the status of any official police evidence becomes relativised. In many cases the only evidence available is the shaky hand held point of view shot of an amateur by-stander. A host of issues needs to be addressed with the employment of high quality consumer and portable media. No longer can non-broadcast material be identified as poor, grainy or hand held. Spiesel's taser example shows how discernment is required in any form of video composition. Why else would police seek to censor cameras at crime or accident sites, and deny bystanders the prevailing right to photograph in public places? At worst the police are forced to become producers of their own account amidst a range of possible alternative 'unofficial' videos, and courts are forced to evaluate the status and reliability of forms of video evidence that they might traditionally prefer to dismiss.

There is a fundamental error in regarding video as a passive or realistic medium. The apparently fixed and close up framing of the videoconference interview restricts gestures and body movement, and can focus on the face in a way that is not natural or realistic in everyday interactions. Fixed video shots are framed and controlled as much as they are truthful. With the prevalence of

video as evidence, all legal practitioners need to be literate in the language of media. A simple naïve presumption of truthfulness inherent in the video medium will not go far in evaluating the merit and meaning of security or hand held amateur shots tendered as essential evidence during hearings.

The boundary of public law and media might be capable of negotiated survival but it could be envisaged that the flood of citizens' media forms might bring any boundary between the law and media down altogether. The preceding statement might seem rash, but it is in accord with the aspirations and expectations of many new media advocates. In areas of politics, commerce, and commercial media, there is an uncanny idealism about the transformative effects of new digital media to reform traditional practices. It is true less attention has been given to the effects of new media on legal practice, than it has on politics, or mass media, yet one might wonder why such attention has not occurred. Both political and television culture can prove more resilient to change, able to control and manipulate new media within their own traditional fabric. Yet the law remains a relatively unknown field for inquiry about the effects of media.

REGULATING PRIVACY

More than ever substantive media law must define and help clarify the subject matter of media practice, and philosophical implications on social and personal identity. David Rolph ("The Mechanical Eye") shows how the development of direct privacy protection in the United Kingdom and Australia involves an implicit, profound but unacknowledged epistemological shift in the treatment of photography. The common law previously treated the human eye and the camera as equivalent – the presumption being "what one can see one can photograph" – with property rights and trespass setting the main restrictions to this natural right. Increasingly however the human eye and the camera are treated as different. This chapter argues that it is only by making this epistemological (and legal) shift that one can move from a position where there is no wrong in looking or seeing (and, by extension, photographing) to a position where photographing is viewed as an act distinct from looking or seeing, and photographing, recording and disseminating images can be viewed from an ethical and legal perspective. Media practice involves a redefining of the public sphere and individual rights and David Rolph makes an invaluable and erudite examination of complex and significant implications of the practice of new media in our society.

Rolph reminds us that the Common Law has always adeptly negotiated the boundary of private and public domains and there is no reason to doubt that the advent of social media will not be met with deserved scrutiny. In its rush to resolve problems of media through the emergence of social media, new media theory can overlook outstanding issues of legitimation, privacy, equity, policy and regulation that arise with any changes in media technology and practice.

SUBJECTIVITY AND POINT OF VIEW

Videos and photographs, taken from the point of view or perspective of one participant to an event, can be notoriously ambiguous and subjective. Per Anders ("Your Words against Mine") shows how new forms of subjectivity and hearsay can emerge in media forms. His example of a street incident in print and visual media can be replicated many times over – the camera is not necessarily a device for truth, but another layer of perspectival and relative knowledge that invites and requires clarification and commentary in court. No longer do police at a crime scene have to contest broadcasters' desire and ability to document a crime scene – community bystanders produce their own records that can become evidence, sometimes competing with official ones. In addition to surveillance monitors, handycam records of street fights might be the only evidence. It is relatively easy for any citizen to capture any event, and portable equipment and videophones bring a new sense of citizen justice, the horizons of which can only just begin to be visible. What will stop private videos of court proceedings being anonymously circulated on viral videos? Why can't clients obtain second and informal opinions and legal advice on a plethora of websites such as they do on medical or consumer areas? If this hasn't happened, when will it? How soon will a trial be disbanded because of a juror's wireless leak on proceedings on their blog site?

Per Anders stresses the paradox at play in media reporting of contested or judicial events. The media can act as quasi investigator, adopting a strategy of balance and adjudication, as much as it can seek bias and quick judgment. The issue of justice cannot be confined institutionally, but is played out across a plethora of informal and media arenas.

That is why broadcast television relies on presenters and anchor persons, and narrated commentary, to set the context and preferred public interpretation to a perceived event, and acknowledge that to some extent a video shot of a subject reflects the perspective and agenda of the camera person or producer as

much as the inherent qualities of the subject. It is by no means the case that video is a visual or transparent medium, but rather operates as a language form with a particular mix of verbal, non verbal and visual dimensions.

MULTI-MEDIA AND INFORMATION TECHNOLOGY

There is a second problem with any presumption of video being realistic or passive by nature. The potential mix of complex language forms inherent in video has become more explicit in the mixed media environments in which video is now located and disseminated. Small screen and digital video now commonly exist alongside lists, graphic boxes, banners and headings, written text, database entries and photographs, as web design truly optimises the potential for mixed or "convergent" media messages. The overall design of web sites and pages is increasingly diagrammatic and graphic, and does not discriminate between or separate media forms such as old analogue systems did. Movement between different media objects or forms, sometimes of the same subject matter, is effortless, via a mouse or links to other pages. The "hyperlink" environment of CD, computer media and web design, represents an explicit manifestation of the abstract and mathematical processes that underpin its programming. Video exists in and as a geometrical and spatial expression, and is itself subject to numerate time coding and manipulation as part of the typical viewing experience.

Discussion of multi-media legal systems also provides an opportunity to introduce a third main issue of media-law topics, and that is information technology. For two or more decades, most legal offices, police and courts implemented various forms of database and programming to assist in case management, billing, research and administration. These computer systems have not commonly been known as "media" systems, although with the advent of digital media the opportunity to merge information and media systems arises. Increasingly the term "information technology" will become redundant, when case management and client information will be sited close to tools for client services and research.

Implementation of computer systems in legal domains has provided another history of media-law relations, with commensurate challenges in translating the language of programmers to those of court staff and professionals. Despite high aspirations for efficiency, cost and delay reduction, increase in professional incomes and social justice, the experience of justice systems has been mixed, with some significant if under-publicised failures.

The challenge for integration of different types and levels of data, while preserving respective security and confidentiality, remains, and has not been made easier by the opportunities for and availability of fully digital video.

Previously there were differences, not only in form but artefactually and technically, between forms of writing, between handwriting, printing and publishing. Now transcription of a court proceeding or client interview can sit side by side with a video version, both forms interlinked electronically, as a result of digital and mathematical processes, to allow the facility of so called "interactive video" for a user. A video can be watched as it is read, and searched in written and visual forms. To speak of the interweaving of writing, speech and video, in dynamic forms close to the reasoning process of case inquiry, is to circumvent many of the old boundaries between the language forms of different media. It is to raise possibilities about new ways of integrating legal research, court proceedings, client interviews, evidence; new ways of providing dynamic client information and services, especially for pre-hearing mediation; new ways of delivering and archiving judgments; new modes for processing client interviews; new mnemonic forms of detailed case information. However, to speak of multi media legal systems is also to speak prospectively about systems that are not in the main currently in place. It is to speak of the transformative effects likely as the result of the diffusion of media innovations now present in the wider community, and to test once again the ability of legal institutions to control and determine the kind and rate of media innovations they adopt.

The same digital processes that enable portable high quality cameras for official use in courtrooms also allows ownership and production for individual use in the wider community. The prosumer world of video production has emerged especially in the last decade, and its products and messages begin to infiltrate the membranes of legal institutions. So-called new media provides a plethora of new means and methods of cheap amateur production, and the orderly, professional and controlled public world of media has been supplemented by an inchoate, comparatively disorganised range of interpersonal messaging.

Compared to the formal rhetorical structures of traditional argument, or the scripted structure of television drama or news, so called social media can seem disorganised and ephemeral. There is no doubt that theories of individual expression – whether American pragmatism or European phenomenology – need to be updated to come to terms with the new electronic tools of interaction and communication. The old opposition of natural or private

communication, and the constructed world of media productions, needs to be challenged, in court environments as in society generally.

The challenge, raised earlier, for a comparative meta-theory of the language of law compared to that of media, can begin to be developed or refocused into one of the diagrammatic or mathematical, in contrast to rhetorical languages. The former terms can be used in a liberal, conceptual sense to embrace the wide variety of computerised diagrams, menus, lists, video timelines, transcripts, spatial displays, headings, borders, as well as specific computerised computation and statistics, that have become increasingly embedded into legal environments. It is a comparison already encountered in the design of computer systems, although their manipulation of mathematicised data sets shared a desire for public, predictable outcomes across large numbers of cases.

The chapter by Sykes ("Media as Mathematics) addresses with confidence and some speciality the use of computerised methods in court related domains – first through the theoretical perspectives of Roberta Kevelson, and her use of Charles Peirce, then efforts to study judicial behaviour, in particular the work of Fred Kort. This chapter reviews and analyses various efforts to introduce mathematical and digital methods into court environments. It alludes to a wider methodological issue, of comparison of mathematical and rhetorical language, of graphic and visual displays, and the certainty and uncertainty of conclusion. The study focuses on case studies as well as particular methodologies, and indirectly seeks and presumes a mathematicized paradigm of contemporary media that can be related to legal practice.

The option for such a theory of the meeting of two cultures, of science and humanities, in everyday casual social encounters and individual experience, might seem limited. Kevelson and Peirce are philosophers of language and sign systems who do address modes of action and informal reasoning within a conceptual framework of mathematics and graphic tools. Through Kevelson, Peirce has become a philosopher who has been adopted by legal studies, and it is possible will continue to offer seminal insights to address issues of language and reasoning in a multi media law environment. Where does one turn for a philosophy of media or jurisprudence that can comprehensively address and explain the contemporary nature of law and media? Kevelson's co-option of Peirce within legal theory might help. Peirce was one who adeptly included a pragmatic or communicative inquiry within a multi-dimensioned theory of reasoning and society.

FILM AND DISCOURSE: A CASE IN INTERNATIONAL LAW

Shea Esterling's chapter ("Indiana Jones and the Illicit Trafficking and Repatriation of Cultural Objects") might at first seem like a supplement to the ones that precede it. On second thought, in its macro and structural attention to issues of international law and ethnography, it can be seen to represent a role for media content that is foundational to the more phenomenological perspectives of previous chapters. How the law is represented, in professional and public shows and films, is not merely one of supplementary re-telling of narratives that have their own legitimacy and procedures somehow hermetically separate from media. In its traditional and transformed practice the law in content becomes a form of media discourse. The structures, boundaries (national and otherwise) and patterns of signification, regulation and jurisdiction need to be continually investigated and publicly and politically legitimated. On the other pole of social media, the large theatrical and cinemagraphic productions have the capacity to tell and present public and collective myths and stories, that do more than reiterate but correspond and synergise the conception and landscape of public law. The law will continue to redefine its public responsibilities and roles through a dialogue with and implementation of the full range of new media opportunities and methods.

CONCLUSION - SOME OUTSTANDING ISSUES

Just when new even exciting negotiations of the relationship of public broadcasting and law might seem possible, a new boundary or membrane opens up between both of these public spheres, and what has come to be called new or social media. Old political and philosophical debates of the individual and society are rearticulated in media forms that potentially challenge and transform both media and legal cultures. New media theorists can adventurously talk of the death of television, and even the birth of new participatory politics, yet what prognosis, reformist or conservative, is offered for the potential impact of social media on legal processes?

One thing we can be sure, that prophecies about the death of the public sphere, whether in television, law or political organisation, seem premature and ill-informed. Television has reinvented itself in terms of trans- media strategies, that embrace and syphon broadcast programming into websites and

supplementary on-line information and two way exchange of messages with audiences. The public and commercial dimensions of broadcasting need to be re-legitimated actively through negotiation with new media.

The implementation of media systems in legal domains, whether taser guns to police, or in-house television in courts, cannot be assessed only according to their effects, but also in terms of the infra-structure that finances, owns and controls them. The effects of media on client and professional behaviour can be held as a supplement to a more systemic understanding of the changing jurisdictional and political agendas of law as a macro organisation in a modern commercial and political state. The fluid and perplexed world of state legislation, in response to security, environmental, economic and social change, invites another perspective on media content. Mass media and film do not only represent the behaviours and internal world of courts, in fictional and realist modes, but participate through news, current affairs and fiction, in agenda-setting discourses that parallel and even anticipate the research, decision and law-making functions of courts.

Several questions – historical, philosophical, legal, semiotic – that are implicitly raised in this volume, are questions that await further specialist publication. This volume contains within it an argument worthy of greater elaboration. It is fair to say that most writing on the effects of media on law share a presumption that legal domains are late or slow adaptors of media practices. In terms of a diffusion theory of media innovations, the law is not a champion or key liaison in new practice. This volume begins to suggest the terms in which the law, in content and practice, can contribute a more substantial and leading edge role in terms of contemporary and emerging media processes.

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Chapter 2

"MEDIATED FORENSICS: FROM CLASSROOM TO COURTROOM"

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ABSTRACT

This chapter comprises a discussion paper that has as its stimulus or point of departure an observation by one of us, (Shaeda Isani), about a class of French law students, coming to terms with several documentary studies about common law coronial courts. This chapter uses this example to argue for the need for sophisticated methods and diverse understanding of media processes, if inter-disciplinary progress in 'law and media' is to be made. The chapter invites discussion beyond the legal domain, and simplified, old fashioned or singular accounts of media effects and processes.

INTRODUCTION - TWO FORENSIC PROGRAMS

During the course of lectures designed to analyse differences between common law and civil law legal professionals, it was necessary to talk about the coroner, a professional who is specific to Common Law cultures and a

source of puzzlement to the French who have no equivalent jurisdiction. A Channel 4 English observation documentary entitled "The Coroner", first broadcast in March 1999, was used as a visual support to illustrate what a coroner's functions in England are. The documentary was, on the whole, very restrained, although parts of it were highly suggestive as, for example, the to-and-fro movements of the pathologist's arms sawing through an unseen but nevertheless present cadaver, the zipping up of being zipped, etc. During these passages, some students shut their eyes, protested, and generally moaned about the "gruesomeness" of such scenes. However, the same students report that they regularly view American forensics television series currently very popular in France, some examples of which are *CSI,* (which marked the great popularity of forensic television shows), *Bones* and *NCIS*, which they found highly entertaining.

In contrast to the muted and restrained footage regarding the medical examiner's work in the BBC documentary, the television series tended to be very explicit about blood, human tissue and dead bodies without any attempt at visual "euphemism" destined to "soften" the image with regard to the viewer's sensibilities: the cadaver, its injuries and mutilations, are reduced to an object of scientific reification.

The contrasted viewer reaction as expressed by the students seems paradoxical and contradictory and motivated further enquiry: why is it that blood and cadavers attract when made explicit in the context of entertainment fiction, yet repel when merely suggested in the context of an educational documentary about professional legal work?

Explaining Effects

The leading question and point of departure for this paper, is how to explain contrasting reactions to the two sources of related material? Why were intelligent, undergraduate, law students, accustomed to discussing the murder and mayhem of criminal law, repulsed by images of footage which, although firsthand, had been carefully edited to cater to sensitivities. The parts that most shocked the students were most implicit: the medical examiner's arm shown sawing, presumably at bones, is highly implicit in comparison to what is dramatised on forensic drama where the cadaver is laid out on "the pathologist's slab" and internal organs are shown being weighed and placed in kidney dishes. This reaction raises the question as to why implicit images shot

by legal professionals were tolerated less than more graphic images made by television producers on the same subject matter in a fictional context.

There is an obvious jurisdictional issue – that the French inquisitorial system does not have a specialised coroner's court, whereas the common law British and American legal systems make an exception to its adversarial system with a separate coronial, investigative court. The students may also be reacting to the novelty of separate fulltime courts dealing with coronial matters, while in France, these tasks are shared as one of many functions within investigating courts processes.

The problem with this explanation is clear. The students were simultaneously exposed to representations of the British and American coroners' courts in television shows, both reality and fictional in genre, with no adverse reactions. The cross media presentation problematises any suspicion that it was the students' age or lack of experience that caused their response. Once again, young law students, apparently like many of their peer group, are being part of mass audiences for television shows that specialise in graphic depictions of bodily dissection, mutilation and injury. One has only to consider the number and recent success of programs such as CSI – "the most viewed television series in the world today" – to confirm that what needs to be explained is their popularity, not, on the contrary, the aversion of their audiences.

It may well be that the French students, like audiences generally, are fascinated with the unknown inner workings of a system like the coroner's court. What is distant in a jurisdictional, geographic and cultural sense from French students is also closed for British audiences and, albeit to a somewhat lesser extent thanks to wider media accessibility to courts, for American ones, as well. So the phenomenon we study is probably not culturally specific, nor specifically French. Detection stories and television shows seem to have burgeoned in part as a response to the necessarily closed and private nature of police investigation, and the banning of cameras from court proceedings. The hermetic nature of a professional context such as this brings out an aesthetic instinct for voyeurism and curiosity [Newtown, 105]. In the case of the coroner's court, an innate interest of audiences in medical and criminal procedures that comprise the inner workings of these secluded courts can help explain the growth of fictional representations of the same jurisdictions.

There has been a longstanding mix of reasons, some essential, others discretionary, for barring access of mass media to crucial areas of police and legal investigation and decision-making. [Cohn, Dow] [Golfard]. In the matter of media access to courts, clear differences exist between national systems.

For example, Johnstone outlines how television access into the Australian court systems has been "slow and piecemeal, with Australia falling behind Canadian and New Zealand initiatives in this area." [Johnstone]. A similar comparison can be made between experiments in access in the United States, and the even more conservative approach in France and other European countries. European students might have less familiarity or literacy generally with documentary video accounts of courts.

Yet here the paradox of the reception of the coronial documentary video turns again. If the success of mass media programming is due to its representation of areas of society that audiences already find of interest, why are French students not more intrigued when presented on a privileged basis with actual professional footage of thanatological investigation? Why is the actual or real time footage not preferred to edited, scripted and produced fictional presentations of the same subject matter?

To solve the paradox we need to turn from legal to media theory, to do some quick thinking within the body of media theory – in particular of the reception of television programs, and the style and genre of programming. There is a long-standing argument for the opposition of media production and natural or real life situation, whereby the production process manipulates or distorts the qualities and truthfulness of actual situations. This presumption has been held in various media theories since the early days of television, in part as a result of the response of propaganda on film during WWII. The so-called "hypodermic needle" theory suggested that the reception of messages in passive mass audiences was almost unconscious, much like the effects of wartime propaganda. From the early 1950's, advertisers and broadcasters sought to exploit the constructed, artificial nature of television style, and its potential homogeneous reception by mass audiences, to their advantage. At the same time psychologists and regulators sought to study and control the worse perceived effects of mass inculcation of audiences, especially in areas of violence and morality [Lewis, pp. 83-86] [McQuail, pp. 33-60].

To account for the coronial paradox, another more general paradox about the reception and style of television programs needs to be argued, one that is at variance with the negative presumption about the manipulative effects of messages on audience understanding of reality and truth. What is required is a more positive account of the reception of television genres that will explain why the students in question preferred source information about coronial procedures from fictionally produced rather than from documentary sources. If there is a preference for fiction as opposed to factual representation, then fiction must be serving mimetic and abductive thinking about reality. Any

didactic or pedagogical point about the use of fiction or role play in class, as opposed to documentaries, as a source of information about actual sites and practice, must also be balanced against the vogue for reality television style, which confounds any clear separation of fiction and factual style. The hybrid modes of "reality TV" can indeed be known as "faction", in its composite of fiction and fact.

Such an affirmative account in fact is presumed by producers and practitioners of television and by teachers of the practice. There is considerable stress on the persuasive and qualitative skills in good presentation and journalism, and critical discernment about good and poor television drama is certainly made. At a more theoretical and academic level, the legacy of social criticism of mass media, typical in the Birmingham tradition of cultural studies and the Frankfurt School of media studies, have continued, only to be eclipsed by an argument for the redundancy of broadcast television in the face of emerging, digital social media. [Lewis, pp. 87-89]. Without reappraising critical traditions of mass media studies, these critical positions are now validated by the growth of minority, web-based interaction text and video media.

This chapter suggests that discounting of television theory, and practice, is premature, and that re-evaluation of paradigms of television aesthetics is required, to comprehend more fully the history of the medium and also to provide a conceptual framework for locating a television style within the diversified world of mixed media. Such evaluation will help explain the isolated example from law-related classroom didactics , and also locate it in a wider context of media and communicative practices, both within wider society and potentially and actually with courts and legal domains.

"THE PRESENTATIONAL PARADOX"

The argument that will be innovatively brokered in this paper, and argued theoretically, can be termed the "Presentational Paradox of Broadcast Television", or more broadly general documentary video practices. We could also adopt the more generalised term "televisual" to denote a more flexible approach to the study of television style [Deming]. However this might encourage a post-television paradigm, when the problem to be discussed should be located within the conventional practice of broadcast media as much as the recent growth of reality television styles, many of them about police and

coronial practice. So called reality TV is only the most recent of several layers and modes of realism that have always been present in television style.

Camera crews are very mobile and accompany police on patrol and at actual crime scenes. Reality television can play with and exploit the boundary of realism and fiction, yet equally it represents an important re-negotiation of realism in the media. The negotiation is more than a matter of style – a plethora of issues, legal and procedural, regarding privacy, libel, defamation, obtrusiveness, property and consent, are introduced, once the controlled convenience of scripted drama is put aside. The production quality, including lighting, multiple cameras, audio quality and tracking, would be hard to reproduce in actual filming, especially within a court setting.

Despite its mass production and reception, televisual style has always maintained a highly interpersonal and immediate format that constantly and reflexively qualifies any potential for programs to become over-constructed and artificial. That is, television itself has addressed the worst fears of its critics, and adopted communicative practices that appeal to the critical judgment and goodwill of audiences. This mode, called by Jeremy Butler "expository", can be true of drama as well as non-fiction. Indeed, expository style blurs any clear distinction between drama and non-fiction, as well as between actor, presenter and social actor or everyday person, and helps explains the hybrid form of "reality" television [Butler, pp. 9-25] [Kavka].

There is no question that these communicative strategies can be abused. However, until they are recognised, it is impossible to evaluate such abuse, or understand the medium as a whole and plan its ongoing development into areas such as court proceedings.

We label this revised approach to television style as presentational, or in terms of answering one paradox by another, as the 'Presentation Paradox of Mass Media'. The paradox resides in the following: what is mass and homogenous is simultaneously intimate and interpersonal. The interpersonal functions, we argue, have two dimensions: on screen, in the mediating role of presenters, newsreaders, commentators and anchorpersons, and in terms of the audience, in the distribution and iteration of received messages within a discourse and talk about shows in a community. Geographically, despite the wide dispersion of the broadcast signal, television works to preserve a sense of a localised milieu – as if the presenters were present in the household living rooms, and the studio accessible and nearby. Indeed, in the history of the medium, television broadcasts were very much foot-printed by a localised signal and station. It was only through aggregation and networking that the

regional infrastructure was changed, and broadcasts became national or even global in nature. [Butler, 263].

Like many practitioners and teachers of the medium, in his book Butler focuses on the essential function of presenters, and how much is invested in the communicative attention that is afforded through engagement with studio and home audiences. The techniques of gestural and voice techniques, as well as studio lighting, cues and design and camera procedures, especially use of close-ups, are all worthy of attention, certainly more than can be provided in this paper. The techniques are not merely aesthetic or superficial, but are fundamental to creating a relationship of trust, persuasion and apparent interaction with the audience [Deming, 136-139], [Kavka, 37-38]. This relationship becomes the basis of the key function of presenters, in mediating or interpreting subject matter, especially in non-fictional genres like current affairs, news, talk panels and documentaries.

The presentational paradox is partly resolved through the celebrity status that well-known presenters and newsreaders can attain. This can be a problematic thing in itself. However, generally TV celebrities differ from film stars and create and maintain their role through active conversational engagement with audiences. Presentational authority can also be transferred from expertise outside television, through what Butler terms social actors. Expert or even celebrity social actors can become key presenters in segments or programs like counselling, political comment, science, fashion, cooking and, most relevant to our paper, televised courtroom shows [Chad].

This function of presentational commentary in television images reminds us of Roland Barthes' adage about print pictures, i.e., that pictures in themselves can be highly ambiguous, and require written comments or captions for clarity. This does seem to be the case in the production of 'raw' footage, in documentaries for example. The audience relies on the voice over and narrator for appropriate guidance, information and context of particular shots and sequences. It is possible that the Channel 4 documentary on coronial matters, while having a presentational component, failed to provide adequate and familiar authority and background about graphic imagery, to allow their meaningful reception by French law students concerned. It is not that presentation did not occur, but it was probably limited, and its style might not have been culturally immediate or familiar enough to satisfy the communicative function required for commentary of such sensitive subject matter.

RECEPTION THEORIES

If this is the case, what more needs to be added to contextualise the subject matter, in this case of a court's functions? In terms of media theory, Lazarsfeld's stepped model of message reception is a classic account of how television programs are not received and interpreted in isolation from a social context of their audience [Blake, 125]. Thus, another level of commentary and presentation is involved, occurring not in the studio but in the viewer's living room, neighbourhood or workplace . Despite the appearance of individual and hermetically isolated viewing patterns, the television is a social media and invites ongoing social talk about its content.

What is distinct about our example is that television was being viewed in a group situation. The revulsion and reaction by students could have been as much a rhetorical strategy and pre-sequence to talk about the show as an authentic register of their individual feelings. As such it could have been exaggerated peer talk, pre-sequencing more nuanced or appropriate consideration. On the other hand, the group and class-room situation may have afforded a more candid opportunity to share individual responses that would otherwise have been implicit and inhibited.

It can be argued that the classroom reaction was context related. Given the formal and unbalanced situation of communication – classroom, teacher, knowledge gap, learning and silence – the students produced what they considered to be the expected appropriate behaviour. When they watch their blood and cadaver series lounging on a sofa in their living rooms, they are probably drinking soft-drinks, smoking and talking on their mobiles at the same time. As Lazarsfeld argues, viewing television is in part a "stepped", social activity, inviting and relying on discourse and shared responses. The context of these social responses could be reiterated in the more formal classroom setting, producing a form of familiarity that is also embarrassing. The students' response is an unchecked mix of both motivations – recognition of embarrassment at the repetition, out of context, of a familiar show.

Social reception theory provides another clue to teasing out the inquiry about the students' responses. The American police procedural and coronial television series include dimensions or "steps" of talk perhaps absent from the more controlled documentary presentation. Actual or scripted renditions of police, judicial and participant talk provide an essential social and legal context to footage of injured or dissected bodies. Reality television embodies and demonstrates social reception theories – that television is a conversational medium, inviting and requiring forms of discursive response by audiences.

Reality television blurs the line of fiction and reality, and begins to depict legal and court processes, from police investigation, to prosecution, to trial and judgment, in a fully televised format.

It is thus possible that the students' reaction to the material was to a sense of it being out of its context of the full judicial process. As law students, they would respond more intelligibly if the full context of processes surrounding this evidence were present or observed. The issues of media and legal literacy thus interweave, in the immediate context of the screening of video as classroom material. The issue is not merely a matter of interpretation of the message in its own forms or genres, but of dynamic translation and discursive reconstruction of messages into social and professional contexts. Interpretation involves identification and recognition and some of these socialised and professional links could be unknown or absent in student reception of the particular sequence.

Their response to selective use of video evidence also points to the wider and unfulfilled potential for the use of video and television in court environments. The American shows in fact might satisfy these needs in young undergraduate viewers because they realize a potential and informative content about mediated court proceedings that would put court domains on equal footing with other parts of society that are accessible and represented on video media. That is, television can help legitimate social reality and set a presentational framework for an assessment of truth.

The wider issue of cameras and courts is a large issue that can only begin to be addressed in this paper [Pearson] [Howard]. For instance, it is becoming an emerging issue in France, a country which is otherwise very restricted in media access to courts, with the proposed introduction of video-conference testimony in the case of trials involving witnesses from overseas territories (Guyanna, Polynesia, La Réunion, St Pierre & Miquelon, etc.). There are of course philosophical and other theoretical issues at stake in any idea of the "televised" or "televisual" court. Can the subtlety of legal argument, in written form, be represented in a video environment? Will the witness testify in front of the camera as he would in a real courtroom? Wouldn't the camera's focus on the witness's face be too narrow to allow for perception of other participants? In view of such reservations, the initial reaction of many French judges to the prospect of videoconference trials is a decided 'No'.

Can multi media supplement visual presentation with logical and written aids? Television has always specialised in caption and on screen text. It would be a sensible progression to envisage court media continuing the multi-media presentation of varieties of content and image. Recourse to philosophers such

as Charles Peirce and Gilles Deleuze can assist in seeing the potential for electronic forms of reasoning in digital media – a potential well envisaged in the writings on legal semiotics by Roberta Kevelson [Sykes]. Such directions can only be sketched here, but it is helpful and quite necessary to ask how the form of implicit reasoning, by forensic professionals dealing with the graphic footage watched by students, could best be represented in electronic media. Would media and video always fall short of the full complement and line of reasoning and argument that would accompany forensic analysis of visual material?

One aside to the various perspectives in this paper is the phenomena of police producing and presenting their own versions of crime scenes. Producers of programs such as those mentioned as being popular with the French law students have begun to provide material available as evidence within court proceedings. To counter such produced video evidence, some American police departments are beginning to produce and present their own version of events – competing almost, on a trans-media basis, with the development of both "viral" informal or citizen evidence, and produced television versions.

It would seem that progress in this area, of video usage in legal domains, requires appropriate use of interdisciplinary and media theory, and understanding of the medium of television and video generally. The presentational paradox, that realism and information in a video medium require intermediary commentary by appropriate presenters, on the one hand seems at odds with the demands of real time, unmediated records of court evidence. One of the principal roles of the judge in the common law adversarial system is to guarantee that any court evidence, and it follows video record of evidence, be unmediated. The judge is cast in a quasi director's role that is quite at odds with the televisual techniques of a television director.

On the other hand, it is wrong to stress too much any opposition between the "natural" real world of the courtroom and the constructed world of television. Court procedures are constructed, arguably, in more complex ways than television depicts, and the constructed ways issues of reality and truth are mediated are not entirely dissimilar to the rhetorical forms of television. In both, presentational roles are present (panel host/ judge) and engage in indirect interaction with other professionals (studio panel member/legal counsel) along with social actors (studio audience, panel members/expert and everyday witnesses).

The discussion of this example has focused on communicative and phenomenological dimensions – of audience reception and interpretation. Yet another perspective seems to be at play: the other side of the so-called

Presentational Paradox. Television does not merely reproduce or represent the actual working of courts, but presents a rival, constructed version of legal discourse and events. Television shares a tradition of film, in the construction of meta-narratives, that can offer claims on social justice and values that can seek to rival, in terms of law making, the legitimating function of courts. The perceptual and epistemological gaps in everyday public knowledge of legal systems can lead not only to curiosity about those actual systems but also about the substitutional role of presentation of justice on mass media and cinematographic narratives.

This construction of alternative, part fictional and even mythologised narratives can be regarded as being manipulative. Critical theorists would share with many legal professionals a critique of the constructed and manipulative quality of mass media narratives. The transforming processes are implicit to audiences, hence the entire process of capture, editing and production is material, which being manipulated, is subject to suspicion and distrust compared to some primary or authentic notion of unmediated communication.

On one account such manipulative rendition can be normalised into a set of genres, often fictionalised, and literary in nature, whereby the images of everyday life are glamorised with typified sequences of narrative and character. The public has a psychological and entertainment fascination with morbidity in various genres, and shows like *CSI* need to be explained in the contexts of generalised genres that long precede the particular attention to morgues and coronial investigation. The entertaining effect of detection and court genres of television programming, it can be argued, gives an imaginary or virtual quality to representations of actual situations, and makes difficult subject matter, such as in coronial work, more tolerable and accepted. The dilution of the gruesome by thriller, mystery and romance narrative montage makes the *mise-en-scene* of individual scenes, however graphic, more acceptable.

