

# No Foundations 13

## **EDITORS-IN-CHIEF**

**Julen Etxabe**, University of Helsinki, Finland

Email: [julen.etxabe@helsinki.fi](mailto:julen.etxabe@helsinki.fi)

**Mónica López Lerma**, Reed College, USA

Email: [monlopez@reed.edu](mailto:monlopez@reed.edu)

## **ADVISORY BOARD**

- Sakari Hänninen, University of Helsinki, Finland
- Ari Hirvonen, University of Helsinki, Finland
- Samuli Hurri, University of Helsinki, Finland
- Pia Letto-Vanamo, University of Helsinki, Finland
- Panu Minkkinen, University of Helsinki, Finland
- Kimmo Nuotio, University of Helsinki, Finland
- Kaarlo Tuori, University of Helsinki, Finland

## **INTERNATIONAL ADVISORY BOARD**

- Peter Becker, University of Vienna, Austria
- Joxerramon Bengoetxea, University of the Basque Country, Spain
- Emiliós Christodoulidis, University of Glasgow, UK
- Carlos Closa, Spanish National Research Council (CSIC), Spain
- Peter Fitzpatrick, Birkbeck, University of London, UK
- Jeanne Gaakeer, Erasmus University Rotterdam, Netherlands
- Daniel Halberstam, University of Michigan, USA
- Rebecca Johnson, University of Victoria, Canada
- Juha Karhu, University of Lapland, Finland
- Hans-W. Micklitz, European University Institute, Italy
- François Ost, Facultés Universitaires Saint-Louis, Belgium
- Ditlev Tamm, University of Copenhagen, Denmark
- Scott Veitch, The University of Hong Kong, China
- Gary Watt, University of Warwick, UK
- Jeremy Webber, University of Victoria, Canada
- James Boyd White, University of Michigan, USA

## TABLE OF CONTENTS

|                |   |
|----------------|---|
| Editorial..... | i |
|----------------|---|

### ARTICLES

|   |     |
|---|-----|
| Here and Now: From 'Aestheticizing Politics' to 'Politicizing Art'<br><i>Desmond Manderson</i> .....  | 1   |
| The Paradigm Case: Is Reasoning and Writing in Film Studies Comparable<br>To (or With) Reasoning and Writing in Law?<br><i>Geoffrey Samuel</i> .....                        | 17  |
| Law as Record: the Death of Osama bin Laden<br><i>Jothie Rajah</i> .....  | 45  |
| Forever Again: How Discursive Strategies Re-legitimate Torture in the US Senate<br>Select Committee's 'Torture Report' and the CIA's Response<br><i>Kati Nieminen</i> ..... | 70  |
| Writing Contagion as Cancer: Law, Gender and HPV Vaccination in Australia<br><i>Joanne Stagg-Taylor</i> .....   | 96  |
| Charity Law and Religion—A Dinosaur in the Modern World?<br><i>Juliet Chevalier-Watts</i> .....   | 124 |

### BOOK REVIEWS

|   |     |
|---|-----|
| Jill Stauffer: <i>Ethical Loneliness. The Injustice of Not Being Heard.</i><br>Columbia University Press, New York 2015.<br><i>Linda Ross Meyer</i> ..... | 144 |
| Alison Young: <i>Street Art, Public City. Law, Crime and the Urban Imagination.</i><br>Routledge, New York 2014.<br><i>Preeti Dhaliwal</i> .....          | 152 |

## Editorial

As every June, we are proud to present a new issue of NoFo. NoFo 13 includes articles dealing with the politics of aesthetics in painting; comparative reasoning in law and film studies; a new legal archive of images in the post-9/11 cultural landscape; discourses of deflection and responsibility-avoidance in official torture reports; gendered construction of vaccination campaigns and medical governance; and the continued, though changing, relevance of religion in the area known as charity law. In addition, we are publishing two book reviews, one dealing with the ethical responsibility to listen, and be just, to stories of atrocity, and another on the intersection of street art and criminal law. In sum, the breadth of this volume attests to our continued commitment to interdisciplinary research and to the importance of law and legal studies being open to it.

Here is a short summary of the articles in NoFo 13. Desmond Manderson's 'Here and Now: From "Aestheticizing Politics" to "Politicizing Art"' takes as its point of departure Benjamin's celebrated 1936 essay, 'The Work of Art in the Age of its Mechanical Reproducibility', and draws it into a dialogue with two exemplary events that occurred around the same time: An opinionated debate in 1935 concerning the Mexican mural movement—most notably in the work of Diego Rivera—and the Paris World's Fair of 1937. Both these episodes, Manderson suggests, invite us to reconsider any simplistic opposition between 'fascism' and 'communism', the former characterized by 'aestheticizing politics' and the latter by 'politicizing art'. The true distinction, he argues, lies in how the work of art relates to the 'here and now' [*Jetztzeit*], a term first used by Benjamin in 'The Work of Art', and then in 'The Concept of History'.

Manderson explains the difference as follows: On the one hand, the ideological appropriation of art involves situating political representations in a mythological framework, in a logic of eternity that attempts to shield political claims from scrutiny or context, where even the work of as fine an artist as Diego Rivera fell too often into this trap. On the other hand, art that resists that ideological appropriation works precisely in the opposite way, testing political mythology against its precise contexts and consequences, thus enabling art to hold politics to account rather than simply exult in it. All this would have been apparent to a *flâneur* trawling the Champs-de-Mars in Paris in 1937, Manderson surmises, for it was not just the grandiose pretensions of Soviets and fascists that were on display there. In the Pavilion of

the Spanish Republic stood the greatest piece of political art of the era—Picasso's *Guernica*.

Moving from painting to film, Geoffrey Samuel asks the general question of the comparability of reasoning processes in law and film studies. In 'The Paradigm Case: Is Reasoning and Writing in Film studies Comparable To (or With) Reasoning and Writing in Law?' Samuel takes on a task that has not yet attracted much academic writing, seeking to elucidate the actual forms of reasoning employed by film critics and academics. For Samuel, the comparative challenge lies in the fact that reading and writing about movies presents issues significantly different from those encountered in law. In particular, law tends to operate within what he calls the authority paradigm, that is, the fact that legal scholars are not free to disregard the authoritative texts of law, which also imposes limits on the kind of arguments that can be used in presenting a case and in justifying a legal decision. In contrast, film scholars do not operate within the same paradigm, which means that a much wider range of arguments is likely to be found in their texts. Nevertheless, the schemes of intelligibility employed in the social sciences are applicable as much to legal reasoning as to critical analysis in cinema studies. These schemes provide, Samuel suggests, another *tertium comparationis*.

Focusing on the mutual benefits that a comparative undertaking may have for both jurists and film scholars, Samuel analyzes the role of the *persona*, the *anima*, and the *image* in Alfred Hitchcock's *Vertigo* and in various legal cases, also singling out the essential role of the audience, which is arguably eclipsed in legal studies by the authority paradigm.

The next two articles also interrogate the images and cultural underpinnings of law and legal language, situating their analysis in the post 9/11 context. In her article 'Law as Record: the Death of Osama bin Laden,' Jothie Rajah focuses on the mediatized record of bin Laden's death, and the contestation surrounding it, as a way to reflect more generally on the changing conditions of law's record—the practices of receiving, disseminating, and archiving law. Rajah contends that law's public face—i.e., its record—appears to have been displaced. Thus, principles and practices that used to represent law, such as human rights and public judicial proceedings, have been displaced by what is invoked as 'national security,' of which the secrecy of the Guantanamo tribunals seems emblematic. In this context, it makes sense to ask: how is law represented and made visible today?

Rajah suggests that, even as law's traditional representations have receded, indelible displays construct legal knowledge in ways that have been pivotal to the militarization of global culture. Rajah examines law's 'popular' record through a critical analysis of the burial at sea of a fictional bin Laden-like character enacted in the popular television series, *Homeland*, and the main photograph relating to bin Laden's killing, the 'situation room.' Rajah urges an approach to law as record as a way to revitalize contemporary legal and political engagements.

Kati Nieminen's 'Forever Again: How Discursive Strategies Re-Legitimize Torture in the US Senate Select Committee's "Torture Report" and the CIA's Response'

analyzes the report of the Senate committee set up to investigate allegations of torture in secret detention facilities after 9/11. Nieminen contends that, while the report straightforwardly condemns ‘enhanced interrogation techniques’ and their use by the CIA, a critical discursive analysis unveils a much darker reality. In particular, Nieminen shows how legal argumentation is used in various ways, in both the Committee report and in the CIA’s response to it, to deflect or avoid responsibility for torture. In doing so, the discourse reveals a phenomenon that Scott Veitch describes as law’s irresponsibility, namely, the way law and legal institutions, generally seen as society’s key modes of asserting and defining responsibility, are in fact central in organizing the opposite when faced with extensive human rights violations and other large-scale harms. Nieminen provides an analytical framework both to identify and classify certain discursive strategies for responsibility-avoidance in cases of torture, while showing how legal language might contribute to the recurrence of such practices despite the declaration ‘never again’.

The two remaining articles take us to the Australian context, examining discursive constructions of gender in public health vaccination programs and the role of religion in modern charity law. In her article ‘Writing Contagion as Cancer: Law, Gender and HPV Vaccination in Australia’, Joanne Stagg-Taylor examines the gendered discourses of health and contagion around vaccination programs for the human papillomavirus (HPV) in Australia. Stagg-Taylor argues that HPV vaccination programs are based upon patriarchal concepts of women who, as potential reservoirs of disease, must be regulated and registered to protect both themselves and wider society from the risks of contagion and cancer. The article examines the ways in which ‘HPV governance’ obliges women to internalize a constant risk-state which casts their bodies as inherently unruly and pathological. Stagg-Taylor argues that these legislative schemes require women to become complicit in perceptions of themselves as risky, and in a constant state of self-surveillance, in order to be able to obtain health protection.

Juliet Chevalier-Watts’s ‘Charity Law and Religion: A Dinosaur in the Modern World’ critically examines whether, in the face of modern secularism, the advancement of religion continues to be a fundamental basis of charity law—namely, the area of law that recognizes special treatment for trusts constituted for ‘charitable purposes’. Chevalier-Watts explains that the legal meaning of charity derives from an 1891 case, where Lord Macnaghten stated four different heads that could benefit from this consideration, including the advancement of religion. Through an analysis of selected key cases from Australia, New Zealand, England and Wales, the article examines the roots of charity law in the traditional Judeo-Christian notion of religion, where salvation for the soul was purported for generous charitable gifts, and finds a reticence in contemporary courts to provide a universal definition of religion. In spite of this, charity law continues to accept the advancement of religion as an appropriate charitable purpose on the assumption that ‘any religion is at least likely to be better than none’. As a result, regardless of the changing societal status of religion in modern societies, the advancement of religion is still relevant in this area of law.

The issue closes with two book reviews: Linda Ross Meyer reviews Jill Stauffer's 'Ethical Loneliness: The Injustice of Not Being Heard' (2015) and Preeti Dhaliwal reviews Alison Young's 'Street Art, Public City: Law, Crime and the Urban Imagination' (2014).

Julen Etxabe & Mónica López Lerma  
Helsinki/Portland, June 2016

# Here and Now: From ‘Aestheticizing Politics’ to ‘Politicizing Art’

Desmond Manderson\*

The fusion of art, law, and politics achieved critical mass in the 1930’s—one need only think of the calculated exploitation of aesthetic forms of authority in Nazi Germany and Fascist Italy; but Soviet Realism, despite its radically different ideological orientation was not far behind in cultivated the inter-relationship of political, aesthetic, and legal discourses. As will be seen, in Mexico, too, a post-revolutionary nationalist ideology recognized the work of artists as a crucial tool of its legitimacy. It hardly comes as a surprise then, that Walter Benjamin, whose ability to detect the faintest breeze of the *zeitgeist* was so uncanny and so keen, should choose to write on the subject.

This article takes as its point of departure Benjamin’s celebrated 1936 essay, ‘The Work of Art in the Age of its Mechanical Reproducibility’, and draws it into a dialogue with two exemplary events that occurred around the same time, shedding a new light on his work and on the conjoined discourses at its heart. The year before, the Mexican mural movement—most notably in the work of Diego Rivera—was excoriated in a debate that strikingly prefigures Benjamin’s central themes and concerns. The year after, the Paris World’s Fair perfectly exemplified Benjamin’s thesis and his prognosis. But with a twist. For both these episodes invite us to reconsider any simplistic opposition between ‘fascism’ and ‘communism’, the former characterized by an ‘aestheticizing politics’ and the latter by ‘politicizing art’. The examples of Mexico and Soviet Russia should lead us to be wary of this reductive conclusion. Rather, the interplay between 1935, 1936, and 1937 reflects a much more universal conflation of aesthetics, nation, politics and law.

The true distinction lies in how the work of art relates to *Jetztzeit*, ‘*here and now*’, a term first used by Benjamin in ‘The Work of Art’, and then in ‘The Concept of History’. The ideological appropriation of art involves situating political representations in a mythological framework, outside of place or time. This rhetoric

---

\* Future Fellow, ANU College of Law/Humanities Research Centre.



of eternity attempts to shield political claims from scrutiny or context. Even the work of as fine an artist as Diego Rivera fell too often into this trap. Art that resists that ideological appropriation, it will be argued, works precisely in the *opposite* way, testing political mythology against its precise contexts, times, and consequences. 'Aestheticizing politics' turns visual representation into something a-temporal and u-topian; 'politicizing art' on the contrary, involves returning the image to the temporal and spatial specificities of its origin, with a vengeance. Thus is made possible an art that can hold politics to account rather than simply exult in it. All this would have been apparent to a *flâneur* trawling the Champs-de-Mars in Paris, in 1937. For it was not just the grandiose pretensions of Soviets and fascists that were on display there. In the Pavilion of the Spanish Republic stood the greatest piece of political art of the era—Picasso's *Guernica*.

### ≈1936≈

In 'The Work of Art in the Age of its Mechanical Reproducibility', Walter Benjamin pens the obituary of the artwork: the death of its presence and the implications of its absence.<sup>1</sup> For Benjamin, this loss is a consequence of its reproducibility. But his argument is more complicated than that.

That which withers in the age of mechanical reproduction is the aura of the work of art. This is a symptomatic process whose significance points beyond the realm of art. [...] Both processes are intimately connected with the contemporary mass movements. Their most powerful agent is the film. (Benjamin 2006b, 254.)

Terry Eagleton (1981, 176) to the contrary, this argument is not technological determinism. On the contrary, the reproducibility of photography and, even more importantly, of film, is '*symptomatic*' of a broader process 'whose significance points *beyond* the realm of art'. Indeed, elsewhere he describes the notion of 'art for art's sake' as a doomed response to a much earlier crisis in the relationship of aesthetics and politics, 'a crisis which was by no means occasioned exclusively by photography but rather *in a relatively independent manner* by the appeal of art works to the masses' (Benjamin 2006b, 264). Mass media, mass production, and 'mass movements' are both fruits and seeds, not just of a technological but a social revolution.

Benjamin is interested, on the one hand, in the way techniques of mechanical reproduction (as far back as the lithograph) undermine an artwork's uniqueness in space and time, opening it up to new forms of mass production and consumption (Ibid., 252). He is equally interested, on the other hand, in the ways that film techniques—montage, slow-motion, or close-up—'bring things closer spatially and humanly' (Ibid., 255) to a vast field of spectators. In what we might now recognize as a prophetic Foucauldian move (see 1970, 1966), he concludes that 'thus is manifested in the field of perception what in the theoretical sphere is noticeable in the increasing

---

<sup>1</sup> Benjamin 2006a, 101-133. As is conventional, quotations are, unless otherwise indicated, taken from the slightly modified Third Version, in Benjamin, 2006b, 251-283.

importance of statistics' (Benjamin 2006b, 256). In other words, changes in aesthetics both constitute and are constituted by broader changes in 'the increasing significance of the masses in contemporary life'. Improved methods of reproduction make the image radically more accessible to vast numbers of people but, correlatively, make vast numbers of people radically more accessible to the image-makers. This is what Benjamin is getting at when he distinguishes between 'a person who concentrates before a work of art [and] is *absorbed* by it', and 'the distracted masses [who] *absorb* the work of art' (Ibid., 268). The presence or aura of the former mode of production of art exerts an intensive power; its absence in the latter exerts instead an extensive power. A concentrated drug exerts a powerful influence, for those who take it; but a highly diluted drug can infiltrate whole water supplies.

Dada, Benjamin (Ibid., 266-267) argued, was engaged on the same project—the annihilation of the aura of the artwork—from within the fine arts but for essentially the same reasons: in the name of the masses and of political instrumentalization, and against art as a cult object. Marcel Duchamp blurs the distinction between original artwork and reproducible commodity, showing its dependence on context or perception, producing something which can be defined neither as one nor the other (Duchamp, 1994). Dada attempted to accomplish by satire what the film achieved by technology.

The twentieth century's mass movements—most notoriously but not exclusively fascism—seized upon art's potential to serve not ritual but political purposes. The emotive paraphernalia of fascism—propaganda films, marching troops, flags, insignia, and the rest—clearly recognized the potential that aesthetics held to marshal collective experience as a powerful social force (Mosse 1996; Strathausen 1999). What a remarkable development. Benjamin observes (2006b, 270) that, by using aesthetics to mask or indeed to exacerbate the underlying social tensions in society, the inevitable outcome of fascism must be war. He concludes with a clarion call: 'Such is the *aestheticizing* of *politics* as practiced by *Fascism*. Communism replies by politicizing art.'

It is misleading to take this contrast between fascism and communism at face value. Fascism, as Benjamin makes clear, was merely exploiting widespread aesthetic trends. Marinetti's futurist manifestoes embraced the world war as a 'cleansing purge', 'the most beautiful Futurist poem to date'. 'Take out your pick-axes, your axes and hammers and wreck, wreck the venerable cities, pitilessly' (Benjamin 2006b, 269-270; see also Braun 2000, 31-32; Affron and Antliff 1997). George Sorel's *Reflections on Violence* ([1908] 2004; see Affron 1997, 134-140) offered a more intellectual account of the same visceral desire, blaming the atomized individual and materialist culture for a widespread social malaise, and advocating instead an intuitive, collective, psychological—in other words mass and aesthetic—consciousness. The World War only intensified these links between violence, suffering, and redemption. Sorel's contribution was to shift the discourse from class conflict to 'national regeneration' and from reason and history to psychology and myth. His definition of myth as 'a system of images' gave art a central role in the revolution to come (Braun 1997, 101;

see also Gentile 1997, 36-38).

As Giorgio Agamben has pointed out (1999, 3-5), the disjunction between aesthetics and politics, which (before the First World War and then more emphatically after the Second) has come to seem inevitable, can equally be viewed as a sign of how far art has lost its way. He blames Kant, who fatally identified aesthetics with disinterest, thus sundering creativity and taste, the passionate artist and the dispassionate spectator. But it was not ever thus. For Plato, art menaces the Republic precisely because of its political *interestedness* (Ibid., 3-8). In the eighteenth century and through the French revolution, for example, aesthetics and politics were inseparable expressions of the same underlying ideology.<sup>2</sup> Benjamin's essay on mass movements and modern art does not identify the birth of an alliance, so much as detect its resurgence under the altered conditions of twentieth century life. What distinguishes his analysis is the recognition that the constitution of mass publics and collective interests changes both the forms this alliance takes and the functions it fulfills. At stake is none other than the implications of thinking of aesthetics as the handmaiden of politics.

### ≈1935≈

Benjamin was not, however, the first person to note and critique this problematic relationship. The question had already been raised—not in Berlin or Paris or Moscow but in 'faraway Mexico', as Leon Trotsky put it. Forget Soviet art, he wrote (well he would, wouldn't he):

The official art of the Soviet Union—and there is no other over there— resembles totalitarian justice; that is to say, it is based on lies and deceit. [...] Do you wish to see with your own eyes the hidden springs of the social revolution? Look at the frescoes of Rivera. Do you wish to know what revolutionary art is like? Look at the frescoes of Rivera. (Trotsky 1950, 61-64.)

Despite their aesthetic sophistication and emotional power, Rivera's murals have left an ambivalent legacy.<sup>3</sup> In the aftermath of the fratricidal revolutionary war that shook Mexico from 1910-1920, the post-revolutionary government of Alvaro Obregón and its successors took their own legitimacy as inheritors of the revolutionary mantle as a central concern. Inspired by José Vasconcelos Calderón, the so-called 'cultural *caudillo*' of the revolution, a highly ambitious program of publicly funded art was placed at the very heart of the government's nation-building project. The Mexican mural movement was supported not as a cultural foray but under the aegis of the Ministry of Public Education. It was conceived as a secular religion that fused art, politics, and the nation, in the minds of the people (Folgarait 1998; Coffey 2012). As

<sup>2</sup> See Eagleton 1991. See also Postle 2005; Barrell 1986; Reynolds 1992; Eitner 1971. See also Manderson, forthcoming.

<sup>3</sup> See Craven 1997; Rochfort 1987; Craven 2001; Coffey 2002; Lopez, Rochfort, Vaughan and Lewis 2006; Paz 1967; Folgarait, 1998; Anreus, Folgarait and Greeley 2012; Coffey 2012.

Octavio Paz put it, ‘that was the way in which a mistake began which ended with the perversion of Mexican mural painting: on the one hand, it was a revolutionary art, or one that called itself revolutionary; on the other, it was an official art’ (Coffey 2012, 1).

The funding of the muralists and their installation in vast government buildings fused the concepts of nation, revolution, and government. From the vast murals he completed at the Ministry of Public Education itself (1923-28), to the imposing *History of Mexico* triptych at the Palacio Nacional (1929-35; 1942-51), Rivera’s work gives an aesthetic form to the ideology of the government of Mexico, which would eventually travel under the name of the ‘Party of Institutionalized Revolution’—an oxymoron that reveals very clearly how the rhetoric of national revolution masked increasingly ossified and authoritarian institutions.

In an essay entitled ‘Rivera’s Counter-Revolutionary Road’, the mural artist David Siqueiros expressed his concerns in no uncertain terms (1934; see also Siqueiros 1975, 332-334). Indeed, the conflict between the two artists exploded in a three-day public brawl at the Palacio de Bellas Artes in 1935. In a *denouement* worthy of the show trials they eerily foreshadow—Siqueiros the committed Stalinist, Rivera the friend of Trotsky—the accused was coerced or persuaded to sign an artistic *mea culpa*, conceding that his ‘art has served the demagogic interests of the government’, and that it was ‘an error to realize murals almost exclusively in the interiors of grand buildings’ (see Jolly 2012, 75-92; Coffey 2012, 38-42; Manjarrez 1996). Notwithstanding its edge of menace, Siqueiros’ critique was astute. He condemned murals for showing little sensitivity to their specific sites. He attacked Rivera’s conventional, even folkloric, representational style and traditional materials. And he criticized the romanticized treatment of the past. In these ways, his critique draws attention to the very dynamic that Benjamin was to address the following year.

In Rivera’s murals in particular, two elements stand out. First, the priority he gives to the nationalist and liberal movements from 1821–1911 portrays the government and the nation as the natural outcome of nineteenth century liberalism. Hero figures such as Father Hidalgo, Miguel Morales and Benito Juárez were co-opted to shore up the legitimacy of the modern State. Rivera represses the murderous internecine conflicts of the Revolution, still more the underlying tensions they reflected. Secondly, while Rivera articulates an explicitly socialist and radical agenda for the Revolution, his utopian imagery juxtaposes a non-existent past and an unrealizable future, offering the viewer no way of connecting these dreams to the challenges of modern Mexican society. Yoking the vision of ‘*mexicanidad*’ to a utopian socialist dream allowed the government to claim it for its own, but without having to do anything about it (Folgarait 1998, 122, 194; see generally 86-136).

Rivera thus recuperates the paradox of an ‘institutionalized revolution’, justifying the first in the name of the second and deferring the second in the interests of the first (Ibid., 122; Coffey 2012, 14). The image of the perfected revolution provides a justification for Mexico’s one-party rule at the same time as it postpones any realization

of those ideals to some faraway future. In short, a wholly *mythic* resolution is forged between ideals and reality (see Barthes 2000, 109-155; Manderson 2015). This ideological strategy, resolving the challenges and tensions of real human societies in aesthetic terms while endlessly deferring them in political terms, Siqueiros branded 'counter-revolutionary', and Benjamin described as 'aestheticizing the political'.