The reception of graphic body images, according to this narrative or structural account of television programs, needs to be assessed alongside the depiction of violence and horror in feature films, using evaluative techniques quite apart from issues of social or legal realism. Fictionalisation of everyday reality would be regarded by the Frankfurt or Critical Theory School, or the French media critic Paul Virillo, as a form of false consciousness or virtual reality, a product of commercial consumerism. According to this analysis, our assessment of the students' response or conditioning by mass media should be mainly negative, a result of putting "style over substance, the emotional and

physical over the intellectual and the moral, and a general aversion towards complexity". [Dahlgren, p. 418]. It follows that production bias can be tested against the reality and immediate knowledge of actual trials and forensic processes: that television itself becomes an object, not a means, of scrutiny [Bignall, pp. 210-225] [Fiske, pp. 49-52]. Programs are analysed and evaluated against social truths, about gender, race or politics: it is assumed that some non-manipulated benchmark of social reality exists by which the constructed representations of media programming can be assessed, both in style and content. The phenomenological dimensions of television that this chapter has addressed then become tools of persuasion and control, disguising the tacit function of media to create politically and commercially motivated representations of social reality.

CULTIVATION THEORIES

On the other hand, "cultivation" or socialisation theories [Blake, pp. 79-91] stress the basic sociological and discursive function of media in maintaining social hegemony and identity. The function, structures and rituals of media narratives can be much larger and more significant than glamorising aspects of reality that would otherwise be unpalatable or complicated. Notwithstanding their capacity and function to sensationalise and entertain, television and film will continue to present discourses and knowledge about law-making that potentially rival or even compete with the proceedings of courts.

Two cultivation theories can be mentioned which are applicable to some extent to our example. Forum theories stress how television can "work through" sensitive issues, such as a coronial investigation, how its multiple camera, flexible production style encourages "transitory glimpses, preliminary meanings, multiple frameworks, explanations and narrative structures" [Dalgren, p. 417]. The interpersonal, socialising modes of television style are means to reorient private citizens – and the individual students – towards a shared public court culture, in ways that might be restricted in the formal modes of an actual court. Television allows forms of engagement which facilitate functions of civic culture and public debate. Presenters are representational in a political sense, engaging and disposing private and individual audience members in the cultural formation of the public sphere. We need appropriate methodological tools – structural, systemic, communicative – to approach and understand such collective and civic

functions, and seek to optimise, critically assess and help produce works, with jurisprudential consequence, in terms of their contribution to public debate and democratic society.

Palmer, for instance, looks at the emergence of the Judge TV as a social actor and media presenter, comparing the authority and role of the Judge TV with that of the talk-show host and a court judge. Palmer discusses how TV can be compared with other forums and systems of justice which, while separate and sometimes competing, work towards a sense of collective governance in society [Palmer].

One further cultivation theory analyses deeper, more diachronic or unchanging patterns or structures, of social or legal signification that recur in individual film and television works [Harman]. In a deeper sense it is possible that what is at stake in our example is a play of national and cultural boundaries, whose differences operate at or in media systems and productions as much as they do in jurisdictional practice. What is distant in a jurisdictional, geographic and cultural sense from French students is also close for audiences from common law countries. Underpinning the subjective and social reception of the forensic programs, there are deeper structural and cultural patterns at play that set parameters to individual experience and interpretation.

CONCLUSION

It is tempting to depict the conundrum that commenced this paper in terms of competing sources of knowledge and perception of forensics processes. What is at stake is not the translation or representation of subject matter, manipulative or otherwise, but two mainly separate versions of the forensic practice which potentially confuse students, who are in a transitional state between theorectical, televisual and experiential professional knowledge, and potentially confused about different styles. Rather than being between media and reality, the difference between television and court can be labelled as being between media forms, or being 'transmedia' by nature [Jenkins, pp. 8-9]. The students are engaged in a process of translation and comparison between two sources of information.

Like television studios, courtrooms are constructed rhetorically in the visual and everyday material and subject they present and represent. The court, both in its current form without electronic cameras, and in potential form with cameras, is in itself a mediated, controlled context. The problematic example of student viewing of selected videos has been used as a line of inquiry to

issues of media theory that could apply more widely in courtroom practice. Our example has not been studied as an empirical case study and it is possible that surveys or questionnaires could reveal some quite extraneous explanation, about the personalities or social background of individual students. However, this small, confused issue can become theoretically clarified in a useful line of inquiry about the role and place of video in legal literacy and practice, and about appropriate genres and style that could comprehend, if not transform, conventional courtroom practice in a televisual age.

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Chapter 3

THE MAN IN THE GALLERY WITH THE WRITING ON HIS FACE: DEPICTIONS OF THE AUDIENCE AT THE DIANA INQUEST

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ABSTRACT

Press and media interest in the apparently peripheral social elements at the Diana Inquest often centred on lack of public interest in the daily proceedings and on the activities of the small band of members of the public who were regular attendees. The focus in much press commentary on the 'oddity' and isolation of this group tended to identify them as the misguided spectators of a charade, and their small number became an index of the pointlessness of the proceedings. Using elements of performance analysis derived from theatre and performance studies, this essay argues that such media focus on these figures and their behaviour highlights the interpretation of social performance as a significant component in the narration of legal proceedings. Media commentators tended to cast their own journalistic readings of the social interactions and performances they witnessed around the courtroom as authoritative and objective while deriding private spectators' own readings of such encounters as delusional. This article considers how such interpretation of social performance in the courtroom is employed in the range of conspiratorial narratives circulating around the Inquest – both those propounded by members of the public audience (which, for them, expose

deep-lying manipulations by the powerful) and those examined by media commentators, (decrying such theories as the product of a group of deluded and inadequate fantasists).

INTRODUCTION

The Inquests into the 1997 deaths in a car crash in a Parisian underpass of Diana, Princess of Wales, and Dodi Al-Fayed, held at the Royal Courts of Justice in The Strand, London during 2007/8 were in part intended, in the words of the Coroner, to "allay public concerns and dispel groundless suspicion and speculation if, in truth, there is nothing to it" [Baker]. The Coroner noted that, in the 10 years since the deaths, the circumstances surrounding the crash had been the subject of enormous speculation; "Books on the subject fill shelves in public libraries, television programmes have abounded and newspapers have frequently carried reports and articles, some almost to the point of obsession" [Baker, p. 18].

As a result of this apparent public interest, the Courtroom in which the Inquest was held was supplemented by a large temporary annexe in the courtyard of the rambling Victorian law courts in which the public audience, alongside the representatives of press and television (in excess of the 20 or so who could be seated inside the court), might be accommodated, watching live relays of evidence being given and of documents being scrutinised. The annexe provided seats for 150 and entrance both to the courtroom and the annexe was controlled on a first-come, first-served handout of tickets early each morning before the court opened. In addition, transcripts of proceedings and evidence were posted daily on the Inquest's website. The clear expectation was that the scale of public response to the death of Diana, along with the interest in the conspiratorial narratives which had proliferated since the accident, would ensure that the proceedings received massive public attention. In fact, the Inquest was rarely attended by large numbers of people, and was for the most part watched by only a handful, comfortably accommodated in the Courtroom itself.

Subsequently, in the press and electronic media, narratives developed in which this non-attendance by large numbers of the public became proof of the overanxious indulgence of the authorities in allowing the Inquest to proceed - after a series of appeals by Dodi Al-Fayed's father, businessman and Harrods' department store owner Mohammed Al-Fayed, alleging a conspiracy to cause the accident involving members of the British Establishment and the Security

Services. Despite the courtroom exchange of accusations and confidences receiving a consistently high level of media attention in the UK, this general tone of condemnation remained widespread. Commentaries also tended to focus on the appearance of a group of regular attendees at the Inquest whose committed engagement with the trial was read as further evidence that it was a wasteful exercise - their perceived eccentricity being the proof of this particular pudding. This essay will examine the characterisation of this audience body, employing models of analysis arising from performance and theatre studies to examine their persistent presence as a mode of social performance and to account for the meanings attached to it in media commentary.

Developments in performance studies and theatre semiotics, through Richard Shechner's definition of performance as 'restored behaviours' [Schechner, p. 22], Victor Turner's concept of the 'social drama' [Turner], Erving Goffmann 's explorations of staging and scripting, of 'back region' and 'front region' spaces in social interactions equating to theatre's backstage and frontstage [Goffman], and Keir Elam's, Patrice Pavis' and Elaine Aston and George Savona's (building on Charles S Pierce) contributions to semiotic analysis [Elam] [Pavis, pp. 208-212] [Aston] [Peirce], have established the complex reading of social performance, of societal ritual and of the staging of events of public significance, and of the narratives which emerge from these events. Such analyses focus on the performative address of language and action in the social event, the qualities of enactment, presence and representation at play in such instances and, through semiotic analysis of the performance, the symbolic encoding and decoding of the event's meanings. Applied to the analysis of legal proceedings, theatre and performance studies models suggest the possibility of a performance analysis of the 'live' events of the courtroom and the representational practices at work both within it and in its subsequent replaying and mediation in the wider social world. They provide a theoretical basis for consideration both of the commonplaces of the 'theatrical metaphor' as they are habitually applied to the forms of staging and address present in the courtroom – focusing on costuming, the performed rhetoric of advocacy, the roles of jury and gallery as audience to this 'playing' - and to the reading of performance as a thread of representational process which weaves through all social interaction but which is particularly intensified within the heightened formality of the courtroom.

Pavis's famous questionnaire [Pavis, pp. 230-231] sought to establish a system of analysis for the theatrical event, developing the precise evaluation of the meaning of its constituent parts, including dramaturgical and theatrical

elements but moving beyond these into questioning the social environment and context of the performance. The questionnaire itemises elements of the 'onstage' proceedings, such as costume, stage properties and scenography, for discussion and analysis to consider how "the event's components separately" generate "part of the overall meaning". However, it also asks the observer of the performance to consider elements not part of the aesthetic object of the stage, such as the "relationship between acting and audience space". Asking "where does [the] performance take place" and "how did [the] audience react" , the questionnaire suggests that both the audience and the observer of the audience may be active elements in the creation of the performance's meaning. A production of *Macbeth* performed in the darkened proscenium arch setting of the Royal Shakespeare Theatre in Stratford Upon Avon is thus seen to have a very different context and significance to the same play performed in a promenade production in a disused school, as in the case of the influential PunchDrunk company's performance, *Sleep No More*, in Kennington, South London in 2003, in which audience members witnessed different elements of the production in different spaces and in an order decided by audience choice within the constraints of the production's overall shape.

When theatrical practices move further, to break down the separation between the aesthetic object of performance and its social surroundings, the role of the audience can become the core of the event's significance. The participatory performances engaged in in the late Brazilian director Augusto Boal's models of Forum or Invisible theatre (in the former the audience is actively requested to intervene and debate and decide how the drama should unfold, in the latter the audience is at first unaware that they are participating in a performance) raise questions concerning the possible, appropriate or relevant reading of any 'staged' component to the events. The implication of Boal's practice is that the audience is a potentially destabilising element in the theatre's transmission of meaning, even when the context of the performance is apparently highly managed and controlled – as might be seen to be the case in the social performance of the courtroom [Boal 1979, 1995]. The significance of social performance and its representation in the case of the Diana Inquest may be to depict the audience to the Inquest and the social performances which its members engaged in as part of a contestation of authority over the dominant meanings of the events being examined. Notwithstanding David Miller and Greg Philo's warning that the reading of the subversive potential of audience 'resistance' to the authoritarian role of the media is increasingly fetishised, as "the activities which are said to be resistant are often trivial" [Philo & Miller, p. 56], the social performance of the

audience and the subsequent representation of that performance at the Diana Inquest is an example of an intriguing interweaving between public concern and the affairs of state. Indeed, the question of whether or not the social performance of the public audience in the courtroom provides a participatory form of resistance to authority, or merely a rather pathetic misreading of the true nature of social relations is central to media reportage and discussion of the Diana Inquest.

THE COURTROOM AS A PERFORMANCE ENVIRONMENT

In print, electronic and online coverage of the Inquest, its meanings were seen to reside not only in legal judgements on evidence delivered but also in the 'live' social performance of the courtroom. A performance analysis of the proceedings might focus on those elements of 'offstage' activity in this space which Pavis suggests. The Inquest was held in what appeared to be a converted office space. The Coroner sat on a raised dais with court officials before him and a Royal crest behind. To his right a further dais held the jury, to his left was the witness stand. In the well of the court sat counsel. To their right were seats reserved for family and friends of the interested parties. At the rear of the court, in raised tiers, were rows of plastic seats, on one side reserved for press, on the other for the public. Video screens relayed medium close shots of courtroom participants, or replayed video materials or evidence relays from Paris. Alongside these screens others carried the LiveNote transcription of proceedings, producing an instant written record of verbal exchanges. These materials were also carried on the screens in the Annexe, so that fixed viewpoints of counsel and of witnesses (but not of Jury, or, at least directly, of public or family) were available to the Annexe audience. Significant elements to be considered in an analysis of the performative elements of this setting and of the proceedings played out in it would be; the proximity of parties in this live encounter; the reading and negotiation of relationships of status and social function in this setting which are created by the relative lack of architectural 'authority' in the dividing of the separated spaces for the various groups in the courtroom; the interaction between the formal and the informal in this environment and the associated and perhaps inadvertent foregrounding in the courtroom of its position as a site for the negotiation of a web of contrasting and contradictory narratives. In this

particular instance, the latter might include the personal stories, representations and mediations of the members of the public present in the room as well as the more serious, complex and resonant stories which the courtroom explored in the lives and attitudes of those on the stand.

The particular mix of the formal, legal environment and the informality introduced both in the daily setting-up of this environment and in the frequent breaks in proceedings drew attention to the significance of 'offstage' social interactions – a feature registered in previous theatrical modellings of Tribunals and legal processes such as those staged at the Tricycle Theatre in Kilburn, London, in the past ten years, [Norton-Taylor] where the replaying of such interaction as part of the verisimilitude of the production has been a prominent feature. However, one of the most striking elements of such 'offstage' interaction in the social environment of the court, and one which has not generally been a part of the Tricycle's re-staging of such events, were the attitudes and behaviours of the figures populating the public gallery. On my own first visit, the gallery was peopled by a range of visitors, including an elderly couple who had brought along a tourist map of Paris to follow evidence, various individuals who discussed the trial, as long standing colleagues, with mutual friends in the gallery, as well as a number of people who appeared to be watching with a professional or scholarly interest. A man in the third row of the gallery was dressed in a suit, dapper, well-presented, albeit with DIANA and DODI written across his face in blue pan-stick. Outside the courtroom a heated conversation went on between a young man with a mass of curly hair and an older man with a bag full of papers about the reasons for a piece of evidence not being given on the stand. In the breaks between sittings the formal boundaries between communities in the court dissolved further. Here it was possible to witness a member of the public audience debate the interpretation of evidence with a journalist, to watch another discuss their apparent fame with newcomers in the gallery, or to follow the same individual approvingly patting the back of a discomfited ex-security chief after a day's hard work in the witness box. To queue for a public gallery ticket was to briefly become part this group, a community who were often looked at with amusement or bemusement by legal professionals on their way to work in the surrounding streets, or with a degree of scorn by the members of the public walking past the accusatory placard held by one figure outside the front entrance of the building each day.

MEDIA COVERAGE

The presence of this community was also quickly noticed by journalists and commentators and, as the much anticipated Inquest began to drag on with relatively little sensation and increasingly strained efforts to pursue conspiracy theories by some of the legal representatives, a significant degree of attention started to be paid to the social environment of the court. Repeatedly, commentary picked up on the architecture of the site, on the layout of the courtroom and its meanings, on the demeanour of witnesses, of family and friends, of jury and press and, frequently, of the public who attended. Writing in the *Daily Mail*, Jane Fryer gave a detailed account of the space and the participants, including an atmospheric description of the "slightly musty smell of too many people cooped up in one room for too long" [Fryer], and made a series of comments on the "small band of Diana devotees" and their actions in the Courtroom. For Stephen Bates, writing in *The Guardian*, the demeanour of those in court was read as a significant index of attitudes to the Inquest; "The legal teams have been beadily watched most days from a few feet away by Fayed himself, surrounded by his smirking phalanx of acolytes and employees" [Bates]. In *The Spectator*, Martin Gregory's account of being called a "bastard" and flicked a V-sign outside the courtroom by Al-Fayed was followed by a further description of witness interaction which drew attention to the behaviours around the court (as did sections of his Sky News documentary which followed the conclusion of the Inquest). Commenting on evidence given by a witness who had made accusations concerning another, Gregory wrote; "On oath, MacNamara withdrew his claim, but claimed that he had not been able to apologise to Rees-Jones, as he had not seen him since he made it. I was surprised by this, as I had witnessed the two men acknowledge each other in the High Court on 29th January, while Rees-Jones prepared to give his evidence" [Martyn].

As the Inquest proceeded, reportage increasingly began to focus on the significance of the empty 150 seats of the courtroom Annexe, reading them as a signifier of the failings of the hearings as an exercise in public openness [Verkiak]. Such reports poured scorn on the proceedings and their cost, or on the suggestibility of authorities prepared to bow to the Al-Fayed camp's legal team's persistence. Some articles interviewed those present in the annexe, ranging across the attendants who stood desultory guard, the students, day-trippers and legally interested parties who dropped in, and seeking comments on public apathy [Winterman]. Others, throughout the Inquest, fixed on those particular individuals – the nine or so "dishevelled" [Bates, 2008i] people who

occupied the public gallery virtually throughout and could be overheard discussing the performance of various witnesses and counsel during the breaks; "a small band of Diana devotees – neat, tidy, grey-haired and armed with noisy carrier bags and clingfilmed sandwiches – [who] mutter, rustle, exchange knowing glances and take important-looking notes" [Fryer].

The BBC spoke to three such regulars during the final week of the Inquest. These were John Howsam, a convinced conspiracy theorist who regularly forsook a seat in the gallery to brandish a placard outside the court; Annabelle Drummond-Reece, a retired doctor who, the BBC article implies, attended partly to escape the awkwardness of her own immersion in a court case; and John Loughrey, a figure who is central to the narrative of absurdity which surrounds the audience to the Inquest. Loughrey, the man in the gallery with the writing on his face, is a chef who gave up his job and rented out his flat – moving in with his sister – in order to attend the Inquest. He was variously described in a range of publications as a Diana fan, a devotee, at times as an obsessive [1].A variety of blogs comment on Loughrey's obsessive behaviour, and generally with a more abusive tone than mainstream press commentary. [Lady Di Blogs]

His behaviour was registered, in all cases, as at the very least delusional, with the BBC's headline –"I'm going down in history for this"– suggesting that this was a figure who had lost all sense of proportion. That at the end of the Inquest the Coroner made reference to Loughrey in the courtroom as the only person outside of the Jury to have heard every minute of the evidence, further supported this characterisation, and my own brief encounters with Loughrey – who pounced on me with a "not seen you here before" on my second day in court – made it apparent that he was a figure who had found some form of self-definition through participation in the event. This flamboyant courting of minor celebrity was registered through some ostentatious elements of performance - the facepaint, the daily early arrivals to queue for tickets, the round of media interviews and photographs in which he presented himself as a committed Royalist. In each case media commentary drew him into the circulation of meanings surrounding the Inquest in which they began to serve a variety of semiotic functions, operating as indexes of the

[1] A variety of blogs comment on Loughrey's obsessive behaviour, and generally with a more abusive tone to them than mainstream press commentary, see 'Lady Di's 13th man set for Royalist celebrity Circuit'. Examples at the time of writing include www.personneltoday.com/blogs/human-resources-guru/2008/lady-dis-13th-man-set-for-roya-html**,** www.longrider.co.uk/blog/2008/04/08, and www.gamestm.co.uk/ forum/ view topic.php?t=10033@sid=af308b1b031c3e0eb33763b3166b2051

wider British population's engagement with the Diana myth. Here, John Loughrey represented the perfect summation of the wilder shores of public Diana grief, with Ros Wynne-Jones commenting in *The Guardian* that "John is as much a part of proceedings inside Court 73 as anyone, representing as he does the more troubling aspects of the public's relationship with Diana" [Fryer]. Figures such as John Howsam provided indexical accounts of another form of distortion, seemingly in contradiction with the above. Howsam appeared as a conspiracy theorist extraordinaire, an individual who had stepped too far into the hall of mirrors which was the 'conspiracy' and who operated as a tragi-comic avatar for the wider tragi-comedy of Al-Fayed's own theorising. Press suggestions that the misguided nature of Al-Fayed's accusations was proven by his own legal team's unwillingness to pursue any but a handful of them in court were provided with an official stamp of authenticity by the Coroner's final conclusion that there was "not a shred of evidence" [Baker] to suggest a conspiracy on the part of any group or individual. In such a context, Howsam's self-presentation was read as being as clearly delusional as Loughrey's and, by implication, Al-Fayed's. Loughrey, Howsam and their fellow gallery-hangers became encoded as indexes of those national attitudes – from emotive immersion to distanced scorn – which have characterised the reading of Diana and her many meanings, but their presence also opened a set of questions about the purpose of the Inquest, with the self-conscious playing of their participation being read as an indication of the degree to which this event had become a wasteful circus [Wynne-Jones]. They also stood in for a wider body of conspiracy theorists, those for whom the full bookshelves of the Coroner's opening remarks were stocked. And these conspiracy theorists become themselves part of a conspiracy – a conspiracy by the irrationally involved to maintain a critique of the authorities beyond the bounds of any plausible justification [Rifkind].

Outside of these narratives of audience identity and engagement, media coverage tended to focus on those elements of evidence which seemed significant in providing substance to either side of the case - perhaps in bringing forth the weakness of the most extreme conspiracy theories - or which themselves foregrounded elements of revelatory social performance, representing some form of hostile, sensational or salacious airing of private or secret relationships and behaviours. As well as the evidence which went to the central mystery of the case – what caused the crash in the tunnel - revelations of the private relationship between Diana, her lover, Dodi and her father-in-law, Prince Philip became the leading news items, along with insights into the management of her life and affairs through the negotiation of private space by

her staff, friends and public figures who had come to know her. Unexpected glimpses of the relationships between the public and the establishment were relished in the left-liberal press, such as the tense exchanges between Michael Mansfield and former defence minister Nicholas Soames who was accused in court of attempting to intimidate Diana over her pursuit of a campaign against landmines which ran contrary to government policy [Bates]. Insights into the relationships between various areas of the security services, their agents and minders - most vividly captured in the day's evidence given by Sir Richard Dearlove, former head of MI6, the British government's overseas security and espionage agency – were also prominent. Given that evidence from exchanges such as this latter often proved to be of relatively little consequence in the case, it is perhaps unsurprising that press accounts often seemed to focus on the performative elements of the courtroom exchanges concerning these matters rather than on the material such exchanges provided to either or any of the legally interested parties. In these accounts, the chief spook was read as an individual with a persona which seems to embody all of the perceived clichés surrounding such figures. For example, the Ex-MI6 Chief admits agents do have a licence to kill but denies executing Diana [English, R].

SOCIAL PERFORMANCE AND ITS INTERPRETATION

On footage of Diana and Dodi at the Ritz hotel shortly before the crash, it was said that "she laughed and smiled like the old Diana, and for a moment it was difficult to believe that she had been dead for ten years. Dodi's body language was solicitous and attentive, slipping an arm round her waist and looking like the cat that got the cream" [Hamilton, A].

Ironically, this interest in social performance both as presented in evidence in the case *and* as enacted behaviour in the courtroom created a reckoning between the higher symbolism of the Inquest and the proliferation of localised, fragmented narrative viewpoints which are a frequent feature of commentaries on figures such as Howsam and Loughrey. Indeed, much media commentary on the Inquest relied on foregrounding forms of social performance in partial and subjective readings, despite such ways of reading being condemned when presented by other observers – the Loughreys, the Howsams, etc . On the one hand media accounts of the 'backstage' significance of private lives and the intimate details of the Princess's personal relationships attested to the revelation of truths in the proceedings; yet on the other media condemnation – or at least, not so gentle ridicule - of those members of the public audience

who saw themselves as personally invested in the case emphasised their mis-reading of their own status. Such a contradiction highlights the significance of the *interpretation* of social performance in both spaces.

At one point in the proceedings, Mohammed Al-Fayed's spokesperson, Katherine Witty, was reprimanded by the Coroner for disrespectful behaviour after the Jury complained of her laughter in the courtroom, apparently in mocking condemnation of the evidence of the police officer who was on the stand at the time. This reprimand symbolised for certain commentators the chief corrupting drive behind the whole Inquest, a bare-faced attempt by Al-Fayed to make the facts bend to his analysis. This became the dominant reading of Witty's laugh in subsequent media coverage, as characterised in Andrew Pierce's *Daily Telegraph* column which attacked Witty for her activities as Al-Fayed's PR, describing how she was "publicly rebuked by Lord Justice Scott Baker, the Coroner for "inappropriate behaviour" as she smirked during Michael Mansfield's cross-examination of a witness. Nice". Pierce also asked and answered his own question "just how much money does it take to make you speak the unspeakable?" [Pierce] My own reading of this incident, from a seat in the public gallery, was that Witty had responded to a member of one of the legal teams who had sneezed in an accidentally comical manner. Witty's helpless fit of giggles at this was of the order of a kid in a school assembly who knows they should be quiet and desperately wants to but who cannot - inappropriate, yes, disrespectful, perhaps, but certainly not aimed at mocking the evidence of the witness on the stand. However, for me to present a reading of such social performance as substantive evidence of meaning and as contradicting the claims made both for it and for the typicality of the Al-Fayed camp's attitude is, perhaps, to enter the realms of delusion which Loughrey et al are accused of. The informality of my presence in the Courtroom means that I am only able to register and to offer a local, fragmented and partial version of the events. Yet, if such a localised reading of an incident as contrary to the official interpretation of the significance, or of the wider mediated symbolic narrative into which it is interpolated, speaks of anything substantial, it is surely of the existence of a host of unmediated interpretations of events which resonate outside of the courtroom, establishing fragmentary and 'minor' narratives beyond the grand narrative of truth or conspiracy. And, indeed, media concern with the public audience at the Diana Inquest clearly foregrounds anxieties about this narrative proliferation, focusing on the unreliability of such public interest in the events as evidenced by the unreliability – the eccentricity - of the regular attendees.

THE COURTROOM AND THE CONSPIRACY

However, if the reading of social performance can be seen as offering a significant degree of insight into the play of power emerging from the narration of legal proceedings, we must also acknowledge that those conspiracy theories which seem to proliferate around Diana and Dodi's death tend themselves to take social performance as foundational, and perhaps to value it above even indisputable evidence, fact and testimony. In his 1988 outlining of a model of conspiracy theorising, Frederic Jameson suggested that 'Conspiracy is the poor person's cognitive mapping in the postmodern age; it is a degraded figure of the total logic of late capital, a desperate attempt to represent the latter's system, whose failure is marked by its slippage into sheer theme and content' [Jameson, p. 355]. More recently, for Peter Knight, 'Narratives of conspiracy now capture a sense of uncertainty about how historical events unfold, about who gets to tell the official version of events, and even about whether a causally coherent account is still possible. They speak to current doubts about who or what is to blame for complex and interconnected events' [Knight, pp. 3-4]]. Such analysis suggests that conspiracy theories build on postmodern doubt concerning the ability to gain purchase on complex and dislocating actions. "The culture of conspiracy surrounding the Kennedy assassination is, for Knight, so enduring, not because it provides a compensatory sense of closure and coherence, nor even because it led to a loss of innocence, but because it is very much in tune with a postmodern distrust of final narrative solutions" [Knight, pp. 3-4]. In the case of Diana such distrust led originally to a series of scattershot theories regarding her demise, theories which, given the centrality of the Royal Family to the British state, had a powerful semiotic resonance. The idea that Diana may have been assassinated by secret service agents due to being impregnated by a Muslim lover who she intended to marry certainly captures a range of iconic fears and anxieties surrounding the circumstances of public affairs. Equally, the sense of an overlap between surveillance and publicity, that perhaps paparazzi might be as close to security services as to newspapers, was compellingly dramatic. In such versions of the purposes of the Inquest, not only was the extreme popularity of the Princess read as a reason for this courtroom to become an equally popular location for the public, but the complex of theories became a further reason for making this a compelling show – those theories were to be put, tested and contested in a live discursive space.

In fact, for many media commentators, public attendance at the Inquest was only seen as indicative of one of two attitudes – a Diana fixation which was a sublimation of unexplored psychological deviance, or a conspiracy theory obsession which was similarly illustrative of some kind of disturbance. In this case, audience members witnessing the events to an unhealthy degree become conspiracy theorists seeking Knight's 'compensation' in their own reading of impossibly remote events, and also as figures whose appearance to publicly claim such a status was an unhealthy parody of the dignified but intense public grief surrounding Diana's death. Writing in the *New Statesman,* Ros Wynne-Jones characterises this deriding of the regulars alongside a general 'anti-inquest' attitude amongst opinion formers in public and private life, as a form of defensive apology for the very un-British display of national grief after the death. "It is as if the collective shame of that very un-British episode [the large-scale mourning] is being played out in an anti-inquest sentiment, as the proceedings are vilified by talkshow hosts and belittled by opinion-formers from cab-drivers to Question Time panellists"[Wynne-Jones]. The public whose grief appeared to be so widespread as to disarm cynicism in the immediate aftermath of the accident was not represented in this reading of the figures present. Rather, this wider, more dignified, absent, body was seen as being engaged in a double refusal – firstly to take an interest in an Inquest which should be allowing the dead lovers and their driver to rest in peace and secondly to take an interest in the absurd conspiracy narratives surrounding the event. The reading of the social performances in the environment of the courtroom provided, in Loughrey's face-paint, in Howsam's placard, in Witty's giggles, evidence that the real 'conspiracy' was the creation and maintenance of a context in which such delusional behaviour might flourish, a conspiracy of conspiracy theorists, obsessive, socially maladroit and seeking to waste the time, energy and money of the state through the connivance of irresponsible legal business. The social performance surrounding the courtroom became confirmation of the correctness of this particular conspiracy theory – that the only figures who might become caught up in such events were those whose lives are empty – an insight which echoed with the general media characterisation of Mohammed Al-Fayed himself.

CONCLUSION - PERFORMANCE IN THE ROYAL COURTS

My own sense of the reading of the events before Court 73 is that a series of elements of social performance appeared to provide resonant insights into

the collision of facts and representations in this case. In a few days attendance at the Inquest I would place in this category the mis-reading of Witty's laugh; the revelation of a bathetic series of issues in the life of James Andanson, the paparazzi photographer held by conspiracy theorists to be the owner of the white Fiat said to have collided with the Mercedes in which the victims were travelling, which seemed to knock that particular conspiracy theory firmly on the head; the strange mixture of formality and joviality in the interplay between QCs; the inscrutability of a certain class of British judicial representative; the self-presentation in the case of French witnesses called to give evidence by video, as if bemused by this glimpse into overdressed British legal process; the particularity of the employed personalities surrounding Al-Fayed; the banality of British security service internal procedures and the extraordinary and tragic emptiness of the images of the crashed vehicle, underlit as they largely were, capturing a stationary car with its doors closed, traffic still passing in the next lane, then surrounded by men whose approach seems neither urgent nor connected, as though looking at a vehicle which is about to be towed away, not – and it took me some time to register this – a vehicle in which people were dead or dying. All of these elements registered a particularly affective power and seemed to me to be revelatory of aspects of the case which are, as meanings and significances, worthy of analysis and comment alongside formal reportage. These elements suggest that the meanings of an Inquest held on the grounds which the Coroner originally outlined – to allay public fears and suspicions - resides in part in the preparedness of members of the public exactly to read its significances in their own paranoid, delusional or conspiratorial way – and that, in evaluating social performance for themselves, such figures may be contributing to the building of a body of meaning from the events in the Courtroom which is as revelatory of instances of 'truth' as the supposedly informed, authoritative journalistic perspectives offered by commentators. Performance in the legal environment creates a supplementary text to that with which law is apparently interested, one which is mined and examined both at the moment of its enactment and in the subsequent ascription of meaning to it by commentary and media reportage. Beyond the Coroner's verdict, perhaps the most resonant element of the Diana and Dodi Inquest, was the reading of Al-Fayed's own appearance in the witness box, during a day of cross-examination in which the significance of this figure in relation to the British Establishment was thoroughly explored, examined and judged. Journalistic coverage of this stage of the event looked closely at the absurdity of the claims advanced, rendering, with a tone of reserved sympathy for this grieving father, the collapse of theories of

conspiracy in the scattershot impossibility of the variety of guilty figures which Al-Fayed claimed were involved. In doing so it positioned Al-Fayed as one of the dramatis personae who was in an equivalent space to Loughrey or Howsam, trapped by monomania into a lack of sufficient self-knowledge and insight to allow him to break free of his delusional state and to objectively assess the nature of the obsessions gripping him. Such media commentary asserted that this whole process was an unnecessary mis-reading of the facts behind the deaths of these figures, that a combination of accidental factors had created the circumstance and that the proliferation of narratives in its aftermath was a performative smokescreen. In this analysis, to penetrate that screen required merely a commonsensical calling to account of those parties foolish enough to have allowed it to rise, whether these were the authorities who were complicit in its ascent, or the lawyers, always the fat-cat focus of scepticism and condemnation, who had let it mushroom. Social performance – including Al-Fayed's loss of control as he swore at a reporter outside the court [Gregory ii, 2008] [McClatchey], became an index of the Inquest's many truths and, strangely perhaps, an unpredicted confirmation both of the importance of its costly and lengthy process and of the significance of the proliferation in social performance of the readings, perspectives and interpretations which surround the establishing of a judicial grand narrative.

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Chapter 4

THE FATE OF THE ICONIC SIGN: TASER VIDEO

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ABSTRACT

Legal practitioners, like many people, can betray a naïve belief that photographs are direct representations of "the real" and that a picture will communicate facts about reality directly to its audience. This arises from a belief that these pictures will reveal truths about which we can all agree because they describe a commonly shared perceptual reality captured by a mechanism that we believe has no desires of its own: the camera. Photographs are commonly understood to have been caused by the phenomena before the camera, light carrying information and imprinting it on a sensitive surface that can the enable the picture to be prepared for display. Photographers know that this is a misconception but the general public does not seem to share that awareness.

Video made with a lens (and therefore presenting viewers with 29.97 photographic frames a second) will be the concern of this chapter – in particular, a very particular form of video, that generated by Tasers (electrical stun guns) when they are equipped with recording devices. In particular, police forces are encouraged to equip their Tasers with this capacity so that the conditions of their deployment can be reviewed later. I call this tasercam video. I will discuss, briefly, the landscape of legally relevant video and then discuss the characteristics of this kind of video in particular, concluding with some thoughts on why, even given its

extremely potent and limited nature, we need a sophisticated theory of media effects in what might appear to be the realistic medium of tasercam video. This discussion is centered on American legal culture.

INTRODUCTION

Elie Wiesel, who lost both his foundation and his personal fortune to financier Bernard Madoff's Ponzi scheme, [ABC News] was asked how he would like to see the scam artist punished. Wiesel answered: "I would like him to be in a solitary cell with only a screen, and on that screen for at least five years of his life, every day and every night, there should be pictures of his victims, one after the other after the other, all the time a voice saying, 'Look what you have done to this old lady, look what you have done to that child, look what you have done,' nothing else" [Chicago Tribune]. This is a curious panopticon – the jailer sees to it that the incarceree must see, all the time, the eyes of the victims confronting the evildoer. He becomes the central observer of a unique show, not himself pinned by the surveillant gaze of a central prison authority but instead trapped in a private exhibition constructed just for him of pictures intended to evoke memories of a wounded collective of victims.[1] One problem with this punishment is that we cannot be sure that it actually would be one. Wiesel wants to remind Madoff that his acts had consequences but if Madoff is as sociopathic as his acts would suggest, it is equally possible that he would find the pictures a source of perverse pleasure, reminding him, while incarcerated, of his abundant successes, making the pictures "trophies" of bad acts to be delectated over, a customized pornography not unlike the collections of victim's personal belongings made by some serial offenders. For instance, news reports of the arrest of Philip Markoff for killing a young woman offering massage services on Craig's List made sure to note early on that he collected panties from the victims [Netter], conforming him to previously existing stereotypes of compulsive killers.

Wiesel betrays a naïve belief in the realistic power of photographs -- that his picture gallery will communicate "see these victims" to its audience, Bernie Madoff, with all that implies to him, Elie Weisel. This in turn depends upon his belief that these pictures will reveal truths about which we can all

[1] It is outside the scope of this chapter to discuss the meaning of this suggestion within Wiesel's life and work. Given that he was a Holocaust survivor, and the Nazi regime that carried it out was obsessed with visual imagery, it is not surprising to this author that he would make such a suggestion.

agree because they describe a commonly shared perceptual reality captured by a mechanism that we believe has no desires of its own: the camera. Photographs are commonly understood to have been caused by the reality before the camera, light carrying information and imprinting it on a sensitive surface that can then be prepared for display. Consider this statement: " 'Photographs are traces left when objects causally interact with cameras, and these elements can be preserved." On the face of it this denies the frame of human making and misses (as does Peirce) the propositional aspect of all pictures." [Hookway, p. 65].

Photographers know that this is a misconception but the general public doesn't seem to share that awareness. Certainly the United States Supreme Court is no different in this general attitude toward photography than was Elie Weisel. Confronted with dashboard camera video evidence in the *Scott v. Harris* case, Justice Scalia, writing for the Court declared, "We are happy to allow the videotape to speak for itself." [Scott][2] Generally, the Supreme Court only reviews matters that pertain to the interpretation of the law. In *Scott v. Harris* they were asked to decide a qualified immunity case that had never actually gone to trial and so, unusually, the Court was confronted with evidence, in this case copies of police car dashboard camera video tape of the incident that brought about the filing of Harris' suit against Scott.

Implicit in Justice Scalia's assertion is that we will see and believe and therefore agree with the Court's assessment of the case and its decision. Like Weisel, the Court does not imagine that there can be substantive disagreement in viewers' assessments of the meaning of the video evidence in their case(s). An empirical study of public response to the *Scott* dashboard camera tape showed that, while the majority agreed with the outcome of the case, believing that the tape did reveal that the driver of the car was, in fact, driving too fast and the police chase justified, the study responses did vary with political attitudes of survey participants. [Kahan] My methodology does not make empirical claims; it depends upon knowledge of the medium, how it is made,

[2] Justice Scalia is either unfamiliar with Justice Oliver Wendell Holmes' writing on photography or doesn't agree with him. Oliver Wendell Holmes: "There is only one Coliseum or Pantheon; but how many millions of potential negatives have they shed,--representatives of billions of pictures,--since they were erected! Matter in large masses must always be fixed and dear; form is cheap and transportable. We have got the fruit of creation now, and need not trouble ourselves with the core. Every conceivable object of Nature and Art will soon scale off its surface for us. Men will hunt all curious, beautiful, grand objects, as they hunt the cattle in South America, for their skins and leave the carcasses as of little worth." [Holmes]. While acknowledging the role of the sun (light) in making the picture, Holmes clearly saw both that people make photographs and that this activity was going to be socially transformative.

and attending to what is observable in the piece of video. (Readers are encouraged to view for themselves.)

And it is video, a very particular form of video, that concerns me here – that generated by Tasers, (ECDs, or electronic control devices or stun guns), when they are equipped with recording devices that document their use – what I will call tasercam video. Taser International markets this equipment to move interactions involving police use of Tasers from "he said/she said" claims to more evidence-based records that permit review of the circumstances of police use of Tasers post-deployment. I will discuss, briefly, the landscape of legally relevant video and then discuss the characteristics of this kind of video in particular, concluding with some thoughts on why, even given its extremely potent and limited nature, we need to pay more attention to the media effects, not less, with tasercam video.

VIDEO IN LAW

Inexpensive and easy to use video technology has made it possible for video to move out of television studios, and its use is now ubiquitous and pervasive: institutions and persons in the street record whatever they choose to turn their cameras on. So audiences are becoming accustomed to seeing video that is no longer just a vehicle for news and drama on television, which are controlled for production values and are highly edited to create and sustain audiences. They are used to seeing video clips that may be hard to see, that may have bad audio, that stop and start chaotically, that feature mundane or unusual content that someone somewhere thought was interesting for whatever personal reasons. This is web video on YouTube, Vimeo, Google Video, and so on. This is the context for the emerging legal video culture – not the stuff of law and film, with its clear narratives and complex expression of its themes – but video entangled at every level of legal culture and practice.

Courts, like the rest of society, use available technology to help accomplish various functions. Video is used to document court proceedings (even, at times, to substitute for court stenography), present evidence (particularly depositions, visits to scenes, and sometimes reenactments) and increasingly to enable distance-appearances – of incarcerated defendants, witnesses who may not be available otherwise due to our global economy, and for official recordings of confessions [Gower]. Or video may itself be evidence. Any newer video forms are going to fit into this "videoscape" of common uses of the technology and their affiliated social practices. In general,

these practices assume authority for the camera, and sanction its use, because it is believed to contribute factual truth to matters at hand and/or a more complete sense of presence than is possible through documents alone. [3]

That this could significantly complicate legal decision making has been observed in discussions of the use of videoconferencing in appearances and arraignments in criminal proceedings, where defense lawyers have to choose whether to join their client in a remote location, making possible consultation, advice, and support, or to remain in the courtroom, where the client may see the lawyer as part of the court and not as a personal advocate, but where presence in the court enables the defense lawyer to confer with the judge. The benefits attributed to using videoconferencing in these contexts are savings in time and travel costs and easier management of security. Defendants have the right to refuse to appear or be arraigned in this fashion, although there are no doubt pressures toward accepting it. Poor technological arrangements can exacerbate the problems the defendants face. [Fowler] [Sharkey]

When courts use video as part of their regular administrative practices, we have recordings made to accomplish deliberate ends, and while they may be "edited" both through the timing of the start and end of recording or because selections may be made from the video stream (clips from long depositions, for instance), they are not constructed cinematically through the "grammar of film language" [Arijon] to any great degree (though any fragment of video has expressive effects arising from whatever was captured in combination with the circumstances, equipment, social surround and viewer understanding.) While it is very possible to criticize video used by the legal system for technical inadequacy, poor planning for ancillary or incidental effects that can actually affect the administration of justice (as in camera angle for remote appearances; matching of gazes or not in video-conferencing), the circumstances of their making bespeak a measure of control over their realization. Someone ordered and set up the equipment; presumably there are technical staff available to troubleshoot any problems and there is probably some system of backing up crucial data and archiving it. Or there should be.

Newer kinds of video that are and will be increasingly at issue are recordings made by surveillance cameras and those made by mobile devices, such as dashboard cameras in vehicles, and hand-held devices (made by

[3] Presence is of increasing importance in legal contexts. Our global economy is creating disputes across national borders, time zones, cultures, and there will be increasing debate around what is the required presence for trustworthy decision making with the use of technology to transcend limitations on actual physical presence, adding not just videoconferencing but virtual reality environments, avatars, etc.

officers or members of the public) to document unfolding events of uncertain outcomes. Uses where cameras are fixed and simply record what appears in their field of view as determined by the installation offer, whatever the angle, a fixed gaze with its own implications, whether bird or worm's eye view, whether eye level to the action or not. We have other expectations as well: for instance, we expect that surveillance film will be low resolution and grainy, for that is what we have been accustomed to seeing in films and on television or in stores where we shop and catch ourselves in the screens of camera surveillance installations. In fact, these cameras, like our cell phone cameras, are getting better and better. Compare the now famous Columbine High School cafeteria footage from 1999 [Klebold] with the Salt Lake City, Utah, surveillance footage released by the police in April 2009 [Salt Lake City].

In contrast, hand held devices (cameras, video camcorders, still photo and video cell phone cameras, audio recording devices) are often pulled out in a hurry, subject to amateur deployment with shaking hands and wandering gaze leaving data confusing at best. These "informal" video fragments will become evidence, sometimes requiring courts to sort out different and partial accounts of the same event as evidenced by the products of different "observers" – there may be surveillance camera footage, cell phone footage, dashcam video from police vehicles, and footage from passersby on the street -- all relevant to the legal determination to be made. Police are ambivalent about citizens' use of technology for public purposes. On the one hand, they create websites where citizens can send text messages containing tips, and, now, cell phone video, and on the other, they will attempt to confiscate cameras and camera phones if they believe that they will be caught on them in ways harmful to their interests [Baker] [Hauser].

An example of how complicated this new visual environment can be for law enforcement is a story concerning the shooting at point blank range of a young man in the wee hours of January 1, 2009, at a BART Station (Bay Area Rapid Transit) by a uniformed officer of the transit police [La Ganga, & Dolan]. Presumably there was surveillance camera footage from the station. Some travelers managed to hide their devices from police collection and later posted clips to YouTube, forcing authorities to deal with a problem that wouldn't go away. Potential problems of authenticating these kinds of video fragments, and then relating them to one another as decision makers must, in order to construct coherent narratives of the events, abound.

So, like it or not, decision makers are going to have to become adept at fitting these video pieces together in sensible ways. They will need to understand that the video they are asked to use in judgment requires reading

and interpretation, not just viewing. Some surveillance footage can only be specifically interpreted using other first person accounts, other footage, and technological enhancement, because it is low resolution and shot at some distance from the relevant actions being recorded. See, for instance, footage from more than one fixed camera in the 95th Street Red Line station in Chicago where Officer Alvin Weems shot Michael Pleasance on Saturday, March 8, 2003. Without the voice-over explanation of what we are seeing, very little is clearly understandable. [Chicago Reader]

Other video may offer clear visual signals but be opaque about the narrative and motives of people represented. This is true of most such video posted, for example, a very recent clip posted on the front page of Huffington Post for May 13, 2009 [Huffington] .The video clip is shot from above and so steady that it must have been made with professional equipment; the logo tells us that it is material copyrighted by NBCLA. The clip is now hosted on a news website (NBC) in Chicago but the episode depicted unfolds in El Monte, California. We see the end of a not very fast car chase brought to a conclusion by police cars surrounding a vehicle by the side of a boulevard. The driver jumps out and takes off, the overhead camera following him as he runs across a parking lot, between houses, and is eventually trapped in a fenced backyard. He sees that he is cornered and so lies face down spread-eagled on the grass before any police arrive near him. The video then shows an officer arriving with a drawn gun who kicks the young man in the head. Another officer arrives, also with gun drawn, knees the young man in the back, and both officers keep him down using only one hand each as their guns are still drawn. The tape shows us the same kick to the head three times, twice zoomed in. The young man appears to be white; so do the officers. The young man, unarmed, appears to be slender and constituting no physical threat compared to the bulked up police officers. The clip ends with more officers at the scene with the young man and his two subduers still in a pile. We know nothing of the events that provoked the chase. We do not know whether the police had any reason to suspect that the young man was armed and dangerous. We are treated to a close up view of the kick to the head. That piece of editing must have been done in the camera. Why? Was the NBC News just gratifying their audience or are they attempting to editorialize about police practices? Were they following because they picked up a police radio call or were they just trolling in the neighborhood?

So, far from giving us direct access to reality, if we pay close attention to what is recorded, we may find instead an abyss of questions – who, what, when, what happened before and what does any of it mean? This will not be

like *Rashomon* [Kurosawa], produced cinemagraphic material from multiple viewpoints ready to be assembled by viewers; it will be more like putting together part of an ancient pot from a few shards and guessing at the rest.

Further, we should know, but do not, much more about the effect of the source on the credibility of the video document. Does video material from dashboard surveillance cameras have a special credibility because of its source within police practice and not just from its seemingly detached "eye"? Does video that is generated in this way, even if it records bad behavior on the part of the officers, more often than not exonerate officers who should be reprimanded because of the source? See for example the video from *Buckley v. Haddock,* the first case to cite the Supreme Court's decision in *Scott v. Harris*. The Buckley police dashcam tape records the use of the Taser by an officer [Buckley police]. The Buckley tape produced no revulsion in the finders of fact – Haddock was given qualified immunity. But I, watching this video on the Web, cannot but feel surprise that the officer thought he needed to tase a handcuffed man who was merely weeping. What are the effects on judgment if members of the public post the same police video on YouTube or other similar venues? We simply do not have empirical studies on these and related topics.

A NEW VIDEO MEDIUM

One of the newest forms of on-the-spot video recording that has legal significance, is video made by Tasers when they are activated. For a detailed discussion of these pieces of equipment, see a major report by Amnesty International [Amnesty ii] [Taser International].

They are referred to as Electronic Control Devices (ECDs) and are intended to incapacitate briefly an out of control person by disrupting their ability to control their gross motor capacities. In December 2008, an Amnesty International report stated that there have been 334 deaths from the use of Taser guns in the United States [Amnesty i] [Rawstory]. As the use of these stun guns expands, we can expect that video records of deployment will enter both as evidence of crime and crime control and also as evidence in cases litigating over the effects on people who have been injured or killed from being tasered.[4]

[4] Being tasered is part of police and military training, so some victims of Tasers are, in fact, members of uniformed services.[TChris] Readers interested in arguments favoring

What are we looking at in Taser video? First, it is plain vanilla video -- we are not looking at MTV – we are looking at something that appears documentary and "unedited," if by "editing" we mean complex juxtapositions that arise from putting together video clips to tell a story or clips that have been stylized through the use of video effects generators, whether aided by transitions or not; the cut itself is a carrier of meaning. This is a data stream with moving pictures and sound [Tasercam]. While it may run continuously from the moment the video is turned on, it does not provide much context about what was going on prior to deployment and nothing about what happens after the Taser is turned off. The camera is attached to the gun so that viewers are treated to what might be touted in another context as the ultimate immersive first-person shooter experience, where the point of view the viewer assumes is not that of the eyes of the officer above the gun, but that of the gun itself -- lower down in the visual field, more a part of the action and less connected to the head of the operator. Viewers can feel this disconnection from the head, it is a visceral view. This point of view puts us in the action, not just standing back and thinking about it; it seems to turn the standard trope of photographic observation, particularly photojournalism, as non-intervention, on its head. [Sontag, p.11]

Looking with the barrel of the Taser, we are not only there but our looking itself is carrying out the action -- extreme action; pain is being inflicted. Beings are subdued and brought under control, seemingly with the glance of our eyes. We can see them fall and hear them cry out. Subsequent events do not appear on the video snippets that are currently available. The actual wounds, the actual pain, from the use of the Taser (or other stun devices) for the most part leave no marks. It is what Darius Rejali has termed "violence you can't see." "Out of sight is out of mind. Niccolo Machiavelli once advised princes to use stealthy violence because people will get less alarmed. He said, 'in general, men judge more by sight than by touch. Everyone sees what is happening but not everyone feels its consequences.'" [Rejali]

So on the one hand the viewer is invited into the action as its agent and on the other oddly distanced from the consequences of that action because the viewer sees no visible wounds on the body, no blood, no broken bones, no sounds of direct body contact that would be made if someone was hitting or stomping on the victim. The person deploying the Taser can stand back without personal risk as the other is temporarily immobilized and seemingly

widespread deployment of Taser technology can read a note arguing for municipal liability for NOT supplying officers with these weapons.[Nevins]'

unhurt. There is, however, a typical ratta-tat-tat, a bit like raccoons calling to each other erotically on early spring nights that can be heard on YouTube videos of tasing, some 4,000 posted so far as of 8/4/09.

When the arena is video game play we might be inclined even to value the catharsis of harmless violence by representation, hoping that it would deflect the need for actual acts of violence in the world. When the video in question has been recorded during real action and becomes a document of legal interest, this is a problematic perspective, because it is untrue that Tasers cannot cause long lasting harm or even death. Will finders of fact be seduced by the voyeuristic participation in what seems to be harmless action in these videos or will they be able to step back and think critically about them as evidence? For instance, if we see the police tasing a man in the back, will we assume that the shooter is acting egregiously aiming at a receding non-threatening person or will the viewer be moved to ask whether that same receding figure hadn't just before threatened the shooter with physical harm? Or if the shooter maintains the story of threat to explain his actions, will the viewer be moved to ask whether that account is credible, or not, and look for external evidence to corroborate one version or another, especially if one is a police officer in uniform? [Miller ii]

While the camera possibly will record a lot of detail, it may or may not be meaningful for understanding the unfolding events because of the narrow view. So we may become occupied with the clothing or hair of the person being tased, and see stains on the floor, but we probably will not see much of the full scene at all. The camera is intended to document the deployment of the weapon, neither to tell the story of the events that caused the gun to be fired nor the aftermath of its use. So the figure is ripped out of context, in contrast to dashboard camera video that may show the tasing episode from some distance and where the context overwhelms the picture of what is happening to the person being tased. One of the few examples of tasercam (in contrast to tasting) involves a dark and relatively unspecified interior of perhaps a small commercial establishment and a young African-American man, with short dreadlocks and otherwise undistinguished clothing. [Taser Cam] Contrast this with the dashboard camera video of the tasing of Jesse Buckley, mentioned above. He was a twenty-three year old very large man [US Court of Appeals] stopped on a speeding charge. He submits to being handcuffed and when he gets out of his car, he drops down to a seated position on the ground and begins to weep at his situation – not just the moment of being pulled over but perhaps over all the destitution in his life. When he refuses to get up and go to the police car, after repeated warnings, he is tased at least three times at close

range. The video that we find posted on the web, taken from deputy-sheriff Jonathan Rackard's dashboard camera recording, begins after Buckley has gotten out of his car and ends before a second officer arrives to render assistance. We see cars passing on the two-lane highway on the left side of the picture and the rear of Buckley's car and the grassy embankment where much of the action unfolds. We cannot really see his face and can barely see the effects of tasing, although we can hear the weapon go off each time it is discharged. The person tased in the tasercam example looks like a youth who might be scary if encountered on the street where Jesse Buckley does not seem to pose a threat at all. In both these examples, the officers appear to be calm and clear and managerial in their orders in contrast to other recordings where officers seem to lose control. The most famous example of this is the Rodney King beating caught on Richard Halliday's amateur recording where viewers worldwide focused rather more on the police batons than the stun gun used against King [Shanahben].

As a non-police viewer, it is hard to understand why the officer, under no threat from Buckley, and having stopped him on a traffic violation and not in pursuit of criminal activity, needed to be in such a rush. Where would the harm have been in letting Buckley have his cry? And why did he proceed to tase him multiple times when any properly trained officer should know that it is impossible to follow an order to stand up shortly after receiving a tasing? Taser stuns produce immobility immediately in most people, so a police officer who demands that someone move/stand up after tasing is producing an involuntary disobedience which is then subsequently punished with repeated tasing if the officer loses control, prolonging the inability of the person to comply.

Both of these video sequences depersonalize the recipients of the tasing because of the particularities of the recording and because of the truncated, only barely suggested narratives they report. Of course it is not "I came, I saw, I tased" but there's not much more than "I saw something that I had to put a stop to" or "someone I thought I had to gain control of." From the video itself, we know little more. This maps onto the new penal system where "the offender is rendered more and more abstract, more stereotypical, more and more a projected image rather than an individuated person."[Garland, p. 179]. Similarly, due to problems of file size, resolution, hurried taping, much surveillance camera footage presents relatively undifferentiated persons who are hard to categorize. We have to take someone's word for it; the video data are just an information token encouraging us to believe an account expressed with words.

To review: Tasercam video is made by a "security" device that is a kind of weapon that claims to be non-lethal. While the picture is being recorded an electrical current is being deployed against a living subject, so the making of the picture and the infliction of pain are co-incident within a point of view that brings viewer and weapon into a tight relationship. Because there is no outward evidence of wound or permanent damage, we viewers can perhaps enjoy the sadism (inflicting pain on another) seemingly without being implicated or feeling too much responsibility. What viewers see is a person being immobilized. If there is audio, generally those on the receiving end cry out [Taser clips].

Aside from the various recordings of enforcement activities involving Tasers, the web is full of examples of training videos and "home uses" – a roommate tasing his friend while in the shower [BreakMedia], a wife, her husband, while fooling around in the backyard, [NinjaWholesale], trainees doing it to each other. [Trainees taser video] . As of 8/4/09, YouTube responds to the search term "tasers' with a possible 14,400 choices. All of this normalizes the device, reducing any reservations we might harbor over its deployment in law enforcement. Todd Phillips' summer 2009 film *The Hangover* has a scene, played for broad comedy, of school children being drafted to tase one of the heroes to punish him for bad behavior before his release by the authorities [Phillips].

On the Taser International web site there is a category of Tasers for consumers and it is illustrated with a picture of a woman protecting her home, not unlike previous ad campaigns to sell women on the use of firearms [Women and Guns]. The result of disseminating materials like these is to make the technology everyday, like an appliance. We are invited to protect ourselves, the Taser giving us security, and, at the same time, it justifies our "actions" in identifying with the point of view if we are watching Taser video: this can only increase our sense of psychological safety around the gratification of our own sadistic pleasure of being on the sending end of pain infliction.

Without resorting to Freud, we can look to our own art history for confirmation. Stephen Eisenman argues that, in the Western cultural tradition, that which links Classical art from the ancient world with European and American civilization is the pathos formula replete with eroticized tortured humans and animals (culminating in much religious art that many hold sacred) and that it is this tradition that has paralyzed our social response to the Abu Ghraib photographs. He suggests that our outrage has been tempered by the deep familiarity of such imagery to us as evidenced by our own cultural

history [Eisenman]. This, too, is the cultural ground that tasercam images will evoke. But unlike art in museums, tasercam in courtrooms will be part of the administration of justice and its truth, like all forms of evidence, must be actively tested. So, I argue, we need to be concerned about our ability to take on these compelling video records.

WE CAN BE FOOLED BY OUR OWN MEDIA HABITS

Another factor that normalizes the tasercam picture is that these videos are the product of photography, a medium that has its own critical history defining it as a violent form of expression both because it "takes" its subject's "skins" or surface appearance and because of the behavior of the person taking the picture. Photographer Bill Jay asserts that the " single most consistent attribute of the twentieth century photographer is his willingness, and even desire, to violate any and all social conventions of good behavior in order to take a picture." [Jay, p.1]. [Sontag] [Vettel-becker]. Before Tasers, the close cultural association between making the picture and producing the effect on a living being has perhaps its most extreme manifestation in the 1960 film *Peeping Tom*, directed by Michael Powell, a horror film in which a photographer murders women with a blade concealed in his tripod while filming their dying moments. Surely this is a close precursor to what we see in tasercam video [Feigensen]. Tasercam videos do not end with the death of the victim (or we are not given that portion of the tape) but they come close to the low budget snuff film in underground violent pornography, which surely, some finders of fact may well have seen.

How do the facts of photography as a medium complicate our understanding of video? First, and common to all photography, is that we have a reading problem – photographs look real. Second, the social context has shifted dramatically: anyone can make quite good photographs now and they are easy to disseminate. Non-gatekeepers are making pictures to create alternative histories of public and private events; they are "talking" back to power. Official sources are using photography (as they always have) as a weapon in info wars. Our reading problem when it comes to photography arises from the fact that a photograph looks like something we might have observed with our own eyes were we but there. We are wired with the cognitive default setting that we automatically believe that something that looks real, actually is or was real. [Reeves & Nass]. Video represents "the real" because it looks real in the same way as pictures from other cameras and

because it moves, it is even more lifelike. The photographic picture in general is a very complex object because it participates in all three elements of the Peircean sign triad. At first glance the photograph is a Peircean iconic sign, because it overwhelmingly resembles the surface characteristics of that which it depicts; nevertheless, "it is directly and physically influenced by its object, and is therefore an index; and lastly it requires a learned process of "reading" to understand it"[Huening] which brings it into the realm of mediation and symbolic (Peircean) structures. Interestingly, while Peirce's system articulates the reasons for photography's power, Peirce himself failed to see his own errors when he limited photography's power to the indexical. [Kibbey, pp. 132-164].

Perhaps it is this semiotic triple play that gives the photograph its particular power over us as a medium of exchange. While it is true of all semiosis that it is dynamic and not neatly fixed, this appeal to the entire basic Peircean triad of the relationship of the sign to its object must confer extra credibility on the photograph. I would suggest that it is precisely because of this power that we are so unable to disentangle our perception that it reflects reality of some kind from the proposition that what it shows IS reality. That is, at first glance, without training, we miss entirely that we are looking at a picture of reality that has been transformed by a technology that has characteristics of its own. The camera is being operated by someone or something that has a reason for taking the picture. (Note how this is analogically like the common sense construction that if a person is arrested, they must be guilty; both suppositions have the potential to lead to serious miscarriages of justice.) The picture, in turn, is then deployed as a sign in a context. Tasers equipped with video and used by the police are made to record the actions of the person using the gun in context for a record of what happened, as evidence. Once made, the recording can be used by supervisors to monitor the behavior of officers (police, prison guards, etc.) and it may or may not become part of a legal proceeding. Monitoring can result in exoneration from culpability; it adds information to what might otherwise be a "he said/she said" situation of competing and difficult to verify claims. But once out in the world on YouTube, these recordings become a part of a larger conversation.

As an aspect of the media culture arising from digital technologies, "the photographic" is now a sign itself deployed in ever more complex mash-ups of data from multiple sources and the still photograph is now a nearly infinitely malleable set of pixels [Ritchin]. The public is beginning to understand that the same thing can be true of video data. The cultural understanding of the

photographic is parting company with our everyday social understanding of the video that we encounter in the non-art situations of surveillance video, etc. We used to be able to count on such markers as poor focus or poor resolution to help us tell the difference between social functions of the video picture. The price of higher resolution has been coming down and surveillance video is ever better (and so are the cellphone cameras that people have been using to do their own surveillance). For instance, Janis Krums' cell phone picture of the emergency landing of an aircraft on the Hudson River, in January 2009 [Krums], is a beautiful picture with old master overtones, and not at all what we expect of a snapshot taken from a cell phone. Can the iconic sign continue to function in a world where it can be a paintbrush for a new virtual creation?

The ever-increasing quality of inexpensive video recorders is already bringing about a convergence of entertainment data streams and reportorial/documentary data streams, so it is difficult to distinguish them on the basis of their appearance. The claims of poor police, poor technicians will no longer hold up and the distinctions that finders of fact will have to make will be ever more complicated by our habitual experiences of the medium.[5]

The roughhewn handheld video output of amateurs that was imitated in a film like *The Blair Witch Project* and conferred on it a mark of (seeming) authenticity, has since become just a style. On the one hand, we will see that which is represented with ever greater clarity. On the other, we may be less and less able to separate one kind of video from another as other photographic media are deployed in our documentary as well as fictional lives. Where does a gigapixel photograph of Vancouver that allows us to peek into real people's apartment windows fit? Are we spies or voyeurs or just grooving on the pleasures and powers of our digital tools? [Vancouvergigpixel]

The demanding process of creating photographs in the medium's infancy has been replaced by technology that is small, can "remember" many pictures, and can do this at great speed, so anyone can be a photographer. Not only do average people make pictures, lots of them [Higonnet], but in urban areas especially, they are also used to being on camera in public places. Even in smaller towns, public buildings, banks, etc. are equipped with camera surveillance. Reality television, "The People's Court" and its many offshoots, and now YouTube and other video hosting sites on the World Wide Web, present a huge variety of non-professional people in front of cameras as well

[5] Richard Sherwin's *When Law Goes Pop* takes up the blurring of law and popular culture. [Sherwin]. While this is certainly relevant, I discuss the video medium itself in the communicative stream and not so specifically its narrative characteristics, especially because tasercam video is without self-conscious storytelling strategies.

as behind them. In the early days of nineteenth century photography, there was a lot of social concern about people taking pictures in public of unwilling subjects, even prior to the development of photojournalism [Jay]. The expectation of privacy has eroded – or we have all become participants. Photography has both escaped from its referents and escaped from the constraints of social boundaries. Probably inevitably, people are using available camera technologies to document abuses of power by those in authority and are thereby providing an alternative record of events. Francis Ford Coppola's 1974 film *The Conversation* explored the beginning of this social change.

Police and other enforcement authorities are responding now by going after cameras demanding that people surrender their equipment, erase their memory, otherwise cease and desist exercising their legal rights to photograph in public [Schneier]. When not hostile to photography, the police are using cameras as public relations weapons themselves. They may release their own or "official" surveillance video of events in response to people's posting their videos on the Internet to frame the debate themselves or to try to head off the unofficial version acquiring a social consensus. In some jurisdictions, police are asking citizens to post evidence of crime on special websites [NYC_311]. See for example the TSA posting of its own surveillance footage to counter the story of a disgruntled passenger [WUSA9.COM].

Courts will have to sort out different versions of evidentiary video; they will have to be interpreting what is shown and can be known from often fragmentary recording of bits of reality in different degrees of resolution and, finally, all participants may come to the court having seen all kinds of video that won't be admitted at all but which may, nevertheless, influence their judgments. In the "olden days", television would broadcast information about events that could wind up in the courts but television had gatekeepers. Virtually free and self-selecting video posting has changed all that. Indeed in some recent cases in the United States jurors were found to be using their hand held devices to surf the World Wide Web for additional information pertaining to their cases. [Schwartz]

Photography has become a "weapon" in info-wars carried out by opinion makers and critics, whether photo-op (as in the recent ill-advised fly-over of lower Manhattan of Air Force One) or the photoshopped (as were Iranian missiles, the wounded in Palestine) [Wald] [Morris].