In all the great artists of Mexican mural renaissance—Rivera, Siqueiros, Orozco—mythology substitutes for critique. This is what distinguishes 'the aestheticization of the political' from 'the politicization of art'. The mythic register of the Mexican muralists postulates a rhythm that swells up from out of the deep past, and that still endures (Coffey 2012, 33, 64). Myth knots together the past and the present into an eternal truth, treating history and politics as epiphenomenal. It is a question of the treatment of time.

This is certainly true of the work of José Clemente Orozco. Political action is depicted as a kind of futile striving that is incapable of modifying the mythic structures of the land or the people (Rochfort 1998; Greeley 2012, 158). The dark stains of violence, death, and corruption are never far from the surface in his work, and no amount of scrubbing will remove them. Many of his works lift their subjects out of a particular historical moment and use them as the medium to deliver a timeless message. What makes *The Trench* (1926) so moving, for example, is the way it abstracts from a specific soldier or war to make a statement that transcends the particulars of a battle. Some have read the three overlapping figures as a freeze-frame that traces the fall of a body in time and space. But it seems to me that Orozco's point of reference here is not so much slo-mo, but montage. The three men represent not a single human being falling, but three positions of abjection, all devoid of face or identity, all lost, three snapshots from the eternal tragedy of war. The murals in the Palacio de Gobierno in Guadalajara likewise treat ideology, whether Christian, communist, or fascist, as equally destructive and eternally at war (Rochfort 1998, 161-184). Even when he portrays specifically historical figures, such as *Hidalgo* (1949), he tends to surround them with the trappings of myth and work them loose from their social and political context. The juxtaposition of Father Hidalgo, brandishing a burning torch (a reference to a famous act that touched off the war of independence in 1811) alongside communist and fascist warmongers from a century later, implies that the apocalyptic fire he lit still burns.

The timelessness of myth is not a distance but a presence; not a lesson of change but of the illusory nature of change. As Roland Barthes puts it (2000, 142, 155), myth transforms historical intention into a natural justification, 'making contingency appear eternal' and reducing human decisions to 'the simplicity of essences'. 'For the very end of myths is to immobilize the world: they must suggest and mimic a universal order'. This universal order is of course the very opposite of politics which treats the established order as contingent and seeks to intervene in it. A *political* reading of Hidalgo would think about what he did that changed history; Orozco thinks about what he did that didn't.

In Diego Rivera, above all, time is not continuous but fractured, made up of



a series of unbridgeable abysses. Take the *History of Mexico* series, comprising the large triptych on the ground floor of the Palacio Nacional and eleven vignettes on the patio balcony above. Here we have three different temporal frameworks, but each of them suffer from the same kind of problem. On the right-hand wing of the triptych, and in the scenes above depicting pre-Columbian life, the Aztecs are associated with femininity, craft, and harmony with nature.<sup>4</sup> Labor is never presented as coerced but as social. (The contrast with his treatment of modern Mexican workers in the SEP's Courtyard of Labor, is stark.) The violence associated with the Aztecs, their imperial ambitions, ritual sacrifices and authoritarian social structure, are completely ignored (e.g. Rochfort 1998, 81). This is not so much myth as legend. A legend does not transcend time, like a myth; on the contrary, it is *trapped* in it. A legend belongs to a specific time and place; it may well be based on real historical figures or events. As opposed to a myth then, the legend does not continue to exist; it is expressed as loss or displacement. Myth is epic; legend is elegaic. Here too then, all temporal links are severed. This is precisely the function that Rivera's native peoples serve.

On the other hand—the left wing of the triptych, to be precise, entitled 'Mexico Today and Tomorrow'—Rivera presents the 1911 Revolution as an incomplete event, whose promises of development, prosperity, and equality have yet to be fulfilled (Rochfort 1998, 81-160). But the Utopia of a unified national community in which the capitalists have been overthrown and a peaceful Mexico prevails, lacks any sense of specificity, any precise political program, or any sense of the conflicts and differences that might need to be addressed along the way. Rivera's Utopia is no less fanciful than his Paradise. In the case of legend, the connection between past and present has been severed; in the case of utopia, it is the connection between present and future. Both myth and utopia 'immobilize the world' and 'mimic a universal order' (Barthes 2000, 142, 155) the former by constituting an inescapable presence, the latter an unbridgeable distance. In each case what Benjamin might have identified as politics disappears.

Between Paradise and Utopia lies *History*, which commands the vast central stage of Rivera's triptych. But here too the iconography is so dense with episodes from the nation's past as to be strangely dispiriting. A parade of great men and great events march past, but its spectators are given no role except that of passive approbation. The images are flat and crowd the canvas, made into such a complex set of overlapping icons that one can do no more than recognize and name them. The static poses, the flat surface and the two-dimensionality of the representation together produce a sense of a 'chronological itinerary', as Siqueiros put it (Coffey 2012, 42)—an inexorable movement towards ever greater unity, progress, and modernity, culminating in the national triumph of the Revolution (Folgarait 1998, 110-115). In the highly critical words of Leonard Folgarait, 'The figure now functions as a juridical emblem and itself becomes flat, disembodied, and glyph-like. Writing has labelled and supervised the behaviour of its subordinate. Its ownership of the

<sup>4</sup> See for example, *The Aztec World*, right hand stairwell of *History of Mexico*; *The Great City of Tenochtitlan*; *Totanc Civilization*; *Huastec Civilization*; *The Papermakers*, and others, all in patio corridor.

image is both juridical and economic' (Ibid.).

The problem of the relationship between aesthetics and politics is essentially one of time—a problem not of vision but of transition. The Mexican mural renaissance found no good way of establishing any continuity between past, present, and future. Whether as legend, myth, apocalypse, or utopia, the very connections or transitions that would have helped realize their political ambitions were severed.

### ≈1937≈

The year after the publication of Benjamin's essay, the *Exposition Internationale des Arts et Techniques dans la Vie Moderne*, was held in Paris.<sup>5</sup> It offers an exemplary opportunity to apply Benjamin's analysis. Benjamin now lived there, working on the Arcades Project (Benjamin 2002) he would never finish. So there is no doubt Paris was on his mind. Although he was in San Remo for most of that summer, and in July 1937 wrote in a letter to Gershom Scholem that he was 'yet to set foot on the grounds of the world's fair', (Adorno and Scholem 1994, 540) he returned to the city in September. His main concern seems to have been how the exhibition contributed to rising accommodation costs. No doubt at some time over the next few months, however, he joined the hundreds of thousands of *flâneurs* wandering the site from the Trocadero to the Eiffel Tower. As he did so, what must have struck him was how closely the displays confirmed his predictions of a dramatic shift in the dynamics of art and politics. It is not just the form of art that is transmuted by modern technology; on the contrary, despite—indeed, perhaps because of—their overwhelming employment of traditional media, the art of the pavilions at Paris 1937 exemplify a far deeper shift. Art served as the sensory vanguard for ideological visions of the nation.



Exposition Internationale des Arts et Techniques dans la Vie Moderne, Paris 1937.<sup>6</sup>

<sup>5</sup> 25 May–25 November, 1937; see Herbert 1997. See also Kargan 2015; Greenhalgh 2011; Mattle 1998.

<sup>6</sup> Author unknown, editor La Photolith, © Wikimedia Commons [editors' note].

Across the *Champs-de-Mars*—a battlefield by any other name—loomed the rival goliaths of Nazi Germany and Soviet Russia. On one side, Albert Speer's outsized neo-classical monument to Nazi power was crowned by the eagle and the swastika. On the other side, the Soviet edifice, equally imposing, was topped by the dynamic image of a male worker and a female peasant, hands clasped together, thrusting forward into the future clutching a hammer and a sickle. The Italian pavilion featured *Fascist Work*, a vast mural by Mario Sironi, again expressing the kind of archaic timelessness beloved of fascist fantasy, its oversized figures apparently stamped out of the primordial clay (see Braun 2000, 198-200). The Paris Exhibition presents us with an aesthetic rivalry that surely portends the military one soon to come; or to put it another way, it dramatized how central were the aesthetics of the nation to the furtherance of ideological disputes. All these regimes shared a belief in the key role of the artist in mobilizing mass social change: perhaps ironically, and despite their ideological differences, all sought both to engage the artist politically and to reconstitute him as a humble worker for the betterment of the masses, rather than as an individual aesthete.

The question of reproducibility marks for Benjamin less a technological than an ontological crisis for art. As James Herbert explains, it is precisely the presence or, dare we say it, the 'aura' of nations which was *lost* at the World's Fair, in its efforts to 'recreate' 'replica states' in miniaturized form, and thereby shrink them to a form capable of apprehension, consumption and purchase (Herbert 1997, 40). 'In a few hours we have just completed a genuine world tour!' gushed one critic (Ibid., 4). The whole principle of the pavilions followed the logic of reproducibility—the annihilation of singularities of time and space, compression into the genre of montage, and the amusement of a mass public. The paradox of the idea of *la France* as a culture of universality and peace, represented through an implicitly violent and hegemonic national competition, only intensifies the fragility of the pluralism of the World's Fair, which was punctured by a political reality it only temporarily managed to sublimate.

Two additional displays outside the grounds of the International Exhibition suffered from the same problem. Against '*La vie moderne*' (the theme, it will be recalled, of the Exhibition) is juxtaposed two apparent 'others', *le moyen âge* on the one hand, and the rest of the world on the other. *Musée des monuments français* did not offer up original architectural features, but merely reproductions, shrunken copies that reduce even the cathedral at Rouen to yet another spectacle for mass consumption (Herbert 1997, 41-70). Benjamin's thesis is even better on display at *Musée de l'homme*. Here, 'primitive' cultures from around the world were distilled into specimens and artefacts contained in long lines of identical vitrines (Ibid.). These objects existed not as unique individual artworks but as samples or types, for which many others could easily have been substituted. One mask signifying 'Africa' is much like another. Their function may have been ritual, cultic, or aesthetic in their own cultures. But in the museum environment, as Benjamin put it—a year before, you will recall—'the whole social function of art is revolutionized. Instead



of being founded on ritual, it is based on a different practice: politics' (Benjamin 2006b, 257). 'The abstraction of material things (*objets*) into forms of knowledge (*documents, temoins*)', says Herbert (1997, 64), offers political or social *knowledge* as a substitute for aesthetic or social *experience*. In the words of Jacques Soustelle, the Assistant Director, this knowledge is presented to a mass public as 'a collective good,' as opposed to limiting it to an 'elite' as a private good (Ibid., 62). Ethnography, like statistics, is a modern human science—converting ritual into use, individuals into masses, and the production of presence into the reproduction of information. What is on offer is the objectification of archaic others in the interests of the modern subject.

The *Musée des monuments français* and the *Musée de l'homme* attempt to do away with the constraints of time, in the first case—*la France* through the ages—and space, in the second—around the world in eighty minutes. This is what makes them emblematic of the work of art in the age of mechanical reproduction. Herbert quotes André Warnod:

As soon as you pass through its gates [...] you are [...] in a land that is located nowhere and everywhere at the same time. A land where all notions of distance and time are confounded. (Ibid., 6, 14.)

Benjamin (2006b, 253) points us to these dimensions as key to the withering of the aura. 'In even the most perfect reproduction *one* thing is lacking—the here and now [*Jetztzeit*] of the work of art—its unique existence in a particular place'. The nation, the Middle Ages and the people, are the three dimensions of time and space that the Fair sought to bring to Paris; but in each case they show only that, by 1937, the task was impossible. But the abolition of the conditions of presence, as we have seen, imports a compensatory power of absence, of influence by dissipation, dissemination, and distraction. Arts' form and function are reframed by and for mass movements, directed towards political lessons, and constructed by machines—by films and displays if possible, and with bombs where necessary. With eery foresight, Benjamin (2006a, 122) had observed of fascist war in 1936: 'instead of promoting power stations across the land, society deploys manpower in the form of armies. Instead of promoting air traffic, it promotes traffic in shells', before concluding that, against the fascist strategy of rendering politics aesthetic, 'communism responds by politicizing art'.

And this is exactly what Benjamin would have witnessed on the *Champs-de-Mars*. In the very shadow of this aesthetico-political battlefield, the pavilion of the doomed Spanish Republic unveiled the greatest mural of them all, *Guernica*, created by Picasso in barely four weeks in response to the carpet-bombing of the Basque town by German and Italian airplanes on May Day 1937.<sup>7</sup> Indeed, when he came to revise 'The Work of Art' two years later, Benjamin changed the passage above and inserted a specific reference, with Franco's *Guernica*, and Picasso's, clearly in mind:

---

<sup>7</sup> Picasso 1937. See Opler 1988; Clark 1941; Berger 1965; Arnheim 1980; Chipp and Tusell 1988.

‘Instead of dropping seeds from airplanes, it drops incendiary bombs over cities’ (2006b, 270).

Only Picasso succeeded in anchoring our senses in a time and place from which the mythic forms of modernist aesthetics pretended to float free. Here the sensory experience of the destruction of a nation is condensed into a single ‘here and now’. This is not just a matter of an artist’s representation of—or worse still, information about—an event. It is rather that Picasso’s treatment of form provides a direct sensory, almost visceral, experience. On the one hand, his cubist forms dismember the body in a manner that exactly complements the effects of the incendiary bombs dropped over the city. As Berger says,—‘what has happened to them in being painted is the imaginative equivalent of what happened to them in sensation in the flesh’ (Berger 1965, 169; Opler 1988, 271). On the other hand, *Guernica* references the black and white photo-journalism of the newsreels, with its appeal to an objective and disseminated reality. The violent cuts and rapid compression of montage are a necessary point of reference if we are to understand its poly-perspectival composition. They also provide a further layer that chillingly parallels political and aesthetic violence. The shrapnel’s cut and the cubist cut—and now the director’s cut.

If Picasso exemplifies Benjamin’s prognosis that the aestheticization of the political must be countered by ‘politicizing art’, this is not a matter of political labels. Certainly the various monuments to ideology on show in Paris reveal the irrelevance of such distinctions. Rather, the distinction to which Benjamin might be alluding is between the supposed timelessness of mythology and the ‘here-and-now’, the *Jetztzeit* that juxtaposes rhetoric against events in the real world. An ‘aestheticizing politics’ is purposely unanchored in time and place. A ‘politicizing art’ *uses* the specifics of time and place in order to expose the concrete implications swept under the carpet by mythological thinking. It engages with the non-commodifiable specifics of time and place that ‘even the most perfect reproduction’ lacks.

There could be no better illustration of this opposition than the 1937 World’s Fair. As the story goes, a visiting German officer, after looking at Picasso’s painting, asks him ‘did you do this?’ ‘No, *you* did’, replies Picasso. The joke hinges on whether what is ‘done’ in the artwork is done by the artist or only represented by him, and done by others. And that is exactly what is at stake in the difference between aestheticizing and politicizing. The contrast between Picasso’s historical specificity and the overlarded bombastic pretensions of the Pavilions that surrounded it created exactly the kind of ironic juxtaposition that might have incited some real reflection from his spectators. By drawing attention to the historical and political context that the works around him steadfastly withheld, Picasso stimulates a critique of the mutual complicity of aesthetics and politics, and reminds viewers of the physical brutality hidden underneath the skirts of fascism’s transcendental aesthetics. Picasso’s *Guernica* is essentially ‘queer’ (e.g., Sullivan 2003; Butler 1990, 1993); it works not by how you look at the wall on which it is placed, but because it changes how you look at all the other walls, on which it is *not* placed. It queered the Paris World’s Fair, savagely critiquing its aesthetic ideology.

Picasso was, if anything, less sanguine than Benjamin. Benjamin still acknowledged a residual cult power in the art object, exerted by its singular aura. But by combining traditional artistic tropes, such as the *Pietà* and the *Madonna*—some might say, parodying them—with a personal psycho-symbolism he had recently explored in *Minotauromachy*,<sup>8</sup> *Guernica* confronts the limit of art's capacity to represent or communicate suffering (Opler 1998, 207 (and see also 253-302); see also Zervos 1986, 206-09). Traditional aesthetics universalizes language to the point of banality, while the artist's mythopoesis personalizes language to the point of impenetrability. The mural leaves us wondering how close art can ever truly get to real life. Although trying to bring so close an event—the title itself points to it, identifying a particular place and a particular date—Picasso's *Guernica* can do no more than recall it from faraway (Wenders 1993). The more that Picasso tries to represent pain by citing the long tradition of the representation of pain in Western art, the more reality slips through his fingers. Picasso's black and white painting is an image made up of pastiches of other images; a painting, of a reproduction, of a newsreel, of a memory, of an event. It is infinitely mediated. It reaches out to a *Jetztzeit* that has already vanished.

In this sense Picasso takes Benjamin one step further; he is acutely aware of the limits of the critique and the limits of art. An artwork, be it ever so political, is still trapped within the frame of representation.<sup>9</sup> In *Likeness and Presence*, Hans Belting argued (1996) that the Western imaginary changed when it ceased to think of the image as an icon of power, and instead treated it only as a re-presentation. Does a picture of a saint produce miracles or narrate them? Does a wafer embody Christ or symbolize Him? Art, as representation, is always already memory. As such, while it can 'politicize art', it cannot *become* politics. 'Did you do this?' sneers the German officer; 'no, you did,' retorts Picasso. But the soldier walks away and looks at another painting, another representation that strives and fails to *do* something. Perhaps, though, this weakness, this limit, is also art's strength, or at the very least, the source of its honesty.

8 Picasso 1935; see Opler, 100. See also Crichton-Miller 2013; Damian and Simonton 2011; Weisberg 2004.

9 Benjamin's emphasis on aura as a kind of 'distance' clearly recognizes this point, and indicates a suggestive connection in language and in concepts to Levinas. See Levinas 1987, 1-13; Schmiedgen 2002. See also Manderson 2007.

## Bibliography

Affron, Matthew Affron & Mark Antliff: *Fascist Visions. Art and Ideology in France and Italy*. Princeton University Press, Princeton 1997.

Agamben, Giorgio: *The Man Without Content*. Translated by Georgia Albert. Stanford University Press, Stanford 1999.

Anreus, Alejandro, Leonard Folgarait, Robin Adèle Greeley (eds): *Mexican Muralism*. University of California Press, Berkeley 2012.

Antliff, Mark: 'La Cité française'. In Affron, Matthew Affron & Mark Antliff: *Fascist Visions. Art and Ideology in France and Italy*. Princeton University Press, Princeton 1997, 134-170.

Arnheim, Rudolf: *The Genesis of a Painting. Picasso's Guernica*. University of California Press, Berkeley 1980.

Barrell, John: *The Political Theory of Painting from Reynolds to Hazlitt*. Yale University Press, New Haven 1986.

Barthes, Roland: 'Myth Today'. In *Mythologies*. Translated by Annette Laver. Vintage, London 2000, 109-155.

Belting, Hans: *Likeness and Presence*. Translated by Edmund Jephcott. University of Chicago Press, Chicago 1996.

Benjamin, Walter: 'The Work of Art in the Age of Its Mechanical Reproducibility'. In Howard Eiland and Michael Jennings (eds): *Walter Benjamin, Selected Writings, Vol. 3—1935-38*. Belknap Press, Cambridge 2006a, 101-133.

Benjamin, Walter: 'The Work of Art in the Age of Its Mechanical Reproducibility'. In Howard Eiland and Michael Jennings (eds): *Walter Benjamin, Selected Writings, Vol. 4—1938-40*. Belknap Press, Cambridge 2006b, 251-283.

Benjamin, Walter: *The Arcades Project*. Translated by Howard Eiland and Kevin McLaughlin. Belknap Press, Cambridge 2002.

Berger, John: *The Success and Failure of Picasso*. Pantheon Books, New York 1965.

Braun, Emily: 'Mario Sironi's Urban Landscapes'. In Affron, Matthew Affron & Mark Antliff: *Fascist Visions. Art and Ideology in France and Italy*. Princeton University Press, Princeton 1997, 101-133.

Braun, Emily: *Mario Sironi and Italian Modernism. Art and Politics under Fascism*. Cambridge University Press, Cambridge 2000.

Butler, Judith: 'Critically Queer', 1 *GLQ-NEW YORK* (1993) 17-32.

- Butler, Judith: *Feminism and the Subversion of Identity*. Routledge, New York 1990.
- Chipp, Herschel and Javier Tusell: *Picasso's Guernica: History, Transformations, Meanings*. University of California Press, Berkeley 1988.
- Clark, Vernon: 'The Guernica Mural—Picasso and Social Protest'. 5 (1) *Science and Society* (1941) 72-78.
- Coffey, Mary: 'Muralism and the People: Culture, Popular Citizenship, and Government in Post-revolutionary Mexico'. 5 (1) *The Communication Review* (2002) 7-38.
- Coffey, Mary: *How a Revolutionary Art Became Official Culture*. Duke University Press, Durham 2012.
- Craven, David: 'Recent Literature on Diego Rivera and Mexican Muralism'. 36 (3) *Latin American Research Review* (2001) 221-237.
- Craven, David: *Diego Rivera as Epic Modernist*. GL Hall, New York 1997.
- Crichton-Miller, Emma: 'La Minotauremachie'. (2013) 74-75.
- Damian, Rodica and Dean Keith Simonton: 'From Past to Future Art: The Creative Impact of Picasso's 1935 Minotauremachie on his 1937 Guernica'. 5 (4) *Psychology of Aesthetics, Creativity, and the Arts* (2011) 360-369.
- Duchamp, Marcel: *The Creative Act*. Edited by Marc Dachy. Sub Roas, New York 1994.
- Eagleton, Terry: *Walter Benjamin. Or Towards a Revolutionary Criticism*. New Left Books/Verso, London 1981.
- Eagleton, Terry: *The Ideology of the Aesthetic*. Blackwell, Oxford 1991.
- Eitner, Lorenz (ed): *Neoclassicism and Romanticism 1750-1850, 2 vols*. Prentice Hall, London 1971.
- Folgarait, Leonard: *Mural Painting and Social Revolution in Mexico, 1920-1940*. Cambridge University Press, Cambridge 1998.
- Foucault, Michel: *Les mots et les choses*. Gallimard, Paris 1966.
- Foucault, Michel: *The Order of Things. An Archaeology of the Human Sciences*. Pantheon Books, New York 1970.
- Gentile, Emilio: 'The Myth of National Regeneration in Italy'. In Affron, Matthew Affron & Mark Antliff: *Fascist Visions. Art and Ideology in France and Italy*. Princeton University Press, Princeton 1997, 25-45.

Greeley, Robin: 'Nietzsche contra Marx in Mexico'. In Anneus, Alejandro, Leonard Folgarait, Robin Adèle Greeley (eds): *Mexican Muralism*. University of California Press, Berkeley 2012, 148-173.

Greenhalgh, Paul: *Fair World. A History of World's Fairs and Exhibitions from London to Shanghai*. Papadakis, Winterbourne 2011.

Herbert, James: *Paris 1937: Worlds on Exhibition*. Cornell University Press, Ithaca 1997.

Jolly, Jennifer: 'Siqueiros' Communist proposition for Mexican Muralism'. In Anneus, Alejandro, Leonard Folgarait, Robin Adèle Greeley (eds): *Mexican Muralism*. University of California Press, Berkeley 2012, 75-92.

Kargan, Robert, et al: *World's Fairs on the Eve of War*. University of Pittsburgh Press, Pittsburgh 2015.

Levinas, Emmanuel: 'Reality and its Shadow'. In Emmanuel Levinas, *Collected Philosophical Papers*. Translated by Alphonso Lingis. Springer Netherlands, Den Haag 1987, 1-13.

Lopez, Rick, Desmond Rochfort, Mary Vaughan and Stephen Lewis (eds): *The Eagle and the Virgin. Nation and Cultural Revolution in Mexico, 1920-1940*. Duke University Press, Durham 2006.

Manderson, Desmond: 'Metastases of Myth: Legal Images as Transitional Phenomena'. 26 *Law and Critique* (2015) 207-223.

Manderson, Desmond: *Concepts of Law and Time in the Visual Arts*. Cambridge University Press, Cambridge, forthcoming.

Manderson, Desmond: *Proximity, Levinas and the soul of law*. McGill-Queen's, Montreal, 2007.

Manjarrez, Maricela González Cruz: *La polémica Siqueiros-Rivera: planteamientos estético-políticos 1934-1935*. Museo Dolores Olmedo Patiño, 1996.

Mattle, Erik: *World's Fairs*. Princeton Architectural Press, Princeton 1998.

Mosse, George: 'Fascist Aesthetics and Society: Some Considerations'. *Journal of contemporary history* (1996) 245-252.

Opler, Ellen: *Picasso's Guernica*. WW Norton, New York 1988.

Orozco, Jose: *Hidalgo*. Mural, Government Palace, Guadalajara, Mexico 1949.

Orozco, Jose: *The Trench*. Mural, Colegio San Ildefonso, Mexico City 1926.

Paz, Octavio: *Labyrinth of Solitude*. Allen Lane, London 1967).

Picasso, Pablo: *Guernica*. Oil on canvas, Museo Reina Sofia, Madrid 1937.



Picasso, Pablo: *La Minotaure*. Etching, Musée Picasso, Paris 1935.

Postle, Martin, et al (eds): *Joshua Reynolds—The Creation of Celebrity*. Tate Publishing, London 2005.

Reynolds, Joshua: *Discourses*. Edited by Pat Rogers. Penguin, London 1992 [1797].

Rivera, Diego: *From Pre-Hispanic Civilization to the Conquest*. Eleven patio corridor murals, Palacio Nacional, Mexico City 1942-51.

Rivera, Diego: *Secretariat of Public Education (SEP) Main Headquarters*. Murals, Mexico City 1923-28.

Rivera, Diego: *The History of Mexico from the Conquest to the Future*. Staircase triptych, Palacio Nacional, Mexico City 1929-35.

Rochfort, Desmond: *Mexican Muralists. Orozco, Rivera, Siqueiros*. Chronicle Books, 1998.

Rochfort, Desmond: *The Murals of Diego Rivera*. Journeyman, London 1987.

Schmiedgen, Peter: 'Art and Idolatry: Aesthetics and Alterity in Levinas'. 3 *Contretemps* (2002) 148-160.

Scholem, Gershom and Theodore Adorno: *The Correspondence of Walter Benjamin*. Translated by Manfred and Evelyn Jacobson. University of Chicago Press, Chicago 1994.

Siqueiros, David: 'Rivera's Counter-Revolutionary Road'. *New Masses*. New York May 29, 1934.

Siqueiros, David: *Art and Revolution*. Lawrence and Wishart, New York 1975.

Sorel, George: *Reflections on Violence*. Translated by T E Hulme and J Roth. Dover, Mineola, New York 2004 [1908].

Strathausen, Carsten: 'Nazi aesthetics'. 42 (1) *Culture, Theory and Critique* (1999) 5-19.

Sullivan, Nikki: *A Critical Introduction to Queer Theory*. NYU Press, New York 2003.

Trotsky, Leon: 'Art and Politics in our Epoch'. 11 (2) *Fourth International* (1950 [1938]) 61-64.

Weisberg, Robert: 'On structure in the creative process: A quantitative case-study of the creation of Picasso's Guernica'. 22 (1) *Empirical Studies of the Arts* (2004) 23-54.

Wenders, Wim (dir): *Faraway, So Close! Road Movies*, 1993.

Zervos, Christian: *The Story of a Painting: Picasso's Guernica*. Norton & Company, New York 1986.

# The Paradigm Case: Is Reasoning and Writing in Film Studies Comparable To (or With) Reasoning and Writing in Law?

Geoffrey Samuel\*

Is comparing legal reasoning with reasoning and analysis in other disciplines of value? It has been suggested that a comparison between legal and medical reasoning is fruitful (Samuel 2015b, 323), but is such an exercise a one-off so to speak or might it be considered as the first step in a more general direction of comparative reasoning? This is a theme that certainly lies behind this present investigation which looks at the value that reasoning and writing in film studies might have for jurists (and vice versa). Now it must be said at once that reasoning in disciplines such as literature, theatre and film studies does not seem to be a focal point in itself that attracts much precise academic writing (although there are a number of works on law and literature). Plenty has been written on theory, but just as legal theory and legal reasoning, while closely interconnected at certain points, are rather different areas of analysis, so theory in the arts is different from the actual forms of reasoning employed by literary and film critics and academics. What are these forms of reasoning? It is the primary purpose of this article to examine this question with regard in particular to film studies. One reason for this emphasis on cinema is that it is an area in the arts disciplines that in many ways presents issues that are significantly different from those encountered in law. This difference is where the comparative challenge lies.

## 1. Overture: preliminary problems

The first, and of course overriding, question is the one concerning the value of comparing legal writing and reasoning with writing and reasoning in film studies.

---

\* Professor of Law, Kent Law School, UK; Professor affili  ,   cole de Droit de Sciences Po, Paris.

\*\* This article is based upon a paper to be presented to the British Association of Comparative Law workshop in September 2016 and is dedicated, as is the workshop, to the memory of Bernard Rudden who was a distinguished holder of the Chair of Comparative Law at Oxford (see generally Birks & Petto 2002). Professor Rudden had a great interest in cinema.



Yet before this question can be properly tackled there are a number of subsidiary issues that need to be considered. One obvious difference between the two disciplines is that in legal studies there are, seemingly, two classes or types of reasoning. There is the reasoning that might be regarded as an integral part of the subject itself; this is the reasoning of lawyers in arguing cases and of judges in their decisions to such cases (Samuel 2015c, 776). In the civil law systems—and perhaps to an extent even in the common law—it may well equally embrace the reasoning of the doctrinal writers (see Gordley 2013). Another form of reasoning in legal studies is the one associated with commentaries and criticisms on the positive legal texts; this is the reasoning of, for example, those who examine and write about case law and other legal texts (see Birks 1996). As has just been implied, the line between these two types of reasoning is at best unclear, but such a duality is not to be found in film studies. There is only one class of analytical and critical reasoning about films and this is the class of writers external to the film itself.<sup>1</sup> This said, ‘a large diversity of discourses is evident’ in film studies and that these discourses ‘are different from the analysis of films itself’ (Ibid., 9).

Another difference between legal discourse and discourse on film is that the former is subject to what might be called the authority paradigm. This is a characteristic that has been discussed elsewhere and so, for present purposes, it can be summed up as a paradigm that restricts legal reasoning, at least with regard to reasoning internal to legal studies, to limits imposed by the accepted fact that legal texts have an absolute authority (Samuel 2009, 431). The texts—legislation and judgements—can be criticised but they cannot be dismissed or ignored as invalid. They have an authority that might be described as a secular divinity. Moreover the authority paradigm imposes limits on the kind of arguments that can be used in presenting a case and in justifying a legal decision. Thus it is not normally acceptable in legal reasoning to state that a particular decision in the House of Lords was caused by the Law lords dislike of the judge or judges who decided the case at a lower appeal level. In other words it is not normally acceptable for lawyers and jurists, when reasoning within the authority paradigm, to have recourse to psychological or ideological theories (although this restriction would not apply to a jurist writing from outside this authority paradigm). Reasoning and analysis in film studies is not subject to such an authority paradigm and this means that a very much wider range of arguments, observations and assertions is likely to be found in the books and articles. Indeed, in addition to this absence of an authority paradigm there are factors inherent in the object of analysis itself—the films—which are not to be found (or at least not to be found with the same intensity) in legal reasoning. One clear example is a sense of the aesthetic; this is not really a dimension that normally applies to legal analysis, although some civil law countries have a tradition of *elegantia juris* or *elegantia jurisprudentia*. Indeed one film writer, Raymond Durgnat, has said that

---

<sup>1</sup> This said within this broad class several sub-classes (if not more) can certainly be identified. For example a distinction can be made between the writings of film critics and those of film analysts and between those of analysts, those of theorists and those of interpretativists (Aumont & Marie 2002, 9-13).

film is ‘an art-form which seems to pose certain aesthetic problems more insistently than other media have done’ (Durgnat 1967, 13).

A further difficulty is that in many ways films could be said to be more complex than cases and legislative texts. This is not to say that these latter objects of analysis lack complexity, but they might be said to be ‘one dimensional’ in as much as there is just a sole focal point, namely the language employed by the judges and legislators. And, it must be recalled, the methodology itself is traditionally operating within the authority paradigm. Films, in contrast, are complex in the sense of being multi-dimensional; there is the script, the narrative, the characters, the image of each frame, the editing, the acting, the sound and so on. The kind of analysis and reasoning methods are bound to be, it might be said, very different from those employed by a legal analyst. Moreover Raymond Durgnat has identified another complexity in addition to this multi-dimensional one: ‘the medium generates conflicts between its function as an “art form” and its function as an entertainment “dream factory”’ (Durgnat 1967, 13). In the middle of the last century this dichotomy was seriously problematic, as Durgnat explains. The critic wanted a picture to be so good that it stood up to educated taste, whereas the filmmaker wanted to produce something that could not be defeated by bad taste. ‘All these confusions’, wrote Durgnat, ‘[were] further compounded by the controversies and tensions existing within the schools of aesthetic opinion’ (Ibid.). This tension has now eased of course, but it has not completely disappeared.

Do these differences—and no doubt there are others—render any comparison between reasoning in law and in an arts discipline like film studies largely unhelpful or even valueless? The differences certainly present challenges. Yet there are some basic points that are worth repeating. The first is the often noticed idea that a basic institutional structure which links law with theatre (and by extension with film) is the tripartite system—associated with the Roman jurist Gaius—of *persona*, *res* and *action* (Gaius, I.8). Law, like film, consists of actors, props and actions (Villey 1979, 44-45). Indeed the Roman law expression for the legal subject—*persona*—is a term, so it has been said, ultimately derived from the masks used by a single actor to express different persons (Duff 1938, 3). This structural and institutional analogy should not be underestimated as one will see.

Secondly, as Jacques Aumont and Michel Marie point out, the principal distinction for the epistemologist examining methodology is the one between, on the one hand, the natural (or hard) sciences and, on the other hand, the social and human sciences. For ‘there is always a basic difference of nature between the *facts*, the *objects*, of the ones and the others’ (Aumont & Marie 2002, 29). It is fruitless to try to compare the analysis of a film with a scientific experiment because one is not looking for what is repeatable but for what is singular (Ibid). Now law—at least in the civil law tradition—likes to see itself more in the natural science category with the result that its methods have been compared to those in the sciences (Champeil-Desplats 2014, 58-75; Jestaz & Jamin 2004, 160). But such association is probably no longer sustainable save at an ideological level. There is, then, nothing inherently

objectionable in comparing two modes of reasoning that form part of the human sciences. Indeed the schemes of intelligibility employed generally in the social sciences are applicable as much to legal reasoning as to critical analysis in cinema studies (Samuel 2014, 81-92). These schemes provide, in other words, another *tertium comparationis*.

A third point to be made concerns the level at which comparison between legal reasoning and reasoning in film studies might be conducted. To talk at a macro-level of comparing the two forms of reasoning is likely to flounder almost immediately given the differences mentioned earlier. Such floundering may well be unjustified as will be seen, but there is perhaps a constant danger of a comparison that veers towards, if not superficiality or even pretentiousness, then a series of generalities whose epistemological value may seem at first questionable. In saying this, the purpose is not to undermine the earlier point that schemes of intelligibility provide a *tertium comparationis*. It has been indicated elsewhere that causal, structural, functional, hermeneutical, actional and dialectical *grilles de lecture* are as applicable to reading a film as to reading a case and its judgments (Samuel 2014.). The problem lies in comparing a structural or a hermeneutical analysis in film and in legal studies at some general level. As a matter of semiotics it might well be feasible to assert that both law and cinema consist of systems of signs—indeed ‘codes’. But are not the effects and concepts employed so different as to render any general comparison of little value? In fact it has been observed recently that the ‘image’ of the world that law represents is not one that is a ‘faithful copy’; it has its own ‘mental representation’ of reality (Mathieu 2014, 7-10). However in order to appreciate these images and mental representations it might be useful to descend to the micro-level—that is to say to the language and visual schemes employed by lawyers. At this level one finds that through the use of analogies, metaphors and diagrammatic schemes lawyers often resort to mental images, perhaps bringing law a little closer to the visual arts than one might at first think (Ibid., 181-199).

## 2. *Persona*: form and content

Operating, therefore, at a more micro-level might permit the identification of focal points capable of producing useful comparative insights. One might begin with an institutional notion or concept that appears fundamental to both film and law, namely the *persona* (Duff 1938). Leaving aside the film of this name by Bergman, a work that is based almost entirely on this concept is Alfred Hitchcock’s *Vertigo* released in 1958. The film has as its institutional structure (so to speak) three *personae*—indeed perhaps more—but only two actors, although there are other characters whose importance within the narrative must not be overlooked. Indeed there are two other individuals whose roles are crucial to the structure of the work. In addition to the *personae*, the *res*—clothes and a necklace in particular—are equally important; for the film is about how these props go far in shaping, and destroying, the persons and their personalities. One might add that the film has a structure that any French jurist might well find satisfying: it is in two distinct parts and this *plan* is integral to the

substance of the whole movie (Jestaz & Jamin 2004, 226-228).

The film opens with Scottie (James Stewart) and another policeman chasing a suspect over the rooftops; Scottie slips and is left hanging from a gutter high above a courtyard which results in the death of the other policeman when he tries to help the stricken detective. The next shot shows Scottie in Midge's (Barbara Bel Geddes)—his girlfriend's—apartment with, surprisingly, nothing more than a broken leg, but the audience learns that Scottie suffers from severe vertigo and, as a result of the rooftop experience, has resigned from the police force. He is subsequently contacted by an old friend, Gavin Elster (Tom Helmore), who offers him work as a private detective. What Elster wants is someone to keep his wife Madeleine (Kim Novak) under surveillance because she has come to believe that she is a reincarnation of her great-great grandmother Carlotta, who took her own life. Having been invited by Elster to glimpse his wife (in a mesmerising restaurant scene), Scottie accepts the offer and begins to trail Madeleine becoming ever more fascinated by her and her behaviour with regard to Carlotta, represented in a museum painting wearing a distinct jewelled necklace. This trailing episode ends when Scottie saves her from drowning in an apparent suicide attempt. Scottie by this time is in love with Madeleine and while she starts to reciprocate the whole episode seemingly ends abruptly with Madeleine's death in a fall from a bell-tower, Scottie, because of his vertigo, having been unable to save her.

The film then enters its post-Madeleine's death second part. This second section itself is sub-divided into two parts: the first part is Scottie's decline into severe trauma and depression—in which he is institutionalised—and the second part is his post-institution haunted period where he imagines that he keeps seeing, in various locations, Madeleine, although the women turn out to be different people who happened to be wearing clothes similar to those worn by Madeleine. One day, however, Scottie sees a woman (Kim Novak) who really does, in her facial features if not her clothes, seem to be the living image of Madeleine and, his detective skills reawakening, he follows her finally arriving at the modest hotel in which she is living. He summons up the courage to knock on her door and, having overcome her initial scepticism, this look-alike woman invites Scottie into her room, telling him that she is Judy from Kansas who works as a shop girl. When Scottie leaves, we see Judy in her room with a distinctly worried and intense look and the film slips into a flashback. Judy was both Madeleine and not Madeleine; she was Elster's mistress hired by Elster to impersonate his wife in an elaborate plot by Elster to kill his actual spouse, which he does by throwing her from the bell tower knowing that Scottie's vertigo will prevent him from intervening and learning the truth. Thus it was Elster's wife, and not the woman he had been trailing, who Scottie sees as the actual dead figure.

What follows is a deepening and disturbing relationship between Scottie and Judy in which the former obsessively tries to turn Judy into the image he has of the 'late' Madeleine and he only is able to consummate his relationship with Judy, in a physical sense, when he has transformed her into the perfect image of his imagination.

As Judy grows more confident in her relationship with Scottie she carelessly puts on a necklace that is identical to the one worn by Carlotta in the museum painting; and Scottie, on seeing it, immediately realises its significance. He has been tricked and reacts brutally, forcefully driving Judy all the way to the bell tower where, presumably, at its summit he hopes to learn the truth from her. But on reaching the summit it ends tragically when Judy, apparently startled by the appearance of a nun, falls to her death. The film ends with Scottie looking down from the tower and, seemingly, once again completely traumatised (although perhaps cured of his vertigo).

As one might expect much has been written on this film—including at least two books (Barr 2002; Esquenazi 2011). Many of the key commentaries analyse the film sequence by sequence emphasising for example the structural aspects of the film, the intention and outlook of the director (Hitchcock), the moral dimensions of the characters or the psychological obsessions of Scottie and Madeleine. Indeed the film is so rich in possibilities that it can be profitably read through all the various schemes of intelligibility. Who *caused* the Judy/Madeleine death? What *significance* have clothes and the necklace in the narrative? What are the *dialectical* possibilities inherent in the Madeleine versus Judy characters? What are the *functions* of the various narrative techniques employed by Hitchcock (for example in informing the audience almost immediately that Judy and Madeleine are the same person)? What role does the ‘actor’ have in the film given that by definition all narrative films have actors but in *Vertigo* these actors are, especially in the case of Kim Novak, actors playing people who themselves are acting? All of these questions (and others) have been, or could be, themes pursued by writers on film. Yet do these kinds of question really have relevance for jurists?

One concept shared by *Vertigo*’s vision of, and law’s vision of, the world is the notion of *persona*. Robin Wood, who has written one of the principal books on Hitchcock’s films, had this to say of *Vertigo*:

If we re-see the film, or carefully reconstruct the first two-thirds, we shall see that we have not yet taken the full measure of the subtlety and complexity of Hitchcock’s conception. For such a re-viewing or reconstruction will show us that the illusion is not *just* an illusion: Judy was not *merely* acting Madeleine—up to a point she *became* Madeleine. (Wood 2002, 121.)

Robin Wood goes on to explain:

Our very incredulity that the Judy we see could ever have been trained to act the part of Madeleine works for Hitchcock here. Judy—on her first appearance, and in her treatment of Scottie when he follows her to her hotel room—appears hard and vulgar, over made-up, her attitude at once defiant and cheaply provocative; she is playing up the tartiness to deceive him, and her underlying vulnerability is gradually exposed, yet she is never depicted as intelligent. (Ibid.)

However, as Wood notes, she was, as Scottie says in the film, ‘a very apt pupil’ (Ibid). As this author implies, Hitchcock is contrasting the visual image with the narrative



implied image. As Wood says:

If we mentally juxtapose her stance and manner in the doorway of the hotel room—her way of holding her body, her expression, her intonation, her vulgarised version of what is in part their love story—with, again, Madeleine's entry from Scottie's bedroom, her way of moving and standing, her hesitant words, her reticence and *pudeur*, we shall see that Madeleine was not just an acted role but another persona. (Ibid., 121-122.)

Or, as Wood asserts, 'the pretence partly became reality' (Ibid., 122). But did it?

The problem with this reasoning, although in many ways insightful, is that 'reality' and 'persona' are not really capable of existing in the same Hitchcockian space. Robin Wood certainly appreciates the subtleties of *Vertigo*—for example its fantastic (unreal) plot and its emphasis on the separation of *persona* and physical person—but there is no real attempt to 'drill down' into the paradoxes that the notion of *persona* engenders in Hitchcock's hands. One wonders, therefore, if the legal mind might not be more demanding in this respect. The jurist influenced by fiction theory might argue that all of the *personae* are surely constructed 'fictions' (see Samuel 2015a, 31). Wood seems to suggest that there are only two such persons, but a moment's reflection will doubtless indicate that there are more. There is, first, Elster's constructed *persona* of his actual wife which Judy is supposed to assume. Perhaps she does, but it is feasible that Judy's Madeleine *persona* is (secondly) not quite that of Elster's, just near enough. Thirdly there is Scottie's view of Madeleine's *persona* which, again, Elster and no doubt Judy hope will match with their constructed visions, but might not exactly.<sup>2</sup> The obsession with the grey suit worn by Madeleine might not have been fully foreseen by Elster (Scottie might instead have become obsessed with Madeleine's cream overcoat). Fourthly, Judy's construction of Madeleine can be seen as the construction of two personalities; there is 'Madeleine' herself and there is 'Madeleine-as-Carlotta' (Modleski 2005, 95). Fifthly, there is Judy's construction of the 'Judy' which she wants to project onto Scottie when they meet in the street, a *persona* that might actually be perceived (sixthly) differently by Scottie. Seventhly, there is Judy's metamorphosis back into the *persona* of Madeleine—but is it the same Madeleine?—which might not quite match (eighthly) Scottie's construction of this *persona*. Indeed Scottie 'knows' that the Judy-into-Madeleine *persona* cannot be the actual personality because Madeleine is (for him) dead. In short there could be at least eight different *personae* in play, none of which have any reality as such. They are fictional personalities created by actors playing at acting differently constructed personalities.<sup>3</sup> Indeed these personalities are all participating in a film whose plot, as Robin Wood points out, 'hinges on a wild improbability' (Wood 2002, 109). The whole plot is quite fantastic, for 'no one would ever set about murdering his wife in *that way*' (Ibid.). Yet such 'unreality' still raises another concept noted by a film writer, that of *anima* (Durgnat 1974, 282).

2 A point implied in Durgnat 1974, 283; 289.

3 As Modleski notes, Madeleine 'is a person with no identity' (Modleski 2005, 95).

### 3. *Psycho*: the role of *anima*

Fiction it all may be, but what is going on in the minds or souls (*anima*) of the various personalities? Here reasoning in film studies can seemingly wander off into areas that at first sight are of little interest to the jurist. The characters' psychological states of mind in *Vertigo* provide a rich source for analysis (Durnat 1974); but such analysis is often unsupported in any research sense and can on occasions say as much about the film writer as the film itself. Yet aspects of this kind of reasoning about a film can raise issues that should be of interest to the jurist. Who are to blame for the various harms and deaths in the film? As Raymond Durnat observes:

If we are to blame Scottie for errors which result in his losing Judy, we must also blame Midge [Scottie's long-time girlfriend] for errors which result in her losing Scottie. If we are to blame Scottie for causing the policeman's death, we must also blame the nun for causing Judy's. The pattern of guilts in the film is altogether ambiguous, simply because it is circular. It need not have been. Hitchcock might quite easily have inserted subtle yet effective pointers towards certain aspects or moments and not others. He does not. (Ibid., 287.)

Durnat goes on to suggest all manner of possible readings, although, for the most part, with a certain scepticism. But he is much more confident in asserting that Scottie's relationship with Judy 'is one of Hitchcock's astute studies in, not male, but masculine, bullying of the female' (Ibid., 288). This remark unites film and legal analysis through feminist theory and although this aspect is not developed by Durnat in respect of *Vertigo* it certainly raises some interesting issues for the jurist. One thinks of Lord Denning's and Cumming-Bruce LJ's depiction of—'bullying' of?—the female claimant in *Miller v Jackson*<sup>4</sup> in which she is depicted as a 'newcomer' who does not like cricket—'the manly sport' (Ibid., 988)—and as a person who is 'obsessive' to an unreasonable extent (Ibid., 989). Even if this depiction of the claimant does not amount to bullying as such, it certainly involves an exercise in 'depersonalisation'.

This 'depersonalisation' is, however, as far as many jurists would go in deconstructing the 'person' in a case like *Miller*. The film writer is different in this respect; he or she is far more likely to offer, say, a Freudian or some other psychoanalytic analysis (see Wood 2002, 388-405). Why do lawyers, on the whole, traditionally shy away from this kind of theorising? Why do they not subject a reported legal case—a 'text'—to the same kind of analysis as a cinema academic adopts with regard to her 'text', the film? Now it must be said at once that feminist theory is firmly established in legal studies and, in the area of legal reasoning in particular, has made notable contributions (Hunter, McGlynn & Rackley 2010). Moreover a diachronic view of legal theorising indicates that there are writers who can be categorised under the heading 'psychological theories' (Jones 1940, 187-202). Indeed some of the jurists who formed part of the school of American Realism were more than prepared to take as their object of focus the *animus* of the judge. For example Jerome Frank,

<sup>4</sup> *Miller v Jackson* [1977] QB 966.

after having set out the views of a judge who had written that judging was a matter of ‘hunching’, concluded that if ‘the law consists of the decisions of the judges and if those decisions are based on the judge’s hunches, then the way in which the judge gets his hunches is the key to the judicial process’. In short, whatever ‘produces the judge’s hunches makes the law’ (Frank 1949, 104).

The fact is, however, that much writing and commentary on legal cases by academic lawyers do not look beyond the actual formal legal reasoning employed by the judges in their judgements. The leading European law journals do not present to their readers a detailed analysis of the psychological states of mind of the judges in cases discussed by the academic writers. In some ways this is astonishing. Few would surely disagree with Jerome Frank when he says this:

His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats. A certain twang or cough or gesture may start up memories painful or pleasant in the main. Those memories of the judge, while he is listening to a witness with such a twang or cough or gesture, may affect the judge’s initial hearing of, or subsequent recollection of, what the witness said, or the weight or credibility which the judge will attach to the witness’s testimony. (Frank 1949, 106.)