We are learning to be skeptical of all official stories. Taser video enters this pictorial landscape of uncertainty. Will it seem to be especially probative

given the authority of its source and its bare bones narrative? Or will it evoke a different set of cultural associations?

In Taser video we have created a tool that is, truly, a weaponized picture maker, capable of "speaking" in the real world. It is especially powerful to us because it is so semiotically rich and compelling from the combination of its photographic medium and point of view, and, let's be honest, there is the additional pleasure of the satisfaction of our voyeuristic impulses to literally but safely "be there." When officers deploy tasing appropriately, it can save them and others from real harms arising from dangerously uncontrolled persons. But the stun gun is a tool that can very easily be misused. Manufacturers' claims that such devices cause no permanent harm encourage use, not just the threat of use. The fact that Electronic Control Devices leave no obvious marks makes misuse seem to have no consequences. And they are so easy to deploy. From anecdotal viewing of posted videos showing Tasers in use by police authority, it seems that these devices are often brought out to compel obedience for its own sake instead of using words either to elicit more information or to persuade. With so little communicative information in play, the human meaning is diminished. There are two recent stories, from different states, on the Web concerning the deployment of Tasers against middle-aged folks sitting in the wrong seats at ball games. Both seem like a totally unnecessary use of force [Ball_game_taser-videos].

The managerial threat of tasing described above, reminiscent of either bureaucrat or parent, is another form of normalization. "If you do not, or if you do … I will tase you…." The gun offers immediate enforcement, and immediate gratification through the assertion of power. In our society that claims to observe the rule of law, do we really want police officers not only enforcing laws but also delivering punishment without a full fact-finding procedure?

IT'S NOT JUST A PICTURE

We have come a long way from Elie Weisel's fantasy of using pictures to punish by simply making victims visible. Wiesel shields himself from his own sadistic impulses by proposing punishment by representation – effectively saying to himself, "It's just a picture". With the invention of a picturing device that actually punishes, that inflicts not just emotional pain but extreme physical pain, one that collapses the distance between a perception of the problem and administering punishment for it, we risk the very evidence itself

making the event seem "only a picture" and therefore "unreal." In the video-equipped Taser we have a device that records photographically but one that draws on different media habits for deployment – the rapid reflexes of aggressive video games where the task is somehow to control or eliminate "others". These "others" in the real world of people getting tased are often mentally ill, foreign or not competent in the local language, members of minorities, women, the elderly, and the young.[6]

In this fantasy space, a "harmless" Taser makes talk unnecessary – there needs to be no communicative relationship between the person of authority (whoever has the stun gun) and the other. With no talk needed, there is no debate, there are no alternative points of view that need to be resolved. There is just power, all action; it's very simple in this reductive universe. There are many reasons to be concerned about this use of technology. If we begin to assimilate this as the way things are, then how will we be able to object to the use of robots for law enforcement? [Marks]

In courtrooms with screens showing all kinds of moving pictures, will we be able to make critical and informed judgments based on photographic material that is now being generated in a culture where the old norms of photojournalism are seriously frayed, where people know that pictures can be altered? Will we be able to watch and step back from the gratification of our own sadism to think critically about the Taser picture? Alternatively, will police forces reject the supervision that tasercam might provide and therefore fail to equip stun guns with this feature? Will we be able to respond to counter stories about those very pictures? Are we concerned with justice or do we simply want to restore order after a threat of chaos, and if so, how far are we willing to go with regimes of control? How will we determine the proper role of pictures in the pursuit of justice? How these questions are answered will help to define whether we sink completely into an authoritarian culture of control or rescue our democratic ideals. History gives us some pause and some reason for cheer.

In *The Story of Cruel and Unusual*, Colin Dyan links the conditions of America's current penal system to the old institutions of slavery and both to the debates on torture that spanned the end of the Bush administration and the beginning of the Obama presidency. She asks, "What do prisoners, 'security detainees,' and 'illegal enemy combatants' in U.S. custody all have in common? They are all bodies. Few are granted minds. The unspoken

[6] It is also probably a mistake to assume that medical risks, and therefore potential harms, are the same for all these groups. We certainly need much more data in this matter.

assumption is that prisoners are not persons."[Dyan, pg. 90]. It is unknown whether the taser-play represented on videos in YouTube circulation will have a dulling effect on their audience, normalizing a tool of law enforcement that can also be used as an instrument of torture [Regali] [Miller i], or whether a younger generation of participants in the legal system will bring new literacies to bear. Habits from their own use of photography and, most especially, their experiences editing it with widely available digital tools, may cause younger people to be able to think more critically about what they are seeing. Will they be more able to see the doubleness of iconic pictures – that they look like what we see but that they also have mediated effects and are not just slices of "reality"? And will they be able to maintain this under the viewing pressures of 29.5 frames a second?

Viewers of weaponized video will need moral imagination. They will have to begin by seeing that the person tased is a human being with rights. They will have to refuse the pleasures of the images of control and mastery over that person by an officer of the law enough to evaluate those same pictures in the context of other evidence in the case. Supervisors reviewing the Taser recordings to monitor their own operations will face the same sorts of questions, only the recordings will be even more normalized because they are a part of normal institutional practices. Will they pay attention? First, video recording ought to be mandatory on every stun gun unit sold. Users should know that their decision to deploy might be monitored and subject to review by some external authority. Supervisors should be required to keep detailed data on Taser deployment by officers and correctional staff working under them. Without surveillance, it is too easy to use impulsively. Anecdotal evidence suggests stun guns are deployed against people who lack political power in circumstances where officers are not really in danger. So we need to have more pictures generated, not fewer. And second, we need to be sure that everyone connected with the justice system is media literate – and the broader population as well.

CONCLUSION

We need the resources of pictures that have iconic relationships to reality for witnessing and documenting and for entertainment and aesthetic pleasure. We also need to resist their simple persuasions so that we can understand them as a communication in a context that is material, pertaining to how it is made, and social. While there is promise in a younger generation of sophisticated

media consumers, in the interest of justice (and legitimacy) we ought to make much more self-conscious efforts to make sure that visual media literacy is regarded as crucial to educated people and most especially for all those involved in the justice system.

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Chapter 5

THE MECHANICAL EYE: LOOKING, SEEING, PHOTOGRAPHING, PUBLISHING

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ABSTRACT

For several centuries, Anglo-Australian law consistently refused to recognise a legally enforceable right to privacy. As a consequence, no wrong was committed by mere looking. As Lord Camden evocatively stated in *Entick v Carrington* (1765) Howell's State Trials 1030, 'the eye cannot by the laws of England be guilty of a trespass' (at 1066). The development of photography and photographic technologies did not immediately cause the common law to review its position. Thus, as recently as 1995, Young J in the Supreme Court of New South Wales, in *Raciti v Hughes* (1995) 7 BPR 14,837 at 14,840 could confidently assert that '[t]here is no doubt that, as a general rule what one can see one can photograph without it being actionable'.

More recently, legislatures, courts and law reform bodies in the United Kingdom and Australia have been more receptive to providing a remedy against invasions of privacy. In this context, photographs have come to be viewed by courts as posing a particular problem. In *Theakston v Mirror Group Newspapers Ltd* [2002] EMLR 398 (at 423-24), Ouseley J observed that 'photographs can be particularly intrusive'. In *Douglas v Hello! Ltd (No. 3)* [2006] QB 125 (at 157), the Court of Appeal suggested

that '[s]pecial considerations attach to photographs in the field of privacy'. There has been a clear change in judicial approaches to photography. The reasons for this change are the need to overcome a glaring deficiency in the common law and the obligation to comply with human rights obligations, notably in the United Kingdom where the *European Convention on Human Rights* has been enacted into domestic law. This article argues that one of the crucial aspects of this development of direct privacy protection in the United Kingdom and Australia is an implicit, profound but unacknowledged epistemological shift in the treatment of photography. Whereas the common law previously treated the human eye and the camera as equivalent – *what one can see one can photograph* – it now treats the human eye and the camera as different. This article argues that it is only by making this epistemological shift that one can move from a position where there is no wrong in looking or seeing (and, by extension, photographing) to a position where photographing is viewed as a distinct act from looking or seeing, and photographing, recording and disseminating images can be viewed as a wrong.

INTRODUCTION

At the outset of Christopher Isherwood's *Goodbye to Berlin*, the narrator famously asserts:

> 'I am a camera with its shutter open, quite passive, recording, not thinking.' [Isherwood]

This conflation of the narrator and the narrated and, more importantly, this metaphorical equivalence of the human observer and the mechanical recording device resonate with the common law's traditional approach to privacy and photography. The starting point of the common law is the general proposition that what one can see, one can photograph.[1] Therefore, the common law too, at least initially, rested upon an equivalence of the human eye and the camera. Whereas the common law was so certain for so long about this equivalence, Isherwood's narrator was not. One may doubt the claim to objectivity, such as it is, by Isherwood's narrator but the metaphor nevertheless conveys his

[1] See also *Bernstein v Skyviews & General Ltd* [1978] QB 479 at 488 per Griffiths J; *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 706-08 per Young J; *Lincoln Hunt (Australia) Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 461-62 per Young J; *Raciti v Hughes* (1995) 7 BPR 14,837 at 14,840 per Young J.

passivity in the face of his experiences and encounters in Weimar Germany. Yet shortly after making his opening assertion, Isherwood's narrator observes that:

> 'Some day, all this will have to be developed, carefully printed, fixed.' [Isherwood]

By contrast, rather than developing its view, the common law was content, until recently, to treat the acts of looking, seeing, photographing and publishing what was looked upon, seen and photographed as largely indistinguishable acts, not attracting liability. Yet, as recent cases suggest, especially in the United Kingdom, courts now consider the taking and the publication of photographs as a particularly serious form of invasion of privacy, which can give rise to liability.

This article has a modest but telling aim. It seeks to explain how this shift in judicial attitudes occurred. It does so by locating this change within the broader context of developments towards greater direct privacy protections which have occurred over the last decade in the United Kingdom, New Zealand, the European Union and, to a lesser extent, Australia. Perhaps the most significant impetus for this trend has been the recognition and enforcement of the right to privacy as a human right. The focus on privacy as a human right, integral to the dignity and autonomy of the individual, has challenged the tendency, particularly in legal systems derived from English law, to conceptualise privacy as a right attached to, or associated with, private property. This article suggests that this detachment of privacy from private property has facilitated an implicit and unacknowledged epistemological shift in the common law's approach to privacy and photography. The courts themselves have not been reflective about this change (Beddard, 1995). Therefore, in order to elucidate this shift, it is necessary to engage in detail with the decided cases in which these assumptions are embedded.

THE RIGHT TO PRIVACY AT COMMON LAW

Until recently, one could confidently state that Anglo-Australian law did not recognise an enforceable right to privacy.[2] Privacy might be an important

[2] *Victoria Park Racing and Recreation Grounds Pty Ltd v Taylor* (1937) 58 CLR 479 at 496 per Latham CJ; *Kaye v Robertson* [1991] FSR 62 at 66 per Glidewell LJ, at 70 per Bingham LJ;

value, assumed by non-lawyers to be protected by law, but it was not in fact a legal principle.[3] A significant obstacle confronting attempts to identify a common law right to privacy has been the asserted difficulty of defining what privacy means.[4] Although respect for privacy might be a shared community value, each individual within that community might have a different subjective expectation or experience of what privacy means to him or her. More broadly, the content of privacy can vary historically across time, culturally across racial or ethnic groups, nationally across borders, socially across classes or generations [Australian Law Reform Commission, 2008].

In addition, although privacy has not been considered an enforceable legal right, privacy as a concept is well-known and freighted with meaning. There are multiple senses in which the terms, 'private' and 'public', can be deployed, frequently in dichotomy to each other. One can talk about private or public property; the private or public sphere; private or public places; private or public law; the private or public sector; or private or public facts. One can talk about the 'public interest', which presupposes the existence of private interests. One can talk about 'public figures', which equally presuppose the existence of private persons. These multiple discourses of privacy and publicity frequently overlap or conflict. That the concept of privacy has developed so many distinct meanings attached to it, without the common law developing a direct form of legal liability, presents a real difficulty to any attempt now to create and impose such liability.

Notwithstanding the multiple senses in which privacy may be understood, the concept of privacy in the Anglo-Australian legal imagination is inextricably connected with private property. It is frequently the well-established torts protecting possessory interests in land – trespass to land and private nuisance – which are cited as providing adequate, indirect protection of privacy (in the case of trespass to land), thereby rendering a separate, enforceable right to privacy otiose, or denying the possibility of further legal protection of privacy (in the case of private nuisance).[5] The common law's

Cruise v Southdown Press Pty Ltd (1993) 26 IPR 125 at 125 per Gray J; *Australian Consolidated Press Ltd v Ettingshausen* (unreported, CA(NSW), Gleeson CJ, Kirby P and Clarke JA, 13 October 1993) at 15 per Kirby P; *GS v News Ltd* (1998) Aust Torts Reports ¶81-466 at 64,913-64,915 per Levine J.

[3] *Wainwright v Home Office* [2004] 2 AC 406 at 423 per Lord Hoffmann.

[4] See, for example, *Kaye v Robertson* [1991] FSR 62 at 70 per Bingham LJ; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 225-26 per Gleeson CJ; Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, 2008, [1.41].

[5] See, for example, *Wainwright v Home Office* [2004] 2 AC 406 at 418 per Lord Hoffmann.

association of the right to privacy with rights to private property has been remarkably tenacious. As Sedley LJ, writing extra-curially, has pithily observed:

> 'The protection of privacy was largely left by the common law to the law of trespass…If you had no property you had no privacy.' [Sedley, 2006]

The tort of trespass to land protects a plaintiff's possessory interest in land from any unwanted, direct encroachment by others, even if no damage results. In doing so, it has been accepted that the cause of action for trespass to land indirectly protects a plaintiff's privacy.[6] By contrast, the tort of private nuisance, which protects a plaintiff against indirect interferences with his or her use or enjoyment of land, has long held that there is no legally enforceable right to freedom from view or inspection and, by extension, no legally enforceable right to privacy. If a person were able to overlook the plaintiff's property, whether by natural or by artificial means, such a person committted no wrong. Somewhat paradoxically, the tort of private nuisance does not protect privacy as an incident of the possession of land.[7]

The importance the common law ascribes to the protection of private property has long been recognised and was emphatically reinforced by the judgment of Camden LCJ in *Entick v Carrington*.[8] In this case John Entick, a writer for allegedly seditious publications, brought proceedings against the King's Chief Messenger, Nathan Carrington. Carrington, along with three other messengers, broke into Entick's house to conduct a search and seizure of his private papers. Camden LCJ famously stated that:

> 'By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing…'[9]

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[6] *Plenty v Dillon* (1991) 171 CLR 536 at 647 per Gaudron and McHugh JJ; *T.C.N. Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 344-45 per Spigelman CJ.

[7] *Victoria Park Racing and Recreation Grounds Pty Ltd v Taylor* (1937) 58 CLR 479 at 494-96 per Latham CJ, at 507 per Dixon J.

[8] (1765) 19 State Trials 1030.

[9] (1765) 19 State Trials 1030 at 1066.

In the course of his judgment Camden LCJ also observed that 'the eye cannot by the laws of England be guilty of a trespass'.[10] The effect of Camden LCJ's *dictum* was to reinforce the view that, at common law, no wrong is committed by mere looking. So long as there is a direct encroachment upon the plaintiff's land, a degree of protection will be afforded to the plaintiff's land. In the absence of any direct encroachment on the plaintiff's land, no right to privacy will be acknowledged.

WHAT ONE CAN SEE, ONE CAN PHOTOGRAPH

The common law's view that no wrong is committed by mere looking was clearly established before the advent of photographic technologies in the nineteenth century. The challenge for the common law was how to respond to photography. If 'the eye cannot…be guilty of a trespass', what then is the position in relation to photography? The common law was not especially reflective about the particular problems potentially posed by photography. Instead, it simply extended to photography the principle that no wrong is committed by mere looking. As a consequence, it was possible to assert, up until the mid-1990s, that 'as a general rule, what one can see, one can photograph'. Implicit in the common law's acceptance of a general right to photograph, although unacknowledged by the courts, was an equation of the act of looking and seeing by a natural person with the acting of looking and seeing (and importantly, recording) by a camera; an equation of the human eye and the mechanical eye – the camera lens. It will become apparent that making this assumption explicit raises difficult questions about the common law's changing treatment of photographs as a form of invasion of privacy.

This general "right to photograph" and its interconnection with private property rights has developed through a series of cases. In *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co. Ltd*,[11] Sports and General Press Agency sought an injunction to restrain *Our Dogs* magazine from publishing photographs taken by a freelance photographer, Mr Baskerville, at the Ladies' Kennel Association dog show. The Ladies' Kennel Association had previously purported to confer on another freelance photographer, Mr Fall, the sole right to take photographs at its dog show. In turn, Sports and General

[10] (1765) 19 State Trials 1030 at 1066.

[11] [1916] 2 KB 880 (first instance); [1917] 2 KB 125 (appeal).

Press Agency purchased the right to publish photographs from Fall, acting on the basis that he had the exclusive photographic rights. Baskerville was a lawful entrant to the dog show. Although he was warned not to take photographs at the dog show, there was no term or condition attached to his entry which restricted his right to photograph. Sports and General Press Agency claimed that the Ladies' Kennel Association's possession of the venue carried with it the right to control the taking of photographs. At first instance, Horridge J held that the right to restrict the taking of photographs was not a property right attached to the possession of land but arose purely by virtue of contract. In the present case, the Ladies' Kennel Association had failed to achieve this by means of contract.[12] Thus, *Our Dogs*' use of Baskerville's photographs was permitted. An appeal to the Court of Appeal was unanimously dismissed.[13]

Victoria Park Racing and Recreation Grounds Pty Ltd v Taylor[14] is frequently cited as authority for the proposition that the common law of Australia does not recognise an enforceable right to privacy. For decades, it was considered to be an obstacle to the recognition of such a right. In that case, Victoria Park Racing and Recreation Grounds brought proceedings principally for private nuisance against George Taylor, Cyril Angles and the Commonwealth Broadcasting Corporation. Taylor occupied a property adjacent to the Victoria Park racecourse. He entered into an agreement, whereby the Commonwealth Broadcasting Corporation constructed a viewing platform on Taylor's property. On race days, Angles would sit on the viewing platform and, using a specially constructed telephone system, would call the races live on radio station, 2UW. Victoria Park Racing and Recreation Grounds claimed that this conduct interfered with its use and enjoyment of its land, as a result of which attendances (and therefore takings) were likely to be reduced. By majority, the High Court of Australia rejected the claim. They affirmed that freedom from view or inspection – privacy – was not an incident of the possession of land protected by the tort of private nuisance.[15] A person

[12] *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co. Ltd* [1916] 2 KB 880 at 883-84 per Horridge J.

[13] *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co. Ltd* [1917] 2 KB 125 at 127-28 per Swinfen Eady LJ, at 128 per Lush J.

[14] (1937) 58 CLR 479.

[15] *Victoria Park Racing and Recreation Grounds Pty Ltd v Taylor* (1958) 58 CLR 479 at 493-96 per Latham CJ, at 507 per Dixon J, at 523-25 per McTiernan J.

was even entitled to erect artificial structures in order to gain a vantage point over a plaintiff's property.[16] As Latham CJ evocatively stated:

> 'Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence… In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide. The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground.'[17]

In Latham CJ's view, then, the logical extension of the inability of 'the eye' to trespass is that a defendant is at liberty not only to look but also to describe what he or she sees. To similar effect in the same case, Dixon J claimed that 'the right to exclude the defendants from broadcasting a description of occurrences they can see upon the plaintiff's land is not given by law'.[18]

In *Bernstein v Skyviews & General Ltd*,[19] Baron Bernstein of Leigh brought proceedings for aerial trespass and 'invasion of privacy' against a firm of aerial photographers. In the late 1960s, Skyviews & General had taken an aerial photograph of Lord Bernstein's country estate and had attempted to sell it to him. Lord Bernstein responded by threatening legal proceedings. In the mid-1970s, another photograph was mistakenly taken of Lord Bernstein's country estate and was offered for sale to him. On this occasion, Lord Bernstein acted upon his legal threats.[20] Dismissing the action, Griffiths J (as his Lordship then was) characterised Lord Bernstein's claim thus:

> 'The plaintiff's complaint is not that the aircraft interfered with the use of his land but that a photograph was taken from it. There is, however, no law against taking a photograph, and the mere taking of a

[16] *Victoria Park Racing and Recreation Grounds Pty Ltd v Taylor* (1937) 58 CLR 479 at 507.

[17] *Victoria Park Racing and Recreation Grounds Pty Ltd v Taylor* (1937) 58 CLR 479 at 494 per Latham CJ.

[18] *Victoria Park Racing and Recreation Grounds Pty Ltd v Taylor* (1937) 58 CLR 479 at 510 per Dixon J.

[19] [1978] QB 479.

[20] *Bernstein v Skyviews & General Ltd* [1978] QB 479 at 483-84 per Griffiths J.

> photograph cannot turn an act which is not a trespass into the plaintiff's air space into one that is a trespass.'[21]

Not only did Griffiths J confirm that what one can see, one can photograph, his Lordship also suggested the relative seriousness which the common law ascribes to each of these types of conduct: an aerial trespass is sufficiently serious to attract legal liability but the 'mere' taking of a photograph is too ephemeral for legal concern.

Through a series of cases, Young J in the Supreme Court of New South Wales has consistently upheld the general right to photograph at common law. In *Bathurst City Council v Saban*[22] the Sabans sought to restrain the admission into evidence of photographs of their property in proceedings for public nuisance brought against them by Bathurst City Council. The photographs of the Sabans' backyard were taken either from a public street or, with the occupier's consent, from a neighbouring property.[23] There was no trespass to land committed in the taking of the photographs.[24] The Sabans claimed the photographs were an invasion of privacy.[25] Reviewing the authorities, Young J concluded that it had been consistently held that 'there is no tortious conduct involved in taking a photograph of someone else or someone else's property without their consent'.[26] As such, the Sabans could not object to the tendering of the photographs in evidence.[27]

In *Lincoln Hunt (Australia) Pty Ltd v Willesee*,[28] dealing with an interlocutory injunction to restrain the broadcast of footage taken in the course of a trespass on business premises by a television current affairs programme's camera crew,[29] Young J had to address a submission that the court lacked the jurisdiction to make such an order.[30] In the course of rejecting that submission, his Honour stated that:

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[21] *Bernstein v Skyviews & General Ltd* [1978] QB 479 at 488.
[22] (1985) 2 NSWLR 704.
[23] *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 705 per Young J.
[24] *Bathurst City Council v Saban* (1985)2 NSWLR 704 at 706 per Young J.
[25] *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 705 per Young J.
[26] *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 706 per Young J. See also *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 707-08 per Young J.
[27] *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 708 per Young J.
[28] (1986) 4 NSWLR 457.
[29] *Lincoln Hunt (Australia) Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 458-59 per Young J.
[30] *Lincoln Hunt (Australia) Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 461 per Young J.

> '…it is clear that one does not commit a tort merely by looking…Just as it is not a trespass just to look, so it is not a trespass to sketch what one sees…,or to broadcast what one sees…or to photograph it.'[31]

In *Raciti v Hughes*,[32] dealing with an *ex parte* application for an interlocutory injunction to restrain the alleged use of floodlights and video surveillance cameras by one neighbour against another in a proto-*Big Brother* fashion in West Pennant Hills[33], Young J asserted that 'as a general rule what one can see one can photograph without it being actionable'.[34] His Honour found that there was an exception to the general rule when the conduct of the defendants amounted to 'watching and besetting' – a common law offence akin to ambushing a person.[35]

Finally, in *Donnelly v Amalgamated Television Services Pty Ltd*[36] the New South Wales police force executed a search warrant on Donnelly's house, during the course of which a video recording was made. Donnelly was shown on the video being arrested in his bedroom, dressed only in his underpants. The video was not shown in court but was somehow leaked to Channel Seven. Part of the footage was used to promote an upcoming story on the current affairs programme *Today Tonight*.[37] Donnelly sought an injunction to restrain the broadcast of the footage. Hodgson J (as his Honour then was) granted an injunction in limited form, only restraining the broadcast of the footage taken inside the house. Channel Seven was at liberty to screen the footage not only taken from the public road but also the footage taken on the property of the events which could have been observed from the public road – because no wrong is committed at common law by looking at, photographing or filming events occurring on private property which are open to public view.[38]

These cases cumulatively suggest that, up until the late 1990s, the right to privacy frequently arose in the context of claims for trespass to land or private nuisance, reinforcing the enduring common law perception of privacy arising

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[31] *Lincoln Hunt (Australia) Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 461-62 per Young J.

[32] (1995)7 BPR 14,837.

[33] *Raciti v Hughes* (1995) 7 BPR 14,837 at 14,837 per Young J.

[34] *Raciti v Hughes* (1995) 7 BPR 14,837 at 14,840 per Young J.

[35] *Raciti v Hughes* (1995) 7 BPR 14,837 at 18,840-14,841 per Young J.

[36] (1998) 45 NSWLR 570.

[37] *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 at 571-72 per Hodgson J.

[38] *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 at 576 per Hodgson J.

primarily in the context of private property. They also show that, up until that time, courts consistently refused to recognise that an invasion of privacy had occurred by the taking and publication of a photograph in circumstances where the human eye could also look and see. Therefore, potentially invasive types of conduct – looking, seeing, photographing, publishing – were all considered to be equivalent from the perspective of legal liability.

TOWARDS A COMMON LAW RIGHT TO PRIVACY

In order to understand how Anglo-Australian law has changed its attitude towards photography as a practice highly invasive of privacy, it is necessary to understand the broader developments in relation to legal protection of privacy over the last decades. Although courts consistently concluded there was no enforceable right to privacy in the United Kingdom and Australia, there was some dissatisfaction with this state of affairs. In *Kaye v Robertson*[39] the English Court of Appeal was confronted with an application for an interlocutory injunction to restrain the publication of an interview, accompanied by photographs taken of *'Allo 'Allo* star Gorden Kaye, convalescing in hospital following a motor vehicle accident in which he sustained brain damage. A reporter and a photographer from the tabloid newspaper *The Sunday Sport* had managed to gain entry to Kaye's hospital room, avoiding the security arrangements. There being no enforceable right to privacy, Kaye was compelled to rely upon an unusual assortment of causes of action – defamation; battery; passing off; and injurious falsehood – none of which adequately addressed the right that had really been infringed. The court was able to grant relief on the basis of injurious falsehood. In the course of their separate reasons for judgment, all the judges remarked upon the unsatisfactory level of protection afforded by the common law to privacy but found that only the legislature could now remedy this lacuna.[40]

Despite these expressions of dissatisfaction, the legislature did not introduce an enforceable right to privacy and the courts did not revise their view as to the position at common law. The impetus for the development of direct protection of personal privacy in the United Kingdom was the passage

[39] [1991] FSR 62.

[40] *Kaye v Robertson* [1991] FSR 62 at 66 per Glidewell LJ, at 70 per Bingham LJ, at 71 per Leggatt LJ.

of the *Human Rights Act* 1998 (UK), which introduced the *European Convention on Human Rights* into domestic law in that jurisdiction.[41] Like other human rights instruments which also protect privacy,[42] the *European Convention on Human Rights* is premised upon the innate dignity of the individual. In the context of privacy, this has had the profound impact of shifting the *locus* of privacy from the property possessed by an individual to the individual himself or herself.

However, the *Human Rights Act* 1998 (UK) did not directly introduce an enforceable right to privacy. Rather, under the *European Convention on Human Rights* there is a right to 'private life', protected under Art. 8, as well as the right to freedom of expression, protected under Art. 10, and courts in the United Kingdom need to ensure that these rights are adequately protected by domestic law and are appropriately balanced against each other. The way in which courts in the United Kingdom responded was to adapt the existing equitable cause of action for breach of confidence.[43]

Prior to the introduction of the *Human Rights Act* 1998 (UK), the equitable cause of action for breach of confidence had been used for several decades to provide protection against the disclosure of personal secrets. This dates back to the decision of Ungoed-Thomas J in *Argyll v Argyll*,[44] in which his Lordship restrained the Duke of Argyll from disclosing to the tabloid newspaper *Sunday People* information about the Duchess of Argyll's sexual exploits.[45] The Duke's interview was given in the course of acrimonious divorce proceedings[46] and in retaliation to an earlier interview given by the Duchess to the *Sunday Mirror*, concerning the Duke's health and financial affairs.[47] During the mid-1990s, prefiguring subsequent developments in legal thinking, breach of confidence was extended to protect against the disclosure

[41] *McKennitt v Ash* [2008] QB 73 at 80 per Buxton LJ; *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 at 686 per Eady J.

[42] *International Covenant on Civil and Political Rights* Art. 17; *Universal Declaration of Human Rights* Art. 12.

[43] *A v B plc* [2003] QB 195 at 202 per Lord Woolf CJ; *Campbell v M.G.N. Ltd* [2004] 2 AC 457 at 465 per Lord Nicholls of Birkenhead; *H.R.H. Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 at 114 *per curiam*; *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 at 686 per Eady J.

[44] [1967] Ch 302.

[45] *Argyll v Argyll* [1967] Ch 302 at 315 per Ungoed-Thomas J.

[46] *Argyll v Argyll* [1967] Ch 302 at 316-17 per Ungoed-Thomas J.

[47] *Argyll v Argyll* [1967] Ch 302 at 330 per Ungoed-Thomas J.

or publication of photographs.[48] In his influential *dicta* in *Hellewell v Chief Constable of Derbyshire*,[49] Laws J suggested that

> '[i]f 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.'[50]

There are several points to be made about Laws J's *dicta*. First, as equity is a conscience-based jurisdiction, the motive of the photographer and any subsequent publisher, the surreptitious nature of the taking of the photograph and the lack of consent may all be relevant to any liability, defences and remedies for breach of confidence. This is in marked contrast to the approach of common law causes of action, such as trespass to land and private nuisance, where such considerations are largely irrelevant. Secondly, Laws J accepted that an 'act' may be private, even if it occurs where it might be observed and photographed. Consequently, his Lordship did not accept that simply because an act is capable of being viewed that it is permissible to photograph it and to publish it. This marks a departure from the nexus of privacy and private property and the general "right to photograph". Thirdly, and related to this, Laws J importantly acknowledged the impact of technology – the camera can be used to see more than the human eye. Therefore, his Lordship suggested that different legal consequences should attach to the taking and the disclosure of a photograph. Laws J did not treat the camera as equivalent to the human eye and does not elide acts of looking, seeing, photographing and publishing. It will become apparent that Laws J's *dicta* have been particularly influential in the subsequent development of a substantial jurisprudence in the United Kingdom on privacy and photography.

Although there is no general, enforceable right to privacy in Australian law, courts, legislatures and law reform bodies have been actively considering

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[48] One of the problematic features of using breach of confidence as a means of protecting photographs from disclosure or publication is that it requires photographs to be treated as a type of 'information'. The difficulties associated with this proposition are too complex to be discussed adequately in this article.

[49] [1995] 1 WLR 804.

[50] *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807 per Laws J.

the recognition of such a right over the last decade. Both the Australian Law Reform Commission and the New South Wales Law Reform Commission have had recent investigations into this issue (NSWLRC, 2007; ALRC, 2008). As the only Australian jurisdictions with human rights legislation, both the Australian Capital Territory and Victoria seek to protect privacy as a right based upon the dignity of the individual.[51] In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[52] the High Court of Australia revisited its earlier refusal to acknowledge an enforceable right to privacy in a case concerning the threatened broadcast of footage of a possum abattoir taken in the course of a trespass to land. A number of the judges suggested that they were willing to recognise a tort of invasion of privacy but not for the benefit of a corporate entity such as Lenah Game Meats Pty Ltd,[53] privacy being a right founded upon the dignity of the individual.[54] Significantly, in the course of his judgment Gleeson CJ endorsed Laws J's *dicta* from *Hellewell v Chief Constable of Derbyshire* but noted that what constituted a 'private act' could be problematic.[55] Further eroding the nexus between privacy and private property, Gleeson CJ analysed the problematic nature of the concept of privacy thus:

> 'An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.'

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[51] *Human Rights Act* 2004 (ACT) s 12; *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 13.