Is not, therefore, Frank clearly right to conclude that if ‘the personality of the judge is the pivotal factor in law administration, then law may vary with the personality of the judge who happens to pass upon any given case’ (Ibid., 111)? As Frank goes on to ask: Why such resistance to the truth? Why has there been little investigation of the actualities of the judging process (Ibid., 116)? Of course academic lawyers have, since Frank’s time, produced monographs on racism, sexism, anti-Semitism and other psychological prejudices to be found within the legal profession, just as there are works on the influence of politics on judicial decision-making (see Griffith 1997). But this focus on the judicial *animus* cannot by any means be said to be the norm in academic law writing.<sup>5</sup> In film studies it is quite different. While there are many works analysing a film like *Vertigo* scene-by-scene, or in terms of the motivations of its characters, there is equally no reticence in looking at the personality and psychological orientations and (or) prejudices of a director like Alfred Hitchcock (see Spoto 1983), and of course how this *animus* reflects itself in his films.

Jerome Frank’s own answer to his questions is one based upon what he calls ‘childish emotional attitudes’. There is a childish introspection by lawyers with regard to their own discipline (Frank 1949, 117). And as a result ‘the inclination towards a critical analysis of the motives which lie behind thinking is not very vigorous’ (Ibid.). One perhaps should add that any potential jurist in France, and no doubt in other countries as well, tempted to adopt a more vigorous attitude towards legal reasoning and judicial motivation might well find that their careers as academic lawyers do

---

<sup>5</sup> Especially in the civil law systems (see generally Jestaz & Jamin 2004). With respect to UK legal writing see Cowrie 2004.



not progress. One has to conform to the tradition of the corps of professors and this tradition insists upon a particularly positivistic approach to legal analysis (Jestaz & Jamin 2004, 193-200). As has been mentioned, one difference between reasoning in law and reasoning in film studies is the constriction imposed on the former by the authority paradigm. Nevertheless such a paradigm need not necessarily exclude, even if it does discourage a direct examination of the judicial psychology as a source of law, a more vigorous approach to the methodological and epistemological aspects of legal reasoning. In pursuit of this objective, can reasoning in film studies offer any insights?

The first possibility is to be found in the way that film criticism managed to escape from the 'authority paradigm' of literary criticism. One of the key writers in this paradigm battle was the critic Raymond Durgnat who himself had had a traditional Cambridge English literature education (see generally Miller 2014). He attacked (in 1963) the critical tradition in England of the 1950s and 1960s caused in part, he said, by the literature courses in universities (Ibid., 13). In these courses eighteen year olds 'are required to turn out weekly essays in each of which they solemnly "evaluate" Wordsworth, Milton, Webster, etc, and often from the vantage point of, society hopes, total virginity where sex, violence, death and even barrack-room camaraderie are concerned, discuss whether the "texture" of Fielding, Hardy or Baudelaire "reproduces the authentic density of lived experience"' (Ibid., 13). In addition, Durgnat went on to assert, 'the Anglo-Saxon culture puritan braces himself against the temptation to relax in the opium-dens of light entertainment' and 'he treats all entertainers and artists as putative drug-peddlers whose work has to be carefully scrutinised before it may be allowed to communicate' (Id.). As for film criticism itself, as represented in the British Film Institute journal *Sight & Sound*, its 'tone of superiority' buttressed by 'heavyweight intellectual quotes (Aristotle, Thomas Mann, Balzac)' (Ibid., 21) kept it 'naïve' and infected with 'a lofty disinterest in what the general public wants and why' (Ibid., 24). The result of this 'paradigm', academic criticism was, said Durgnat, 'condemned to misunderstand' films like *This Island Earth* (1955) and *Forbidden Planet* (1956) and 'to dismiss [them] as routine trash, because [their] psychology is straightforward, [their] terms melodramatic, and so on' (Durgnat 1967, 268). Today the huge literature on cinema and television attests to the fact that Durgnat and his followers and successors were successful in freeing film writing and reasoning from the then existing literary 'paradigm'.

Such attacks on the authority paradigm have of course been part of the jurisprudential literature at least since the American Realists. In particular, just as Durgnat was critical of the literature faculties, the Critical Legal Studies (CLS) movement took aim at legal education (see Cownie, Bradney & Burton 2013, 126-129). Yet while these attacks have definitely opened up the boundaries of academic legal writing (Ibid., 133), at least within the common law tradition, open-minded French jurists still describe such American legal writing as an 'anti-model' [in comparison to their own French model (Jestaz & Jamin 2004)]. Indeed even within the common law tradition, the effects of both Realism and CLS, although of major

importance, have been limited (Cownie, Bradney & Burton 2013, 126). One should not be surprised by this since law as a discipline rests upon a foundation that is very different from film studies. In England, for much of its history, the law faculty was simply irrelevant to legal thought and to legal studies; and it is still perfectly possible to envisage law as a formal discipline and reasoning process without academic law professors (Siems 2011, 71). In short it is a professional subject and those faculties in Europe and elsewhere that work outside the authority paradigm can largely be ignored by those in practice. By way of analogy, some of this structure is applicable to cinema as well. The actual production of films has never been dependent upon university faculties.

#### 4. *Images: representation and dimensions*

The second possibility, stimulated in part by the publication of a book in France by a law professor with a mathematical as well as a juridical background, is to look at the extent to which law is represented in terms of images rather than language as such (Mathieu 2014). According to Professor Mathieu such images—mental representations of law—can be conveyed through analogies, metaphors and graphic images (diagrams, graphs and the like). Now one problem with using the page to convey information, either through language or by means of a diagram, is that one is trapped within two dimensions. Reducing, therefore, an image to a diagram or a set of words will always result in a loss of information (Delacour 1995, 35-36; Mathieu 2014, 140); one is operating in a ‘flat’ world (Mathieu 2014, 135-141). This creates its own reasoning patterns in respect to categories and concepts in that the world of fact has to be reduced to categories that often function in terms of a dichotomy. Is this a ‘property’ or an ‘obligations’ issue? Is this a ‘public’ or a ‘private’ law matter? As Professor Mathieu points out, in this flat world a factual situation—a new type of contract for example that cannot be categorised under one of the existing heads—can only be accommodated either by forcing it into an established category or by locating as a hybrid between two or more existing categories (Ibid., 112-120).

More generally one can talk, in this flat world, of reasoning that is binary in nature (Ibid., 125). Either something is X or it is Y. Indeed if one looks at legal reasoning in its historical context it was the ability to reduce problems to what one might call a binary algorithm that made a jurist like Bartolus so notable. The dialectic method in its most perfected form consisted of drilling down using an ‘either...or’ (*aut...aut*) method of *divisio* and *distinctio*. Manlio Bellomo provides an illustrative example of this technique:

[I]f a servant acquired a sick animal, he either was aware that the animal was unhealthy or not; if he was aware of the state of the animal’s health, one must ask whether he acquired for himself, out of his own *peculium*, or for his master; in the latter case one must distinguish whether or not the master knew of the acquisition or not, and if not, whether or not he could have known about it. (Bellomo 1995, 181.)

This dialectical scheme is not the only methodological approach used by lawyers. But it does illustrate how legal reasoning based on the authority of texts operated within a world that was flat. It was either this or that. One divided the world into a series of alternative categories and, as far as possible, forced facts into this two-dimensional dialectical scheme. Even the interpretation of words and expressions can be subjected to this binary form of reasoning. A word in a legal text can be defined in terms of what it is not and thus the word 'state' in respect to the 'state of the premises' can be distinguished from the word 'layout'. Thus a badly designed apartment which subsequently was deemed to be prejudicial to health did not fall within the word 'state' because the problem was one of 'layout'.<sup>6</sup> As Professor Mathieu points out, flat (two-dimensional) images can create their own particular problems given the absence of a third dimension (Mathieu 2014, 137-141). Yet they can equally exclude and thus provide a type of space for an important form of rhetoric: 'those who are not with us are against us'.<sup>7</sup>

Representation of images on film would seem at first sight to be far less restrictive. The photograph reveals a three-dimensional landscape in a way that the two-dimensional map does not. Lawyers are not of course writing as such about maps, but in fact the metaphor of a map is surprisingly strong in legal thought and acts as an important image in the debate about legal taxonomy. 'Many attempts have been made', writes Stephen Waddams in a chapter entitled 'the mapping of legal concepts', 'to explain the relation to each other of categories (organizing divisions) and concepts (recurring ideas) in private law, leading, since Blackstone's time, to a great many maps, schemes, and diagrams' (Waddams 2003, 1). As Professor Waddams goes on to point out, law is as much about facts as law and no map is capable of classifying all imaginable facts (Ibid., 14). Yet factual reality can prove just as challenging for the film-maker. Hitchcock himself is reported as saying that the cinematic image lacks depth and that in *Vertigo* he was restricted 'to more or less two-dimensional effects' (Durnat 1974, 294).

## 5. *Imitation of life: depicting 'reality'*

This lack of dimensional space applies more generally in cinema. Discussing the impossibility of 'realism' in film, Raymond Durnat says that it is 'a means, not end' and goes on to ask to what end. 'To showing, surely, something deeper than the surface of life', he suggests, 'whether it be the subjective experiences of the characters in the story, or a clarification of social processes, or the artist's feelings about these things'. He then makes the point:

All of these things are invisible to the camera-eye, which can't see the inside of a man's mind, or a historical process, or a sociological generalization, or a theological or philosophical belief, or the artist's own responses. These 'invisible'

<sup>6</sup> *Birmingham CC v Oakley* [2001] 1 AC 617.

<sup>7</sup> *Qui non est mecum, contra me est* (Bartolus, commentary on C.1.9.9 No 1.).

realities can, must, be reached through diverse methods, or by different methods in various combinations: the ‘sample moment’ of *cinema-vérité*, expressionism, or studio trickwork, or dialogue, or music [...] (Durgnat 1967, 33.)

More recent writing has developed this kind of observation into what has become known as representation theory. As one film writer puts it:

Representation is the depiction of things, classes, relationships, experiences, and other phenomena by means such as signs, images, models, formulas, and narratives. In an important sense the notion of representation—something standing for something else—implies that the real world is not simply out there for us to perfectly copy or experience without mediation. We assume material reality exists irrespective of our consciousness but only representations enable us to create a meaningful and workable relationship to that reality. (Bacon 2014, 402.)

The starting point of representation theory is the idea that films do not simply depict reality, even films that claim to be realistic. They construct an artificial world into which the viewer is then drawn (Ibid., 406). Some directors quite openly did this—Von Sternberg for example created his closed and exotic European and Asian places only within Hollywood studio sets—but in fact whole genres of films such as horror, fantasy, science-fiction and so on are deliberately ‘real’ unrealities in which the audience participates in fully accepting such constructions.<sup>8</sup> Indeed this in many ways is what the visual and literary arts are about. Yet the cinematic constructions of a depicted reality are imbued with a particular complexity because, as one saw with *Vertigo*, the *personae* and the *res* always have a hermeneutical implication. The audience is presented with actors who often themselves have a distinct *persona* but they remain signifiers of another *persona* which is the thing signified. James Stewart and Kim Novak are ‘real’ people yet they are, equally, always playing somebody else. The same is true of the props and the landscapes; they are ‘real’ in one sense but stand for something else within the constructed context of the film. The landscapes, the cars, the guns, the clothes and so on are things to be ‘read’ by the viewer. Thus the sets of Hammer and of Roger Corman horror films are as important as the actors and the storyline while firearms and landscapes have a particular iconic role not just in the films of Sergio Leone but in many of the Hollywood westerns that inspired him (Frayling 2000, 190-191). In short ‘realities’ are carefully crafted representations.

Law is faced with similar representation complexities. As one appeal judge famously said, ‘the state of a man’s mind is as much a fact as the state of his digestion’,<sup>9</sup> but of course actually trying to determine such a fact cannot be done directly. Whether a person has consented or agreed to something has to depend upon what

<sup>8</sup> Roger Corman, for example, stated that he never filmed outside of the studio when making his Edgar Allen Poe adaptations, except for sea-shores and burned out forests (Pirie 1970, 58). Actually he abandoned this rule for his final adaption, *The Tomb of Ligeia* (1964).

<sup>9</sup> Bowen LJ in *Edginton v Fitzmaurice* (1884) 29 Ch D 459, 483.

is observable and so whether parties to a contract ‘have reached agreement on the terms is not determined by evidence of subjective intention of each party’.<sup>10</sup> Such intention is ‘determined by making an objective appraisal of the exchanges between the parties’.<sup>11</sup> This usually involves interpretation of the words used by the parties, the object of the exercise being ‘to determine what each party *intended*, or must be deemed to have *intended*’.<sup>12</sup> As with cinema, one might be said to be dealing with ‘realities’ that are hidden and can be expressed only through other ‘realities’ (Ivainer 1988).

Yet there is an important difference. In cinema the author (or authors) of the film will often deliberately be using certain methods or signs to convey a particular message whereas in law the person involved in a legal situation such as the making of a contract might not have such a deliberate intention to convey a particular message to another person or persons. The party may not have thought about the words he or she used.<sup>13</sup> There may not exist, therefore, the same understanding between the sender of the message and the receiver of it. Nevertheless the hermeneutical situation can, in the world of cinema, operate at different levels in that the film-maker may be sending a message either to all the world so to speak or just to a more restricted ‘sophisticated’ audience such as critics. A film-maker may use weather or the colour of the landscape or clothes to convey to the mass audience the state of a character’s mind (storms for example traditionally being employed to give expression to mental instability). But the film could also contain more subtle messages which might well not be consciously perceived by those who do not have a store of film knowledge (Constable 2014, 377). In David Cronenberg’s *A History of Violence* there are many references to earlier violent films with the result that his product is both (arguably) a gripping entertainment in itself and—for those who have an interest in *film noir* and westerns—a vehicle for some more ‘subtle’ reference messages.<sup>14</sup>

These examples are simplistic to say the least and are used just to make the point that there are different levels of hermeneutical operation in relation to a cultural product such as a film, a painting, a play or a novel. One role of reasoning and theorising in film-studies is to bring out these different levels and meanings. This can be done at a very general level—at the level of theory—or at a close-reading ‘textual’ (image) level, that is to say in relation to a particular film; equally the analysis can be pitched anywhere between these two poles. In other words one can theorise about, say, the use of image in *film noir* generally or one can focus on the particular images in one particular film in order to expose and to discuss invisible realities associated with certain images and (or) their edited juxtaposition.

10 Lord Phillips in *Shogun Finance Ltd v Hudson* [2004] 1 AC 919, para 123.

11 Ibid.

12 Ibid., emphasis in the original.

13 See eg *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195. In this case the defendant most probably did not intend that its words (the conditions of tender) would be contractually binding.

14 Sergio Leone’s *Once Upon a Time in the West* (1968) has endless references to Hollywood westerns (see Frayling 2005, 59–63). Even the *res* (the land at the centre of the dispute) is a direct reference to *Johnny Guitar* (1954). This 1954 film is discussed at length in Durnat 1967, 187–192.



To what extent can images be used to expose ‘invisible realities’ in legal reasoning? Before considering this question it might be useful to make the point here that a barrister presenting an argument to judges may be in a different position—one that is closer to the film-maker—than a litigation party whose words and actions are being assessed by a court (did such a party intend to contract on these terms?). The advocate may well be deliberately sending a message to the judges.

Take the following quite recent case. A schoolgirl suffered serious injury during a school swimming session and sought compensation from the school; the school argued that it was not liable because, although it had organised it, the session itself was supervised by an independent contractor. It was well-established law that the employer of an independent contractor is not to be liable for any tort committed by the contractor, save in exceptional circumstances where there is a non-delegable duty owed by the employer to the victim. The Court of Appeal, holding the school not liable, drew an analogy with a school outing to a zoo. A mishap ‘such as an accident in the bus on the way, or an animal bite at the zoo, would not expose the school to liability where the respective causes were the negligence of the bus driver and the zookeeper’.<sup>15</sup> This decision was reversed in the Supreme Court. Lord Sumption, delivering one of the lead judgments, suggested a rather different ‘image’ than the zoo example; he thought that an analogy with public services was more appropriate. ‘The analogy with public services’, he said, ‘is often close, especially in the domain of hospital treatment in the National Health Service or education at a local education authority school, where only the absence of consideration distinguishes them from the private hospital or the fee-paying school performing the same functions under contract’.<sup>16</sup> As he pointed out, a patient in an NHS hospital injured by the negligence of an agency (independent contractor) nurse would certainly be able to seek redress against the hospital since it would owe a non-delegable duty to patients.

One can of course regard the difference of opinion between the Court of Appeal and the Supreme Court as one of interpretation of a rule in the law of tort (the rule of non-delegable duty). But what is surely striking is the role of images employed to give force to the opposing arguments. If one replaces the school with a parent, picturing a day at the zoo resulting in an accident to the child caused by a negligent zoo employee does not entail, one would imagine for most people, any breach of duty on the part of the parent. In contrast, a visit to a hospital where the child is harmed by a negligent agency nurse would not, for many people, absolve the hospital itself of any responsibility. Both the parent and the hospital are technically ‘independent’ from the actor who directly causes the harm, yet somehow the hospital exposing the child to the agency nurse is different from the parent exposing the child to a zoo. Imagine an audience watching these scenarios in a film. There is a kind of audience participation in which they feel that the day at the zoo, while involving risk, is a ‘reasonable’ parental thing to do. Indeed to refrain from going because of all the risks might well be regarded as obsessive and thus ‘unreasonable’

<sup>15</sup> Laws LJ in *Woodland v Essex County Council* [2013] 3 WLR 853, para 26.

<sup>16</sup> *Woodland v Swimming Teachers Association* [2013] 3 WLR 1227, para 7.

parental behaviour. But watching a hospital official informing the parent that, while regretting the incompetent treatment by the agency nurse, the hospital is in no way responsible, would, surely, provoke some anger on the part of the audience. Raymond Durnat has talked of the spectator's response as 'resonance'. It is the individual's response to the image which involves 'the whole interplay of culture and human nature'; and one 'might call it "human content", provided that one remembers that it is created out of style as well as out of the patterns of the story' (Durnat 1967, 174). The Supreme Court judges' reaction to the images presented to them proved very different to the reaction of the Court of Appeal judges. But the 'human content' is an 'invisible reality' that is the message contained in the image; and perhaps reasoning in film studies can help jurists acquire a deeper understanding of this 'resonance' between audience and representation.

## **6. The audience: reception theory**

This reference to audience reaction forms the basis for another possible connection between reasoning in literary and film studies and in law. This connection is reception theory which originates in literature but has been taken up by a film theorist. It has been summarised as follows:

'Reception theory' refers both to a model for literary history developed by Hans Robert Jauss in 1967 and to a more general approach in literary and film and media studies. In its recent incarnation, reception theory does not denote a theory *per se* but rather a collection of models, practices, and heuristics that are concerned with historicized and active responses by readers and viewers as opposed to intended meanings by authors and film-makers. (Dzialo 2014, 390.)

In fact reception theory has quite a long history going back to Max Weber, but its strongest proponent in film studies is Janet Staiger (Staiger 1992).

This writer has argued that in literary theory texts can be categorised into three kinds. There are text activated theories where the text itself strongly determines the meaning for the readers and the latter are regarded as being passive in terms of the reception of the message contained within the text. 'Text-activated theories', writes Staiger, 'assume or imply that the text controls or provides information for the reader's routine, although perhaps learned, activities' (Staiger 1992, 36). In contrast to these author and text theories there are what Staiger labels reader-activated theories in which the text is seen as weak and the reader as strong. 'Where text-activated theories focus on features of the texts and the effects they produce', says the author, 'reader activated theories examine features of readers and those features' consequences for the reading experience' (Ibid., 43). Here the meaning of the text is determined much less than the text itself and much more by the experiences and psychology of the audience of readers. Thus the readers 'constitute a valuable part of a "feedback loop"' (Id.). Somewhere between these two positions are context-activated theories

which, as the name suggests, ‘differ from the first two by looking at the contexts for reading experiences’ (Ibid., 45). The meaning is ‘in’ the contextual event (Ibid., 47). Thus historical and sociological circumstances are crucial, but a wide variety of data ‘might be used by a reader to hypothesize the appropriate communicative process into which a specific instance fits’ (Ibid., 46).

These categories have a relevance for lawyers and jurists. The authority paradigm, particularly in respect to legislation, would suggest that legal texts are largely text-activated in their design and in their acceptance within the legal community. Indeed the legislative text is seemingly specifically designed to assert control over its readers, the only counter-weight so to speak being the judges’ right to interpret. Even this right to interpret is subject in most Western systems to the will of the legislator (*mens legislatoris*).<sup>17</sup>

This said, the position is not always so straight-forward. For a start, not all legislation, at least in English law, is aimed at quite the same audience. Some pieces of legislation are aimed directly at specialist lawyers and will use terms and expressions such as ‘bailor’ or ‘bailee’ without express definition because these words will be understood by the specialist target audience.<sup>18</sup> Take section 2(1) of the Misrepresentation Act 1967 which reads as follows:

Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

To the person on the London underground (to use the fictional figure employed by the judiciary) this statement would make little sense. The word ‘misrepresentation’ is hardly in common use today (or in 1967) and ninety word sentences are at best difficult to comprehend even by readers of a sophisticated newspaper. Moreover most non-lawyers, even if they spent time and energy on the sentence, would probably end up wondering what the author was trying to say. However to those readers with a good knowledge both of the law of misrepresentation and of the history of the tort of deceit the sentence would be comprehensible. It is simply extending the tort of deceit to non-fraudulent misstatements. Now there is no doubt that this section is author-activated in that it is sending a clear message to the specialist lawyer. Yet it is also in some ways a reader-oriented text in as much as the statement is specifically targeted at a very specialist audience whose must actively participate in the interpretation of the section.

One might compare section 2(1) of the 1967 Act with another piece of

<sup>17</sup> For a historical discussion see Maclean 1992.

<sup>18</sup> Torts (Interference with Goods Act) 1977 s 2(2) and 12.



legislation, this example belonging to the field of criminal law rather than the civil (private) law of obligations. The Obscene Publications Act 1959 section 1 states:

For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

Arguably this sentence, despite its length, is aimed at the ordinary person on the London underground in that it is this type of reader who is likely to make up a panel of jurors. It is, in other words, not aimed at a lawyer with specialist knowledge but at a person who has to judge whether a publication is one that ought not to have been published. The actual criteria—‘deprave’ and ‘corrupt’—employed by the author of the text are completely meaningless in any scientific or philosophical sense. They are words designed entirely to stir emotions and activate intuition. They are probably intended as a means of bestowing discretion on a jury whose own ‘common sense’ will decide whether the publication is obscene. This piece of legislation is, then, rather less author-activated and more context-activated than the 1967 section in that what amounts to deprave and corrupt changes over the decades. Films that might have been prosecuted in the 1950s might well be considered somewhat tame today. In fact one might go further and argue that section 1 of the 1959 Act is more reader-activated than author-activated in that the wording is designed to ensure that a jury—the ordinary readers of the prosecuted text—are the ones who will interpret the words.

Both of these legislative texts are author-activated in as much as the drafters of the legislation had the intention of imposing a normative proposition designed to achieve an objective. However there are occasions where this objective is not always reached. The judges, as readers, might interpret a text in such a restrictive way (as viewed by the author) that the wording does not cover a situation envisaged by the legislator. This may often be unhelpful as far as the legislator (author) is concerned; but it is not always the case. It is possible that the readers (judges) might adopt an interpretation that is narrower than the words seemingly permit in order to achieve an objective that, at least at the time of the litigation, accords with that of the author (legislator).

Can one talk, therefore, of a relationship between author and reader as one that is capable of being both non-receptive and receptive depending upon context? Can one conclude that while legislation might at first sight be author-activated it is, in the end, always context-activated (if not reader-activated) because much will depend, first, on the target readership (specialist lawyer or ordinary juror) and, secondly, on the receptive attitude of the readers themselves? Certainly, the great civil law codes—legislative texts of course—can arguably be understood, today, only in terms of a context-activated (if not a reader-activated) reception theory. As Professor Niglia has written, ‘codification is a dynamic and never-static phenomenon, for, to

exaggerate, there is never a well-defined code-text, but always interpretation of it and perspectives on it—and struggles’ (Niglia 2015, 157). Thus understanding ‘a code is about capturing these perspectives, and capturing them is about detecting struggles as well as participating in them’ (Id.). For a ‘code, once enacted, may enjoy weak authority or no authority at all in being highly contested and resisted, depending on the degrees of contestation and resistance that surround the code-product’ (Id.).