[52] (2001) 208 CLR 199.

[53] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 231 per Gaudron J, at 248-50, 257-58 per Gummow and Hayne JJ. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 225-26 per Gleeson CJ ('The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.')

[54] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 per Gleeson CJ.

[55] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 224.

Direct privacy protection is in a state of flux in Australia. It is unclear how privacy protection will develop but, given the level of interest from a range of agencies, it seems likely some progress will occur.

The process of severing the link between privacy and private property and reconstituting privacy as a value attached to the person is a relatively recent development in the United Kingdom and Australia. However, this process is more well-established in the United States. It can be traced back to the highly influential article by Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' [1890]. Their significant contribution to the development of privacy protection was to undertake an extensive review of the available common law and equitable causes of action and to discern in them an existing right to privacy, being 'the right to be let alone' [Warren & Brandeis, 1890]. So described, the right to privacy was not an incident of the possession of private property but a generalised right common to all persons. Warren and Brandeis make clear that their impetus for thinking and writing about privacy was the capacity of photographs to intrude upon privacy. They evocatively state that:

> '[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops".' [Warren & Brandeis, 1890]

Thus, the consistent theme unifying the emergence of direct privacy protection, in their varying degrees, in the United States, the United Kingdom and Australia appears to be the recognition that privacy may be a right valuable to the individual, without any necessary attachment to the possession of private property.

PHOTOGRAPHS AS HIGHLY INTRUSIVE UPON PRIVACY

As a result of this larger context in which direct privacy protection is developing, particularly in the United Kingdom, there have been important changes in the treatment of photography as a practice intrusive upon personal privacy. If privacy is to be properly protected as a human right, the general "right to photograph" is insufficiently sensitive to claims of privacy outside rights of property and needs to be revisited. This has seemingly occurred in the

United Kingdom in the last decade through a series of cases involving the publication of photographs in the mass media.

In *Theakston v M.G.N. Ltd*,[56] a television presenter and radio disc jockey, Jamie Theakston, sought an injunction against a tabloid newspaper, *Sunday People*, restraining it from publishing an article accompanied by photographs of him in a compromising position with several prostitutes in a Soho brothel. The photographs were taken late at night when Theakston was intoxicated. The photographs were staged. There was an initial attempt at blackmail. When Theakston refused to pay, the story and the photographs were provided to *Sunday People*.[57] In dealing with the application, Ouseley J found that the publication of a verbal description of what occurred at the brothel should not be restrained.[58] His Lordship found that the brothel was a public place, which members of the public could enter.[59] The encounters with the prostitutes were transitory, such that no obligation of confidence and no reasonable expectation of privacy arose.[60] Ouseley J also found that, given that Theakston was a role model to young people, there was a public interest in publication.[61] Moreover, his Lordship formed the view that the prostitutes' right to freedom of expression, as well as that of the newspaper publisher, should prevail over Theakston's right to privacy.[62] However, his Lordship dealt separately with the photographs as a form of information. Ouseley J concluded that:

> '…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 extends 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 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.'[63]

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[56] [2002] EMLR 22.

[57] *Theakston v M.G.N. Ltd* [2002] EMLR 22 at 402-03 per Ouseley J.

[58] *Theakston v M.G.N. Ltd* [2002] EMLR 22 at 422-23 per Ouseley J.

[59] *Theakston v M.G.N. Ltd* [2002] EMLR 22 at 419 per Ouseley J.

[60] *Theakston v M.G.N. Ltd* [2002] EMLR 22 at 419-20 per Ouseley J.

[61] *Theakston v M.G.N. Ltd* [2002] EMLR 22 at 421.

[62] *Theakston v M.G.N. Ltd* [2002] EMLR 22 at 421-22 per Ouseley J.

[63] *Theakston v M.G.N. Ltd* [2002] EMLR 22 at 423-24.

His Lordship further stated that the publication of the photographs would constitute a particularly humiliating and damaging intrusion into Theakston's private life. Ouseley J found that Theakston had a reasonable expectation of privacy that he would not be photographed when he was inside the brothel. Therefore, his Lordship restrained the publication of the photographs of Theakston's attendance at the brothel, even though a verbal description of the same event was permitted to be published.[64]

There are several points to be made about Ouseley J's analysis in *Theakston v M.G.N. Ltd*. It is novel to treat the verbal and photographic depiction of the same event as different categories of information, allowing one to be published and forbidding the other. It can only be achieved because there has been a departure from the general "right to photograph". This development facilitates a distinction between the act of looking, seeing and describing an event and even taking the photograph of the event on the one hand, and the act of publishing the photograph of the event on the other hand. The general "right to photograph" did not discriminate between the acts of taking and publishing the photograph. Yet *Theakston v M.G.N. Ltd* is primarily concerned with what can be published. It is concerned only with the attachment of legal liability to the publication of a photograph, not to any of its precedent steps. In making this distinction, Ouseley J accepts that different, indeed conflicting, expectations of privacy can arise, depending upon whether one is merely looking, seeing and describing an event or whether one is photographing an event.

These themes have been developed in subsequent cases.[65] For example, in *Douglas v Hello! Ltd (No. 3)*,[66] the high-profile case in which Michael Douglas and Catherine Zeta-Jones sued *Hello!* magazine for publishing photographs of their wedding, the exclusive rights to which they had already sold to *Hello!*'s competitor, *O.K.* magazine, the Court of Appeal observed that:

> '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 voyeur would be the more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a

[64] *Theakston v M.G.N. Ltd* [2002] EMLR 22 at 423-24.

[65] For further examples, see *D v L* [2004] EMLR 1 at 8 per Waller LJ; *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 at 689-91 per Eady J.

[66] [2006] QB 125.

> 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 photographs to scenes where those photographed could reasonably expect that their appearances or actions would not be brought to the notice of the public.'[67]

Again, these *dicta* demonstrate the treatment of photography as a different kind of information, one which is more injurious to a plaintiff's privacy and one to which different legal consequences should attach. They also differentiate between the power of the human eye and the camera lens to invade personal privacy, finding that the latter certainly can intrude where the former cannot. There is also evident in these *dicta* a sense of moral panic about the use and impact of photography as tantamount to voyeurism, which indicates the continuity of concern about photographs, dating back at least to Warren and Brandeis.

One of the significant features of the recent privacy jurisprudence emerging from the United Kingdom is the revision of the view that no liability attaches to the taking and the publication of a photograph of a person or an event in a public place or visible from a public place. This had been crucial to the general "right to photograph", which had prevailed at common law for several centuries. Yet in *Campbell v M.G.N. Ltd*,[68] the high-profile case involving supermodel Naomi Campbell's proceedings against *The Daily Mirror* newspaper for the taking and publication of photographs of her leaving a 'Narcotics Anonymous' meeting, the House of Lords departed from this position. For instance, in his speech, Lord Hoffmann stated that:

> '…[t]he famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent. As Gleeson CJ said in *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226, para 41: "Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people."
>
> 'But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large…
>
> 'In my opinion, therefore, the widespread publication of a photograph of someone which reveals him to be in a situation of

[67] *Douglas v Hello! Ltd (No. 3)* [2006] QB 125 at 157 *per curiam*.
[68] [2004] 2 AC 457.

> humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information. Likewise, the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) may in itself by (sic) such an infringement, even if there is nothing embarrassing about the picture itself…'[69]

His Lordship draws a distinction between the act of taking the photograph, which need not attract legal liability, and the act of publishing the photograph, which might entail legal consequences. People must tolerate having their photograph taken without their consent but may now complain about its publication. Whether or not such a photograph will attract liability no longer depends upon whether the person depicted was present in, or visible from, a public place but rather the reaction of the person depicted to the context in which the photograph appears.

A similar view was taken in the same case by Baroness Hale of Richmond. Her Ladyship stated that, in order to attract liability:

> '[t]he activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it...'

However, Baroness Hale of Richmond concluded that the photographs in question were unnecessary to the story and vividly reinforced the disclosure of highly personal, medical information.[70] Her Ladyship's position was the majority one.[71] Lord Hoffmann's dissenting view was that the photographs were essentially banal and not sufficiently offensive to give rise to legal liability.[72] There was a consensus in *Campbell v M.G.N. Ltd* on the principles

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[69] *Campbell v M.G.N. Ltd* [2004] 2 AC 457 at 477-78.

[70] *Campbell v M.G.N. Ltd* [2004] 2 AC 457 at 501-02.

[71] *Campbell v M.G.N. Ltd* [2004] 2 AC 457 at 491-92 per Lord Hope of Craighead, at 505 per Lord Carswell.

[72] *Campbell v M.G.N. Ltd* [2004] 2 AC 457 at 478. See also *Campbell v M.G.N. Ltd* [2004] 2 AC 457 at 468-69 per Lord Nicholls of Birkenhead.

to be applied; the differences emerged from the application of the principles to the facts.

However, in light of the European Court of Human Rights' decision in *Von Hannover v Germany*,[73] the principles identified by the House of Lords in *Campbell v M.G.N. Ltd* may not adequately protect personal privacy, particularly Baroness Hale of Richmond's suggestion that no reasonable expectation of privacy arises in relation to a celebrity's "popping out to the shop for a bottle of milk". In *Von Hannover v Germany* Princess Caroline of Monaco brought proceedings in the German courts against a number of German magazines for the publication of photographs showing her engaged in a range of banal activities, such as shopping, skiing, going to the beach, horse-riding and dining with her partner in a restaurant courtyard. Princess Caroline was not satisfied with the decisions of the German courts, so she took her case to the European Court of Human Rights. The European Court of Human Rights found that the German courts had failed adequately to protect Princess Caroline's right to a private life under the *European Convention on Human Rights* Art. 8. Even though Princess Caroline was a celebrity, she was entitled to a private life; even though the photographs of Princess Caroline were taken when she was present in, or visible from, a public place, she was entitled to a 'zone' of privacy, even when she was in public. The European Court of Human Rights concluded that the German courts had given too much weight to the spatial dimension of privacy and insufficient weight to Princess Caroline's legitimate expectation of privacy, which inhered in her person, rather than the place where she happened to be.[74] Given the role of the European Court of Human Rights' jurisprudence in shaping the jurisprudence in the United Kingdom under the *Human Rights Act* 1998 (UK), it is to be expected that the decision in *Von Hannover v Germany* will further inform the development of United Kingdom law on this issue.

Indeed, this has already begun to occur. For instance, in *Murray v Express Newspapers plc*[75] the English Court of Appeal found that it was at least arguable that the child's right to privacy had been infringed. In this case David Murray, the two-year-old son of author J.K. Rowling, was surreptitiously photographed by a freelance photographer working for a photographic agency, Big Pictures. At the time, Murray was being pushed down an Edinburgh street

[73] (2005) 40 EHRR 1.

[74] *Von Hannover v Germany* (2005) 40 EHRR 1 at 60-61.

[75] [2008] 3 WLR 1360. *Cf Hosking v Runting* [2005] 1 NZLR 1.

in a stroller (or 'pushchair') by his famous mother.[76] The English Court of Appeal found that the trial judge erred in finding that Master Murray could have no reasonable expectation of privacy, even though he was in a public place,[77] and that he had no arguable case.[78] The cases dealing with the imposition of liability for invasion of privacy by photographs taken of plaintiffs on public streets or in other publicly visible places demonstrate that the law in the United Kingdom is divesting itself of the nexus between privacy and private places and is beginning to establish liability on the basis of the individual's reasonable expectations of privacy in the given circumstances. It remains to be seen whether Australian law will develop along these lines, although Gleeson CJ's *dicta* in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* and the impetus for law reform in relation to personal privacy suggest it may be a distinct possibility.

CONCLUSION

In the last decade, Anglo-Australian law has departed from its traditional reluctance to provide direct legal protection of personal privacy. These legal systems are no longer content to allow privacy to be identified closely with private property. They have started to address the inadequacy of their previously established position in order to protect privacy as a fundamental human right. In doing so, they have begun to reconstitute their conceptualisation of privacy, from a value associated with the possession of private property to privacy as a human right centred upon, and inherent in, the individual. The *locus* of privacy has shifted from the fixed, stable site of property to the moveable site of the person. In this context, the elision of the acts of looking, seeing, photographing and publishing became less tenable. In this time, and related to this, there has been a crucial but unacknowledged *volte face* on the courts' treatment of privacy and photography. It is no longer true to assert that there is a general "right to photograph" – that what one can see, one can photograph. One's right to photograph a person now is not dependent upon the location of the person but upon the expectations the person in question might reasonably have in the circumstances. A general "right to photograph" has the benefit of certainty but the disadvantage of providing

[76] *Murray v Express Newspapers Plc* [2008] 3 WLR 1360 at 1364-65.
[77] *Murray v Express Newspapers Plc* [2008] 3 WLR 1360 at 1380.
[78] *Murray v Express Newspapers Plc* [2008] 3 WLR 1360 at 1385.

inadequate protection of privacy. The evolving position, allowing the right to privacy to be asserted even when a photograph is taken of a person in a public place, is less certain but more sensitive to claims of personal privacy. Whereas the application of a general "right to photograph" did not discriminate between the acts of looking, seeing, photographing and publishing, taking the view that none attracted legal liability, now distinctions are being drawn between these acts and a more nuanced approach to the legal liability for invasions of privacy by photographic means is emerging.

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Chapter 6

"YOUR WORDS AGAINST MINE": STATES OF EXCEPTION IN POPULAR LEGAL CULTURE

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ABSTRACT

In this article, I will explore the media of law in popular legal culture as an arena for alternative legal practices. This will be done through an analysis of one of its principles, the principle of "your words against mine", i.e. examples of states of exception that declare a communicative stand-still between two parties on the basis of the conflicting character of their contested accounts. Being able to define a conflict in terms of "your words against mine", which has no precise counterpart in official legal theory, is accomplished through a discursive strategy cultivated in the popular legal culture. From a partial point of view it can also be used in order to gain an advantage in a conflict.

INTRODUCTION [1]

A fight broke out between a man and a woman late one night in January 2006. The scene was the busy bar, Crazy Horse, in the city centre of

[1] I want to acknowledge the helpful critical comments by two anonymous reviewers and the help with correcting my English by Sable Helvie.

Stockholm, Sweden. The man in the fight was the doorkeeper at the Crazy Horse. The woman was the Chairman of the Social Democratic Youth of Sweden (SSU), who visited the bar with a number of friends and colleagues. The following day, leading newspapers ran the following headlines:

Excerpt 1

> SSU-boss placed in drunk cell. *Words stand against words* after Anna Sjödin was caught suspected of assaulting a civil servant (SSU-bas sattes i fyllecell. *Ord står mot ord* efter att Anna Sjödin gripits misstänkt för våld mot tjänsteman) [Dagens Nyheter, January 30 2006] (emphasis added).

Excerpt 2

> *Words stand against words* in the bar row *(Ord står mot ord* i krogbråket) [Dagens Nyheter, January 31, 2006] (emphasis added)

The employees of the bar brought action against the woman. When the trial was initiated at the district court of Stockholm in September the same year, the same formulations surfaced in the headlines:

Excerpt 3

> *Words stand against words* (*Ord står mot ord)* [Svenska Dagbladet September 27, 2006] (emphasis added).

Excerpt 4

> *Words vs. words* when the Sjödin trial is initiated (*Ord mot ord* när Sjödinrättegång inleds) [Sveriges Radio, September 27, 2006] (emphasis added).

The woman was later prosecuted on a number of counts: assaulting a civil servant, insult, and arbitrary conduct. In December, following a district court decision, the woman was fined. The same day she published a public letter of

resignation from her post as Chairman of SSU. In her letter, the very same formulations occur again, but this time with a different twist:

Excerpt 5

> For me the court's decision did not prove that I said or did anything. On the contrary, in a situation where *words stand against words,* the court has chosen to completely accept the story by the doorkeeper and his colleagues. It makes me miserable. It is unbelievably humiliating. (För mig handlade inte domen om att det är bevisat att jag sagt eller gjort något. Däremot har rätten i en situation där *ord står mot ord* valt att fullständigt köpa vaktens och hans kollegors berättelse. Det känns bedrövligt. Där ligger en sådan ofattbar förnedring.) [Dagens Nyheter, December 16, 2006] (emphasis added)

Situations including the expression "your words against mine"[2] are paradoxical and multifaceted. The very expression "your words against mine" does not belong to any formal juridical vocabulary. Juridical theories about testimonies and epistemological status, however, can explain similar standstills in social relations as well as explore relations between discursive actions such as claiming, presenting evidence and passing judgment (Walton 2008). The expression is an example of quasi juridical discourse, a discourse that relates legal matters outside of the formal legal institutions, in the realm of what we, following Friedman (1989), think of as popular legal culture. "Your words against mine" situations include many contradictions and dilemmas. The expression is, in itself, puzzling in many ways and raises a host of questions:

- What can this expression mean?
- When, where and by whom can this expression be used?

[2] "Ord står mot ord": In Swedish this expression conveys a situation with contested accounts. The quality of disagreement in the accounts is reduced to a matter of words; the very words that are used are the content of the disagreement. The expression in Swedish becomes neutral, not just in the sense that by using the expression one assumes no stance in a conflict, but also in the sense that agency is unspecified in terms of pronouns, gender or any other socio-cultural category. This may be contrasted to the English usage in expressions such as "his words against hers" or "he said, she said". In English, however, there are other similar expressions that describe a state of disagreement in a gender neutral, yet pronoun specific way, e.g. "One person's word against another's" or "your words against mine" where the persons involved are a bit more specified (you and me) yet not socially identified in detail. In this analysis, I will use the English expression "your words against mine" as the translation of the Swedish expressions "words vs. words" or "words stand against words".

- What are the characteristics of the contexts in which the expression can be used?
- What is the function of this expression in these particular situations?
- What are the possible pro and cons of making this formulation explicit?
- What is the legal and/or popular legal status of an expression like this?

In this article I will focus on some of these questions. The aim of the analysis is to explore interpretations of the expression "your words against mine" based on various contexts of use related to the specific case at Crazy Horse. The central problems concern the possible uses and interpretations of the expression "your words against mine" in popular legal contexts and explore which strategies are used by actors in order to promote or combat particular interpretations. The analysis will follow three steps. First, I will interpret the expression as a principle of journalistic neutrality which has a specific role to play in a particular dimension of popular legal culture, i.e. the media. I will show in detail how this principle of neutrality is accomplished. Secondly, I will identify another context (the public letter of resignation) in which the same expression is used by one of the contested parties. Finally, these interpretations and strategies are related to an eclectic selection of theoretical resources, a theoretical smorgasbord, if you like. I will theorize the expression "your words against mine" from the point of view of communication theory, media studies, discourse and law. The discussion will initially be put into the frame of popular legal culture, particularly identifying the role played by media in the process of reporting on legal matters. The analysis is a contribution to discourse theory and law, as well as to culture and the law, and to media studies and communication theory.

The particular case in question is based on an event taking place in a North European socio-cultural context of dispute, but I believe that the argument about communication, media and law carries a more general validity as an example of a communicative state of exception.

POPULAR LEGAL CULTURE AND THE MEDIA

The media, as noted by Lawrence Friedman in his seminal article "Law, Lawyers, and Popular Culture" [Friedman], occupies an important part of what we define as popular legal culture. The media functions as an informal

juridical process where various cultural representations of legal affairs and the law become public and visible [Macaulay]. As an informal juridical process, the media may or may not affect legal culture proper, an issue which is at the core of the law and society movement and which will be touched upon below. Media is without dispute one of the most important institutions for the public negotiation of attitudes, norms and values attached to the law. This is where ethical, political and social consensus as well as controversy and dissent are enacted.

By "legal culture", Friedman [Friedman, p. 1579] refers to the "ideas, attitudes, values, and opinions about law held by people in a society". In distinguishing "popular legal culture" from "legal culture", he identifies two senses. The first sense concerns ""ideas and attitudes about law which ordinary people or more generally lay people hold" (ibid, p. 1580) and in the second sense one can think of "books, songs, movies, plays and TV shows which are about law and lawyers, and which are aimed at a general audience" [Greenfield, Osborn & Robson]. In this definition he does not explicitly mention the media, although from the rest of his article it is clear that this is included in the second sense [Carrillo 2007]. Popular legal culture in this sense refers to many forms of cultural expression and to the "consumers of the legal system" as Friedman likes to call the users. In science studies it is common to talk of "public understanding of science" [Irwin & Wynne] [Irwin & Michael 2003] and we could make an analogy to law as the "public understanding of law".

Media as a setting for popular legal culture shows plenty of ambiguity. The expression "your words against mine" is part of everyday discourse as well as part of the symbolic production in the media. The examples mentioned initially are taken from the media, an institution for the representation of norms and values that peculiarly both are and are not part of legal culture. The media is legal in the sense that some actors with a legal standing, such as the police and public prosecutors, actually are involved at an early stage of the process of media representation. These actors are confronted and interviewed in the media and thus explicitly become part of the informal juridical process through how the media represents them. The expression is part of popular legal culture since making verdicts of any kind is not the duty of the media in a state governed by law. A situation involving the expression "your words against mine", or a situation described as such using other similar expressions, is paradoxically both a legal and a popular legal event: it cannot (yet) be decided upon legally because it takes place before any legal action has been initiated. But in order to be part of legal action, however, the situations have to

qualify as legitimately legal. In order to qualify as a legitimate legal event it has to be identified as one on the basis of a preliminary investigation made by a public prosecutor. This identification is done proximately close to the events but prior to any court proceedings. Even if the very expression "your words against mine" does not have any formal legal standing (although with counterparts in the theory of testimony and epistemology), the condition to which it refers has a legal standing which is the very business of law. Based on these assumptions, we may suggest that in a legal sense a "your words against mine" situation is somewhat of *a communicative state of exception* over which the court cannot rule. The expression takes place in time prior to court processes, yet it is already objected to some legitimate, albeit preliminary, legal attention (cf. above). Popular legal culture thrives precisely on this indeterminacy. The fact that it constitutes a state of exception explains why the expression is missing in legal dictionaries and in the professional vocabulary of law (cf. above about testimony). Talking of "your words against mine" would be grossly redundant and unsophisticated in a context which is permeated by contested accounts, by the authority of legal professionals and by the access to relevant procedures for solving these disputes. These contested versions are the very objects of the law. Using an expression like "your words against mine" in a legal context would be to overly reduce the complexity of what the law and the court is all about. The expression can be used for various purposes before and after court proceedings, which we will see in the analysis.

CASE STUDY: "WHAT ACTUALLY HAPPENED AT THE BAR IS STILL UNCLEAR"

The analysis of the Crazy Horse case contains several methodological problems. There are problems, for instance, with the representation of the details of the event as these are based on media accounts. This problem of representation is central to the problem attended to in this analysis. Any attempt at describing even the most schematic contours of this event (or, in principle, any other event) runs into the difficulty of imposing an interpretation on a series of circumstances by forcing dispersed fragments together. These fragments are then converged into a narrative structure that functions in a daily newspaper, in a court procedure, or in a scientific article. This methodological

difficulty concerning interpretation is a general condition of all *post facto* accounts which determines first order testimonies and second order witnessing, as well as attempts to make disinterested reportage or analysis. When I now resume the task of describing a few more details of the case, I run into the same risk of representation as the media and the court when they make their accounts. I note this as a reminder about methodological reflexivity.

First of all, some more information about the main actors can be given. This is basically what we learn about the contestants from the media accounts: The man, who is most often anonymous, is of Iranian descent, working part time as a doorkeeper at the restaurant Crazy Horse. According to the accounts in the media, he is also an intern working in a North Stockholm general hospital. The woman has had the position of Chairman for the youth party SSU since almost a year before the event. It is striking that we learn substantially more about the woman than about the man from the accounts. This may or may not be explained by her being a more official person about whom more things are generally known by the public. Her political style, for instance, is described by "a leading person in the party" as "straight and tough": "She talks without ornaments, a practical and forcible politician" [Dagens Nyheter 31/1/06]. The woman has a background as a rugby player in Sweden's national team. When she accepted the role as Chairman, she made an analogy with sports, characterizing politics as a "tough game" in analogy with rugby (ibid). Upon accepting office, she promised that the youth party SSU would be "a blowtorch in the ass of the party" (ibid). She came to office at a time when the youth party had been seriously challenged by a series of scandals involving irregular accounting practices, which led to an immediate decrease in the number of members.

It is certainly difficult to describe exactly what happened that night at the Crazy Horse, and to determine exactly who said what to whom, and in what emotional key and with what physical force. Obviously, it is the object of the court proceedings to try to determine the extent to which these actions happened or not. The very indeterminacy of the events is also what is behind the expression at focus, "your words against mine". The accounts are contested and the media apparently do their best to report about this in what they assume is a balanced way, although any kind of representation is always more or less partial.

With the risk of running cynical, I would say that what really happened is not the issue in this particular analytic context. For the court proceedings it is certainly important, but for the purposes of analysis it is not. It is not the case because we cannot from this position know anything about what took place

and our interest lies mainly not therein, but in exploring the potential meanings and interpretations of a certain expression. This is where we risk cynicism. The expression in its various contexts of use conveys particular attitudes in relation to the task of finding and validating facts which the media (and later one of the contestants, cf. below) assume.

Another methodological difficulty concerning the reproduction of a reasonably fair version of the event is that the accounts are contested and that all the witnesses brought in are supporting either one of the two versions. There is no aim towards consensus on which a fair representation could be built. We thus enter into the fuzzy domain of claims and counter claims, accounts and counter accounts provided by the actors and disseminated by the media. Here are some examples: The woman claims that the doorkeeper "jumped" her after she questioned the acquittal of her friend from the bar. In her report to the police, as well as in her formal legal report, she accuses him for physically abusing her with a baton and yelling sexist words at her. The doorkeeper, on the other hand, claims that the fight started when the bartender refused to serve the group more drinks. He claims that the woman acted "aggressively" and that she yelled sexist and racist remarks at him. According to him, she also threw a fist into his face as well as attempted to take a strangle-hold on him. The paper reports her allegedly yelling "jävla svartskalle" at him. This expression contains a swear word and a derogatory name used for immigrants based on the black color of their hair (and skin). As one of the newspapers succinctly summarizes the event: "What actually happened at the bar is still unclear" [Dagens Nyheter 30/1/06]. This summary made by the newspaper is also valid in this particular analytic context, with the important difference that I am more inclined to explore the potentialities of this interpretive gap and its legal and non-legal implications, rather than in finding out "what actually happened".

The employees at the bar brought action against the woman. With her celebrity status attorney, the woman responded by making a counter action a few days later. The procedures in district court started half a year later. In December of the same year, the judicial decision sentenced the woman to pay fines on all counts. She resigned from her post as Chairman and has since then, without success, been trying to appeal against the sentence.

In the following two parts of the analysis, we will explore these interpretations of the expression through the communicative strategies that are used. The analysis is based only on a small segment of popular legal culture, as well as tiny bits and pieces from the newspapers. For the purposes of a more comprehensive analysis, however, we would need to explore also TV and

radio as well as blogs and news reports on the web. This lies outside of this particular analysis as does the comparison with detailed accounts of the court proceedings.

FIRST CONTEXT OF USE: "YOUR WORDS AGAINST MINE" AS A STANCE OF JOURNALISTIC NEUTRALITY

The examples given above illustrate two different contexts for using the expression "your words against mine". The first context is when the expression is used by the media in Excerpts 1-4. The second context is when the expression is used in Excerpt 5 by one of the contested parties. In the following analysis we are interested in understanding the different conditions for using the expression and the meanings attached to these expressions.

The expression "your words against mine" was first used (Excerpts 1 and 2) by the media in the proximity of the event in question. Clearly the media, as indicated above, could not at this stage (nor later) discern the most truthful story of the accounts given, but could just accept that various competing versions of the event circulated. The versions of the event differed between the two main parties and their attorneys. At this stage the task of the media was to report to the public that a fight involving two parties had taken place. If it would not been the case that one of these parties was a high profile public person, the event would barely have been noticed. The media did report on the event and did so with some detail, expediency and thoroughness given the public identity of one of the parties. It was too early to declare who was right and who was wrong, neither was this the duty of the media. An indeterminate situation where the truth of the events could not be corroborated is emphasized by the fact that one of the parties is a public person. This leads to special measures of precaution from the point of view of the media, in order for them to proceed in a safe way that explicitly avoids intervention in a legal matter. The principle of non-intervention by media in legal matters is general but is perhaps more urgently called for when the case involves a public figure, such as the Chairman of SSU. It is not only out of a possible fear that a wrongful conduct would lead the public person taking action against the newspaper in case their initial account was wrong; it is also a matter of establishing and maintaining the newspaper's principle of neutrality in relation to the law,

which is also a way of reproducing law as the legitimate arena for solving legal conflicts and of refraining the media from doing so [Thompson].

Later, in connection with the trial at district court (as shown in Excerpts 2 and 3), the media once again used this expression which described a legal and communicative standstill – a communicative state of exception - between the opponents. Declaring a situation "your words against mine" is the same as saying that what we have here is a matter of conflicting accounts. Until a legitimate legal verdict is reached, no one reporting on the case can nor should say which version of the accounts was most truthful. The media use the expression "your words against mine" more than half a year after the event at Crazy Horse because they are still extremely cautious not to let any premature evaluation of the event slip into their reports.

The media declared the conflict a communicative state of exception (cf. below) because they strive to conform to the general expectation of the media according to the principle of non-intervention with the legal processes. By using the expression "your words against mine", they are able to emphasize an epistemological position that aims at balancing the contested accounts. It is an implication of a principle of neutrality. It is not only a formula handy for the difficulty of coping with contested accounts; it is also a declaration of a position of neutrality congruent with the expected behavior of the media [Clayman] [Greatbatch] [Clayman & Heritage]. The case in question can be regarded as an opportunity to reproduce this stance of neutrality. The question is rather: why is this or similar expressions not used far more often considering that, in principle, the media always would need to reproduce a stance of neutrality [Schudson]? An explanation that I have tried here is that this is so because this case involves a public person, towards whom more concern is shown.

Constitutionally the media is not regarded as a legitimate legal institution and serious effort on behalf of various stakeholders is put into securing that this remains so. Still, it is well known and generally acknowledged that the media plays an important role in affecting the opinions and feelings of the public [Schudson]. No report in any media or in any modality - perhaps with the exception of sophisticated biometric technologies such as DNA-analysis and face recognition such as a photograph, a documentary film or a tape recording -- is an innocent mirror of reality. The media and, in particular, the self-acclaimed "serious media" such as those quoted above, want to assume a stance of neutrality, partly in order to qualitatively distinguish themselves from their tabloid colleagues with their less recognized reputation for veracity. In media studies it is repeatedly shown that reporting on almost anything, also

in the "serious" venues, cannot be made without taking a perspective and with the choice of words determining interpretive frames suggestive of privileged interpretations.

If we look a bit closer at the accounts given by the media in Excerpts 1-4, we have already noted that far more attention is given to the woman and her personal and physical characteristics than to the man. I suggested that this might be explained by a decision on behalf of the media to explore the characteristics of the known person rather than to engage in a description of the anonymous man. This might be a reasonable explanation, but the effect is that we learn a lot more about her communicative and social behavior, about her personal style, and her physical features. Her attitude of toughness is quoted directly it was spoken. All these facts can be regarded as more or less innocent iterations of what is already publically known, but it can also be regarded as building up a frame for interpreting the event in a particular way, namely of making the woman appear guilty. We learn that she is physically strong (she plays rugby on the national level), she is unusually fearless in a physical and verbal sense, she can be very straightforward in her way of speaking, and she is deliberately fearless and provocative in the face of power. Meanwhile, we learn nothing whatsoever about the physical condition of the man, neither anything about his verbal behavior, his psychological fitness, or his relation to power. What we learn is that he is a doorkeeper and it is also indicated that he is highly educated. The frame for interpreting the man and his role in the event supports his version of the event: the colored intellectual doorkeeper was hit and discriminated against by the brusque white rugby woman. This implicit frame runs counter to the stance of neutrality which is symbolically marked by the use of the expression "your words against mine". This interpretation could be made based on the information about the contestants, although the expression "your words against mine" serve to counter any such bias in reporting.

We might talk of the non-legitimacy of media as a legal institution [Friedman 1989]. From a legal perspective the media has an unwanted status as a negative institution potentially intervening in the proper legal institutions and their procedures. Obviously, the functions of the media are not altogether negative, but the media maintains a number of crucial functions in the state, most prominently as "the fourth estate of democracy". It is often repeated that no one can be sentenced in the media; that the media should not be a stage for trials; that the only legitimate context for sentencing is the court; that nobody is guilty until this is proven by the court; etc. A recurring claim in legal culture is thus that the administration, mediation and decision making related to legal

processes should only take place in the legitimate institutions. Such claims often proceed to specify the places, institutions and contexts which are legitimate and non-legitimate for such purposes. The media occupies perhaps one of the most privileged positions as the illicit context for the enactment of legitimate legal processes. As such, the media is positioned as the counterpart or the unwanted alternative to legitimate legal processes, codified, for instance, in the emphasis on procedures such as the sequestering of a jury in different legal cultures. Another example is that media behavior and intervention in itself can be brought into the court as a complicating factor in a legal process, where, for instance, it can be shown that the trial is in some way irregularly affected by the media representations.

The expression "your words against mine" is used by the journalists in Excerpts 1-4 and they do this in advance of any legal decision. By doing this they accomplish a number of things. First, they express their own stance as a stance of neutrality vis-à-vis legal power. Second, they consolidate the conflict by voicing the different opinions related to the event. Third, they declare a communicative state of exception because by representing an event through the expression "your words against mine" it is not possible to identify a winner or truth teller. The actors in the media are using a state of delay or expectancy (on the legal opinion) in order to classify an event in terms of "your words against mine". What is accomplished by using this expression is a postponement or delaying of the decision on who is right and who is wrong. Traditionally and constitutionally, it is not the duty, as we have seen, of the media to pass any verdicts or opinions in legal matters. Their obligation and responsibility are to objectively report on a series of events that may include contested accounts and that may lead to legal action, but without revealing their own opinions. Given that the role of the media is not to express opinions before legal action have been brought to closure, it is still very common – if not inevitable - that this is done. Many studies show that reporting only can be done from taking a perspective which includes assumptions, values and norms [Schudson 1995).

The media refracts rather than reflects our impression of reality and thus affects the opinions and world views of the public. We can even say that people actively orient themselves to the media in order to access perspectives on the state of things and events. Part of this orientation consists in the expectation that the media plays an important role in the expression and production of social and cultural norms. Today, we witness, for instance, a collegiality between politicians and journalists, rather than a professional animosity based on their adversarial positions. In opinion polls it is repeatedly

found that the public find journalists more trustworthy than politicians. People do care about the media and what is expressed there. The media affects a general recognition of moral, legal and political issues, an issue which Friedman was quick to note in his analysis of popular legal culture. Extending the definition of what constitutes legal culture, we can, following Friedman, say that the media is part of a popular legal culture. This popular culture is not sanctioned by the constitution as a legitimate arena for courting morality or law but it is sanctioned as a social institution for the expression of social and cultural norms. The media relates to the official legal culture, cautious not to intervene in a way that is much too explicit. We can also note that the media invents their own procedures and strategies for coping both with its non-legitimate character and for still being able to express norms. These things may be separated as reflected by the organization of journalistic work, but in practice the boundaries are fuzzier. While this may be understandable from the point of view of the legitimate legal processes, its institutions as well as its advocates, we also know that enormous intellectual and emotional investments are made in the mediation of legal processes in this unwanted popular sense. Popular legal culture thrives on its unrecognized and unauthorized status as a relevant legal realm. Even more so, popular legal culture seems to invent its own procedures, rationales, theories and vocabularies supporting this mediation of legal processes, in itself institutionalized in the public sphere but differentiated from the core legal institutions.

In Marcus Daniel's historical account *Scandal & Civility: Journalism and the Birth of American Democracy* [Daniel] it is shown that standards of journalistic objectivity date to the Nineteenth Century. Before then, the whole point of the media was in fact to explicitly demonstrate a point of view. "The Business of Printing has chiefly to do with Men's Opinions", Benjamin Franklin wrote in his 1731 *Apology for Printers*. Franklin's job was not only to find the facts, it was to publish a sufficient range of opinions: "Printers are educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick; and that when Truth and Error have fair Play, the former is always an overmatch for the latter" [Daniel].

SECOND CONTEXT OF USE: "YOUR WORDS AGAINST MINE" AS A STRATEGY OF PERSONAL DEFENSE

The second context for using the expression "your words against mine" is directly related to the public character of the legal sentence. As a direct response to what she experiences as injustice, the woman in the fight at Crazy Horse writes an open letter which is published in the debate column in Dagens Nyheter, generally regarded as perhaps the most privileged media spot in print media in Sweden, a spot to which not just anybody has access. In this letter she recapitulates the events of the court proceedings and blends this with retrospective fragments of her own political biography. The letter culminates in a formal public resignation from her post as Chairman of SSU.

By using the expression "your words against mine" (cf. below) in this context, she is not reproducing her own stance in analogy with what motivated the journalists in Excerpts 1-4. She is not in a position to maintain neutrality vis-à-vis the legal process and she is not in the business or interest of declining her own will vis-à-vis the court. By using this expression, she aims to accomplish something entirely different than what has been done so far by the journalists.

Excerpt 5

> For me the court's decision did not prove that I said or did anything. On the contrary, in a situation where *words stand against words,* the court has chosen completely to buy the story by the doorkeeper and his colleagues. It makes me miserable. It is unbelievably humiliating. (För mig handlade inte domen om att det är bevisat att jag sagt eller gjort något. Däremot har rätten i en situation där *ord står mot ord* valt att fullständigt köpa vaktens och hans kollegors berättelse. Det känns bedrövligt. Där ligger en sådan ofattbar förnedring.) [Dagens Nyheter, December 16, 2006] (emphasis added).

In contrast to the journalists, she is in a position to make a verdict on the decision made by the court. She is not constitutionally prohibited from intervening in the evaluation of the decision, but she is in the business of invalidating the interpretations on which the court's decisions were made. She explicitly declares that the decision by the court was not a proof of what she ever said or did – and doing precisely this is more or less what is expected of

her. The case is clearly still not settled from her perspective. The second sentence in Excerpt 5 is crucial. This is where she uses the expression "words stand against words" ("your words against mine") in order to disqualify the court's decision entirely. She refers to the situation as one in which "your words [stands] against mine" and indicates that the court has acted as if they completely relied on one version of the events as more truthful than the other, although the premise she is alluding to, contained in the very expression which she uses, is that both parties (still) carry equal weight. An effect of this is that she appears as being more untrustworthy given that her words counted for less than those of the man. That is, she argues that the court deliberately chose to believe one party rather than the other, although according to her the case and the amount of available proof could still be regarded as a draw. Thus, the court has overruled the assumption that they should acknowledge both versions of the event. She vents her feelings of misery and humiliation. The experience of being publicly humiliated by the law is a major reason put forward for her resignation from political office. We can only speculate if also other reasons, such as peer pressure and the potential of political survival, played a role in her resignation.

In order to understand this second context of use, we need to explore in what sense "your words against mine" can be used in order to benefit from a specific position in a situation including contested accounts. The expression has another function, yet she is using the connotations from the previous context for her own purposes. When somebody is using the expression "your words against mine" this can also mean that one is speaking in favor of oneself. Per definition, being engaged in a contested event means that you yourself are a witness to the events. This is what you are striving to legitimate. Being a witness to oneself is not, however, an acceptable or sufficient basis for decisions in legal terms where external and independent witnesses are regarded as more relevant and valuable. Any witness needs to be qualified as an independent and reliable agent in order for their testimony to count. If a person's (internal) testimony should be given any credit at all, it must conform to those made by external witnesses. The validity of a testimony can be tested through a general examination of the person's character and credibility. In various social relations and disputes, however, these individual (internal) reports are the only forms of testimony available. To witness on behalf of yourself or by the help of an attorney means that your own words and the proof that you can convey together carry an equal or stronger weight than the other party's. To say that the words carry an equal or stronger weight means that the total sum of arguments, proofs, observations, memories and rhetorical

support outweighs the other party's. This is what is referred to by using the juridical notion "value as evidence" [Walton 2008]. When a "your words against mine" situation is at hand, it means that until further proven, these positions are taken to carry exactly the same weight and they should carry this balanced weight until the court proceedings have decided otherwise. Such a situation can also be the result of a different form of evaluation, namely that the evidence brought forward is very hard to assess or compare or that it is difficult to find criteria for evaluating these accounts in order to measure them against each other. In legal contexts, a "your words against mine" situation most typically is at hand when the sufficient proofs and evidence are lacking (cf. below). Perhaps most typically, this happens when the only available evidence is the party's own testimony, when other means of proof such as written evidence, external witnesses, visual documentation, technical evidence, etc. are lacking. What remains are only the subjective words of the contested parties, which capture the literal meaning of the expression "your words against mine".

"Your words against mine" is an expression used in a situation which can be characterized by a high degree of symmetry, an issue to which we will return in the theoretical discussion. It differs from many other situations characterized by symmetry in the sense that a third party (e.g. the law) can decide in favor of any of the parties. It is a paradoxical symmetry, however, because the parties can agree that "your words [stands] against mine", yet this is based on the assumption that there is a conflict which per definition is an asymmetry. Symmetry in the context of communication and law is generally regarded as something valuable and as ideologically important in a state governed by law. Such an assessment can be done in a "your words against mine" situation but the relative indeterminacy of the situation is only temporary, until the procedure of decision and verdict starts its machinery. This symmetry can be regarded as something valuable, because a conflict has been established yet a certain cease fire has taken effect and some mundane and trivial things can proceed uninterrupted. The temporary standstill can be interpreted by the parties as a certain relative equality in the respective arguments. Evidence that is brought forward can also be regarded as symmetrical, although this need not be the case. A verbal cease fire can certainly be mixed up with a draw – and sometimes this is the desired strategy. The challenges to one's arguments can be regarded as temporarily eliminated. Usually, one of the parties has something to gain on declaring an end to a "your words against mine" situation. The ensuing asymmetry means that any

of the parties might be declared as the most trustworthy which leads the court to decide in his or her favor.

Yet, the symmetry in this situation is paradoxical because, as we have seen, it is of an asymmetric character. It is based on the assumption that neither party resigns the rightness of his/her own interpretations just like the woman in her open public letter does not resign from her position of being an equal partner in a dispute. The symmetry is accomplished through the consequential exploitation of one's own perspective. Accomplishing a situation as "your words against mine" can thus be understood as a partial goal to be sought in a negotiation where there is something to gain. The symmetry is a joint construction that in itself is understood as asymmetrical.

As mentioned above, a person's own testimony is not of any higher value. In a situation where the contested parties are the only witnesses of the event who give their own report certain equilibrium is at hand; one testimony can "eliminate" another testimony. Accomplishing such a position can be the explicit communicative goal for any of the parties. Eradicating or balancing another person's testimony by producing a testimony of one's own can be sufficient ways of enhancing one's own position. One can ask if there is something to gain on declaring a "your words against mine" situation in other contexts apart from the one mentioned above. Another context in which the expression "your words against mine" is most often used is situations of sexual violence and rape. According to the constitution, it is the obligation of the abused party to present evidence for the court. A suspected rapist need not, however, show proof that he (in the typical case) is innocent but his role is of a more defensive character. A suspected rapist can thus potentially win some advantage by producing a story that runs counter to the story told by the victim. Neither story can be verified by external witnesses. Only by a suspect producing an alternative story can this function as a sufficient strategy for being free from allegations. The suspected rapist can also win something advantageous by coming to a situation in which the trustworthiness of the victim must be investigated, what Judith Butler (1997) refers to as a process of double vicitimization: first being victimized in the event and then in the court. From this point of view, there is clearly something to be won by the suspect in order to declare a "your words against mine" situation. The only thing that is required from him is to produce a sufficiently credible counter story. A perpetrator who wants to avoid legal action or to minimize the possible sentence can strategically act in order to enter into a communicative and legal standstill, a communicative state of exception which cannot be decided upon. Giving a counter story can thus be understood as an expression of the will to

reach a communicative state of exception when the condition is that only subjective reports constitute the available evidence.

By discussing how something can be won by posing oneself as a party in a "your words against mine" situation, I do not mean to indicate that the woman at Crazy Horse was the guilty one who used this strategy in order to pass as a credible and trustworthy person in comparison with the rapist. I want to show that she used this strategy as a way of defending herself against the decision by the court. She is not doing it in order to accomplish neutrality in the sense of the media, but in order to maintain the issue as unsettled and hence the verdict as illegitimate. She uses the previous meaning of the expression (equal weight before the trial begins) in order to consolidate her own position and reputation when the verdict has fallen. This is the same thing as saying that the verdict lacks validity. The decision has led to her being publicly humiliated, and she finds herself forced to resign from public office. What she does not resign from, however, is her role as one of the contested parties in the (according to her) still unsettled dispute between her and the doorkeeper. She feels "miserable" because when a "your words against mine" situation is at hand, the only thing that can weigh the guilt in any direction is the belief in the external witnesses or the belief in character and trustworthiness. She feels that she has lost on all counts.

We have to recall that publishing of a public letter at the privileged media spot in Dagens Nyheter is not an available option for everyone. The ordinary person who has suffered from a similar treatment by the law cannot generally address the public in this way. The display of misery in the eye of the public is an option only for the so called "accessed voices" [Hartley, p. 109], but also for those who are already in power or for those who carry celebrity status.

THIRD CONTEXT OF USE: THEORIZING "YOUR WORDS AGAINST MINE"

In order to understand the expression "your words against mine" and the popular legal situations in which they occur, we need to explore interpretations other than those that prevail in the legal realm. This is where we have turned to media studies, communication theory as well as discourse theory and the law, as analytical resources to understand the everyday and popular meanings attached to the expression. By using this expression, the result of the contest can be interpreted as unsettled (as a draw) because nobody can nor should

(yet) make a final judgment. It is precisely the strategic uses of this interpretive delay in popular legal culture that is addressed in this analysis. Sometimes these contested accounts cannot even qualify as legitimately legal due to lack of evidence, an examination and inventory of which is the central part of a preliminary investigation. The expression "your words against mine" is based on the assumption that there are two parties, each one characterized by being equal in strength to the other, reminding us of a concept taken from the Anglo-Saxon legal tradition, "equality at arms".

In this part of the analysis I want to theorize the peculiar a/symmetry of "your words against mine" situations. A closer look at some theoretical resources can assist in illuminating the paradoxical character: a/symmetry in discourse analysis, Habermas' theories on legal discourse and discourse ethics, and Polanyi's theory of epistemology.

SYMMETRY AND ASYMMETRY IN INTERACTION

In the text above we have explored some of the paradoxical characteristics of "your words against mine" situations one of which is the concurrence of symmetrical and asymmetrical relations. The situation is symmetrical in a legal sense because it necessitates legal action, e.g. it is legitimate to regard this as a valid situation of contested accounts. On the contrary, it cannot be the legitimate basis for any legal action because a "your words against mine" situation can be defined by a lack of evidence. In both cases it is about a situation characterized by "equality at arms" between two equal parties. Their equality is both the equality in the face of law (the condition for fair treatment) and equality in terms of not being regarded as guilty until proven by the court. In the first case, the parties are equal in their roles as persons seeking legal action, e.g. they are equal in the face of law, which prescribes that persons have equal access to the law. In the second case, the whole situation is regarded as too thin in terms of evidence to possibly result in any decision by the court. Either the evidence is missing or the only ones available are the subjective reports by the individuals. The situation is asymmetrical because the parties have differing opinions and perspectives. Another aspect of asymmetry is that the situation can only be resolved by proceeding to a new asymmetry, i.e. that any one of the parties are declared guilty.

The concurrence of two principles of balance, symmetry and asymmetry, is paradoxical but in discourse studies it is often indicated as characteristic of complex communicative events [Markova & Foppa]. In discourse analytic studies of naturally occurring talk, for instance between men and women or in studies of domestic quarrels and disputes, it is not uncommon that these principles of balance are simultaneous. Deborah Tannen shows in her study of male and female language that pragmatic and discourse analytical perspectives can be fruitful instruments for an analysis aiming to understand the double character of expression building on both principles of balance [Tannen]. With intensive knowledge about the perspectives of the actors in an interaction, it is possible to interpret the conditions for this double character in the balance between the parties. On the one hand, argues Tannen, there is a principle of proximity and community that represents symmetry. On the other hand, there is a principle of the independence of the parties that can be related to social status and that represent asymmetry.

It is not at all unusual in the analysis of communicative utterances, whether these take the perspectives of the actors or the researcher, to identify expressions and discursive functions that both stand for proximity and independence. Tannen gives the example of someone who asks a question if another person currently has any occupation (ibid, p.26). The same expression can be interpreted in at least two ways: as a communicative strategy that expresses concern and empathy but can, on the other hand, also be interpreted as paternalistic abuse.

> The symmetry of connections is what creates community: If two people are struggling for closeness they are both struggling for the same thing. And the asymmetry of status is what creates contest: Two people can't both have the upper hand, so negotiation for status is inherently adversarial [Tannen, p. 29].

Asymmetry and proximity is a theme in Tannen's analysis of talk between men and women where power and influence plays a large role as well as closeness and community. In another book on everyday gender discourse, Viveka Adelswärd discusses from a discourse analytical point of view quarrels and destructive talk. She shows how a quarrel is a conflict oriented form of communication that is dependent on cooperation, equality and intimacy [Adelswärd]. When, in a quarrel, a person can feel that the parties are "talking beside each other", this is an example of that which must be accomplished by both parties. Talking "beside" each other is thus a joint construction. If one party would surrender or would ridicule the whole situation, there would not

be a quarrel at all. The conflict would still be maintained but not the verbal quarrel. The consequences of not accepting the cooperative assumptions of such interactions are that the quarrel will not make sense or even occur. A classical quarrel requests an equality: "Although the quarrel can be a fight between the two concerning who is the strongest, the basic condition is in a way an imagined balance" [ibid, p. 145[3]). The difference between a discussion and a quarrel is, according to Adelswärd, that the latter has a personal character in being oriented towards the other person. The conflict or the topic on which the quarrel is based will only become this if both parties accept this assumption. A quarrel is paradoxically a form of conversation that is accomplished "in a spirit of cooperative conflict" (ibid:150).

> Under the surface of agreement conflicts can be hidden. The agreement is there as an implicit understanding that the conflict should not be brought into the open. The participants can use the discursive space for anything but the unselfish acts. Behind a veil of positive agreement, they can interact in order to acquire a position, to gain advantage, to suppress others and to promote themselves [Adelswärd, p.150].

The quarrel can be regarded as a "your words against mine" situation where the tempo, intensity and emotions are escalating and where both parties in a spirit of cooperation and in a general atmosphere of conflict, contribute to maintain this character. Conflicts can also temporarily be ignored and this ignoring is also a result of a mutual acceptance of not making this neglect explicit. In the quotation above, we can see examples of people with stern faces and thin smiles who cooperate on not letting the conflicts out in the open. This is also a "your words against mine" situation but this has not yet resulted in a cease fire. In pragmatically oriented discourse analysis, we can thus find many examples on how naturally occurring interaction can both be characterized as symmetrical and asymmetrical. In a communicative sense this is not unique. The parties can choose to cooperate on a surface level and in their turn taking system, but they can carry their own distinctive goals with this interaction. They can be involved in a process of contested meanings but still adhere to the general rules of turn taking in interaction. In fact, the quarrel would not take place at all if it were not for their compliance to these shared communicative rules. A situation involving "your words against mine" can thus be said to be based on mutual cooperation.

[3] The translations from Adelswärd are mine.

FROM DISCOURSE ETHICS TO LEGAL DISCOURSE THEORY

Another theory of communication, ethics and the law that is relevant to bring up in this context is the deliberative theory associated with Jürgen Habermas. Habermas' analyses of the communicative structure of social coordination can be helpful in our attempt to understand situations including expressions such as "your words against mine". It is important to recall that Habermas' theory deals with the deliberate dimension in the social and political production of norms and opinions, i.e. it is about the conditions and forms of collective conflict resolution based on the theory of discourse ethics. This form of conflict resolution assumes the complete acceptance by the parties concerning certain general principles for the ethics of discourse. Under influence of the Frankfurt school, the speech act theory, and Marxism, and American pragmatism, discourse ethics is based on a formal-pragmatic analytic which goes beyond the semantic meaning, syntax and grammar in order to investigate the general structures in the social coordination which makes successful acting possible for those who take part in the interaction. In arguing for this visionary goal, idealized assumptions about the communicative procedures play an important part. Habermas calls these "legitimacy claims" and a criterion of competent participants in communication is that they know these claims. For instance, these competent participants know how they should base their contributions on such shared recognized assumptions. Furthermore, the specific attitude in a competent participant is characterized by the ideal roles that are based on the premise that each participant has to interpret and evaluate all contributions to the conversation from the perspective of all participants. This is a version of Kant's principle of universality that pushes the individual as accountable for the perspectives of the others and as an important part of the production of norms.

In the ideal discursive situation, everybody who wants can participate and all should be protected from coercion. In the ideal situation there is plenty of time to resolve the issues. Obviously, this ideal is hardly a description of how conflict resolution actually takes place but, Habermas argues, we need to have these ideals present when we are participating in such resolutions, because it helps us as participants to utilize communal and optimized beneficial principles for social and communicative coordination. The ideal, although

untenable, fills a normative function. In detail, the principles of discourse ethics are the following:

1. prevent a rationally unmotivated termination of argumentation
2. secure both freedom in the choice of topics and inclusion of the best information and reasons through universal and equal access to, as well as equal and symmetrical participation in argumentation, and
3. exclude every kind of coercion – whether originating outside the process of reaching understanding or within it - other than that of the better argument, so all motives except that of the cooperative search for truth are neutralized [Habermas, p.230].

The principles specify endless time, freedom to participate openly, and freedom from coercion. Only the best argument in the coordinated search for truth is the acceptable rational-logic principle that governs the pursuit of communication aiming for consensus and conflict resolution.

Habermas is completely clear that the principles of discourse ethics cannot readily be translated to a legal order of discourse. There is thus a difference between discourse ethics and legal discourse theory. These two orders of discourse have some things in common, for instance in that both prescribe how collective norms logically can be applied. The ideal conditions for argumentation in the court must be harmonized with the constraints that the court regulates (Habermas, p. 234). The law should enable an argumentation that is focused within the framework of the legal institution:

> Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social and substantive dimensions, the institutional framework that *clears the way for* processes of communication governed by the logic of application discourses. [Habermas, p. 235]. (emphasis in original)

This assurance that communicative processes should function can be seen in the distribution of social roles by the law and, in particular, in the symmetry that should govern the relation of prosecutor and attorney, or between plaintiff and defense; what we previously referred to as "equality at arms". From this basic equality the specific legal process is enacted as a battle between two parties that pursue their own interests and where the judge shall decide only on what is explicit in the court. Here we can see an important deviation from the principle of cooperation in discourse ethics:

> Yet the roles of the participants are so defined that the taking of evidence does not have the thoroughly discursive structure characterizing a cooperative search for truth. [Habermas, p. 235]

Obviously, the different parties in a legal case cannot themselves participate in the particular formulation of the verdict, but the way in which they speak and represent their position is rationally organized by means of an institutional guarantee that there will be a free exchange of arguments and perspectives. The legitimacy of the court/law is continuously accomplished through the same proceduralist principle as the legitimacy of normative accounts is created in practical discourses.

How can "your words against mine" situations be understood in the framework of Habermas' theory of legal discourse? Habermas presents a theory of the ideal conditions for argumentation in practical discourses and in legal contexts. These ideal conditions imply that the parties in a conflict are equal to each other. Both have a similar access to the argumentation and the floor and the legal institution is partly instituted to preserve this state of affairs. In the court the parties can present their own case and the judge can decide on the basis of the evidence presented, ideally without letting external factors affect the assessment. Habermas is developing a normative theory where all conflict resolution, not just "your words against mine" situations should be dealt with in a fair and legitimate manner.

COMMUNICATION AND EPISTEMOLOGY

"Your words against mine" situations are first of all the name given to the communicative escalation that leads to a need for resolution. Second, it is the name given to the unsettled moment in the legal process prohibiting this from proceeding; it actually ends with a draw. Generally, it can also be the name of a conflict in all of its phases and the main task of the process is to show evidence in favor of the indictment made. Evidencing is a complex process that always should be based on more means of evidence than what is available through the subjective accounts and observations by the parties, although these can also be regarded as valid resources under certain conditions. In a process using evidence, the court has to rely on other persons, in particular those whose trustworthiness cannot be challenged. Michael Polanyi formulates these conditions in a context of a general theory of knowledge, but it can also be

read as those conditions that generally are valid for the production of knowledge in a legal process:

> The amount of knowledge which we can justify from evidence directly available to us can never be large. The overwhelming proportion of our factual beliefs continue therefore to be held at second hand through trusting others, and in the great majority of cases our trust is placed in the authority of comparatively few people of widely acknowledged standing [Polanyi, p. 208].

Trusting other people and authorities and being able to make one or others trustworthy or untrustworthy are thus crucial aspects of the process of knowledge production in legal contexts. As Polanyi argues, the evidence can not to a great extent be directly accessible for a human being. Like Habermas has shown, the organization of the court aims to consider only the evidence that can be treated as legitimate, i.e. not subjective. In an analysis of two hypothetical cases of murder as self defense, Mark Kelman argues:

> Questions of how we claim to know the things we know and whose claims to knowledge are treated as authoritative are inescapable in reaching legal judgments [Kelman, p. 798].

In legal processes, the sifting of evidence is an advanced form of epistemological discourse where questions concerning the relevance of knowledge, its creation and authorization are central. In the hypothetical murder cases discussed by Kelman, this kind of epistemological discourse becomes even more stringent when actions like murder in self defense are based on the victim's account of the threatening character of the situation. This leads the court into complicated discussions about probability besides the basic epistemological problems.

What can be counted as evidence is historically connected to understandings of the individual. With reference to Foucault's *The Order of Discourse*, Simon Schaffer in his study of the shifting roles of evidence in the history of science argues that scholasticism derives the authority of statements from that of their personalized authors, while scientists today hold that matters of fact are the most impersonal statements [Schaffer, p.327]. Historical studies of numeric sciences and statistics show that until the early modern period, oral testimonies counted as more important than any written documentation. Pieces of evidence could only be regarded as such if they were supported by the oral testimonies of observers. Oral witnessing counted as more valid than the

written contracts also in business negotiations. We can say that the strategy of evidence has developed historically from regarding the personal subjects as primary to regarding impersonal objects as the most trustworthy.

CONCLUSION

Proof, evidence, and what is generally characterized as legally valid phenomena are always related to a previous question. The evidence does not exist in any other forms than as answers to this question that constitute the basis for an investigation. It is always important to establish a connection between the questioning and the evidencing, between the question and the proofs. A pure "fact"—if we can ever talk about such a thing – doubtless can never work as evidence. If the relationship between questions and evidence already has a complex correlation, then it would be even more complex to think about the questions that can be applied to evidence. Within different scientific traditions, the evidencing has different roles and is based on various methods, from empirically based protocols to personal intuition.

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Chapter 7

MEDIA AS MATHEMATICS - CALCULATING JUSTICE

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ABSTRACT

This chapter will inquire into understandings of mathematics in relation to legal theory and practice. It will draw selectively from historical scholarship, in particular the work of Fred Kort who used an algorithmic methodology in a study about judicial behaviourism and decision making. The historical perspective is a point of departure for a contemporary theory of mathematics that is relevant and indeed essential for an understanding of media-in-law practice. The chapter responds indirectly to the challenge that information technology and digital media have brought to professional and client practice that is rhetorical and verbal in its communication and logic.

INTRODUCTION

It is not possible to write a comprehensive account of differing or competing theories of mathematics-in-law. However the chapter does aim to commence such a project, through reference to the writings of Roberta Kevelson and her appropriation of the semiotic and scientific writings of

Charles Peirce into legal theory. The overall aim is to address a theory that begins to answer problems of the incommensurability of natural and mathematical languages, as employed in legal domains, and to serve conceptually and methodologically the needs for implementing, designing and integrating a plethora of multi media tools and processes that are increasingly common in legal practice.

This chapter argues that a conceptual and paradigmatic approach to the nature of mathematical reasoning and images, compared with more traditional forms of legal argument and writing, is necessary for an adequate foundational approach to opportunities and practices provided by new and emergent media.

This chapter will first overview the relevance of Kevelson and Peirce for a multi dimensioned understanding of media-as-mathematics. In the second part it will introduce the research of Kort, and progressively highlight and comment on its features in terms of key ideas of Kevelson/Peirce.

THE "AMORPHOUS, ENTIRE PROJECT" – INTRODUCING KEVELSON INTRODUCING PEIRCE

Roberta Kevelson was an American theorist of legal semiotics whose books have not received the attention they deserve. Their often peripatetic, cryptic style can in part explain their lack of dissemination; equally, it can be argued, her visionary conception of the transformative effects of legal technology and media were just ahead of their times, and neither well understood nor appreciated by their professional or even scholarly audience.

Kevelson argues for a flexible and generic approach to the phenomenological and inferential character of legal technology, one that facilitates "representation as imaging" [1987, p. 74]. "Not only the medium but the instrument with which the medium is implemented becomes part of the total process of enacting values, of creating values." These features allow the law and its tools to be regarded as "instruments" or media which belong to the experience and "creation of more meaning and sense of value"; such meaning making extends to all processes of legal argument, decision making and case management.

It is convenient to adopt Kevelson's broad, McLuhanesque understanding of media and medium, in order to accommodate diverse methods and concepts involved in the contemporary use of digital and computerised media systems, in legal domains and also generally in contemporary society. In the past two

decades there has been a transformation in the design and engineering of media systems. Traditional analogue technology reproduced and recorded events onto material medium such as film, paper, video and audiotape. The reproduced image involved some form of literal copy or analogy of its source. For example, for more than a century a photograph involved a chemical recording and processing of an external object onto celluloid film. The technology that supported analogue media, for example film projectors and cameras, was often expensive and large scale. From the mid 1990's, media signals began to encode moving images as mathematical and electronic signals, ensuring faster, cheaper and more efficient equipment and methods for all stages of production and transmission.

The mathematisation of processes is not always transparent to audiences.Its effects in terms of digital television broadcast results in more and even better of the same, high fidelity, realism. Yet the same technology that produces more glamorous, high definition images can also produce graphic and statistical displays, photographic and AV records and transcription, mobile, portable and high quality video systems, all interfaced with intelligent and efficient computational and database resources.

Kevelson wrote just before the full effects of digital technology were realized; yet she displays prescient conceptual understandings of the nature of digital media representation and imaging, and the effects of technology on logic and reasoning. In doing so, Kevelson appropriates the work of Charles Saunders Peirce. Peirce was foremost a scientist and mathematician, as well as logician, and his theories of language and signs, while applied widely today in social analysis, are steeped in mathematical terminology and understanding. Peirce is potentially a valuable reference for a multi dimensioned account of digital media, and Kevelson provides a valuable link, via legal theory, to a general understanding of the distinct qualities of Peircean concepts and their relevance to contemporary media.

Kevelson claims to adopt the "amorphous", "entire project" of Peirce's radical and semiotic understanding of mathematics as a sign system. Her "adaptation" can be seen as "traditionally part of the Semiotics-of-Law project" [1987, p. 203], and "as amorphous as is the notion of legal semiotics, it is no more nor less amorphous than the entire project of the field of general semiotics." Thus, Kevelson claims to be progressing an argument about media and semiotics generally, in which legal theory becomes a significant and leading case study.

What is distinctive and invaluable is her focus on the explicit themes of Peirce's mature semiotics, including the graphical or iconic nature of

mathematical processes, and the relevance of his three main sign categories to contemporary legal technology and media. The concepts and imagery of legal theory, involving tools and artefacts of pragmatic reasoning, are re-configured by Kevelson, as she mixes allusions to aesthetics and science alongside legal discourse [1989 : pp. 193-210]. Case studies in property and international law are undertaken where such concepts can be “adapted for the service of lawyers and their clients".

Most importantly, the “paradoxical structures” of law are addressed, that are simultaneously abstract and actual, in terms of Peirce’s categories of Firsts (abstract/diagrammatic) and Seconds (factual/actual). She provides valuable systemic discussion about Peirce’s proto media ‘tools of reasoning or existential graphs’, as part of a reconceptualisation of legal media that addresses reasoning as a basic function of media processes, along with representation. She adopts Peirce’s extended understanding of the iconic and semiotic nature of diagrams, in order to fully embrace the non linear and non representational imagery now common on the Internet and in multi-media applications. Kevelson indeed anticipates more recent theories on the nature of diagrams, as a media and mathematical form, in authors such as Stjernfelt. She anticipates and addressesthe need for an interdisciplinary conception of mathematics, media and law, as a profoundly important, quite essential and largely undiscovered resource for ongoing legal theory and practice.