### **7. Ashes and diamonds: from theory to interpretation**

Reading legislation is no doubt somewhat different than reading a film. Yet reasoning about cinema (or literature in general) is relevant in the way that it emphasises the essential role of the viewer (reader), a role that is arguably eclipsed in legal studies by the authority paradigm. Instead of talking about reception lawyers talk instead of the permissible rules or methods of interpretation (see Bell & Engle 1987, 46-111). The notion of interpretation is of course important both in law and in film studies; but literary and film theory have gone beyond the narrow rules of interpretation by situating interpretation within a sophisticated epistemological context. Such a context—for example the categories envisaged by Staiger (1992)—permits in turn jurists to go beyond the positive rules or methods of interpretation discussed in law textbooks and treatises and to start examining the work of social scientist, and humanities, theorists in general. The idea, for instance, that English statutory interpretation can be understood as an intellectual exercise simply by learning the three rules of interpretation—the literal, golden and mischief rules—is epistemologically absurd. Much the same can be said in relation to the rules of precedent. One may or may not be impressed by Staiger’s categories, but there is no doubting that they force one to think about legal texts in a much more sophisticated way.

At a more specific level a film like *Vertigo* can equally inform conceptual legal reasoning. The film can encourage jurists to think about their own structural model, built upon the elements of persons, things and actions, and the way that this model has insinuated itself into the psychology of jurists. For example one academic lawyer has attacked a particular argument about causation in the law of tort on the basis that ‘it refers not to each defendant as an individual but to the defendants as a collective unity’ (Nolan 2009, 174). Yet the defendants that this writer is treating as individuals are not individuals at all; they are corporations which, of course, are a ‘collective unity’. The constructed social world here is as much a fantasy as the one created by Hitchcock. Later on in the same paper the jurist distinguishes between ‘objective probability’ and ‘epistemological probability’ (Ibid., 185-186). But is not the corporation simply an ‘epistemological individual’ rather than a ‘factual one’? If one is going to make a distinction between an ‘epistemological’ and ‘factual’ world, then what Hitchcock has to offer is a vision that seriously questions such a dichotomy. If Madeleine is an ‘epistemological’ construct, what about Judy? Is she ‘factual’? Or is she, as Robin Wood suggests, more Madeleine and thus more ‘epistemological’? The great fear that some jurists have is that of incoherence (Ibid., 189). However no one

can accuse Hitchcock's major films as lacking coherence. Quite the opposite, even if the coherence comes, as in *Vertigo*, at the price of factual credibility (would one really plan a murder in this way?) *Vertigo*, in short, ought to provoke the jurist into asking this question. Is much legal reasoning based upon a social world as reliable in its 'epistemological' construct as the world of Scottie, Madeleine and Judy? Is it a fantasy world that, like cinema, seems to be offering a vision of reality?

Another writer on tort has noted that 'the goal of an "interpretative legal theorist" is to "reveal" an "intelligible order" in the present law' (Bagshaw 2009, 247). This is of course an important restatement of the role of academics in the social sciences and humanities. Interpretation (hermeneutics) and order (structuralism) are two key schemes of intelligibility employed by social and human scientists. The inspiration behind this interpretative theory, Ronald Dworkin, not only argued that the jurist could better understand law by comparing legal interpretation with interpretation in other disciplines (especially literature) but also suggested that jurists might well be able to provide a better understanding of interpretation in general (Dworkin 1985, 146). Interestingly when one turns to the topic of interpretation in film studies, it has been observed that an exclusive hermeneutical training, which, says the author, is the educational background of many film writers, has had a limiting effect on the development of any sustainable films theories. Because of a lack of training 'in theoretical discipline such as the natural or social sciences, or philosophy', the result is that 'most film scholars do not really understand the difference between theory and interpretation, an obvious liability if theory is to prosper' (Carroll 1996, 42). What Dworkin offered is interpretation as a theory in itself. Law is interpretation (Dworkin 1986). But according to Noël Carroll the two cannot be merged in film studies because 'the interpretation of individual films is not theory, no matter how technical the language of the interpretation appears'. Theory, for Carroll, 'involves evolving categories and hypothesizing the existence of general patterns; but finding that those categories and hypotheses are instantiated in a particular case is not a matter of theory' (Carroll 1996, 42). Theory is about 'the regularity of the norm, while film interpretation finds its natural calling in dealing with the deviation, with what violates the norm or with what exceeds it or re-imagines it' (Ibid., 43).

One may or may not agree with Carroll. Would for example Carroll deny that Stagier, and her representation 'theory' categories, is not propounding a theory? Moreover film studies has surely been dominated—and to some extent is still dominated—by the two fundamental 'theories' of *auteur* and *genre*? (Tudor 1974, 116-152). It is difficult to imagine any film interpretation being conducted without some reference to these theories. Yet, whatever the situation, there is perhaps a problem within law in trying to distinguish theory from interpretation in that law is different from film studies in its discipline paradigms. It is not open in the same way to the criticism that 'showing that a film is an instance of a general theory would imply that the film is, in certain respects, routine, that is, pretty much like everything else in the same theoretical domain, and, therefore, not really worthy of special interpretation' (Carroll 1996, 43). As has been seen, the goal of the legal

theorist is to find an intelligible order in the cases and statutes that are the objects of the interpretation.<sup>19</sup> Indeed Dworkin has argued that the role of the judge is to participate in a grand project that is analogous to writing a chain novel and thus the judge as interpreter is indeed working towards the idea that each instance is part of a greater general theory. In short coherence has been a major objective in legal reasoning, especially since the 16<sup>th</sup> century (Samuel 2012, 448).

Yet Carroll's assertion has perhaps some resonance for lawyers. Tony Weir, in an article comparing contract in English and Roman law, once attacked theorists in asserting that he had no theory to propound. Legal technique was, in his view, casuistic and thus Roman jurists were practical lawyers who 'hypothetically varied the actual facts of the situations presented to them, and considered what the legal effect of such hypothetical variations would be' (Weir 1992, 1617). One might respond to Weir's—and Carroll's—assertion in saying that he was in effect propounding a theory, but perhaps the real problem is that the role of theory in law is more complex (or perhaps more simplistic) than the interpretativists' view might suggest. Many lawyers operate not only within a particular rule-model of law—that is to say an epistemological thesis that regards knowledge of law as knowledge of rules—but equally within the authority paradigm. The result is that most lawyers are, theory-wise, operating within a largely positivist tradition, even if some might temper this, like Dworkin, with what used to be called natural law thinking (Atias 2002, 139-140). Legal method is undoubtedly subject to a paradigm and theory framework even if this is unacknowledged (see Atias 2002).

In contrast, separating interpretation from theory is of value in film studies in that it permits an interpretative approach that can intermix at one and the same time a range of schemes of intelligibility which in turn focus on what Raymond Durnat has called the difficult sources of confusion presented by cinema. There are not just aesthetic and style problems, but also 'the controversies and tensions existing within the schools of aesthetic opinion' (Durnat 1967, 13). This led Durnat to abandon theory in favour of exploring specific films (Ibid., 14). And the result of this exploration is, arguably, one of the richest works on cinema writing in that there are real insights into both a range of very different films and a number of more theory-orientated issues such as Realism and Expressionism. Yet this exploration was conducted through what might be called certain interpretative frameworks (or 'signposts' as Durnat called them) such as the relationship between content and style and between content and 'certain sociological facets' (Id.). Indeed if one was to isolate a single interpretative idea it is that of 'resonance' which in turn can

---

19 It has to be said that there has been a very long running reflection on the role of what might be called legal maxims (*regulae iuris*) as legal statements and their relation with individual cases. The final title of Justinian's *Digest* is devoted entirely to a list of legal maxims, but the first of which issues a warning (D.50.17.1). The law will not be found in these *regulae*. Where is, then, the law to be found? The medieval jurist Baldus said, on commenting on D.9.52.2, that it was to be found in the facts: *ius ex facto oritur; ius est implicitu facto* (Baldus, *In primam Digesti Veteris partem Commentaria*, D.9.2.52.2.). Is a case law decision always to be seen as an aspect of a more general theory? One gets the feeling that one of the Post-Glossators who succeeded Baldus began to struggle with this issue (Philippus Decius, *In Titulum de Regulus Iuris*).



be approached through a rich methodological tapestry of causality, functionalism, structuralism and so on, not forgetting of course issues of style and script that can take one beyond the schemes of intelligibility.

There is no reason, except if one belongs to the Dworkinian interpretativist school, why the jurist could not, at least to some extent, abandon the positivist and authority paradigm in order to approach say cases through the idea of resonance. Of course resonance itself is of little help and so behind it are to be found a range of schemes and focal points which can be deployed in order to create the interpretative structures. Why not teach contract and tort cases through empirical focal points such as debt and personal injury, for these are the focal points that statistically are the most relevant? Might one go further and group the cases and statutes around 'supermarkets' (*Double Indemnity*, *The Ipcress File*),<sup>20</sup> 'swimming pools' (*The Swimmer*, *Deep End*),<sup>21</sup> 'buses' (*Voyage Surprise*, *Bus Stop*),<sup>22</sup> 'ships and boats' (*The Wreck of the Mary Deare*, *Knife in the Water*),<sup>23</sup> 'aircraft and airports' (*The Crowded Sky*, *Airport '77*, *Snakes on a Plane*, *Flightplan*)<sup>24</sup> and so on? One might not be constructing the great literary chain novel envisaged by Dworkin, but, in the spirit of the Roman jurists (as envisaged by Weir), one can vary the facts and push outwards towards new situations. One might even be able to identify a certain aesthetic in the style of, and in the metaphors employed in, judgments, as has been seen with Lord Sumption's approach in the swimming case. Durnat could entice the jurist into a world of visual scenery so as to find some diamonds in the ashes of theory.

## 8. Exodus: concluding remarks

Can, then, reasoning and argumentation within cinema studies be of value to jurists? Certainly representation theory and response theory are of value and a film like *Vertigo* should, at the very least, provoke reflection on the role of *personae* and *res* in the construction of a narrative. But it is the actual differences between the epistemological underpinnings of each discipline that are, perhaps, the most

20 *Pharmaceutical Society of G.B. v Boots* [1953] 1 QB 401; [1953] 2 WLR 427; *Ward v Tesco Stores Ltd* [1976] 1 WLR 810; [1976] 1 All ER 219; *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1; [1997] 2 WLR 898; [1997] 3 All ER 297; *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] 1 All ER (Comm) 737.

21 See eg *Ruxley Electronics Ltd v Forsyth* [1996] 1 AC 344; *Radcliff v McConnell* [1991] 1 WLR 670; *Woodland v Swimming Teachers Association* [2014] AC 537.

22 *Topp v London Country Bus (South West) Ltd* [1993] 1 WLR 976; *Keppel Bus Co v Sa'ad bin Ahmad* [1974] 2 All ER 700.

23 See eg *Clarke v Dunraven* [1897] AC 59; *The Moorcock* (1889) 14 PD 64; *The Great Peace* [2003] QB 679; *Home Office v Dorset Yacht Co* [1970] AC 1004; *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] 1 AC 211; *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1996] 1 WLR 38; *Jolley v Sutton LBC* [2000] 1 WLR 1082 (HL); *Constantine (Joseph) SS Ltd v Imperial Smelting Corporation* [1942] AC 154; *Reed v Dean* [1949] 1 KB 188; *Transfield Shipping INC v Mercator Shipping INC* [2009] 1 AC 61.

24 *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195; [1990] 3 All ER 25; *Morris v Murray* [1991] 2 QB 6; *Manchester Airport Plc v Dutton* [2000] 1 QB 133; *Parker v British Airways Board* [1982] QB 1004; Civil Aviation Act 1982 sections 76-77; *Dennis v MOD* [2003] EWHC 793; *Hatton v UK* (2003) 37 EHRR 611; *Aerial Advertising Co v Batchelor's Peas Ltd* [1938] 2 All ER 788.

valuable when one is reflecting on legal reasoning. Coherence and the authority paradigm, together with a rule-model assumption, are the frameworks within which many lawyers and jurists reason. There have been serious attempts to break out of these frameworks—particularly by some of the Legal Realists and their successors—and this has resulted in a shift from conceptual structuralism (coherence) towards a functional approach. This has led to a major debate within law between the interpretativist school and the functionalists which has the merit of exposing the role of schemes of intelligibility in legal methodology. The major debate in cinema studies is now rather different since it is one between grand theory and individual interpretation. This debate is relevant for jurists as well, but more positively perhaps, jurists might well be able to inform thinking in cinema studies. Certainly grand theory is a problem for film writers as Carroll indicates; but the debate raised by writers like Carroll is, arguably, rather unsophisticated in that it does not begin to investigate the inter-space between interpretations and theory (see Boucher 2013). There is some understanding of the role of schemes of intelligibility and paradigm orientations but this is, arguably, underdeveloped by writers like Carroll. Both film studies and law can, accordingly, mutually benefit from a comparison of their reasoning and methods; the comparisons could aid a rethinking in both disciplines.

## Bibliography

*Airport '77*. Dir. Jerry Jameson. Universal Pictures 1977.

Atias, Christian: *Epistémologie juridique*. Dalloz, Paris 2002.

Aumont, Jacques and Michel Marie: *L'Analyse des films*. Nathan, Paris 2002.

Bacon, Henry: 'Representation'. In Edward Branigan and Warren Buckland (eds): *The Routledge Encyclopedia of Film Theory*. Routledge Publishing, New York 2014, 402-407.

Bagshaw, Roderick: 'Tort Law, Concepts and What Really Matters'. In Andrew Robertson and Tang Hang Wu (eds): *The Goals of Private Law*. Hart Publishing, Oxford 2009, 247-259.

Barr, Charles: *Vertigo*. British Film Institute Publishing, London 2002.

Bartolus de Saxoferrato: *In primam Digesti Novi partem Commentaria*, Venice, 1577.

Bell, John, Rupert Cross and George Engle: *Cross Statutory Interpretation*. Butterworths Publishers, London 1987.

Bellomo, Manlio: *The Common Legal Past of Europe, 1000-1800*. Translated by Lydia G Cochrane. The Catholic University of America Press, Washington, D.C. 1995.

Birks, Peter (ed): *Pressing Problems in the Law. Volume 2: What Are Law Schools For?*. Oxford University Press, Oxford 1996.

Birks, Peter and Arianna Pretto (ed): *Themes in Comparative Law. In Honour of Bernard Ruden*. Oxford University Press, Oxford 2002.

Boucher, Pol: *Qu'est-ce que l'interprétation juridique ?* Librairie philosophique J. Vrin, Paris 2013.

*Bus Stop*. Dir. Joshua Logan. Twentieth Century Fox Film Corporation 1956.

Carroll, Noël: 'Prospects for Film Theory: A Personal Assessment'. In David Bordwell and Noël Carroll (eds): *Post-Theory. Reconstructing Film Studies*. University of Wisconsin Press, Madison 1996, 37-68.

*C'era una volta il West* [Eng. *Once Upon a Time in the West*]. Dir. Sergio Leone. Rafran Cinematografica, Finanzia San Marco, Paramount Pictures 1968.

Champeil-Desplats, Véronique: *Méthodologies du droit et des sciences du droit*. Dalloz, Paris 2014.

Constable, Catherine: 'Postmodern Cinema'. In Edward Branigan and Warren Buckland (eds): *The Routledge Encyclopedia of Film Theory*. Routledge Publishing, New York 2014, 376-383.



- Cownie, Fiona: *Legal Academics. Culture and Identities*. Hart Publishing, Oxford 2004.
- Cownie, Fiona, Anthony Bradney and Mandy Burton: *English Legal System in Context*. Oxford University Press, Oxford 2013.
- The Crowded Sky*. Dir. Joseph Pevney. Warner Bros. 1960.
- Decius, Philippus: *In Digestum Vetus et Codicis Commentarii*, Venice 1596.
- Deep End*. Dir. Jerzy Skolimowski. Paramount Pictures 1970.
- Delacour, Jean: *Le cerveau et l'esprit*. Presses Universitaires de France, Paris 1995.
- Double Indemnity*. Dir. Billy Wilder. Paramount Pictures 1944.
- Duff, Patrick William: *Personality in Roman Private Law*. Cambridge University Press, Cambridge 1938.
- Durgnat, Raymond: *Films and Feelings*. Faber & Faber, London 1967.
- Durgnat, Raymond: *The Strange Case of Alfred Hitchcock*. Faber & Faber, London 1974.
- Dworkin, Ronald: *A Matter of Principle*. Oxford University Press, Oxford 1985.
- Dworkin, Ronald: *Law's Empire*. Fontana Press, London 1986.
- Dzialo, Chris: 'Reception Theory'. In Edward Branigan and Warren Buckland (eds): *The Routledge Encyclopedia of Film Theory*. Routledge Publishing, New York 2014, 390-395.
- Esquenazi, Jean-Pierre: *Vertigo. Hitchcock et l'invention à Hollywood*. CNRS Editions, Paris 2011.
- Flightplan*. Dir. Robert Schwentke. Buena Vista Pictures 2005.
- Forbidden Planet*. Dir. Fred McLeod Wilcox. Metro-Goldwyn-Mayer 1956.
- Frank, Jerome: *Law and the Modern Mind*. Stevens & Sons, London 1949.
- Frayling, Christopher: *Sergio Leone. Something To Do With Death*. Faber & Faber, London 2000.
- Frayling, Christopher: *Sergio Leone. Once Upon a Time in Italy*. Thames & Hudson, London 2005.
- Gaius: 'Institutiones'. In De Zulueta F. (ed): *The Institutes of Gaius. Part I*. Oxford University Press, Oxford 1946.
- Gordley, James: *The Jurists. A Critical History*. Oxford University Press, Oxford 2013.

Griffith, John Aneurin Grey: *The Politics of the Judiciary*. Fontana Press, London 1997.

*A History of Violence*. Dir. David Cronenberg. New Line Cinema 2005.

Hunter, Rosemary, Clare McGlynn and Erika Rackley (eds): *Feminist Judgments. From Theory to Practice*. Hart Publishing, Oxford 2010.

*The Ipcress File*. Dir. Sidney J. Furie. J. Arthur Rank Film Distributors, Universal Pictures 1965.

Ivanier, Théodore: 'L'interprétation des faits en droit. Essai de mise en perspective cybernétique des "lumières du magistrat"'. 20 (1) *Droit et société* (1992) 326-327.

Jestaz, Philippe and Christophe Jamin: *La doctrine*. Dalloz, Paris 2004.

*Johnny Guitar*. Dir. Nicholas Ray. Republic Pictures (I) 1954.

Jones, John Walter: *Historical Introduction to the Theory of Law*. Oxford University Press, Oxford 1940.

Justinian: 'Corpus Iuris Civilis', In Mommsen, T & P. Krueger (eds): *Corpus Iuris Civilis*. Weidmann 1886.

Maclean, Ian: *Interpretation and Meaning in the Renaissance*. Cambridge University Press, Cambridge 1992.

Mathieu, Marie-Laure: *Les représentations dans la pensée des juristes*. IRJS Editions, Paris 2014.

Miller, Henry K (ed): *The Essential Raymond Durnat*. British Film Institute Publishing and Palgrave Macmillan, London/Basingstoke 2014.

Modleski, Tania: *The Women Who Knew Too Much. Hitchcock and Feminist Theory*. Routledge Publishing, New York 2005.

Niglia, Leone: *The Struggle for European Private Law. A Critique of Codification*. Hart Publishing, Oxford 2015.

Nolan, Donal: 'Causation and the Goals of Tort Law'. In Andrew Robertson and Tang Hang Wu (eds): *The Goals of Private Law*. Hart Publishing, Oxford 2009, 174-189.

*Nóż w wodzie* [Eng. *Knife in the Water*]. Dir. Roman Polanski. Kanawha 1963.

Pirie, David: 'Roger Corman's Descent into the Maelstrom'. In Will, David and Paul Willemsen (eds): *Roger Corman. The Millenic Vision*. Edinburgh Film Festival'70/Cinema Magazine, Edinburgh 1970, 45-67.

Samuel, Geoffrey: 'Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?' 36 (4) *Journal of Law and Society* (2009) 431-459.

Samuel, Geoffrey: 'Is Legal Knowledge Cumulative?' 32 (3) *Legal Studies* (2012) 448-479.

Samuel, Geoffrey: *An Introduction to Comparative Law Theory and Method*. Hart Publishing, Oxford 2014a.

Samuel, Geoffrey: 'Is Law a Fiction?' In Maksymilian Del Mar and William Twining (eds): *Legal Fiction in Theory and Practice*. Springer, New York 2015a, 31-54.

Samuel, Geoffrey: 'Is Legal Reasoning Like Medical Reasoning?'. 35 (2) *Legal Studies* (2015b) 323-347.

Samuel, Geoffrey: 'Legal Reasoning and Argumentation'. 13 (2) *International Encyclopedia of the Social & Behavioral Sciences* (2015c) 776-783.

Siems, Mathias: 'A World Without Law Professors'. In Mark van Hoecke (ed): *Methodologies of Legal Research. Which Kind of Method for Which Kind of Discipline?* Hart Publishing, Oxford 2011, 71-86.

*Snakes on a Plane*. Dir. David R. Ellis. New Line Cinema 2006.

Spoto, Donald: *The Dark Side of Genius. The Life of Alfred Hitchcock*. Ballantine Books, New York 1983.

Staiger, Janet: *Interpreting Films. Studies in the Historical Reception of American Cinema*. Princeton University Press, Princeton 1992.

*The Swimmer*. Dir. Frank Perry and Sydney Pollack. Columbia Pictures 1968.

*This Island Earth*. Dir. Joseph Newman. Universal Pictures 1955.

*The Tomb of Ligeia*. Dir. Roger Corman. Anglo-Amalgamated Film Distributors 1964.

Tudor, Andrew: *Theories of Film (Cinema One)*. Secker & Warburg Publishers, London 1974.

*Voyage surprise*. Dir. Pierre Prévert. Duke International 1947.

*Vertigo*. Dir. Alfred Hitchcock. Paramount Pictures 1958.

Villey, Michel: *Le droit romain*. Presses Universitaires de France, Paris 1979.

Waddams, Stephen: *Dimensions of Private Law. Categories and Concepts in Anglo-American Legal Reasoning*. Cambridge University Press, Cambridge 2003.

Weir, Tony: 'Contracts in Rome and England'. 66 *Tulane Law Review* (1992) 1615-1648.

Wood, Robin: *Hitchcock's Films Revisited*. Columbia University Press, New York 2002.

*The Wreck of the Mary Deare*. Dir. Michael Anderson. Metro-Goldwyn-Mayer 1959.

# Law as Record: the Death of Osama bin Laden

Jothie Rajah\*

## 1. Scrutinising law's record

### 1.1. Recording law

Osama bin Laden was killed by US Special Forces in his home in Pakistan on 1 May 2011, and later buried at sea—or so goes the official U.S account.<sup>1</sup> The contestations surrounding bin Laden's death (e.g., Hersh 2015; Johnson 2015) highlight the complexities and contingencies of *record*: record making, disseminating, and receiving. Building on recent scholarship theorising the co-determinations of record<sup>2</sup> and law (Vismann 2008; Mawani 2012), this paper asks, what does the mediatised record of bin Laden's death tell us about law in our contemporary world?

Cornelia Vismann's influential genealogy of Western law analyses materialities, functions, and technologies of administrative record-keeping, drawing on selected instances of Western history from ancient Greece and Rome to the present. Vismann finds that law and record 'mutually determine each other' (Vismann 2008, xiii), and that 'official records have [a role] in the emergence of the notions of truth, the concepts of state, and the constructions of the subject in Western history' (Ibid., xii). Renisa Mawani's compelling theorization of law as archive 'combines, builds on, and expands

---

\* Research Professor, American Bar Foundation, Chicago.

\*\* This paper has benefitted tremendously from the generous engagements of John Comaroff, Ben Golder, Bonnie Honig, Frank Munger, Penelope Nicholson, and Christopher Tomlins. Prior versions have been presented at Melbourne Law School, Carleton University, and Osgoode Hall Law School—thanks are due to Eve Lester, Penelope Nicholson, Pooja Parmar, Stacy Douglas, Hengameh Saberi, and Patricia Hania for welcoming me and my paper. Others who have kindly given of their time are Jerusa Ali, Alejandra Azuero, Priya Gupta, Katharine Hannaford, Aziz Huq, Camilo Leslie, Leslie Moran, Sherally Munshi, Charlie Peevers, Susan Shapiro, and Oishik Sircar. Two anonymous reviewers provided invaluable critique. Warm thanks to all for helping shape and challenge the argument.

1 President Obama announces death of Osama bin Laden. Available on <https://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead> (visited on 25 February 2016); see also Wilson, Whitlock & Brinigin 2011.

2 I use the term 'record' expansively to embrace 'archive'—the primary category in Mawani's analysis, and 'files'—the primary category in Vismann's analysis.