Her eloquent presentation of the “semiotic structure of community-as-inter-relationship” provides admirable and sustained testimony, in applied legal studies, to Peirce’s “basic semiotic model of practical experience” [1987]. In confident paraphrastic interpretation, about the “semiotic structure of community-as-inter-relationship”, about how “a community from a semiotics point of view refers to a system of interrelations,“ she highlights and celebrates Peirce’s Thirdness.

Her argument for Peirce’s own, intentional “breakthrough” in legal theory and semiotics can be seen as over-argued, yet nevertheless as an important conceptual basis for a radical realist sociology and legal epistemology based on Peirce’s thinking, built as it was on re-conceived scientific and logical methods. Around a contestable historical position, she manifests an intriguingly contemporary interdisciplinary basis, involving aesthetics, law, mathematics and science, all of which have yet to achieve “a standard meaning which is used in a standard way in discussions.” Such pursuits are “like any viable and rapidly changing idea - like any actual phenomenon in flux - that has not been drafted and accepted as authoritatively drafted, as a technical legal term may be so defined and drafted.” [1987].

Kevelson argues for the direct and indirect resemblances of Peirce's ideas in the tradition of legal realism generally, in authors like Karl Llewellyn and Jerome Frank. By her own admission, Kevelson claims to be working within a contemporary, transformed legal pragmatism, and claims a foundational and philosophical status to her portrayal of a legal pragmatist tradition that includes the legacy of mathematical and scientific method, going back to Peirce. Jerome Frank borrowed themes of non-Euclidean geometry and spatial reasoning, of aesthetic and visual analogies, in his own realist jurisprudence, to account for the indeterminate nature of informal judicial behaviour. Karl Llewellyn depicted legal reasoning as fundamentally kaleidoscopic and visual in nature [Kevelson, 1988] [1990,213] [1998,pp 76,83]. Kevelson stresses a visual methodology in empirical and realist philosophy generally, commencing with the stress by the British philosopher Bentham on cenoscopic and idioscopic methods, and scientific tools, of observation. As a main initiator of symbolic interaction, John Dewey maintained qualities of inquiry, aesthetics, and cultural tools in a version of communicative action quite distinct from James, and arguably more in line with that of Peirce, his teacher. William Twining stressed the conception of art/craft in realist understanding of Law; Jerome Frank and Karl Llewellyn that of a geometric and kaleidoscopic conception of reasoning [Kevelson, 1990].

Rather than attempting to comprehend the full oeuvre of either Peirce or Kevelson, this chapter will now selectively and respectively introduce and employ their ideas as part of a commentary on a case study in mathematics-in-law, by the researcher Fred Kort.

"LETTERS OF ALGEBRA" – FRED KORT AND THE CALCULATION OF JUSTICE

Fred Kort was one of a number of scholars in the decades following World War II involved in research into the prediction and review of decision making and professional behaviour by officials of the American justice system, particularly the higher and Supreme courts. Despite the focus of his research and its limited audience, interpretation of an early paper, such as "Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases" [1957], can be seen to involve perspectives about the meaning and use of mathematical and quantitative methods in social domains; informal and formal inference; the language of law

and science; and the experience and behaviour of participants in legal domains. Kort's paper helps clarify the status of mathematical formalism and the behavioural assumptions about legal decision.

Fred Kort introduces his work as a minor but pioneering "attempt" to apply quantitative methods to the depiction and prediction of human events that generally have been regarded as highly uncertain, namely, decisions by "at least one area of judicial review", the Supreme Court of America. Ambiguity of understanding about the use of mathematical techniques is signalled. On the one hand, there is the agenda of legal realism, to depict legal processes informally and behaviourally, as social and "human events" that are "highly uncertain", and serve to qualify the formalism of legal decisions. On the other hand, he contests suggestions that substitutional formalism of quantification automatically will help predict, and hence apparently reduce, uncertainty. The theme of the distinction between quantitative, mathematical techniques and conventional legal reasoning is repeated when Kort discusses the area of law that he has selected for investigation. The "right to counsel" area was renowned for the irregularities of judgements by the Supreme courts, concerning appeals from State courts where state counsel had been withheld during criminal convictions.

In his introduction, Kort is explicit about some of the features of quantitative techniques, which aim to identify the factual elements of some cases of an area of law, to derive numeric values using formula and to predict the decisions of remaining cases. He distinguishes his approach from other kinds of conventional legal reasoning and hints at an implicit objectivism that supplants and exceeds legal heuristics and will be made "independently of what Courts said by way of reasoning in these cases."

Kort speaks as a political scientist, positioning his research as externalist and intervening in legal institutions: Kort is not a legal professional. Being "independent" from legal institutions, he consciously adopts methods uncommon in its internal practice to research the nature of court practices, rules, procedures, norms, protocols, actors, precedents or setting. His unstated public agenda is at least two fold: i) reform of policies of public law, which will be achieved by ii) close monitoring of and feedback about the actual decisions and behaviour of individual participants.

His techniques of factor, probability and social analysis are developed on sociometric principles, independent and even unknown by the court practice in which they are applied. Kort recognises opposition to quantitative methods by legal practitioners as being overly objectivist and arbitrary, quoting Justices of the Supreme Court as saying that "the due process clause is not susceptible of

a reduction to a mathematical formula". His paper thus begins to contest a range of epistemological and discursive issues consequent to the methods it adopts. Yet finally he regards these questions as supplementary or theoretical, rather than essential, to the truth claims of its outcomes. Any opportunity for reflexive and critical institutional strategy to do with law reform seems to justify pragmatically the apparent jurisprudential limitations of the particular methods employed.

Is it possible to revisit incomplete research projects, decades old, to produce insights of contemporary interest? Some themes of legal realism remain relevant today: questions about the nature of deontic and traditional verbal reasoning and rules; inquiry about the performative, habitual and symbolic nature of legal decisions; inquiry about alternative methods of the representation of logic, including mathematical notation; the complex indeterminacy of social and individual behaviour; and most pertinent to today, concern for the need for media and creative tools of reasoning in legal domains. Kort is concerned with the observation of actual communicative events and individual behaviour and he seeks reforms to social practice from an identification of the processes of individual reasoning. His own case study can become a pilot study for issues and processes that have become increasingly common with the emergence of new media.

Kort's work argues implicit acknowledgment for his non-verbal inferential analytic in existing verbal statements. "Factors" are identifiable and implicit in court opinions, in a verbal attempt to explain patterns for consistent judgement about petitions before it. Peirce would say there is an implicit mathematical or diagrammatic logic in statutory verbal language, as iterated in judicial opinions of judgments: reasoning will be better comprehended if this pattern is clarified. Kort quotes Bates vs. Illinois - "when the gravity of the crime and other factors such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offence charged and the possible defence thereto" as an identification of factors that might "render criminal proceedings without counsel so apt as to result in injustice as to be fundamentally unfair."

However, Kort, like Peirce, would never envisage automatism based on numerical signs. Quantitative techniques cannot substitute for verbal and human decisions. However he spoke of "logic machine" and graphical reasoning tools, Peirce prophesied autonomous artificial intelligence only to discount it [Peirce, 2.56]. In the same way, Kort does not seek automatic judgments from the wider use of his techniques; however poorly conceived and explained, his research remains part of a behavioural, sociological

approach, not a cognitive or systems approach that might advocate expert systems or artificially programmed decisions.

Likewise Kevelson does not argue for fully automated or mechanical law, or so called "expert systems" as part of her general inquiry. Under certain terms, mathematical methods can provide an efficient determination of administrative and case decisions, in areas such as court administration and insurance claims, and in easy or routine cases can substitute for human decision making. Yet such methods need to be used selectively, within a multi dimensioned array of methods and systems supplementing and assisting professional work, rather than substituting for it. Peirce would regard such predictive use of algorithmic or logical reasoning as being in the state of Seconds, where values are readily determined and reasoning meta-indicative or deontic by nature, so that clear and efficient outcomes can be observed.

Mathematics can as readily accommodate and correlate the uncertainty that features in practical or pragmatic reasoning, and seek to acknowledge and factor in, not reduce nor disguise, indeterminacy and complexity in decision making, which results in fairness and accountability. Fairness does not necessarily come at the cost of simplicity, cost savings or efficiency.

Kort justifies his own approach in terms of a criticism of sequential, statutory, verbal logic. In the absence of any provision in a constitutional amendment, and consequent mandatory obligations on states, the exercise of a right to counsel depended on doctrines of ordered liberty and "fair trial". Kort quotes opinions about the area, about its "nebulous standard" and "arbitrary and capricious rule". He quotes the main author on the topic, W. Beany, as concluding that the "fair-trial rule lacks the essential qualities of a good rule of law: clarity of meaning, facility of application, and satisfying results". Thus he questions how well general values of social justice and fairness can be practised in the absence of "essential qualities" of the good rule of law [1957].

Because of the difficulties of finding a pattern and predicability using "conventional methods of qualitative appraisal" by Supreme court judges, Kort uses quantitative methods. Although his methods might appear a panacea to conventional legal reasoning, Kort at no stage seeks a complete substitution. His aim can be seen to correspond to that of Kevelson and Peirce, to provide an alternative mathematical, iconic expression of verbal logic that will supplement better the "qualitative" reasoning of verbal decisions. Unlike Peirce, Kort does not supply a full behavioural rationale or theory of inference; he fails to account fully to the audience for his research. How can its conclusions and method be communicated or used? Are his methods intended

to be used as legal research tools, or will they assume some quasi-positivist status in the hands of research science operating outside the domain?

As it turns out, results prove favourable to existing practice: calculation of a final composite value (CV) for each case, which can be compared against the cut-off criteria for decision in favour of a "right to counsel", showed remarkable consistency against existing decisions. "It appears that, in at least the area of judicial review, quantitative analysis discloses a consistency of Court action concealed in conventional qualitative interpretation" [1957].

The meta-indicative role of numerical procedures is increasingly common in legal practice. Court procedures and client billing actions are typically coded as a pattern or set of case features in numbered notations, that match individual cases or actions against a set of common factors, which can be used to produce complex results, for example for the purposes of management of individual and collective case development. Such methods often have no explicit equivalent in verbal logic, at least in any efficient or comprehensive form.

Questions of legal ethnography, although implicit, are hardly discussed in this early paper, but are erased by those of public policy in sensitive and publicised jurisdictions. Their oversight, however, is not optional for issues of policy. However, Kort, as research scientist, does not clearly acknowledge his audience nor even attempt discourse with legal professionals. True, at first he refers to legal opinion in order initially to establish what he terms the major categories of pivotal factors (pv). Kort relies on his own reading and analysis of formal sources of professional and expert knowledge, in the form of published cases, and appears not to survey "generally accepted notions" of professionals in selecting factors. He divides his selected cases into source and test groups: yet no criterion is offered for the selection of cases into two groups, a source and test group.

Yet the next step of his procedure is distinctly quantitative - the assignment of numeric values to factors, prior to any calculations. A linear, positive scale is adopted, assigning a higher number to a factor on the basis of two conditions: the factor must have disadvantaged the petitioner adversely in his criminal trial, and secondly, the factor must contribute to a reversal of conviction by the Supreme Court. The same scale is to be used for single factors, or combinations of factors. Higher values attributed to factors indicate its contribution to uncertainty in State decisions. Near zero values mean that a "fair trial" has taken place. The inclusion of the key algorithm, used and published by Kort to compare and rank cases based on numerical values, seems intended for a specialist, sociometric audience.

iv=s[+5-1/10(sum total of pv's of other pf's in case)]

where iv =intermediary value

pv =preliminary value
s =number of judges supporting factors in the case
pf =preliminary value of pivotal factors under investigation

The process as explained by Kort occurs thus. First, an intermediary value (iv) for every factor in every case is calculated. Then, for each case, from the total of each pv the sum of the pv's of all other factors is subtracted, with the result multiplied by the number of supporting votes by justices for this factor. Next, the resulting formula is modified to prevent negative outcomes. The square root, multiplication by 10 and addition of constant 5, ensure pv, usually a fraction below 1, is increased. The squaring and division of the sum of pv's, usually a digit less than 10, ensures it is decreased. And so on.

MATHEMATICS AS TEXT

Mathematically, we can accept this most simply as a nearest neighbour routine, as an associative way of comparing sets of figures. Yet however understood, and in whatever detail, the core of Kort's paper remains algorithmic: any jurisprudential speculation is fragmentary, included as part of prose commentary on numeric method. Kort's notes read like many by Peirce, as supplements or marginalia to a report of an experimental and scientific work in progress. Peirce, like Kort, mixed his prose with diagrams, marginal scribble, hasty jottings and short paragraphs. Both authors had difficulty establishing an audience for their interdisciplinary inquiry. "Predicting Supreme Court Decisions ..." turns out to be more an abstract, than a fully documented account of research, or a pilot project. As we will soon discover, its major part is algorithmic: it sets out a "precedent" or "proof" for its method; its case study is prototypical and brief, and short of conceptual and practical detail. There is no account, for instance, of the actual reading of cases of petition since 1932, and consequent extraction of the pivotal factors, that are summarised in a first Table.

To follow such numeric argument as discourse, is to regard it, as Peirce would say, as a proposition, or in contemporary parlance, as a text, that includes notational and typographic features within a contemporary semiotic

inquiry. Indeed, it is to follow a quasi-legal argument or proposition expressed in mathematical form. The mathematical form expresses a basic logic or grammar for innumerable verbal utterances. The equation mimetically represents, copies and recodifies, in shorthand or even cryptic form, patterns of inference based on the existing statute and its interpretation in individual cases. The capture of such case details can be seen to involve translation between verbal and numeric/visual languages from conventional court records to tabular data sheets, the latter being subservient to the former. "The letters of applied algebra are usually" assumed to be "tokens", while the imperative alphanumeric syntactical codes ("where", "=", "[...]") seem to replicate the function of verbal rules. Peirce would say that the algorithm is an alternative representation or type of the symbolic habits of decision-makers, its algebra being one of Seconds. A final outcome (fv) is output, based on a ranking of iv for each case and is translatable as probable judgment in favour of or against a petitioner which can be compared directly to actual decisions.

Kort's own explanation of the above expressions remains technically sound yet discursively cryptic. Such phrasing, however, would definitely not be comfortably or easily read by politicians or legal professionals, who are presumably intended in part to be its readers. The problem of the apparent incommensurability of natural and symbolic or mathematical languages arises. What takes precedent? What form of translation or mediation between the two can occur between legal and programming professionals?

Roland Barthes [1973] demanded semiotic analysis and educative attention to photographs and visual texts that were previously not regarded as worthy of such analysis. Peirce anticipates such interest and addresses the semiotic nature of a full array of imagery- photographs, patterns, diagrams, logical and numeric graphs – within a fluid understanding of language and mathematical forms. Gunter Kress continues inquiry into meaning, logic, representation and communication, in terms of "different semiotics", especially between contrasting verbal "language" and visual "imagery" [1996].

For Peirce (and presumably Kevelson), the "letters of algebra" are not only presumed as applied tokens: in particular, the intermediary value, (iv), is not presented nor directly translatable into verbal language but is computed through a recursive process that is supplementary to anything expressed in or by a court. As Peirce said, "as for algebra, the very idea of the art is that it presents formulae which can be manipulated, and that by observing the effects of such manipulation we find properties not to be otherwise discerned." Yet this supplementary dimension of the algorithmic proposition is essential to its

purpose. “No application ... of a general formula, such as (x+y)z = x z + y z, could be made of such an abstract statement without translating it into a sensible image.” [Peirce, 3.364]

THE HYPOTHETICAL AND THE ACTUAL – DIAGRAMMATIC FORMS

As well as representing cases indexically, as shorthand for innumerable verbal utterances, the algorithm expresses them in a very hypothetical, intuitive form of reasoning that Peirce called abduction, in which possible as well as actual values and situations can be entertained. Peirce’s explanation of such abstract logic was in terms of behaviour and perception, as well as cognitive “intuition”, occurring in diagrammatically recursive and elaborative forms. The production of new values explores association, not equivalences. The above algorithm encodes explicit complex inferences that are best expressed visually, in non-linear, complex and changing diagrammatic forms. “In such manipulation, we are guided by previous discoveries which are embodied in general formula. These are patterns, which we have the right to imitate in our procedure, and are the icons *par excellence* of algebra. The letters of applied algebra are usually tokens, but the x, y, z, etc., of a general formula, such as

(x+y)z = x z + y z,

are blanks to be filled up with tokens, they are indices of tokens. Such a formula might, it is true, be replaced by an abstractly stated rule (say that multiplication is distributive); but no application could be made of such an abstract statement without translating it into a sensible image.”[Peirce, 3.364] It is the latter that is translated into the complex form of an image, for the purposes, Peirce notes well, of “application” and “manipulation”. This sense of manipulation and action rather than representation or cognition, is central both to Peirce’s first presentation, in 1885 and quoted above, of iconic Firstness, and to his whole pragmatic and ethnographic account of mathematics and language.

The analysis of potential image or diagrammatic form of verbal “translation” from qualitative to quantitative language is between divergent and seemingly incommensurate sign types, between “sensible image” and an

“abstract statement”(3.364], or, as Kress would say, between “different semiotics” of visual image and spoken language [1996]. The linear expression of an equation is deceptive, as what is being encoded or represented is a set of possibilities that are as abstract as they are clear. Kevelson would say that a paradox is involved in a “reinterpretation of relationships” between the abstract “vague” and the “determined” [1987, 145]. Both the vague or possible, and the determined or factual, are epistemic forms elucidated in media forms, and were defined according to Peirce as Firsts and Seconds respectively. Kevelson shares a theme in the postmodern writings of Derrida, that posits fundamental uncertainty in structures of verbal, linear language that continually challenges determinist discourse and communication clarity. “Derrida’s method is to deconstruct, to confuse and confound a way of looking at the world that is solely dyadic, binary, by using the very principles it deconstructs”[Kevelson, 1987, 130]. Kevelson celebrates this deconstructive disequilibrium of actuality and possibility, and the indeterminacy it triggers for implementation of legal codes, in an account of creative interpretation which depicts the legal professional environment as an experimental space of a social epistemology and media practice.

At one level an algorithm has no content or necessary form: its structure invites participation and plays with all content. Values can be hypothesised, or entered selectively, and variables can be changed. There is no implicit or necessary relation of form and content: all kinds of possible cases, improbable, imaginary, actual or near actual, could be expressed, and compared to any other with any other. Peirce was always interested in how knowledge was constructed on fallibility, vagueness, misunderstanding, ambiguity, fancy and non-sense. [Peirce, 2.338] [Peirce, 4.560].

It is the inadequacy of legal reasoning in "right to counsel" appeals that provided Kort with a minimal argument for his interventionist research, using alternative mathematical techniques to correlate court judgements. He responded to perceptions of indeterminacy and disorder, based on the suspected fallibility of individual reasoning, that was being disguised and controlled by verbal reasoning. He sought a logical method that included an indeterminacy principle, in order to establish some principles of determinancy within a wider field of indeterminacy. His case study can be regarded in terms of the Peircean phrase “Firsts-in-Seconds”.

APPLICATION OF METHODS

The contemporary relevance of such specified and mathematical methods, allied to media forms, can be apparent in consideration of forms of intuitive and informal logic involved in web browsing, or so called navigation or "surfing". The search engine of Google uses complex "nearest" neighbour and other associative logics to guide a user through a vast array or list of associated terms, sites, topics, videos or persons. "Navigational" logic might seem imprecise compared to the rigour sought in statutory or legal reasoning, yet it is possible that forms of informal logic could take a place in a gamut of legal tools, indeed that the more predictive tools of legal reasoning could, in mediated forms, be layered on the open format of associative or fuzzy logic.

There could even be domains, such as client services, 'people's courts' or education, for example in mandatory counselling in family law courts, where more experimental comparison between a case at hand and others could be beneficial. The process of mathematicising the search and comparison of cases could be a means of auditing or checking the particular process of formal decisions, and a means generally of making decision transparent. Further, as searches of multi media web sites demonstrate, any traditional opposition of mathematical or scientific methods, and natural language or realist modes, must be re-examined. In a site like You-tube, associative logic is used to enable links and lists of videos from a vast field of submissions – a billion or more in number.

Peirce expresses this supplementary "relative" logic, of abduction, as a form of supplementary, not separate, action, as a doubling of the functions of logic. He would later call this logic's 'second intention' [Peirce, 2.368]. The icon, sourced within the defining function of indexical argument, is doubled and complexified, in the development of Peirce's own theory as well as generally, to become the basis of Firstness, of sign objects in self. Smallest increments and changes of behaviour can be mapped in their repetition in a process he termed Firstness. The algorithmic equivalent of such doubling is recursion, where tokens or immediate values are manipulated and cross-referenced to produce supplementary intermediate values. Kort's example becomes a paradigm for what Kress calls "the role distribution among the different semiotics." The intermediate value (iv) is inserted between the purposeful preliminary and final values, in an "application" or action that suspends and doubles the linear, purposeful sign action of court discourse.

Within this abductive supplement the facts and habits of jurisdictional practice can be represented and even created. A multi-modal, multi-logic

account of reasoning is possible, which can help resolve the "two culture" dilemma that first faced Kort. If anything, the need and stakes for such an account have grown in the past four decades, with a proliferation of computerised and organisation methods in legal institutions.

Peirce's pragmatic and behavioural account of mathematics involves what Kress would call "visual literacy", that can strategically transform the "forms of control over meaning" in social discourse [Kress, 1996]. Central to the argument of Peirce, Kevelson and Kress is the identification and utilisation of the "diverse, heterogenous world" of interpretation and production permitted by the "open structure" of images. To the extent that images are pictorial and "unstructured", they are subservient to verbal language and reasoning. Yet it is the openly structured, and modally perceptual potential of images that allows them to "sit side by side, and independent of" words [Kress and Leeuwen].

The capture and manipulation of cases, using non-parametric methods such as nearest neighbour, can become a prototypical form of common law in suitable statutory jurisdictions or where common law is vague or inaccessible. The opportunity to visualise the nearest neighbour outcomes – who is like whom on what basis – in linked or networked diagrams, readily springs to mind, although it not something undertaken by Kort. The lack of visual, dynamic and diagrammatic expression of his outcomes does date his study – the computer display and program for such expression was obviously not available at the time Kort wrote.

The jurisprudential implications of precedent being discovered and argued through abductive or hypothetical logic are not fully explored by Kort, in any of his published papers – and this could be a consequent of his limited means of documenting results. Yet his inquiry is pragmatic and necessarily intervening: its theory is a form of action, its supplementary study is a doubling of conventional practice, involving tools and methods that can potentially change practice.

To some extent, Kort's paper anticipates a horse that has since bolted: the digital revolution, and organisational crises in law administration, have made mathematical methods far more common than they were forty years ago. Chronic court delays or client dissatisfaction can provide a general political discourse for the implementation of supplementary techniques. Such strategies can seek to close indeterminacies in existing practice through substitutional organisational efficiencies and new determinacies, while leaving the ethnographic implications of the adoption of analytic methods that include creative indeterminancies and semantic inefficiencies, unexplored. There is, in short, a need for a theory of methodologies, to support multi media legal

applications, that will overcome simplified notions of administration, decision making and representation of legal material, and will best articulate the potential and emerging uses of complex, multi faceted media forms.

In considering conditions whereby a fact in a Connecticut workmen's compensation case will be admitted as the basis for a successful appeal to the Supreme Court, Kort asserts that up to a billion possible combinations of rules are possible. The number of examinations of conditions required and involved by human inference is prohibitive. The use of shorthand operators to describe linear combinations of conditions might document routinised symbolic rules, or assemblages of predictable indexes, or as Peircean Seconds, may involve "reasoning with words". But such iteration by no means models the process of associative calculation that is potentially involved in the interpretation of discretionary statutory expression. Nor does the extensive written representation and over interpretation of vague discretion provisions prove at all efficient or helpful to actual judicial use.

An explicit semiotic rationale, parallelling the development of Peirce's mature work, would clarify Kort's sceptical inquiry about logic and research generally. Kort's more articulate interrogation of his own empirical method can be regarded in a clear and paradoxical differentiation of "Boolean" and "statistical" mathematical methods. The 'facts' of an individual case are to be perceived in relation to other cases in complex fields of multiple cases. These relations can be viewed in a dynamic, hypothetical way. The numeric reasoning does not only represent behaviour, in a first indicative intention, to be generalised in one preferred or objective outcome for the jurisdiction, but provides a basis for changes in judicial behaviour. Kort's work optimises indeterminacy: "mathematical and statistical methods" are advocated as an alternative analytic and abstract "formulation", for problems that cannot be adequately solved using traditional methods.

The use of a statistical method such as nearest neighbour routines is convincing. The more factors considered and involved in a case, the more complex its representation, the more probability it has of being reversed. That is, judgment is sensitive to the form of the representation of the case. The Supreme Court was found to exercise tolerance of the number of factors it would allow before a critical, breaking point was reached, when the judgment was reversed.

Further, statistical conclusions provide a complex means that assess the reliability or otherwise of existing judgments. Reliability was found to exist despite changes in the composition of Supreme Court judges over a period of time, and despite the social and intellectual background of individual judges.

Kort holds out the possibility of a radical subjectivity and phenomenology being accommodated in legal domains by appropriate aids, and that statistical and graphical methods can model the associative reasoning actually employed by lawyers, as opposed to the more discursive representation of logical reasoning of legal texts.

Research in this instance does not necessitate law reform, neither does it offer an available tool for professional use. As with visual imagery, the limited application of Kort's work can be credited in part to its early timing. But what if the results had been well published, and manifestly contradicted practice? What if statistical method contradicted conventional verbalism? Should such numeric data be available as feedback, to legislators and lawyers, even as feedback in court, as part of decisions? How would it then be interpreted? Such feedback should not only provide data for policy changes. Directly or indirectly it should comprise self-monitoring of heuristic and communicative behaviour by the judicial subjects of its study. Any presumption of objectivity or truth claims of its content and independence of its author would be qualified, if such feedback provided close control and modification, in the temporal and spatial sequences of actual decision making. What judicial training would such close and immediate feedback presume? What technology or mathematical procedures would ensure more dynamic and widespread use of statistics? If this data is an heuristic map of legal inference, what are the jurisprudential consequences of its use? Can it supply the retrospective explanation of reasons required for judgment? Can its method be fully articulated and ethnographically understood by its subjects? Can the subject of this research be reflexively and creatively owned by its professional and client subject?

Kort's studies, we have said, can at the very least be regarded as exciting and necessary explorations of Peircean Firsts-in-Seconds in a modern cultural domain. He explains how determining instrumental procedures involves hypothetical thinking and polysemic interpretation; how the law is continually recreated as it is judged; how close subjectivist and realist themes are. Kevelson was intensely interested in such analysis, yet always within the overall "structure of indeterminate situations", of the creative and "chaotic" qualities of legal practice and dialogic exchange, which can be identified with the Peircean category of Thirdness. Yet Kort never fully achieved such dialogic exchange within the law community. Kort was not a lawyer and was almost proud of the distance of himself and his methods from his subject matter. Kevelson would have rejected any conventional objectivity of researcher and subject, especially one framed by legal technology. "The initial

basis for inquiry is not a thing, but is a relationship between related functions" [Kevelson, 1987] – and diffusion of innovation in specialised legal discourse and inquiry [Kevelson, 1998, pp. 152-164, 182-192] was her major concern.

Kevelson's own examples transform the focus of legal realist on professional behaviour, to which she brings almost a futurist creative, positive evaluation. Her comparison of the corporate lawyers as artists or experimental scientists, seems to idealise and glamorise, as much as uncritically normalise, their routine activities, generalised behaviour and skills. "A community is therefore, a semiotically, coherent organisation purposefully structured and bound by reference to commonly-held leading principles or value norms. Such norms are those motifs and structures which can be said to characterise a culture as a whole and to distinguish it from other cultures." [Kevelson, 1987, p. 140].

Her concern is with the iconic and "indexical prototypes" and "prefigurement of actions", that "semiotically" structure social and cultural organisation, against which the abstract rhetoric of formal law utterances can be evaluated. "Semiotics is constructed on prototypes of Exchange, of Dialogue, of Community" [Kevelson, 1987, p. 250]. Peirce, Kevelson argues, seeks "free and open systems of thought, in free social organisations"[Kevelson, 1987]. Peirce spoke of an "active law", which can be compared to Kevelson's "creative law", as "efficient reasonableness, or in other words as truly reasonable reasonableness. Reasonable reasonableness is Thirdness as Thirdness." [Peirce, 5.121]. The study of reasonableness had ethical, theological and political implications [Apel, 1995, pp. 191-196], and increasingly gave Peirce a paradoxical relationship to legal discourse [Peirce, 7.61].

CONCLUSION

To what extent does either Kevelson or Kort illustrate the full vision of what Kevelson terms the "perceived and perceivable consequences on the actual lives of actual people in those societies where creative law exists and flourishes?" The opportunity for creative and "chaotic" qualities of dialogic exchange, or "semiotic structure of community-as-inter-relationship" possible in mediation, conciliation, in public administration and counseling, in civil domains especially like the family court, are not addressed by either author. Peirce's ideas, however pertinent, clearly predate such modern practices. Thus, the full potential for public and new contemporary media, in legal and social

domains, is not addressed: however the potential of deep philosophical understanding of the images and process of such media is certainly prefigured and conceptualized in the work of all three authors. Through appropriation of the seminal thinking of Peirce, such understanding of digital media can be conceptualized in terms of a semiotic theory of mathematics. Peirce affords a flexible solution to the long-standing problem of the commensurability of verbal and non-verbal language, by locating various forms of reasoning – mathematical and verbal – within his elaboration of three categories or function of signs.

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Chapter 8

INDIANA JONES AND THE ILLICIT TRAFFICKING AND REPATRIATION OF CULTURAL OBJECTS

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ABSTRACT

'Indiana Jones and the Illicit Trafficking and Repatriation of Cultural Objects' is not the name of the latest film in the Indiana Jones franchise; nor is it the name of any of the previous films in the longstanding trilogy. Nevertheless, titles aside, as blockbusters these films arguably represent an epitome of popular culture which has been explored extensively by the academic community. Despite this openness of many other academic disciplines, the law in general has been loath to engage unconventional sources and in particular popular culture despite the fact that it can benefit legal scholarship with its unique perspective. This article seeks to redress the legal community's avoidance of popular culture by engaging with it through a semiotic analysis of the Indiana Jones trilogy in relation to legal research regarding the illicit trafficking and repatriation of cultural objects. Such engagement needs to be critical – the commercial and entertainment shaping of popular films cannot be denied - but attention needs to be no more or less than formal legal texts on the same subject. In areas of international affairs in particular, informal cultural texts respond to unresolved complexities and limitations, formal jurisdictions and inter-

government agreement, and hence should be regarded as a serious contributor to public discourse.

INTRODUCTION [1]

Popular culture "tends to crystallise most commonly in print media, popular music, film and television" [Thornton, p. 6]. One academic has provided an analysis of these films as an Arthurian narrative that traces the development of Indiana Jones through the typical chivalric "vita" while many others have analyzed the trilogy as "Reaganite entertainment" which involves an effort to restore the faith of individuals in America as a "promised land" entitled to intervene in the affairs of others as a result of moral superiority and divine mission [Aronstein, p. 3]. Legal and cultural research share a common interest in the illicit trafficking in cultural objects from source to market states, that ultimately generates demands for the repatriation of these objects. [2]

Cultural analysis can questionthe legal discipline's resistance to the use of popular culture for fear of its corrupting influence. As Margaret Thornton states: "These terms are amorphous, however, and have merged haphazardly into one another. They do not lend themselves to the clear lines and neat classifications beloved of lawyers. Indeed, the pervasiveness and accessibility of pop culture, particularly the mass media that is consumed by intellectuals and the uneducated alike, puts paid to the idea that there are discrete popular and high cultures" [Thornton, p.4]. It can be demonstrated how legal arguments benefit from engaging with popular culture as a source by use of suitable methods, in this case semiotic, that reveal parallels in subject matter in the two domains. The apparently divided discourse, between law and culture, stymies progress in legal research in an area like illicit trafficking and repatriation of cultural objects, and at worst may even contribute to the problem.

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[1] This chapter has received supplementary assistance by the volume's editor.

[2] In source states, the supply of cultural objects exceeds internal demand. Among others, source states include Mexico, Egypt and Greece. Furthermore, the individuals in these states also are referred to as source peoples in much of the relevant literature. By contrast, in market states the demand for cultural objects exceeds the supply. States here include the United States, the United Kingdom, Germany and Switzerland among others. However, these classifications are deceptively neat. States can be both source and market nations such as the United States and Canada; both are sources of many North American Indian artifacts as well as destinations for many other artifacts worldwide [Merryman, p. 832].

CONVENTIONAL VERSUS NON-CONVENTIONAL SOURCES AND THE ILLICIT TRAFFICKING AND REPATRIATION OF CULTURAL OBJECTS

The sources of the discipline of law and research are written. Writing stands at the discipline's core as "much of the common law tradition is essentially a written tradition" [Cownie, Bradney, & Burton, p. 102]. [Vinson, p. 507]. Legal research involves: "identifying and retrieving information necessary to support legal decision-making. In its broadest sense, legal research includes each step of a course of action that begins with an analysis of the facts of a problem and concludes with the application and communication of the results of the investigation" [Myron, p. 1]. Legal writing then is the communication of this research with reliance on and citation to the authorities that legal research identifies and retrieves. The primary authorities that legal research places emphasis on include cases, statutes and regulations while the secondary authorities include law review articles and legal encyclopedias, among others. Regardless of their primary or secondary nature, all of these authorities represent traditional or conventional sources in legal research.

However, a host of sources exist beyond these traditional staples. Limited only by their own boundaries and genres, non-conventional sources include songs, literary sources, visual depictions, television and film. Yet the discipline of law remains tentative if not hostile to the use of such sources outside of its established repository despite the fact that these sources often benefit legal research and public discourse. Melanie Williams explains regarding the analysis of literary texts alongside more traditional sources in relation to issues of law: "juxtaposing jurisprudence alongside literature can not only assist in making these difficult discourses more accessible and alive, it can also, as with the particularities of life itself, 'test' the viability of jurisprudential claims"[Williams, p. xix].

In particular, the legal discipline proves unreceptive to these unconventional sources as they frequently form part of popular culture. Popular culture refers to the panoply of beliefs, practices and wisdom of ordinary people…. [that] may be implicitly distinguished from the more intellectual, theoretical and scholarly pursuits associated with 'high culture' [Thornton, p. 4]. Generally, the legal community regards popular culture with suspicion if not outright contempt [Chase, pp. 538-41]. Indeed, the law's resistance to popular culture and for that matter most ideas and values outside of its confines, extends beyond that of most disciplines in the humanities and

social sciences "as the law itself is deemed to be the only authoritative source of law" [Thornton, p. 3]. Thornton continues and argues that such self-referentialism is maintained through legal positivism, which refers to that which is posited by the authoritative pronouncements of judges and legislatures [Thornton, pp. 10-15].

However, despite its hostility to popular culture, legal research often lends itself to and benefits from the use of other unconventional sources. Research regarding the illicit trafficking and repatriation of cultural objects proves no exception, and includes academic voices outside of the legal profession such as anthropologists and archaeologists who often focus on the use of unconventional sources as a matter of course. In turn, this area of research has legitimized these voices and in doing so legitimized the use of many unconventional sources beyond that of many other areas of legal research. Moreover, the nature of this area of research lends itself to the use of such sources as the result of a potentially cyclical relationship between unconventional sources and cultural objects.

Specifically, many cultural objects may be non-conventional sources[3] while many non-conventional sources may be cultural objects. For instance, cultural objects have inspired numerous poems and songs which arguably may become cultural objects in their own right. As regards the former, the Elgin Marbles inspired John Keats to pen the aptly named poem *On Seeing the Elgin Marbles for the First Time* in which he writes:

> So do these wonders a most dizzy pain,
> That mingles Grecian grandeur with the ride
> Wasting of old Time- with a billowy main,
> A sun, a shadow of a magnitude. [Keats, 7 May 2008].

In turn, the illicit trafficking and repatriation of cultural objects discourse relies on and so benefits from the use of unconventional sources. For instance,

[3] Article 2 of the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) defines cultural objects as "those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention" [UNIDROIT Convention, Art. 2, p. 1331). The Annex specifically includes categories of cultural objects that reflect the non-conventional sources discussed herein including visual depictions, literature and cinema. Respectively, it makes reference to "pictures, paintings and drawings" as well as "rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.)" and to "archives, including sound, photographic and cinematographic archives" [UNIDROIT Convention, Annex, p. 1339].

this area of research often includes the use of visual depictions such as the inclusion of photographs of the multitude of cultural objects at the heart of this research, which provides a nice illustrative element that legal research often lacks and can help generate public interest. [Merryman] [Goldrich]. Moreover, many cultural objects themselves have inspired countless songs and poems. Leonardo Da Vinci's *Mona Lisa* inspired Ray Evans and Jay Livingston to write the song of the same name first made famous by Nat King Cole and then countless others who crooned:

> "Mona Lisa, Mona Lisa, men have named you.
> You're so like the lady with the mystic smile." [Livingston & Evans]

It is not surprising that the very emotive nature of the repatriation of objects also has moved famous poets to lament their removal and press for their return. In fact, one of the most famous cases in this field of research inspired Lord Byron to scribe such poems. In both *The Curse of Minerva* [1811] and *Childe Harold's Pilgrimage* [1812], Byron laments the removal of marbles from the Parthenon in Athens by Lord Elgin in the eighteenth century. Speaking as Minerva to Byron, he wrote in part:

> "Lo! Here, despite of war and wasting fire,
> I saw successive tyrannies expire.
> 'Scaped from the ravage of the Turk and Goth,
> Thy country sends a spoiler worse than both."

The following passage is illustrative of Byron's lament:

> "But most the modern Pict's ignoble boast,
> To rive what Goth, and Turk, and Time hath spared:
> Cold as the crags upon his native coast,
> His mind as barren and his heart as hard,
> Is he whose head conceived, whose hand prepared,
> Aught to displace Athena's poor remains." [Merryman, p.1904).

These marbles, now known as the Elgin Marbles, stand in the British Museum and at the heart of one of the most famous controversies in the area of the repatriation of cultural objects and so frequently have been explored and referenced in this area of research. [Merryman] [Autocephalous Greek-Orthodox Church].

Yet, despite its relative openness to these more obvious uses of unconventional sources, the research into the illicit trafficking and repatriation

of cultural objects has not extended its use of non-conventional sources to include those of popular culture. This chapter will now provide a semiotic analysis of the Indiana Jones trilogy, which in chronological order includes *Indiana Jones and Raiders of the Lost Ark*, *Indiana Jones and the Temple of Doom* and *Indiana Jones and the Last Crusade.* The use of the Indiana Jones trilogy as the focus of a semiotic analysis stems from its ready classification as an Adventure film or more specifically its sub-genre of a Treasure Hunter film.

Derived from the French word for kind or class, the term genre is widely used in film studies to refer to a specific type of text. For the purposes herein, genre is understood in the way it traditionally has been understood "for most of its 2,000 years… [as] primarily nominological and typological in function" [Allen, 1989, p. 44]. Fiction and non-fiction serves as the basic distinction in film genre. Beyond this, comedy and melodrama provide a further sub-division with the latter including the genre of Adventure films and its sub-genre of Treasure Hunter films [Sobchack & Sobchack, 1980, pp. 203-40]. Of course this use ignores the greater complexities that the term genre entails, such as whether genres exist independently in the world or are merely constructs of analysis, is their taxonomy finite or infinite and are they culture-bound or trans-cultural among others [Stam, 2000, p. 14].

Specifically, it is this genre and its textual features that most closely touch on those issues raised in relation to the research into the illicit trade and repatriation of cultural objects such as the role of the archaeologist, the nature of the discipline of archaeology and most directly how to treat the object at the center of the treasure hunt. In addition, as Treasure Hunter films go, the Indiana Jones trilogy arguably stands out as among the most well-known. A 1994 survey in the United States revealed that only 10% of respondents indicated that they had not seen any of the Indiana Jones movies while 60% answered that they had seen all three [Mackinney as cited in Holtorf, 2008a]. More recently, in 2008 the trilogy continued to occupy three of the top five spots of top grossing Treasure Hunter films [Box Office Mojo, 5 May 2008]. It is not surprising then that Indiana Jones has entered the collective popular culture consciousness and parlance, as evidenced by widespread reference in diverse everyday situations. For instance, a BBC news article discussing Michel van Rijn, the rogue Dutch art dealer who went from smuggler wanted by Scotland Yard to working for them, is quite simply titled, "The 'Indiana Jones' of Chelsea", with no further explanation [Bell, 22 August 2006]. Similarly, in a United States Immigration and Customs Enforcement news release discussing the seizure and return of a pre-Columbian Mayan artifact to

Guatemala, the article describes the individual who attempted to smuggle the artifact into the United States in violation of the Convention on Cultural Property Implementation Act, as "no Indiana Jones" [United States Immigration and Customs Enforcement, 1 October 2007].

It would be profitable to extend audience and ethnographic research into reception of these films – something this paper will not attempt – to trace instances of more significant and motivating effects on individual and collective audiences, especially in Third World countries. Have the films, for instance, assisted in setting political and legal agendas for repatriation of specific objects? We can hypothesise that to some extent this must be the case: that the subject matter of films can help set and assist the agenda for media, political and legal debate on key issues, especially in international law.

SEMIOTICS AND THE INDIANA JONES TRILOGY: REFLECTING THE REALITIES AND LEGAL RESEARCH OF THE ILLICIT TRAFFICKING AND REPATRIATION OF CULTURAL OBJECTS

Semiotics refers to an examination of signs within society which carry meaning for someone. Developed by Ferdinand de Saussure, traditionally semiotics involved the study of linguistic signs (i.e. words) and how these signs carry meanings. Specifically, signs or representations within semiotics are something physical (X) standing for something else (Y) material or conceptual in some particular way (X=Y) [Danesi, p. 23]. Saussure viewed linguistics as only one part of semiology and envisioned that all sorts of other things which communicate meanings could be studied according to the same method of semiotic analysis [Bignell, p. 5]. Indeed, semiotics has been employed beyond its traditional remit to encompass almost every system where something [i.e. the sign] carries meaning for someone. Media proves no exception. In 1957, Roland Barthes first applied semiotics to all kinds of media in his book *Mythologies*. Barthes' use of the term myth here does not refer to its common understanding of traditional stories but rather to ways of thinking about how ideas, peoples and places are constructed to send messages to the reader or the viewer of the text [Barthes].

In doing so, he focused attention and critical scrutiny on aspects of everyday life that previously had been reserved for the study of high culture such as literature, painting and classical music [Bignell, p. 18] with the goal of

demonstrating that popular culture "constitutes an overarching system of signs that recycles meanings within Western culture, subverting them to commercial ends" [Danesi, p. 23]. With its focus on quests for treasures, the Indiana Jones trilogy recycles the cultural concept of cultural appropriations which has deep roots "springing from European mythology and story telling as evidenced in tales such as Beowulf, the Volsung Saga and the Mabinogin" [Hall, 2004, p. 164 citing Pearce, 2000, pp. 48-59]. Specifically, media semiotics involves studying how the media creates or recycles signs for its own ends through a three step process of asking: a) what something means or represents; b) how it illustrates its meaning; and c) why it has this meaning [Danesi, p. 34].

Turning to the step of enquiry regarding what something means or represents, this analysis focuses on two signs or representations included in the text of the trilogy. In the case of *Indiana Jones*, he represents both the archaeologist and the broader profession of archaeology while the various treasures and their ultimate disposition represent cultural objects and repatriation. So how do these representations illustrate these meanings of the archaeologist, the profession of archaeology, cultural objects and repatriation? As regards the archaeologist, these films present a mixed if not contradictory view of the role of an archaeologist. This depiction of archaeologists corresponds to wider analysis, of archaeologists as "primarily white, male, heterosexual, 'able-bodied' individuals [which] serves to alienate experiences, identities and individuals that do not conform to this model of the 'ideal archaeologist' [and ultimately has] a detrimental effect on both the real and perceived accessibility of archaeology to individuals and communities that are not represented by this 'ideal'" [Fraser, 2003].

Indiana Jones frequently advocates the position that the cultural objects he and others acquire should go to a museum. For instance, *The Last Crusade* opens with a young Indiana Jones in a struggle with a group of treasure hunters over the fictional treasure of the Cross of Coronado. In an exchange with these hunters, the young Indiana explains that the cross belongs to Coronado. The lead hunter replies that Coronado is dead and so are all of his grandchildren to which Indiana Jones responds: "then it belongs in a museum" [The Last Crusade]. On the other hand, Indiana Jones recognizes situations where objects should remain with source peoples. As regards the latter, the *Temple of Doom* focuses solely on his quest to and return of a set of stones known as Shankar Stones to a village in India from which they were removed.

This dualism that typifies the trilogy's depiction of an archaeologist is paralleled in its depiction of the profession of archaeology. On the one hand, the trilogy portrays archaeology as a serious academic discipline characterized

as one of science and intense research. For instance, both *Raiders of the Lost Ark* and *The Last Crusade* show Indiana Jones, the archaeologist, as a scholarly professor by including at least one university scene, which involves him teaching an archaeology course while donned in tweed with a bowtie no less. Moreover, many of the statements he makes reflect this view of the profession. In *The Last Crusade*, the speech he gives his students in one of these university scenes best illustrates this view. "Archaeology is the search for fact… no, not truth. If it's truth that you are interested in, the philosophy class is down the hall. Forget any ideas about lost cities, exotic travel and digging up the world. We do not follow maps to treasure, and "X" never ever marks the spot. 70 percent of all archaeology is done in the library. Research, reading, we cannot afford to take mythology at face value." [The Last Crusade].

Obvious humor aside, the trilogy constantly contradicts this serious scientific image of the profession of archaeology. Arguably, such humor in part stems from an acknowledgement on the part of the film makers to the audience that they both understand that adventure does not really typify the reality of the profession of archaeology. However, the fact remains that the trilogy simultaneously portrays both views of the profession. As Holtorf notes: "Ironically, in many ways the reality of professional archaeology is not entirely different from the stereotypical clichés of archaeology that are so prominent in popular culture. As I argued earlier, these clichés have some affinity with what the professionals really do, as well as with how they see themselves – although there are also aspects of archaeological work that are not reflected in any of these stereotypes. But at the end of the day, from time to time archaeologists really do find exciting treasures, and their fieldwork often is exciting in many ways. Precisely that adventure aspect is central to how many archaeologists define themselves as professionals, and how they choose to remember their research. In short, archaeologists really love Indiana Jones." [Holtorf, 2008b, p. 27].

All three films are saturated by the portrayal of archaeology as adventure as Indy dons a leather jacket and a fedora while toting a pistol and a bullwhip wherever he goes; and he goes everywhere! Specifically, all three films include extensive exotic travel and scenes of digging up the world, which have been described as little more than the effective looting of "indigenous cultural heritage, portrayed as the legitimate collection of antiquities" [Hall, p. 164]. The major locations in the trilogy include South America, the United States, Nepal, Egypt, China, India, the Portuguese coast, Italy, Germany and the Hatay Province, an area that both Turkey and Syria claim. In particular,

Raiders of the Lost Ark relies heavily on scenes that literally involve digging up the world. In *The Last Crusade*, Indiana Jones follows a map throughout to the treasure of the Holy Grail and X does in fact mark the spot in one memorable scene which involves a library in Venice at the start of his quest where he looks for the tomb of a medieval knight; a large Roman numeral ten or X literally marks the spot on the library floor!

Similarly, as regards cultural objects and their repatriation, these films also present a mixed if not contradictory view through its representation of the various treasures at the heart of these films and their final disposition. In *Raiders of the Lost Ark*, the Ark of the Covenant is removed and taken into the custody of the U.S. army for 'safekeeping'. Particularly ominous regarding the fate of this object is the final scene where it is packed into an unlabeled and non-descript crate in a store room filled with similar such crates, which suggests that this among other cultural objects, belongs with Western/ market states for protection and scientific study, regardless of the problems this raises in terms of ownership and access by source states/peoples as well as colonialist overtones of the need to rescue cultural objects from the Third World for "the greater benefit of science and civilization" [Shohat & Stam, p. 124]. In *The Temple of Doom* the entire focus of the film centers on Indiana Jones's quest to and return of the sacred Shankar stones to an Indian village. Similarly, in *The Last Crusade,* the Holy Grail remains in its resting place; albeit as the result of mystical forces that prevent its removal!

The last step in a media semiotic analysis asks: why do these representations have these meanings? Why does the Indiana Jones trilogy collectively provide a contradictory understanding of the archaeologist, the profession of archaeology and the repatriation of cultural objects? Ultimately, these representations that a media semiotic analysis of the Indiana Jones trilogy reveal have such meanings because they reflect the equally divided nature of the professional community involved, including archaeologists, curators and lawyers, and their research and proposed solutions concerning the broader debate regarding the repatriation of cultural objects.

Since the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property [UNESCO Convention] and the UNIDROIT Convention, a clear and single legal framework exists regarding the return of illicitly trafficked and/or stolen cultural objects. However, due to the non-retroactivity of this legal framework, most famous requests within the broader repatriation debate are left without a legal claim. These include requests by successor states like Greece for the return of the Elgin Marbles from the British Museum in London, as well as

significant requests by indigenous peoples for the repatriation of their traditional objects at the international level. The vast bulk of these objects left their possession long before the UNESCO and UNIDROIT Conventions came into effect. It is this division or lack within this broader repatriation legislation which forces attention to informal sources in popular culture.

Such sources simultaneously reflect both the ideologies of cultural nationalism and cultural internationalism. Ideology refers to a way of understanding reality and society which assumes that some ideas are self-evidently true while others are self-evidently biased if not untrue. Always shared by members of a group or groups in society, one group's ideology often conflicts with another's [Bignell, 2002, p. 24].

Coined by a leading scholar in the field of art law, John Merryman's binary categorization of the broader repatriation debate has become dominant in the field and permeates almost all of the research it has spawned. Cultural internationalism involves "thinking about cultural property… as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction" [Merryman, p. 831]. Ultimately, it always denies demands for repatriation. On the other hand, cultural nationalism involves thinking about cultural property "as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the 'repatriation' of cultural property" [Merryman, p. 832].

The Indiana Jones trilogy illustrates such diametrically opposed ideologies. For instance, the depiction of archaeologists through Indiana Jones reflects both stress on keeping the treasures at the center of these films in a museum and also returning them to source peoples. Similarly, the representation of the profession of archaeology on the one hand as a legitimate scientific pursuit and on the other hand as sheer unadulterated adventure, often little more than legitimized looting, provides an imaginary expression of actual separation between archeologists, divided between cultural internationalists and nationalists. Finally, the representation of cultural objects and their repatriation through various treasures and their final dispositions in both museums and with various source reflects the contrary ideologies.

Drawing heavily on the concept of legal semiotics as developed by Duncan Kennedy [Kennedy], Alan Audi set the foundation for exposing this divided community and its discourse through a legal semiotic analysis of conventional sources that comprise research into what he terms the "cultural property argument", which essentially reflects the research into the broader

debate concerning the repatriation of cultural objects [Audi, p. 131]. Kennedy's legal semiotics involves a four-step process. However, for the purposes of this analysis, the most important steps to review are Audi's use of the first and second steps as these set the foundation for unmasking a divided discourse. According to Kennedy, the first step of a legal semiotic analysis entails a lexicographical or 'mapping' task of identifying the most common argument- bites in the selected area of legal argument under scrutiny. Kennedy understands legal argument to mean an argument either in favor or against a "particular resolution of a gap, conflict, or ambiguity in the system of legal rules" (Kennedy, p. 325).

What makes something an argument-bite "is nothing more nor less than that people use it over and over again….with a sense that they are making a move, or placing a counter in the game of the argument" [Kennedy, p. 329]. Next, as Kennedy suggests, a legal semiotic analysis explores the formation of argument-bites into pairs and further into clusters. The pairing of argument-bites stems from the fact that within legal argument the practice is to use stereo-typed argument-bites to support one position or another and so results in their existence as opposed pairs of maxims and counter-maxims [Kennedy, p. 327]. In turn, each argument-bite is "associated in the minds of the arguers not with one but a variety of counter-bites" [Kennedy, p. 329]. Therefore argument-bites are necessarily relatively structured, which means then that so is every legal argument within a legal culture [Kennedy, p. 329]. In turn, Audi identifies "argument-bites in pairs as they often appear in court cases and law review articles" [Audi, p. 133]. Careful to stress to the reader to avoid assessing the strengths of the arguments in context in the same vein as Kennedy, Audi identifies and provides examples, though not exhaustively, of five main groups of argument-bites in pairs, including competence, moral, rights, administrability and historical arguments [Audi, p. 134-6]. According to Kennedy, the second step of a legal semiotic analysis then involves placing these pairs into clusters, which refer to a set of arguments used together in relation to a particular legal issue [Kennedy, p. 339]. The central point is that when the bite is heard as a result of the opponent's use of it within a particular doctrinal context, that the other members of the cluster are already in mind [Kennedy, p. 341]. In turn, these clusters give argument-bites their meaning and the overarching legal argument gets its "intelligibility, from the system of connections between bites" [Kennedy, p. 337]. Again, following from Kennedy, Audi arranges argument-bites typically used together into clusters [Audi, p. 137]. He identifies some clusters in the cultural property argument such as the applicability of source nations' laws in market nation courts,

states' duties and responsibilities/ delimitation of communities' protected interests, buyers' duties and responsibilities, sellers' duties and responsibilities and standing to invoke property rights in cultural property [Audi, p. 137].

Although Audi does not explicitly make this connection, he laid the foundation for exposing the all-pervasive divide in the community affected by and the legal research into the broader debate concerning the illicit trafficking and repatriation of cultural objects between cultural internationalism and nationalism as it is then possible to place the argument bites and so the clusters he identifies into the even broader overarching categories of these ideologies. Specifically, each of Audi's argument-bites within the five groups he identifies can be viewed as either a bow in the quiver of cultural internationalism or cultural nationalism. For example, one competence argument-bite pair (identified by square brackets) is that "[s]ource nation patrimony law should not be enforced in domestic (market country) courts because they are against public policy versus [s]ource national patrimony laws establish ownership and we must honor ownership as defined by the state in question out of deference, comity, or public policy" [Audi, p. 134], respectively reflects a cultural internationalist and cultural nationalist argument. A moral argument pair is that "[c]ultural property should be considered the inalienable (non-transferable) property of states versus [c]ultural property is like any other (freely transferable)" [Audi, p. 134]. Again, the former represents a cultural internationalist view and the latter a cultural nationalist view. Similarly, cultural nationalist and internationalist perspectives are reflected respectively in rights argument pairs such as "[s]tates (or social groups) have the right to own their cultural property before other claimants versus [o]ther entities (museums, collectors, etc.) have the right to own cultural property if they wish" [Audi, p. 135]. As regards administrability, the argument-bite that "[t]his regulation is so restrictive that it encourages the black market versus [i]t is a state's duty to protect its own cultural property through restrictive regulations" [Audi, p. 135] again respectively reflects cultural internationalism and cultural nationalism.

Finally, a historical argument-bite pair that "[t]he state or group claiming the title to this cultural property in fact has no historical claim to the property because so much time has elapsed versus [t]he state or group claiming the title has a historical claim for a fact-specific reason" [Audi, 2007, p. 136] also correspondingly display cultural internationalist and nationalist perspectives. To the extent that these argument-bites are then placed within clusters, these clusters then show differing perspectives. Though Audi does not explicitly name these ideologies, he concludes through a legal semiotic analysis of

conventional sources in the cultural property argument that: "Decades of legal scholarship, cases and debates carried out in the press seem to have weighed heavily on scholarly analysis creating a substantial inventory of readymade arguments supporting just about any position in a cultural property dispute. As a result discussion surrounding the protection or restitution of cultural property has come to rely on a dizzying self-referential and self-justifying series of legal theories and counter-theories deploying and combining any number of arguments…. Viewed as a whole, these legal arguments predictably have tended to cancel each other out, muddying the field enough to entrench a status quo in which restitution is studied, analyzed, and bitterly debated, while Western museums are rarely, if ever, compelled to question their vast holdings or contemplate their return." [Audi, 2007, p. 131-2].

LIMITATION OF MEDIA REPRESENTATIONS

Although the text of the *Indiana Jones* trilogy provides a number of signs ripe for semiotic analysis, the trilogy also lacks some representations relevant to the research and realities of the illicit trafficking and repatriation of cultural objects. These omissions in and of themselves prove significant. First, the trilogy lacks any texts related to exploring the complex issues that arise in relation to this research. For instance, it ignores key issues of legal and moral enquiry such as who owns the past, what ownership means and if ownership even matters. Apart from the issue of ownership, it ignores whether the objects should or should not remain with market states or source states and/or peoples, the relationship between the objects and markets states and source states and/or peoples and the broader human rights issues pervasive in all of these enquiries, to name just a few. These enquiries consume much of the conventional research into the illicit trafficking and repatriation of cultural objects. This does not always prove the case for the trilogy's omissions. These films also pay scant attention to representations and so the reality of the plight of one of the most important actors in the illicit trafficking of these objects: the *tombaroli*, *huaqueros,* or tomb robbers [Lattanzi] [Slayman] [Ruiz].

These robbers serve as the starting point in the long journey that cultural objects take in trafficking. They plunder tombs of both sites that they discover and official archaeological sites and then pass the discovered items onto

middlemen[4] who in turn sell them onto buyers in the United States and Europe, thus fuelling a multi-million dollar trade second only to drugs [Elginism]. Terming trafficking in cultural property a "seamless trade" and pegging its value at US $6 billion annually, a high-profile United Nations Educational, Social and Cultural Organisation meeting revealed that it was next only to narcotics trade worth $7 billion. "Trafficking in cultural property has assumed the dimensions of a seamless trade as drug cartels peddle art objects for ploughing the huge monetary gains in their narcotics trade and also for arms dealings" [Galla].

However, these multi-million dollar figures do not reflect the reality of the life of the tombaroli who see little profit despite their dangers and intense manual labor. In an interview with one tombarolo, he relayed the nature of the work, which has been described as follows: "Breaking into a tomb usually takes two nights. On the first, enough dirt is cleared away to allow ventilation of the interior chamber…. On the second night, the tombaroli return to the site. They use no flashlights or torches of any kind and prefer to work when the moon is low…. "[Ruiz].

According to this same tomobarolo, the middlemen or the *ricettatore* see the real profit. In this interview, the tomobarolo would say little about the middlemen though he describes them as "well-educated" and "part of the establishment" [Ruiz, 5 May 2008]. "The guy I work with most is a professional… He makes a very good living from selling the material he buys from me and from other tombaroli. I estimate that this guy sells the stuff for 10 times what he paid me. Let me put it this way: he drives a Mercedes, I drive a Fiat Panda" [Ruiz, 5 May 2008].

Of these social actors, the Indiana Jones trilogy focuses most of its attention on the middleman, rightly depicted as well-educated, professional and wealthy. For instance, *The Last Crusade* takes the time to develop this representation in such a polished character as Walter Donovan who simultaneously works with both Indiana Jones as well as the Nazis to discover the Holy Grail. However, the trilogy pays scant attention to representations of the tombarolo at the heart of the trafficking operation and so their realities. At most, these films only show local workers toiling under the direct control of

[4] "I know the land, know how to recognize the kind of grass that grows on the ground [above the tombs], know almost what the ancient Etruscans were thinking when they were looking for a place to bury their dead" [Lattanzi, pp. 48- 9]. The tombaroli's job was made easier by the large number of unidentified and unguarded sites, but looters are equally at home raiding protected areas. Clandestine digging at Morgantina [in Sicily] was almost uncontrolled; [archaeologists] were having to guard their own trenches at night and actually suffered some losses." [Slayman, p. 43]

either middlemen or a rogue archaeologist. In addition, this representation reinforces imperialist overtones [Shohat & Stam].

Economic profitability partly explains the absence of both these realities and tougher issues regarding the illicit trafficking and the repatriation of cultural objects. Specifically, the texts of films are economic goods that seek to generate profits. Mike Wayne discusses this concept in relation to texts of television shows. However, the concept easily applies to films as well. "It comes as no surprise that directors, producers, actors and the rest of the Hollywood machine seek to earn a profit. However, the realities and serious research concerns of illicit trafficking and the repatriation of cultural objects pull in a different direction from economic considerations and ultimately have erased the aforementioned texts in these films. [Wayne, p. 24]. Spielberg specifically modeled the trilogy on the escapism and simplification characteristic of the Saturday matinee serial. After all, as archaeologist John Gowlett noted specifically in relation to the trilogy's failure to depict reality in relation to archaeology, "I cannot think of anything worse than pontificating upon whether any archaeology in this fails to meet reality. That would be about as worthwhile as spotting the impossibilities of physics in Star Wars" [Gowlett, p. 157].

By omitting the plight of the tombalori and other ethical issues associated with its subject matter, the films can limit issues of public awareness[5] of illicit trafficking, but by no means suppress them. The failure of other forms of public discourse on the subject means that *Indiana Jones* probably remains the main, mass source of information on the subject, and remains a useful stimulus for critical, stepped responses in audiences [Law Times].

To identify limitations in the subject matter of the films, such as the division of ideological discourse between cultural internationalism and cultural nationalism, is to engage in a debate allowed by the cultural works. To use analytic tools to bring close attention to film works, is to treat them with the attention given to formal legal texts, and denies continued resistance to unconventional sources and in particular popular culture by legal disciplines.

[5] A 2001 study by the Archaeological Institute of America reveals that only 23% of respondents were aware of the laws regarding the buying and selling of artifacts while only 28% knew of laws protecting archaeological sites [Wilkie, p. 98]. Yet this survey also indicates there is at least public concern regarding the illicit trafficking and repatriation of cultural objects. 96% of respondents agreed that there should be laws to protect historical and prehistoric archaeological sites while 90% agreed that there should be laws to protect the general public from importing artifacts from a country that does not want those artifacts exported [Wilkie, p. 98].

CONCLUSIONS. ABSURD AVOIDANCE, STIFLING REPRODUCTION AND CHALLENGES FOR THE FUTURE

An examination of the Indiana Jones trilogy in relation to the broader debate regarding the illicit trafficking and repatriation of cultural objects reveals patterns of contradictions and synchronies, both between the relationship of such informal, cultural material, and formal legal sources on the same subject matter. The cultural representations are often motivated by gaps in legislation, in this case in international law. In areas of security and terrorism, disaster, refugees, government and democracy, climate and human rights, one can expect film to take up themes and discourses especially where there are limitations and complexities in the drafting of treaties and international laws. Throughout the arms race and Cold War, films continued to explore and mediate public opinion on international issues, such as arms control, that have proved intractable for formal legal or political resolution. Al Gore's "An Inconvenient Truth" motivated much of the public discourse that has led to the agenda for international legislation on climate change. It is likely to expect further cinemagraphic and narrative works, even in areas of cultural appropriation. It is too easy to dismiss the Indiana Jones trilogy as commercial entertainment. It is more significant to regard it as a seminal media study in a problematic area that will require complex and unknown forms of national and international decision making and legitimation. It is possible that the imperative and agenda for formal solution to many international problems will continue to be aided and even discovered through informal sources of popular culture. Films reflect and reiterate complexities, such as the ideological paradox of national and international, yet in doing so offer a continued source of informal, narrative driven discourse of intractable and outstanding questions. Media and semiotic analysis of a non-conventional source thus provides an important even essential tool for the study of sources that can be intrinsic to the development of more conventional sources. The issue is not one of mass media representing decisions and processes already expressed in the law, but hypothetically responding, along with the law, to issues of national and international importance whose solution remains prospective. Examination of the Indiana Jones trilogy demonstrates how legal scholarship benefits from engaging with popular culture by revealing the real challenge that lies ahead for this area of research regarding the broader debate concerning the illicit trafficking and repatriation of cultural objects [Davis, p. 281].

In areas of emerging international law, the maintenance of boundaries between formal and informal sources can result in never reaching a solution to outstanding issues, or as Audi describes it: " it restrains the bounds of acceptable discourse and limits the universe of potential solutions to cultural property disputes—or at least muddies the water enough to prevent clear-cut solutions from emerging" [Audi, p. 145]. Analysis of popular culture reveals that the real challenge that lies ahead for this area of legal research involves exploring how to escape the stifling replication of legal arguments in order to make progress towards reaching a solution. "Criticism is initially reactive and destructive, rather than constructive. But our mistaken belief that our current ways of doing things are somehow natural or necessary hinders us from envisioning radical alternatives to what exists…. By systematically and constantly criticizing the rationalizations of traditional legal reasoning, we can demonstrate, again and again, that a wider range of alternatives is available to us" [Singer, pp. 58-9].

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