Derrida's (1998, 2001) insights on the force of law and on the archive as command' to highlight 'law's significance to historical, contemporary, and future struggles of sovereignty, authority, violence, and nonviolence' (Mawani 2012, 341 and 337). She argues,

law's archive cannot be broached as a compendium of sources or as a regime of power/knowledge alone. Rather, law *is* the archive. It is an expansive and expanding locus of juridico-political command [...] operati[ng] through [...] a double logic of violence: a mutual and reciprocal violence of law as symbolic and material force and law as document and documentation. Law's archive is a site from which law derives its meanings, authority, and legitimacy, a proliferation of documents that obscures its originary violence and its ongoing force, and a trace that holds the potential to reveal its foundations as (il)legitimate. (Mawani 2012, 337.)

With bin Laden's death, the double logic of violence marking law's archive (Mawani 2012), and the contingent, relational dynamics of truth, state, and subject—uncovered by Vismann as 'the three major entities on which the law is based' (Vismann 2008, xx)—are at the forefront. The contested claims to truth, our subject positions as spectator-consumers of these contestations, and the striking disjuncture between official and unofficial accounts,<sup>3</sup> illustrate the very entities, dynamics, and mutualities of violence, law, and record identified by Vismann and Mawani. It is in part for these reasons that I have chosen to explore law as record through a scrutiny of the mediatised account of bin Laden's death.

## 1.2. Law, language, and 'law as ...'

Before launching into the main argument, I should address the manner in which I deploy the compound category 'law'. Without denying that law 'is also conceived as a semiautonomous realm' with dedicated spaces, professional practices, and notions of authority (Feigenson 2014, 20), my paper adopts notions of law that challenge entrenched legal doctrinal and disciplinary parameters. Rather than a focus on positive, doctrinal law, in keeping with interdisciplinary scholarship on law informed by literature, philosophy, critical theory, and history (e.g., White 1990; Constable 2005; Sarat 2001; Tomlins 2014), I approach law as 'the creation of a world of meaning' constituted by 'acts of language [that] are actions in the world' (White 1990, ix). I follow White in embracing as language more than lexical aspects of communication. Images, sound, gesture, affect, and feeling are all attributes of the social, relational 'deep sea of competence' that is, and informs, language (White 1990, 233) and the law (White 1973). In short, I read for law in co-existing records: the state's record of its conduct, and the record that is cultural text.

---

<sup>3</sup> For example, Edward Snowden claims bin Laden is 'alive and well in the Bahamas' (Johnson 2015). And Seymour Hersh claims Pakistan knew of the raid in advance and that parts of bin Laden's corpse were 'tossed out over the Hindu Kush mountains' (Hersh 2015).



The enormous value of first, turning to cultural texts to discern these worlds of meaning, and second, of regarding law as more than positive rules, is that an expansive, interdisciplinary understanding of law's pervasive presence and forms of expression in broader culture is enabled. This understanding perceives knowledge and law in material and embodied senses.

[W]e think that there is some place that [knowledge] comes from which is external to ourselves. [...] [A]gainst this I would like to suggest that there are no rules out there [...] but that they exist only in reality, that is, only because we live them, we continually create and transform rules as we exist. There is no absolute place where they are all fixed, and to which we can refer to find their authentic form. Law is embodied, as we are and denying this is only a way of making life and law easier by pretending that rules are an absolute justification. (Davies 2002, 5.)

Reading for law in cultural texts thus involves expanding the analytic gaze so that law continues to be understood, at one level, as the 'uniquely authorised discourse for the state' (Post 1991, vii), even as critical and postmodern philosophies of law point us to embracing, *as law*,

everything—from literature to science, and everyday experience. The whole world is structured by laws of one sort or another. The law is a form we cannot avoid, whatever its substance. We think and act in relation to laws. There are laws of social behaviour, laws of language, laws relating to what counts as knowledge and what doesn't, and laws which say that [...] law itself must be clearly distinguished from other sorts of inquiry. [...] But how can law be even conceptually separate from its context? (Davies 2002, 4.)

Alongside established interdisciplinary approaches to both law and language, I build on the recent and ongoing 'Law As ...' project led by Christopher Tomlins. 'Law As ...' is importantly distinct from the conventional sociolegal framework of 'law and' through which disparate disciplines are yoked together. Instead, 'Law As ...' probes the insights facilitated by

deploy[ing] history as an interpretive practice—that is, as a theory, a methodology, and even a philosophy—by which to engage in research on law. Simultaneously it proposes history as a substantive arena in which other interpretive research practices—those of anthropology, literature, political economy, political science, political theory, rhetoric, and sociology—can engage with law. The result is a capacious interdisciplinary jurisprudence inflected by history rather than by the positivism of the social sciences, which holds out the possibility, a century after their divorce, of reuniting metaphysics with materiality. (Tomlins 2014, 1.)

This long overdue reuniting of metaphysics with materiality relates, in part, to a recovery of justice and ethical relations as inextricable aspects of law (McVeigh 2014; Tomlins & Comaroff 2011). As a lens for interdisciplinary scholarship on law, 'Law

As ...' dwells 'on the conditions of possibility for a critical knowledge of the here-and-now' (Tomlins & Comaroff 2011, 1044). In search of a critical knowledge of law in the here-and-now, I excavate legitimising scripts from mediatized accounts of bin Laden's death; engaging in an interpretive practice in order to illuminate insidious rule- and norm- making represented in texts we tend not to think of as legal.

A final note on methodology relates to the close reading of text and the approach of entering broad social questions through single textual examples. This paper draws on the sociolinguistic sub-field of Critical Discourse Analysis (CDA) (Fairclough 1989).<sup>4</sup> CDA is informed by critical theory on language and power, in particular, the work of Foucault, Bourdieu, and Habermas. CDA seeks to render explicit underlying meanings and social relations so as to uncover that which may be hidden or normalized.

In CDA, close reading of text is highly valued because each and every instance of text is understood to yoke the macrocosm of society to the microcosm of a particular text. Because every instance of text expresses the conditions of possibility that are the larger structures of the social, the task for the scholar is to uncover the histories, politics, ideologies, and social relations embedded in, and occluded from, a text. Thus, through the lens of CDA, a single instance of text can validly lead to an excavation of broader social and political dynamics. Through close analysis of text, the goal is to analyse the ways in which one text relates to other texts (intertextuality) as well as to historical and synchronic contexts (Wodak 1995).

It is, collectively, these literatures and approaches that have led me to read for law in the mediatized accounts of the killing and burial of bin Laden. Vismann's media-material genealogy of Western law, and Mawani's theorizing of law as archive, are coherent with, and draw upon, many of the interdisciplinary approaches to law that I have sketched above, such that a history of our present—articulating co-determinations of law and record, illuminating law's contemporary archive—might be mined from accounts of bin Laden's death.

### 1.3. Why the case of Osama bin Laden?

As a figure central to 9/11<sup>5</sup> and its aftermath, bin Laden may appear so extremely aberrant that his death stands in a class of its own, thereby offering limited analytic value. However, while his unique role in redefining violence (Lawrence & Karim 2007, 539) cannot be understated, it is also important to recognise that the discourse

4 Critical Discourse Analysis informs an extensive body of scholarship attending to the relationship between language and power. In addition to Fairclough's own considerable body of work, see (for example) the scholarship of Allan Luke on pedagogy, literacy, and race; Carmen Luke on critical media, and cultural studies, feminism, and globalisation; Teun A. Van Dijk on mass communications, race, and ideology; and Ruth Wodak on critical sociolinguistics. Blommaert & Bulcaen (2000) offer a useful review of CDA.

5 I use '9/11' as a shorthand with some regret. Richard Jackson warns of the bundle of meanings and risks attached to the way in which the use of 9/11 works to 'erase the history and context of the events and turn their representation into a cultural-political icon where the meaning of the date becomes both assumed and open to manipulation [...] [a] mythologizing practice' (Jackson 2005, 7).

of bin Laden's death is coherent with a re-calibration of law as an instrument of a national security ideology 'predicated on eradicating the identity and existence of the Other, not just controlling the illicit use of violence' (Brysk 2007, 5).

The parameters of this discourse in which law is subordinated to national security extends to targeted killings (e.g., the U.S. Department of Justice memorandum that became known as 'the secret drone memo'),<sup>6</sup> justifications of civilian casualties in the extensive drone program (e.g., Byman 2013), state lawyers 'prepared to deem significant collateral damage as lawful' (Savage 2015), and President Obama's assertion that bin Laden's death is the realization of justice (Obama 2011). Almost five years after the bin Laden killing, in his State of the Union Address, Obama invoked the killing of bin Laden as proof of 'American determination [to] root out, hunt down, and destroy killers and fanatics who go after Americans,' naming others who had been targeted, and would be targeted, in the same way (Obama 2016). In short, bin Laden's death cannot be treated as an isolated response to a uniquely aberrant individual. A template for a certain mode of legality, in response to a certain category of enemy in the context of post-9/11 concerns, is inscribed in these events.

A further reason for exploring contemporary law through bin Laden's death is that, in our time, law's public face—its record—appears to have altered. The secrecy of Guantanamo tribunals, for example, seems emblematic of a displacement of law's traditional representations. At the same time, even as traditional representations have receded, '[d]igital visual displays construct legal knowledge in new ways and reconstitute our notions of community' (Feigenson 2014, 13), and images have been pivotal to the post-9/11 militarization of global culture (Mirzoeff 2006, 4-8). If the violence of 9/11 and its aftermath have been recorded through indelible images—planes crashing into towers, hooded abused prisoners—the question that must be asked is where is law in this record? If principles and practices that used to represent law, such as human rights, and judicial proceedings in the public domain, have been displaced by what is invoked as 'national security', how is law represented and made visible today?

Neal Feigenson asks—and answers—'Is justice different in a culture awash in pictures? The proliferation of digital visuals in law and in society at large has many implications for this question' (Feigenson 2014, 13). The scholarship on visuality in law is in agreement that images are powerful in structuring relations to, and meanings for, law (e.g., White 1973; Douzinas 2011; Young 2005; Douglas-Scott 2013). And the visual culture literature highlights that contemporary technology has made for especially pluralized, mediatized, and relational meanings for law, and indeed, all aspects of the social (e.g., Speisel, Sherwin, & Feigenson 2005; Berry 2014; Mitchell 2005a).

An additional motivation for considering the mediatised record as a site of law

---

<sup>6</sup> This memorandum was written in July 2010. A redacted version was publicly released, by court order, under the Freedom of Information Act in 2014. See Redacted U.S. Department of Justice memorandum justifying targeted killing of U.S. Citizens. Available on [https://www.aclu.org/files/assets/2014-06-23\\_ca2-revised-opinion-plus-drone-memo.pdf](https://www.aclu.org/files/assets/2014-06-23_ca2-revised-opinion-plus-drone-memo.pdf) (visited on 24 February 2016).

through bin Laden's death is that there is a striking disjuncture between what we have been *told* and what we have been *shown*. We were told about the Abbottabad killing and the burial at sea but the two primary visuals produced by the U.S. state—the Situation Room photograph,<sup>7</sup> and Obama's video announcing bin Laden's death<sup>8</sup>—do not show us these events. Instead, images and narratives speaking to the Abbottabad raid and the burial at sea have emerged from the sphere of popular culture, rendering vivid and pictorial what official words have described. Given that law's archive operates, in part, through 'a proliferation of documents that obscures [law's] originary violence and its ongoing force, and a trace that holds the potential to reveal [law's] foundations as (il)legitimate' (Mawani 2012, 337), the proliferation of unofficial images speaking to bin Laden's death prompts this paper's exploration of the role of the *unofficial* (Part II below) in recording and representing law.

#### 1.4. Law off the record?

Approaching law as record necessarily, as highlighted above, involves a turn away from law as positivist abstraction. For Vismann, law is 'a repository of forms of authoritarian and administrative acts that assume concrete shape in files' (2008, xiii). In other words, within action reposes law; a law discernible from the material reality of records. With bin Laden's death, the co-determinations of law and record are refracted through discourses of security and exceptionalism, such that certain actions are bracketed as *off the record*,<sup>9</sup> or at least, off the record to which we, as publics, have access. These attributes of secrecy and selective publication, and the tension between public demands for disclosure and state declarations of secrecy, have inhered in record keeping and disseminating from the time 'the publication of records could create a public' (Vismann 2008, 147). Vismann points out,

[F]iles have been the medium instrumentally involved in the differentiation processes that pit state against society and administration against citizenry. The state compiles records, society demands their disclosure. Alongside these struggles over access to files, society arises as a discursive unit, a political force antagonistic to the state. (Vismann 2008, 147.)

Significantly however, with bin Laden's death, demands for disclosure have been minimal,<sup>10</sup> suggesting a collapse of the state/society antagonism. Typically, this collapse accompanies the rise of the friend/enemy distinction marking a state of war

7 The Situation Room photograph. Available on <https://www.flickr.com/photos/whitehouse/5680724572/in/album-72157626507626189/>. (visited 25 February 2016).

8 Video of President Obama's announcement on bin Laden's death available on <http://www.youtube.com/watch?v=m-N3dJvhgPg>. (visited on 25 February 2016).

In general, major newspapers worldwide, carried an image of Obama delivering this speech as the pictorial accompaniment to the report's text (Kennedy 2012, 265-266).

9 Vismann writes, 'For the administrations of the Western world, a life without files, without any recording, a life *off the record*, is simply unthinkable' (2008, xii, emphasis in original).

10 The demands for disclosure made by the conservative legal group, Judicial Watch, discussed below at Part 3, are an interesting exception to this generalization.

(Schmitt [1929] 2007). In our context of what has been called war that is perpetual (Kennedy 2012, 262) and permanent (Lutz 2009), if law's conventional actors, such as lawyers, feature, they seem to be cast in very peripheral roles, almost as an afterthought (Savage 2015). In contrast, at the forefront of contemporary law, those with the agency and ability to deliver 'justice' appear to be military, intelligence, and counterterrorism personnel (Rajah 2014, 136). For all these reasons—law's contemporary context and actors, law's contemporary representations, the disjuncture between what we are told and what we are shown—it becomes important to perceive, in a manner suspicious of received notions, law's new record.

Part 2 explores the question of the unofficial—popular cultural texts—as law's record, examining the dynamics of popular cultural text as law's record through an analysis of the burial at sea of a fictional bin Laden-like character enacted in the popular television series, *Homeland*. Part 3 presents an analysis of the principal official photograph relating to bin Laden's killing, the Situation Room photograph. Part 4 concludes the paper, arguing that contemporary legal and political engagements may be revitalised by approaching law as record.

## 2. The unofficial as law's record

### 2.1. Unofficial and factual

Embracing the unofficial as part of law's record helps unsettle taken-for-granted assumptions about law's sites, sources, and forms of expression.<sup>11</sup> Scholars approaching law from a range of non-doctrinal perspectives have long illuminated law's pervasive presence in social sites and texts, including popular culture (e.g., Freeman 2004), images (e.g., Manderson 2015), and sound (e.g., Parker 2015). And as Fleur Johns points out in her compelling analysis of legality at Guantanamo, spaces of apparent legal exceptionalism and evisceration, may, on closer scrutiny, demonstrate 'to a hyperbolic degree, work of legal representation and classification' (Johns 2005, 613).

Demonstrating the potency of Johns' argument, bin Laden's killing too appears to have been a site suffused with (conventional) law. In October 2015, some four and a half years after the bin Laden killing, the *New York Times* disclosed that weeks before the Abbottabad raid, federal lawyers had engaged in '[s]tretching sparse precedents' to produce 'rationales intended to overcome any legal obstacles' (Savage 2015). This stretching of sparse precedents is a vivid illustration of Mawani's point that,

[b]y referencing statutes and judgments that came before and by determining which are apposite, law cultivates its meanings and asserts its authority while at the same time concealing and sanctioning its material, originary, and ongoing violence. (Mawani 2012, 341.)

11 Eve Darian-Smith (2013) highlights that while an extensive and interdisciplinary critical scholarship has turned away from narrowly positivist understandings of law, dominant, popular, and received understandings of law are overwhelmingly positivist, and legal education tends to perpetuate and emphasize a positivist model of law. Unsettling assumptions about law thus continues to demand attention.



Ironically, four and a half years after the event, the apparently extra-legal killing of bin Laden takes on a second life as a hyper-legal killing; a killing authorised by precedent and legal rationality.

[L]egal analysis offered the administration wide flexibility to send ground forces onto Pakistani soil without the country's consent, to explicitly authorize a lethal mission, to delay telling Congress until afterward, and to bury a wartime enemy at sea. By the end, one official said, the lawyers concluded that there was 'clear and ample authority for the use of lethal force under U.S. and international law'. (Savage 2015.)

However, just as images of the killing and burial are secret, so too is this legal memorandum invisible; off the record to which we, as publics, have access. Paradoxically, the disclosure of the existence of these secret memoranda—so secret that they were concealed from the state's own chief legal officer<sup>12</sup>—performs attenuations of state secrecy, compounding the contested truths marking bin Laden's death.

These revelations of secret legal memos have unfolded in the ostensibly factual spheres of a prestigious newspaper, the *New York Times*, and a book based on interviews with senior state actors (Savage 2015b). On the continuum of fact to fiction, these are claims to truth conventionally regarded as closely aligned to fact and therefore, closer to official than unofficial records. On the other end of the continuum, how do we grapple with law's record when it is articulated through the sphere of the unofficial and the (ostensibly) fictional?

## 2.2. Unofficial and fictional

The value of fiction as an analytic resource animating law's record is highlighted by Vismann. She writes, '[l]iterary fictions that deal with administrations highlight those media and realities of the law that nonfictional, scholarly self-presentations of the law and its history tend to overlook or even suppress' (Vismann 2008, xiii). Similarly, while affect, political myth, and images are among the repertoire of communicative resources deployed by the official record (Rajah 2014), the sphere of the unofficial is at liberty to mobilize these resources in a manner that is *qualitatively* different from the official.

As noted earlier, attending to fictional representations that speak to bin Laden's death may be especially important because, while officialdom has generated and relied principally on two images—the Situation Room photograph, and Obama's video announcing bin Laden's death—these official images do not actually *show* us the events official words describe. Instead, a collapsing of two sets of distinctions—fact/fiction, official/unofficial—appears to be at work when unofficial accounts (such

---

<sup>12</sup> Savage highlights that the intensity of the secrecy was such that 'the White House would not let them [the four federal lawyers] consult aides or even the administration's top lawyer, Attorney General Eric H. Holder Jr.' (Savage 2015).

as the television series *Homeland*, the films *Zero Dark Thirty*, and *SEAL Team Six*, and YouTube clips purporting to leak helmet-camera footage from the Abbottabad killing), render visible what official words have described. Given the paucity of official images, the mushrooming of unofficial visual media speaking to bin Laden's death points, in part, to the visual entertainment industry's recognition of our (the spectator-consumer 'us') desire and need to mark truth by seeing (Mirzoeff 2006; Mitchell 2005).

In light of the centrality of record in shaping the civil and political relations underpinning law (Mawani 2012; Vismann 2008; Azoulay 2008), taking the unofficial and the ostensibly fictional seriously builds understanding of 'the ways in which visual and discursive fields are part of war recruitment and war waging' (Butler 2010, ix). If law's contemporary record articulates our context of perpetual and permanent war (Kennedy 2012; Lutz 2009) then, as Judith Butler highlights, 'if war is to be opposed, we have to understand how popular assent to war is cultivated and maintained' (Butler 2010, ix). Implicit to confronting law's violence is also a wrestling with law's promise of 'a world of meaning in which justice is pursued' (Sarat 2001, 4; Cover 1986). Rather than succumb to discourses scripting war as 'an inevitability, something good, or even a source of moral satisfaction' (Butler 2010, ix), scrutinising law as record holds the promise of illuminating de-democratizing and propagandizing texts that re-inscribe the closures of friend/enemy while normalizing perpetual war and thwarting of law's promise of justice.

### 2.3. Militainment and law's record

Scholarship on post-9/11 engagements between the U.S. state and the visual entertainment industry compels a rethinking of received notions of demarcations between official/unofficial, and fact/fiction. Mary Douglas Vavrus, for example, traces enmeshments between profit-driven television and the Pentagon in describing the workings of the 'media-military-industrial complex' in *Army Wives*, a television program. *Army Wives* submits its scripts to the Pentagon's Entertainment Media Office; an office that 'won't support scripts that present negative portrayals of the U.S. military or its chain of command' (Quigley 2015). Vavrus notes that *Army Wives* 'submits scripts to the Pentagon in order to use Charleston's Air Force base as a backdrop for filming [...] and for employing its Air Force reservists as extras' (Vavrus 2013, 103). The content of *Army Wives* 'naturalize[s] and normalize[s] historically specific ideologies about Army gender politics and the wars in Iraq and Afghanistan' (Ibid., 93) even as 'it obscures the human toll on Afghan and Iraqi families, the politics of war, the military-industrial complex, and any number of problems experienced by female military personnel (such as rampant sexual harassment and abuse of female troops)' (Ibid., 95). Vavrus concludes that this program produces 'gendered propaganda and advance[s] banal militarism' (Ibid., 92).

Roger Stahl's monograph focuses on the post-9/11 relationship between war, media and popular culture (Stahl 2010). Stahl traces the emergence of the neologism 'militainment' to the surge in military-themed television after the 2003 U.S. invasion

of Iraq (Ibid., 6). Stahl defines militainment as ‘state violence translated into an object of pleasurable consumption [...] this state violence is not of the abstract, distant, or historical variety, but rather, an impending or current use of force, one directly relevant to the citizen’s current political life’ (Ibid.). And in her analysis of the U.S. television program 24, Jinee Lokaneeta points to the manner in which ‘the popular and the official legal and political debates on torture inform and constitute each other’ (Lokaneeta 2011, 108). The circulation of a particular, state-serving set of meanings across the sites of officialdom and popular culture is consonant with the de-democratizing post-9/11 intolerance of dissent in the U.S. public sphere (Brown 2005, 27-36).

The following example is illustrative of concerns for law as record arising from the collaborations—perhaps collusions is the better word—between profit-driven entertainment media and the Pentagon. In August 2013, in the course of the long-drawn out Guantanamo military commission trial of five men accused of 9/11 war crimes, it emerged that while defence lawyers had not been supplied with *any* classified information, militainment had.<sup>13</sup> Shortly after the bin Laden killing, when *Zero Dark Thirty* director Kathryn Bigelow, and screenwriter Mark Boal, approached the CIA and the Pentagon, a memo was declassified and handed over to them. In short, information denied to lawyers was supplied to film-makers.<sup>14</sup>

Thanks to demands for disclosure filed under the Freedom of Information Act by conservative legal group Judicial Watch,<sup>15</sup> redacted versions of state records documenting communication between state institutions and *Zero Dark Thirty*’s writer and director are publicly available. Even in their redacted form, these documents reveal the astonishing degree of collaborative engagement between the state and these film-makers. The claim made by *Zero Dark Thirty* in its opening frames, that what we are about to watch is fact, not fiction, appears to be rooted in these collusions between state and media.

This example suggests that in our time, truth is emerging, not at trials, but in the narratives and images of film and television. Television, and increasingly film, is media often consumed in the private sphere of the home, and media that we, as consumer-spectators, are unlikely to recognise as sites of law. Television and film produced for entertainment are thus likely to escape scrutiny for the interests that are served. Certainly, features of the adversarial encounter in a common law public sphere trial—challenge, contestation, counter-narratives, proof—these dynamics are absent when mediatised images make a claim to represent what is *sensed* as truth; a claim that is all the more insidious when it instrumentalises affect, the narrative power of political myth, and the liminality of the fact/fiction conflation.

If unofficial texts are read as law’s record, what account of law’s ‘expansive and expanding locus of juridico-political command’ (Mawani 2012, 337) is inscribed

13 Available on <http://media.miamiherald.com/smedia/2013/08/30/10/26/f74LR.So.56.pdf>.

14 Available on <http://washingtonexaminer.com/zero-dark-thirty-becomes-an-issue-in-911-war-crimes-trial/article/2537824>.

15 See <http://www.judicialwatch.org/>.

in media we think of as entertainment? What accounts of truth, state, and subject are constructed? *Homeland*, the award-winning<sup>16</sup> television series that is followed by (according to some estimates) 4.4 million viewers each week,<sup>17</sup> illuminates law's unofficial record.

## 2.4. *Homeland's* Law

Before detailing *Homeland's* depictions of law, and its enactment of a burial at sea, it is important to contextualise this text of militainment in terms of the collapsing of the fact/fiction distinction. Consider, for example, the opening sequence of *Homeland*. *Homeland's* opening montage weaves three narrative strands together: one is fictional—images of *Homeland's* protagonists. The other two are factual—the aftermath of the 9/11 attacks and U.S. Presidents from Reagan to Obama. In the trajectory of presidents, there is a significant omission—George W. Bush is absent—and a significant emphasis—Obama's face flashes on the screen three consecutive times. All this unfolds on our screens through extremely rapid image shifts. Richard Sherwin highlights that rapid image shift is a technique drawn from advertising designed to induce viewer passivity. Pace and change simultaneously draw the eye and hold attention, but leave the viewer without time to engage in interpretive processing (Sherwin 2000, 143-144).

Despite including footage of the 9/11 attacks and their aftermath, *Homeland* claims to be fictional. In manifesting the ambivalences between binaried notions of fact/fiction, *Homeland* confronts us with the impossibility of knowing truth when we inhabit a mediatised public sphere in which impressions, as Ian Ward notes, are so much more potent than cold facts (Ward 2009, 7).

In *Homeland*, conventional sites and expressions of law are portrayed as inadequate to meet the urgent needs of the contemporary security context. For example, in the space of the first two episodes of season one, CIA agent Carrie Mathison violates formal law to set up surveillance on new national hero, Brody, who returns to the U.S. after eight years as a prisoner of war in Iraq. The unfolding plot shows us that Carrie has been correct in her suspicion of Brody, thereby legitimising Carrie's breach of law and valorising national security ideology over (formal) law.

When Carrie's CIA supervisor, Saul, discovers that she has set up the surveillance despite his instruction not to, Saul effects a repair by approaching a judge to sign documents permitting the surveillance. The transaction between Saul and the judge takes place in a closed room that holds only the two men. In the dialogue, and in the manner in which the judge reluctantly signs the papers, we understand that the judge is somehow corrupt, somehow beholden to Saul.

Later in the series, in season three, Saul and Carrie use public, televised Senate hearings to stage an elaborate and convincing performance of Carrie's fall from grace within the CIA. After she has been confined to a psychiatric ward for violent

<sup>16</sup> *Homeland* has won 37 awards, including three awards in the 2013 US Golden Globe contest.

<sup>17</sup> See <http://www.hollywoodreporter.com/live-feed/homeland-season-2-dexter-ratings-375374>.

and invasive treatment for her bi-polar disorder, Carrie is approached by Iranian secret service to work with them against the U.S. The unfolding plot shows us that this apparent public disgrace is part of an elaborate plan hatched by Carrie and Saul to penetrate Iranian intelligence networks.

In portraying formal law as obstructive (the restrictions on surveillance), formal legal processes as a theatrical smoke-screen (the Senate hearings), and a formal legal actor as corrupt (the judge), *Homeland* dramatically and convincingly marginalises the utility, values, actors, and platforms, of conventional law. At the same time, a particular mode of patriotism, and individual dedication to securing the nation, become a new, embodied law; legitimising the discretionary violence enacted by individual state actors whose conduct, within the shadowy spheres of counter-terrorism and intelligence institutions, is minimally transparent.

As this brief discussion illustrates, *Homeland* scripts a new set of meanings, authority, and legitimacy for law; meanings, authority, and legitimacy coherent with the manner in which democratic states have conducted their power in a post-9/11 context (e.g., Lokaneeta 2011; Brysk & Shafir 2007; Jackson 2005). An especially acute illustration of law's record through conflation of fact/fiction, official/unofficial is supplied by *Homeland*'s portrayal of a burial at sea.

## 2.5. *Homeland*'s burial at sea

As I have noted above, the U.S. state has not released photographs or video footage of the burial at sea. These are events the state has relied on words to describe. Significantly, this space of official invisibility has come to be occupied by unofficial images through *Homeland*'s enactment of a burial at sea.

In December 2012, eighteen months after bin Laden's corpse was buried at sea, *Homeland* ended its second season with the burial at sea of a fictional bin Laden-like figure, the terrorist Abu Nazir. In a visual enactment remarkably attentive to the descriptions of the bin Laden burial supplied by the US state,<sup>18</sup> an imam is shown on board a US Navy vessel, conducting the ritual cleansing of Nazir's bullet-riddled corpse, reciting prayers, wrapping the corpse in a white shroud. The corpse is placed on a narrow plank and tipped into the sea. On our screens, the burial at sea of Abu Nazir is marked by dignity, reverence, and an apparent adherence to Muslim practices;<sup>19</sup> a visual legitimisation of the manner in which the U.S. dealt with bin Laden's body.

In this translation into the visual of the hidden spectacle of bin Laden's burial, *Homeland* presents the (fictional) U.S. as observant of law (in the sense of order,

18 Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, 5/2/2011. Available on <http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homeland>. See also Wilson, Whitlock & Brinigin 2011.

19 *Homeland*'s dramatisation of this burial conforms with the US state's claims as to what constitutes prescribed Muslim burial practices, but the US account of what constitutes proper Muslim burial has been contested. See for example, Leland & Bumiller 2011; Halevi 2011.



decorum, ritual) in a situation in which it need not be. *Homeland's* U.S., mimicking the U.S. that killed and buried bin Laden, has the power and the management of visibility to treat this corpse in any range of ways and yet, the unfolding burial pays homage to the idea of a body of rules that must be observed in the regulatory ordering of this major life event; even when dealing with the corpse of a man characterised as evil beyond redemption, beyond humanity. Even if, in its content and form, that law be sharia, the ritual ordering of the moment is anti-anarchic, law reinforcing.

In a broader project of post-9/11 legitimization, *Homeland's* respectful treatment of Abu Nazir's corpse blurs the boundaries of fact and fiction to exclude any suggestion that there is something annihilatory about dealing with a corpse in this way. Just as the Situation Room photograph (discussed in Part 3 below), displaces the primary violence of the raid on bin Laden's compound, the measured unfolding of ritual in Abu Nazir's burial distracts us from the primary violence of the open sea's erasures. The sea, after all, functions as an unmarkable medium; transforming the material reality of a body into the untraceable—beyond exhumation, forensics, or visibility of any kind.<sup>20</sup> As law's record, *Homeland's* representation of the burial at sea legitimises, even as it masks, the annihilatory violence of this move.

### 3. The Situation Room photograph

The Situation Room photograph has been disseminated and viewed worldwide (Kennedy 2012, 265-266), speaking both to bin Laden's death as a global media event, and to the vitality of contemporary visual culture. In keeping with the project of exploring law as record, I draw on Vismann (2008) and Mawani (2012) to ask, how does this photograph shape truth, state, and subject to represent law; and how, as law's archive, does the photograph participate in the 'mutual and reciprocal violence of law as symbolic and material force and law as document and documentation' (Mawani 2012, 337).

Together with theorising on law as record, this analysis of the Situation Room photograph also relies on Ariella Azoulay's lens on photographs as simultaneous expressions of, and platforms for, political relations that exceed nation-state ideology (Azoulay 2008, 12). For Azoulay, photographs establish a civil and political sphere embracing all actors involved in photography's social and technological encounter, including photographer, photographed subject, camera, viewer-spectator, processes of dissemination and remembering, and those present at a photographic event who are not captured in the image (Azoulay 2008; 2010).

Azoulay's complex and sometimes elusive argument is effectively encapsulated by Justin Carville in his discussion of her 2008 monograph,

The invention of photography is [...] identified as not only the beginning of a new technological means of producing images but as the emergence of a radical reorganization of social and political relations within and through the visual. The

---

<sup>20</sup> I am grateful to Camilo Arturo Leslie for this point.

very breadth of this ‘community of photography’—everyone who has had some relation to photography—what Azoulay terms the ‘citizenry of photography’ is what establishes it as ‘borderless and open’ (97), positioning photography as having agency in ‘de-territorializing citizenship’ (25). Photography’s invention is thus identified as marking a moment when a political space emerged within the arena of the visible in which all those governed are able to participate as citizens. (Carville 2010, 355.)

Also of importance is Azoulay’s argument for a re-thinking of the status of photographs as record. Deploring the tendency of both scholars and the general public to discount photographs as ‘partial, false, incidental, biased’ (Azoulay 2010, 9), Azoulay advocates for photographs to be valued as worthy documentary sources for research; in part so as to challenge the fantasy of sealed images, settled meanings, and single, sovereign perspectives (Ibid.). Given the global engagement with the Situation Room photograph, and the layers of meaning held within it, Azoulay’s bold reimagining of photographs as sites for transnational civil and political relations is of particular value.

### 3.1. Obscuring law’s violence

The Situation Room photograph depicts Obama’s national security team watching a screen we cannot see.<sup>21</sup> With the exception of the uniformed Brigadier General Webb, who is working on his laptop, this room full of powerful state actors watches the screen beyond the photograph with intense concentration and fixed expressions. In this image, the U.S. is pictured as omnipresent watcher; managing territory beyond its borders. The image subsumes the world to a U.S. sphere of action and control with no suggestion that this expansive jurisdiction needs to be explained or justified. Extraterritorial power is seamlessly presented as taken-for-granted; the proper order of things.

Perhaps the most striking feature of the Situation Room photograph is its displacement of the primary scene of violence. In representing ‘spectatorship and virtualization’ (Kennedy 2012, 265) instead of the operation<sup>22</sup> against bin Laden, this photograph captures a double paradox: first, as law’s record, it simultaneously reveals and conceals a killing; and second, in spite of hyper-mediatisation, we see *less* of law’s violence.<sup>23</sup>

21 While a discussion of gender is beyond the scope of this paper, it is noteworthy that the Situation Room photograph depicts an especially masculine space: only two women are visible in a room otherwise populated by men. One of these women is Secretary of State Hillary Clinton, and her gesture, of a hand held over her mouth, is the most dramatic betrayal of an affective response from anyone in the image. The other woman, Audrey Tomason, Director for Counterterrorism, stands at the back of the room.

22 ‘Operation’ is the term Obama uses in his announcement of the killing; an announcement characterized by the significant avoidance of the term law. In the affiliations of ‘operation’ with the spheres of medicine and the military, ‘operation’ is surely designed to evoke the technical expertise of surgical precision and military calculations (Rajah 2014, 121).

23 I am grateful to Alejandra Azuero for this point.

In what it does show, the Situation Room photograph captures a major strand of law in our present: it expresses that law in which the authority of state resides in a national security team rather than in a (peacetime) cabinet or an apex court. With the national security team centre-stage, alternative configurations of state are displaced even as the photograph reinscribes a post-9/11 context of ‘terror as normality’ (Masco 2013) and a militarized civil sphere (Lutz 2009). The uniformed Brigadier General embodies this militarized civil sphere,<sup>24</sup> while personnel from counterterrorism and intelligence agencies embody surveillance and hidden limbs of state power. The national security state, we are shown, is composed of key civil members of cabinet, the brute violence of military, the covert violence of intelligence agencies, and the compound body of the President/Commander-in-Chief.

### 3.2. Liberal democratic virtue in the Situation Room photograph

In her discussion of political idealization, Wendy Brown explores ‘the relationship between citizenship, loyalty, and critique [...] as they are configured by a time of crisis and by a liberal democratic state response to that crisis’ (Brown 2005, 18). In exploring the psychoanalytic dimensions of the state-citizen relation, Brown focuses on ‘the place of *idealization* and *identification* in generating political fealty and conditioning the specific problem of dissent amid this fealty’ (Ibid., 27, emphasis in original). Brown draws on Freud to explain the dynamics of collective political idealization typical of conventional patriotism.

[I]ndividuals replace their natural rivalry toward one another with identification, an identification achieved by loving the same object [...] e.g., the image of the nation, or the power of the nation [...] However, the attachment, [...] produces two very significant, indeed troubling effects for democratic citizenship even as it binds citizens into a nation; first, the attachment achieved through idealization is likely to glory in the *power* of the nation, a power expressed in state action; second and relatedly, because individual ego ideals have been displaced onto the nation, citizenship and patriotism are rendered as both passive and uncritical adoration of this power. Power thus replaces democracy as the love object, and passivity, obeisance, and uncritical fealty replace active citizenship as the expression of love. (Brown 2005, 30, emphasis in original.)

Delving into the complexity of identification informing civic love, Brown explains the work of imaginary and symbolic identification in maintaining political idealization, as well as in ‘maintaining the kind of identification upon which a liberal democratic patriotic ideal depends’ (Brown 2005, 32). Drawing on the work of Slavoj Žižek, and on Rey Chow’s discussion of Žižek, she writes:

[I]n an image of America as good, free, and true, but injured by evildoers who

24 Music critic, Chris Richards notes that the Brigadier General takes the seat usually occupied by the President, <http://www.washingtonpost.com/wp-srv/lifestyle/style/situation-room.html>.

‘hate our way of life’, imaginary identification involves identifying with wounded goodness, while symbolic identification identifies with the power that generates this image. [...] If imaginary identification tends toward identification with powerlessness in such scenes, symbolic identification identifies with power, but dissimulates this identification in the image of purity or woundedness through which it is achieved. (Brown 2005, 32-33.)

In the Situation Room photograph, the tense demeanours of the national security team, augmented by Clinton’s gesture of concern—her hand held over her mouth—facilitate our spectator-subject identification with the wounded goodness of liberal democracy.<sup>25</sup> In the concern and tension, we see affect appropriate to the liberal democratic state displayed: when lives are at stake, decisions and actions are informed, not by untrammelled bloodlust, but by intense concentration, and a sombre gravitas.

The displacement of the primary scene of violence facilitates the other limb of political idealization: symbolic identification. Symbolic identification ‘generate[s] a patriotic ideal that disavows its imbrications with state violence, imperial arrogance, aggression toward outsiders’ (Brown 2005, 33). Instead of seeing the Abbottabad raid—the chaos of sudden military attack in an extra-territorial residential arena, and the affect generated by people confronting, risking, or experiencing imminent and violent death—what we *do* see is a clean, orderly room, populated by clean, orderly people. State elites clad in corporate attire<sup>26</sup> suggest the (peacetime) quotidian regularity of bureaucracy and state institutions.

A further representation of conduct appropriate to a liberal democratic state might be read into the photograph’s apparent delivery of transparency. Even as it displaces the primary scene of violence, the Situation Room photograph appears to supply transparency by taking us into the immediacy and intimacy of the inner workings of state power. Liam Kennedy has characterised this move as the construction of visibility as a species of transparency and legitimacy (Kennedy 2012, 267).

All in all, in appearing to deliver transparency by showing us an otherwise secret state space populated by clean, orderly, concerned people, mostly dressed for work in corporate settings, and taking their work very seriously indeed, the fraught legitimacy, contested legality, and brute violence of the killing of bin Laden is simply not represented. The image thus facilitates identification with the wounded goodness of the US’s liberal democratic virtue even as it ‘disavows its imbrications with state violence’ (Brown 2005, 33).

In a contemporary context of globalized media culture, and processes by which ‘nation-states themselves are receding, however slowly and unevenly, as the basis of collective identification and collective action’ (Brown 2005, 19), the impact of the

<sup>25</sup> I am grateful to Bonnie Honig for this point.

<sup>26</sup> The potentially discordant note introduced by the one sartorial exception—the uniformed Brigadier General—is muted by his exceptional status, the formal military dress rather than battle fatigues, and the mundane activity of his working on a laptop.

Situation Room photograph far exceeds that of state-citizen within the container of U.S. domestic relations. In addition to Azoulay's point that 'photography [...] de-territorializes citizenship' (Azoulay 2008, 25), it is important to highlight that the U.S. is, uniquely, 'the one and only *global* state, with strategic interests and military deployments spread across the entirety of the globe' (Falk 2007, 18, emphasis in original). When U.S.-based and owned media corporations disseminate to audiences worldwide, it is not unlikely that 'global media corporations [...] actually export the perspective of the U.S.' (Butler 2010, xv). As participants in these global processes, the 'we' who are not U.S. citizens, are also likely to read into this image the liberal democratic virtue structuring a political idealization of the one and only global state. Given that '[t]he idealization that symbolic identification generates and lives off of are extremely powerful as legitimation strategies' (Brown 2005, 33), it is important to highlight that the audience for the Situation Room photograph's scripts of legitimation is a global spectator-subject.

### 3.3. Law as vengeance

Significantly, what we are not shown—the chaos and violence of the action unfolding in the Abbottabad compound—is more akin to law as vengeance than what we *are* shown. The arresting power of this photograph rests, in part, in the action and state actors we *imagine*, even as we gaze upon the suspense and stillness of the photograph. The dynamic watching Azoulay calls for—injecting movement and time into the stillness of the photograph—becomes part of what we *see* even though we are not shown it (Azoulay 2008, 14).

These different strands of law—liberal democratic virtue, law in the national security state, and law as vengeance—converged when the conservative group, Judicial Watch, filed Freedom of Information Act lawsuits against the U.S. Department of Defense and the Central Intelligence Agency. Judicial Watch sought 'all photographs and/or video recordings of Osama (Usama) bin Laden taken during and/or after the U.S. military operation in Pakistan on or about May 1, 2011'.<sup>27</sup> At both first instance<sup>28</sup> and on appeal,<sup>29</sup> the courts upheld the US government's position that legitimate national security interests barred public release of these images. The courts agreed with the state's assessment that America and Americans were safer if the killing and burial were not evidenced by images. At first instance, Judge James Boasberg said:

A picture may be worth a thousand words. And perhaps moving pictures bear an even higher value. Yet in this case, verbal descriptions of the death and burial of Osama bin Laden will have to suffice, for this court will not order the release of anything more. (Mears 2012.)

<sup>27</sup> See <http://www.judicialwatch.org/document-archive/foia-request-for-osama-bin-laden-photos/>.

<sup>28</sup> *Judicial Watch, Inc. v U.S. Dep't of Defense*, Civil Action No. 11-890 (JEB) (D.C.D.C. 2011). For a media report, see <http://www.cnn.com/2012/04/26/justice/bin-laden-photos/>

<sup>29</sup> See *Judicial Watch, Inc. v. U.S. Dep't. of Defense*, 715 F.3d 937 (D.C. Cir. 2013).



The word/image distinction that marks the official record of bin Laden's death (telling us with words what it will not show us with images), illustrates Foucault's insight that the archive is 'a system of enunciability [...] first the law of what can be said, the system that governs the appearance of statements as unique events' (Foucault 1972, 129). Visual culture augments the law of what can be said, with the factor of what can be *shown*, when state and judicial actors acknowledge the impossibility of controlling responses to images that will be seen worldwide. In Azoulay's words, 'within this space of photography [...] no sovereign power exists' (Azoulay 2008, 25).<sup>30</sup> Through the lens of law as record, the plurality of meaning ascribable to photographs, and the expansive, transnational civil political sphere of the visual (Azoulay 2008) shapes the law of what can be *shown* differently from the law of what can be said.

In the challenge to the state launched by Judicial Watch, there is a striking commonality between plaintiff and defendant: the legality of the killing, in and of itself, is unquestioned. This extra-territorial, extra-legal killing is understood by both plaintiff and defendant as belonging to a register of post-9/11 violence which 'creates its own interpretive conditions and so suspends ethical and legal conventions of response to its enactments' (Kennedy 2012, 265). Before the courts, Judicial Watch invokes the Freedom of Information Act, and principles of democratic transparency, with no apparent awareness of its complicity in a re-scripting of humanist principles of law and justice (e.g. Sarat 2001). In the web of meanings tied to the Situation Room photograph—law as vengeance, liberal democratic virtue, and law as the national security state—law as vengeance, and as the national security state, are the accounts of law privileged by the state, the courts, and by publics who seem to recognise that state and society cannot be antagonistic when friend/enemy is at work.

### 3.4. Captions, capture, and slippage

When it comes to law as record, captions, Azoulay points out are a key attribute of photographs (Azoulay 2010). In addition to facilitating administrative aspects of record-keeping, captions tend to influence what we see on a first encounter with a photograph. With renewed viewings, a photograph may reveal bodies, objects, and representations that our caption-directed gaze initially dismisses (Azoulay 2010, 10). Captions, and key terms linked to a photograph, will often disseminate discursive categories and ways of seeing that serve state power (Azoulay 2010, 9; 2008, 16).

The relationship between captions, photographs, and state power, are of particular salience with the Situation Room photograph for three main reasons. First, this photograph is especially expressive of state power because it was taken by the White House's official photographer, Pete Souza. Minimally mediated by non-state sources, disseminated both through the White House Flickr website and major newspapers worldwide, this state-generated photograph, depicting state elites in a

---

30 The US state's wary attention to the potency of images cannot but recall the continuing horror—a horror unregulated by nation-state affiliation—precipitated by images of prisoner abuse at Abu Ghraib and Guantanamo Bay.

highly secretive state space, has been assessed, at one point, to be the most viewed image on the internet (Kennedy 2012, 265).

A second reason to highlight the relationship between captions, photographs, and state power is the unwieldy texture of the caption the Situation Room photograph was originally given on the White House Flickr site: 'President Obama and Vice-President Joe Biden, along with members of the national security team, receive an update on the mission against Osama bin Laden in the Situation Room of the White House, May 1, 2011'. The leaden, bureaucratic language of the official caption illustrates Azoulay's point that captions serve an administrative, archival function while perpetuating state perspectives (Azoulay 2010, 9; 2008, 16).<sup>31</sup> In the almost parodic bureaucrat-speak of the official caption, it is as if the weighty burden of truth and fact is carried by the official caption's sharp distinction from the witty word play in typical of captions found in the sphere of entertainment.

Unsurprisingly, the unwieldy official caption has been discarded in common use; the image has come to be known as the Situation Room photograph (Kennedy 2012, 262). This *de facto* caption speaks to the vitality of dialogic engagement between the spheres of officialdom and popular culture. The ponderous, immemorable caption generated by officialdom is discarded, even as the image is taken up, disseminated, and enlivened with a new, unofficial caption.

As a shorthand, the unofficial caption also expresses US soft-power dominance in the global arena. In addition to its factual depictions, various imagined guises of the situation room as the material encapsulation of U.S. global supremacy via networks of technology, intelligence, and military command, have featured in popular film and television viewed worldwide.<sup>32</sup> Both with the Situation Room photograph and with popular cultural texts, the situation room becomes a synecdoche: a part representing the whole that is the extensive fabric of U.S. geo-political power. The operative presumption is that a reference to 'the situation room' needs no explanation. The presumption of shared knowledge is its own expression of the asymmetries of power shaping globalised media culture and the work of the imagination (Appadurai 1996).

The coherence between Azoulay's analysis of the relationship between photographs, captions, and state power, and Vismann's point on the contingencies of truth in law's record, is also brought to the surface by the early contestation as to what was actually unfolding in the situation room at the time the photograph was taken. As Liam Kennedy highlights, '[t]he first media reports, supported by White House spin, stated that the president and his team were watching live footage of the killing of bin Laden. Under media scrutiny, this story quickly swerved after it was admitted that only a small portion of the video viewed was live at the scene'

31 Additionally, the unimaginative captions given to photographs on the White House Flickr site appear to extend the titling conventions reflected by the White House archive of speeches, in which bland description appears to be the norm.

32 TV critic Hank Stuever offers a useful discussion of television and film representations of the situation room: <http://www.washingtonpost.com/wp-srv/lifestyle/style/situation-room.html>.

(Kennedy 2012, 263).

Would media have scrutinised this photograph and its surrounding claims in quite the same way if the photographer had not been a state actor? In any event, the quick swerve in the story reveals the state's ready participation in a misrepresentation.

A further fracturing of alignment between truth and state is articulated through state actors' failures to maintain silence so as to secure secrecy (Mahler 2015, 18). In his memoir, the former Secretary of Defense, Robert Gates, accuses those who were in the situation room of seeking public attention by breaching the silence that sustains secrecy (Gates 2015, 542). However, journalist Jonathan Mahler interprets the failure to maintain silence as a strategic alternative that he characterises as 'the more modern, social-media-savvy approach'. He elaborates, '[t]ell the story you want them to believe. Silence is one way to keep a secret. Talking is another. And they are not mutually exclusive' (Mahler 2015, 19).

Truth then, in a modern, social-media-savvy approach is especially contingent, especially relational. State is disaggregated into multiple, competing, institutional and individual voices. The materiality of contemporary social media, and norms of celebrity culture informing the desire of state elites for media recognition, mean that not even the state is able to generate that 'single and stable point of view' conventionally associated with sovereignty (Azoulay 2010, 11).

#### 4. Conclusion

As law's record, the mediated account of bin Laden's death, whether in the form of the official—the Situation Room photograph—or the unofficial—a journalist's account of secret legal memos, *Homeland's* burial at sea—illuminates the normalizing and legitimizing of the national security state across discursive arenas. At the same time, gestures and representations of law associated with liberal democracy thread through these accounts, compounding law in the national security state with liberal legality. We see this compounding in the reverence and ritual of *Homeland's* burial at sea, the concern and apparent transparency of the Situation Room photograph, and the assurance that secret legal memos have built on precedent. In short, approaching the events of bin Laden's death through the lens of law as record demonstrates the double logic of law's violence at work in representations of law in our present.

Scrutinising this record as law enables us, as non-state subjects, to discard the uncritical passivity engendered by militainment and the media-military-industrial complex (Vavrus 2013; Stahl 2010), and by scripts of political idealization generated when a liberal democratic state is in crisis (Brown 2005). In confronting the gap between what is officially disclosed to us, and what we are unofficially shown, law as record illuminates the impossibility of uncovering a single and certain truth. Law as record compels us, as subjects, to address the astonishing ideological coherence evident in the mediated and transnational public sphere, and the ways in which we are constituted by global media culture. In prompting these processes and understandings, law as record may repudiate and challenge the numbing and

apparently unending force of law's subordination to national security. Our capacity to perceive law as record, to confront law's double logic of violence, and to grapple with the relational contingencies of truth, state, and subject, engages that critical possibility of revitalising the justice held within the promise of law.

## Bibliography

Appadurai, Arjun: *Modernity at Large*. University of Minnesota Press, Minneapolis 1996.

Azoulay, Ariella: *The Civil Contract of Photography*. Zone Books, New York 2008.

Azoulay, Ariella: 'What is a photograph? What is photography?' 1 (1) *Philosophy of Photography* (2010) 9-13.

Berry, David M: *Critical Theory and the Digital*. Bloomsbury, New York 2014.

Brown, Wendy: *Edgework. Critical Essays on Knowledge and Politics*. Princeton University Press, Princeton 2005.

Brysk, Alison: 'Human Rights and National Insecurity'. In Alison Brysk & Gershon Shafir (eds): *National Insecurity and Human Rights*. University of California Press, Berkeley 2007, 1-13.

Butler, Judith: *Frames of War. When is Life Grievable?* Verso, London and New York 2010.

Byman, Daniel L.: 'Why Drones Work: The Case for Washington's Weapon of Choice'. 92 (July/August) *Foreign Affairs* (2013) 32-41.

Carville, Justin: 'Intolerable Gaze: The Social Contract of Photography'. 3 (3) *Photography and Culture* (2010) 353-358.

Constable, Marianne: *Just Silences. The Limits and Possibilities of Modern Law*. Princeton University Press, New Jersey 2005.

Cover, Robert: 'Violence and the Word'. 95 *Yale Law Journal* (1986) 1601-1629.

Darian-Smith, Eve: *Laws and Societies in Global Contexts. Contemporary Approaches*. Cambridge University Press, New York 2013.

Davies, Margaret: *Asking the Law Question. The Dissolution of Legal Theory*. Lawbook Co., Sydney 2002 (2<sup>nd</sup> edition).

Douglas-Scott, Sionaidh: *Law after Modernity*. Hart Publishing, Oxford and Portland, Oregon 2013.

Douzinis, Costas: 'A Legal Phenomenology of Images'. In Oren Ben-Dor (ed): *Law and Art*. Routledge, Abingdon 2011, 247-258.

Fairclough, Norman. *Language and Power*. Longman, London 1989.

Feigenson, Neal: 'The Visual in Law: Some Problems for Legal Theory'. 10 (1) *Law, Culture and the Humanities* (2014) 13-23.



Freeman, Michael: 'Law in Popular Culture'. In Michael Freeman (ed): *Law and Popular Culture*. Oxford University Press, Oxford 2005, 1-18.

Halevi, Leor: 'Watery Grave, Murky Law'. *New York Times* 7 May 2011.

Hersh, Seymour M: 'The Killing of Osama bin Laden'. 37 (10) *London Review of Books* (2015) 3-12. Available on <http://www.lrb.co.uk/v37/n10/seymour-m-hersh/the-killing-of-osama-bin-laden> (visited on 25 February 2016).

Jackson, Richard: *Writing the War on Terrorism. Language, Politics, and Counter-Terrorism*. Manchester University Press, Manchester 2005.

Johns, Fleur: 'Guantanamo Bay and the Annihilation of the Exception'. 16 (4) *European Journal of International Law* (2005) 613-635.

Johnson, Barbara: 'Bin Laden is "Alive and Well in the Bahamas" says Edward Snowden'. 25 Aug 2015. Available on <http://worldnewsdailyreport.com/bin-laden-is-alive-and-well-in-the-bahamas-says-edward-snowden/> (visited 25 February 2016).

Kennedy, Liam: 'Seeing and Believing: On Photography and the War on Terror'. 24 (2) *Public Culture* (2012) 261-281.

Lawrence, Bruce B. & Aisha Karim (eds.): *On Violence. A Reader*. Duke University Press, Durham and London 2007.

Leland, John & Elisabeth Bumiller: 'Islamic Scholars Split Over Sea Burial for Bin Laden'. *New York Times* 2 May 2011.

Lokaneeta, Jinee: *Transnational Torture. Law, Violence, and State Power in the United States and India*. New York University Press, New York 2011.

Lutz, Catherine: 'Anthropology in an Era of Permanent War'. 51 (2) *Canadian Anthropology Society* (2009) 367-379.

Mahler, Jonathan: 'What Do We Really Know About Osama bin Laden's Death?'. *New York Times Magazine* 15 October 2015.

Manderson, Desmond: 'Klimt's Jurisprudence—Sovereign Violence and the Rule of Law'. *Oxford Journal of Legal Studies* (2015) 1-28.

Masco, Joseph P.: 'Terror as Normality'. 69 (6) *Bulletin of the Atomic Scientists* (2013) 26-32.

Mawani, Renisa: 'Law's Archive'. 8 *Annual Review of Law and Social Science* (2012) 337-365.

McVeigh, Shaun: 'Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law'. 4 (1) *UC Irvine Law Review* (2014), 471-490.

Mertz, Elizabeth & Jothie Rajah: 'Language-and-Law Scholarship: An Interdisciplinary Conversation and a Post-9/11 Example'. 10 *Annual Review of Law and Social Science* (2014) 169-183.

Mirzoeff, Nicholas: 'The Subject of Visual Culture'. In Nicholas Mirzoeff (ed): *The Visual Culture Reader*. Routledge, New York 2006, 3-23.

Mitchell, W.J.T.: *What Do Pictures Want? The Lives and Loves of Images*. University of Chicago Press, Chicago 2005a.

Mitchell, W.J.T.: 'There Are No Visual Media'. 4 (2) *Journal of Visual Culture* (2005b) 257-266.

Parker, James: *Acoustic Jurisprudence. Listening to the Trial of Simon Bikindi*. Oxford University Press, Oxford 2015.

Post, Robert: Introduction: 'The Relatively Autonomous Discourse of Law'. In Robert Post (ed): *Law and the Order of Culture*. University of California Press, Berkeley 1991.

Quigley, Samantha: 'To Tap Into the Military's Arsenal, Hollywood Needs the Pentagon's Blessing'. Available on <https://www.uso.org/stories/105-to-tap-into-the-military-s-arsenal-hollywood-needs-the-pentagon-s-blessing> (visited 25 February 2016).

Rajah, Jothie: 'Sinister Translations: Law's Authority in a Post-9/11 World'. 21 (1) *Indiana Journal of Global Legal Studies* (2014) 107-143.

Sarat, Austin: 'Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction'. In Austin Sarat (ed): *Law, Violence, and the Possibility of Justice*. Princeton University Press, Princeton 2001, 3-16.

Savage, Charlie: 'How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden'. *New York Times* 28 Oct 2015. Available on [http://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?\\_r=0](http://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?_r=0) (visited 25 February 2016).

Sherwin, Richard K.: *When Law Goes Pop*. University of Chicago Press, Chicago 2002.

Speisel, Christina, Richard Sherwin & Neal Feigenson: 'Law in the Age of Images: The Challenge of Visual Literacy'. In Anne Wagner et al (eds): *Contemporary Issues in the Semiotics of Law*. Hart Publishing, Oxford 2005.

Stahl, Roger: *Militainment Inc. War Media and Popular Culture*. Routledge, New York 2010.

Tomlins, Christopher: 'Foreword: "Law As ..." II, History as Interface for the Interdisciplinary Study of Law'. 4 (1) *UC Irvine Law Review* (2014) 1-18.

Tomlins, Christopher & John Comaroff: '"Law As ...": Theory and Practice in Legal History'. 1 (3) *UC Irvine Law Review* (2011) 1039-1079.

Vavrus, Mary Douglas: 'Lifetime's Army Wives, or I Married the Media-Military-Industrial Complex'. 36 *Women's Studies in Communication* (2013) 92-112.

Vismann, Cornelia. *Files. Law and Media Technology*. Translated by Geoffrey Winthrop-Young. Stanford University Press, Stanford 2008.

Ward, Ian: *Law, Text, Terror*. Cambridge University Press, New York 2009.

White, James Boyd: *The Legal Imagination*. University of Chicago Press, Chicago 1973.

White, James Boyd: *Justice as Translation*. University of Chicago Press, Chicago 1990.

Wilson, Scott, Craig Whitlock & William Brinigin: 'Osama bin Laden killed in U.S. raid, buried at sea' *Washington Post* 2 May 2011. Available on [https://www.washingtonpost.com/national/osama-bin-laden-killed-in-us-raid-buried-at-sea/2011/05/02/AFx0yAZF\\_story.html](https://www.washingtonpost.com/national/osama-bin-laden-killed-in-us-raid-buried-at-sea/2011/05/02/AFx0yAZF_story.html) (visited on 25 February 2016).

Wodak, Ruth: 'Critical Linguistics and Critical Discourse Analysis'. In Verschueren et.al. (eds): *Handbook of Pragmatics*. Benjamins, Amsterdam 1996, 204-210.

Young, Alison: *Judging the Image. Art, Value, Law*. Routledge, Abingdon 2005.

# Forever Again: How Discursive Strategies Re-legitimate Torture in the US Senate Select Committee's 'Torture Report' and the CIA's Response

Kati Nieminen\*

## 1. Introduction

This article was first inspired by the uneasy feeling I was left with after reading the summary report by the US Senate Select Committee on Intelligence on the CIA's use of the so-called enhanced interrogation techniques (the Committee report, or simply the report), and the CIA's response. The purpose of the report was to investigate the allegations of the CIA using torture in its secret detention centers after the terrorist attacks in September 11, 2001. While it is fair to say that the Commission report quite straightforwardly condemns the way the enhanced interrogation techniques were used, an unsettling undertone remains. If the prohibition of torture is absolute and exceptionless, why is so much explanation required? What I believe accurately captures and, as I will show in this article, explains the uneasy feeling is what Scott Veitch describes as law's irresponsibility (Veitch 2007).

Law and legal institutions are commonly understood as central organizers of responsibility, being 'seen as society's key modes of asserting and defining the scope and content of responsibilities' (Veitch 2007, 1). Veitch's view is different in that for him, law and legal institutions are in fact central in organizing irresponsibility, particularly with respect to extensive human rights violations and other large-scale

---

\* Doctoral candidate, Faculty of Law, University of Helsinki.

\*\* I am grateful to Sakari Melander, Samuli Hurri, and the two anonymous reviewers for their extremely helpful comments on earlier drafts. This work was supported by the Finnish Cultural Foundation, the Olga and Kaarle Oskari Laitinen Foundation, and the Kone Foundation, and was conducted as part of the Legal Language of Moral Struggles project.

harms caused to the human race, such as genocide and nuclear threat.<sup>1</sup> Veitch argues that law as the ultimate measuring stick trumps moral and ethical claims about personal responsibility even when the legal action itself results in extensive suffering. Moreover, law's irresponsibility is not a question of the substance of law, but an intrinsic feature of the law itself (Veitch 2007; see also Cover 1983 and 1985; Kerruish 1998). Veitch argues that '[l]egal norms and actions operating within the legal realm are to be understood as not only contributing to establishing the boundary between the legal and non-legal realms themselves, but also influencing what lies *beyond* the boundary' (Veitch 2007, 81). In other words, the practices, concepts and categories of law and legal institutions guide our perception of harm and responsibility beyond the legal sphere: they 'structure social relations at such deep levels that questions of responsibility and irresponsibility tend already be underpinned or influenced by forms of law and legal role responsibilities that necessarily serve to limit the potential as to what, and how, alternative normative understandings may appear' (Veitch 2007, 84). In this article I demonstrate how legal argumentation is used for deflecting responsibility for torture in the Committee report and CIA's response, despite neither of them was not intended as an assessment of the lawfulness of the so called enhanced interrogation techniques (Miller 2009).

In order to explore Veitch's claims about law's workings in the world I use a reduced and further refined version of Sten Hansson's heuristic model for analyzing discursive techniques of blame avoidance in the Committee report, and in the CIA's response to it (Hansson 2015). Hansson's model categorizes ways of arguing, framing, denying, representing actors and actions, legitimizing, and manipulating the perception of blame through different forms of problem denial, excuses, justifications, counter-attacks, drawing a line under the discussion, changing the subject, restricting information, and working behind the scenes. I have re-organized the central elements of Hansson's model in three sections, namely the representations of *the self*, *the harm*, and *the other* as illustrated in table 1, which is described in more detail below.

Hansson's model for interpreting discursive blame avoidance strategies is a synthesis of the work of many discourse theorists, in which he identifies several strategies of argument for manipulating the perception of loss and the perception of agency. Along with Hansson and other discourse theorists, Stanley Cohen has analyzed the 'repertoire of official responses,' and especially the different forms of denial regarding allegations of human rights violations (Cohen 1996; 2001).

The aims of this article are, firstly, to provide a convenient analytical framework for making discursive strategies for responsibility avoidance apparent; secondly, to demonstrate the discursive process which contributes to atrocities re-occurring

---

1 For the record, Veitch states that he does not claim a straightforward causal relationship between law and devastation, nor is he arguing that the law is completely incapable of holding people and institutions responsible for the harm they cause. Rather, he is 'exploring the ways in which legality can and does allow the production of suffering' (Veitch 2007, 10). What he is claiming is that this is not simply aversion of law or an unwanted by-product, but an integral part of the law's workings in the world.



despite declaring ‘never again’ time after time, and thirdly to examine how legal language is involved in the process.

The analytical framework is presented in table 1 below. I have identified two dominant topoi in the Committee report and CIA’s response to it: *the topos of law* and the *topos of threat*. In discourse analysis, topos has been ‘described as parts of argumentation which belong to the obligatory, either explicit or inferable premises’ (Zagar 2010). In other words, the conclusion rules of a topos justify the relevance of the arguments and the transition from the argument to the conclusion (Kienpointner 1992, as cited in Zagar 2010). In a looser sense, topos refers to a ‘reservoir of generalized key ideas,’ from which arguments can be generated (Richardson 2004, as cited in Zagar 2010). In this article, topos refers to the basis of evaluation and justification, and to the central discursive strategies; in the topos of law the basis of evaluation is authority; the basis of justification is legality; and the main discursive strategy is legitimation. In the topos of threat the basis of evaluation is security; the basis of justification is necessity; and the main discursive strategy is rationalization.

In the topos of law, the construed facts are evaluated according to their legality, which is ultimately based upon the authority of the law: according to the legality or illegality of a specific action, it either has to be performed or omitted (Reisigl & Wodak 2001, 79). Only certain types of justification having to do with agency, causality, intention and legitimacy are relevant in the topos of law. Therefore, also the denial strategies target these elements of responsibility. For example, causing legally relevant harm can be denied altogether, or responsibility for the harm assigned to someone else (the ‘bad apples’); knowledge of the harm and/or the action can be denied; the intent to cause harm can be denied; and the necessity of action can be emphasized (see Cohen 1996, 522-531; 2001, 60-96; Hansson 2015). In the topos of threat, the ultimate and unquestionable justification is security—all things necessary for security are, by default, justifiable, and indeed necessary (Hansson 2015, 309). Furthermore, making a claim of necessity is an effective way to disconnect the use of ‘enhanced interrogation techniques’ from the ‘barbaric’ practice of torture. Introducing instrumentality, rationality and proportionality—all of which are defining features of the liberal democracies—‘democrats have produced an image of torture that may be fitted to its conception of legitimate violence’ (Del Rosso 2014a, 387; see also Luban 2005). In my analysis, I identify specific discursive strategies typical of the topoi of law and threat for producing certain kinds of perceptions of the self, harm, and the victim. The discursive strategies listed in table 1 are not intended to be exhaustive, but examples of prevalent discursive strategies in the material discussed in this article.

I analyze the discursive strategies as a central part of topoi for the purpose of developing an analytical tool that can be used to identify the ways in which irresponsibility is (re)produced in legal language. The identified discursive strategies for responsibility avoidance are, for the most part, adopted from Hansson’s heuristic model, which in turn is based on synthesizing the work of many other discourse theorists. The discursive strategies identified in my analysis are 1) *Individualizing*

(the bad-apple narrative), which means shifting the blame within an organization onto the shoulders of an individual actor;<sup>2</sup> 2) *The rescue narrative*, in which the Hero sets out to protect the Victim from the Villain;<sup>3</sup> 3) *Denial* of intention, act, harm, causality or control;<sup>4</sup> 4) *Obscuring agency* with vague and impersonal use of language;<sup>5</sup> 5) *Silencing* a disconcerting topic;<sup>6</sup> 6) *Relativizing*, e.g., through the use of (possibly misleading) comparisons or equating strategies;<sup>7</sup> 7) *Legitimizing* by referring to the law, morals, authority;<sup>8</sup> 8) *Rationalizing* by referring to goals and effects;<sup>9</sup> 8) *Impersonalizing* the victim;<sup>10</sup> 9) *Assigning partial responsibility* for the harm to the victim because of their own conduct, or presenting the victim as blameworthy because of their characteristics.<sup>11</sup>

As illustrated in table 1, ‘we’ (the self) in the topos of law is presented as law-abiding, and the harm, if it is admitted at all, is presented as legitimate, while the ‘they’ (the other), is seen as partially responsible for causing the harm. In the topos of threat, ‘we’ (the self) is presented as sincere, the harm caused as relative to the cause, and the ‘they’ (the other) as dangerous (Hansson 2015).

My analysis shows that in the topos of law, the perception of a law-abiding, blameless self is produced by individualizing, intention and act denial, compartmentalizing, and obscuring agency. The perception of a non-existent or legitimate and/or unavoidable harm is produced by silencing or denying harm altogether, denying causality between action and harm, denying control over causing harm, and by legitimating harm. The perception of the other, i.e. the victim, as corrupt is produced by assigning responsibility for causing harm to them. In the topos of threat the perception of a sincere self is produced by using the rescue narrative and various forms of denial. The perception of non-existent or relative harm is produced by problem and/or goal denial, limiting, relativizing, and rationalizing. The perception of the other as dangerous and blameworthy is produced by impersonalizing the victims and blaming them for their own suffering.

2 See Hansson 2015, 301; Lakoff 2008, 163-167; see also Cohen 1996, 522-531; Del Rosso 2014b, 53; and Veitch 2007, 41-43, 78, 87.

3 See Del Rosso 2014a, 384; Hansson 2015, 308.

4 Cohen 1996; 2001, 60-96; Hansson 2015, 301-302; Van Dijk 1992, 92.

5 Hansson 2015, 302; Scollon 2008, 109.

6 Hansson 2015, 315; Schröter 2013.

7 Hansson 2015, 309-310; see also Hooks & Mosher 2005, 1631.

8 Hansson 2015, 299; Van Leeuwen 2007, 92, 94; Van Leeuwen and Wodak 1999.

9 Hansson 2015, 303, 7; Van Leeuwen 2007, 92, 94; Van Leeuwen & Wodak 1999.

10 Hansson 2015, 308; Van Leeuwen 1996; 2008.

11 Fairclough & Fairclough 2012, 172; Hansson 2015, 299; Hooks & Mosher 2005, 1630; Wodak 2006.

**Table 1: Discursive strategies for altering the perception of the self, harm, and the other in the topoi of law and threat.**

|                                 | <b>TOPOS OF LAW</b> | <b>TOPOS OF THREAT</b> |
|---------------------------------|---------------------|------------------------|
| <b>Basis of evaluation</b>      | Authority           | Security               |
| <b>Basis of justification</b>   | Legality            | Necessity              |
| <b>Main discursive strategy</b> | Legitimation        | Rationalization        |

| <b>THE SELF</b>              |  |                            |
|------------------------------|--|----------------------------|
| <b>Description</b>           | Law-abiding  | Sincere                    |
| <b>Discursive strategies</b> | Individualizing (bad-apple -narrative)<br>Intention / act denial<br>Obscuring agency<br>Compartmentalizing | Rescue narrative<br>Denial |
| <b>Perception</b>            | No-one to blame, no reason to blame, someone else to blame   |                            |

| <b>HARM</b>                  |  |  |
|------------------------------|--|--|
| <b>Description</b>           | No harm<br>Legitimate harm   | No harm<br>Relative harm   |
| <b>Discursive strategies</b> | Denying harm / causality / control<br>Silencing<br>Legitimizing                              | Denying problem / goal<br>Limiting<br>Relativizing (yes, but)<br>Rationalizing |
| <b>Perception</b>            | No harm, limited harm, relative harm, unintentional harm, unavoidable harm, justifiable harm |  |

| <b>THE OTHER</b>             |  |                                       |
|------------------------------|--|---------------------------------------|
| <b>Description</b>           | Responsible  | Dangerous                             |
| <b>Discursive strategies</b> | Assigning responsibility                           | Impersonalizing<br>Blaming the victim |
| <b>Perception</b>            | Non-existent / non-human, blameworthy, responsible |                                       |

Before analyzing the Committee report and CIA's response and discussing how the topoi of law and threat produce the perception of the self, harm and the other, I will briefly outline the context of both texts, going back to the infamous terrorist attacks in September 11, 2001. The saga of the US war on terror and the use of the so-called enhanced interrogation techniques is long and complicated. The following provides a brief oversight of the authorization of the CIA detention and interrogation

program and the interrogation techniques, but it is not possible to do justice to all the points of interest in the process. Admittedly the picture offered here is rather one-sided and, for example, the internal conflicts of different authorities are not addressed. A brief outline is however needed in order to understand the analysis of the Commission report and the CIA's response. The analysis presented later in this article follows the structure of table 1 above; I will discuss the way in which *the self*, *harm*, and *the other* are constructed in the reports with the *topos of law* on one hand, and the *topos of threat* on the other.

## 2. The 'torture report' and CIA's response in context

Only days after the attack on September 11, 2001, President Bush authorized the CIA to capture, detain and kill al-Qaida operatives around the world by issuing a Memorandum of Notification (MoN) on 17 September 2001. Even at this stage, the possibility of the use of torture during the counter-terrorist operations occurred to the International Commission of the Red Cross, who expressed their concern to the United Nations. The UN High Commissioner then issued a letter reminding the states taking part in the war on terror of the absolute nature of the prohibition on torture (Cohen 2012).

During the Rendition, Detention and Interrogation program (RDI), the CIA used what became known as enhanced interrogation techniques (EIT) while interrogating the detainees captured and held in secret detention sites all around the world. The Department of Justice's Office of Legal Counsel (OLC)<sup>12</sup> was involved in assessing the legality of the enhanced interrogation techniques from the outset. The first series of the so-called torture memos by the OLC were issued in January 2002, in which the OLC provided legal arguments for assertions by administration officials that the Geneva Conventions did not apply to detainees from the war in Afghanistan (The New York Times 2005; Yoo 2002a; see also Gonzales 2002; Powell 2002). In February 2002, President Bush issued a directive stating that the Common Article 3 of the Geneva Conventions, which prohibits torture and the cruel treatment of prisoners of war does not apply to al-Qaida and Taliban detainees (The New York Times 2005; see also Taft 2002). In August 2002, the OLC issued another set of memoranda defining torture infamously narrowly only to conduct which causes pain akin to that of organ failure, impairment of bodily function or death (Bybee 2002; Yoo 2002b). Using the so-called enhanced interrogation techniques on the detainee Abu Zubaydah was authorized for the first time.

The interrogation techniques used by the CIA were classified either as 'standard' or 'enhanced'. At one time during the program, some techniques were classified as standard and enhanced at another. The 2003 Interrogation Guidelines, for instance,

---

<sup>12</sup> The OLC 'provides authoritative legal advice to the President and all the Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department' (Office of Legal Counsel).

defined standard techniques as those that did not ‘incorporate significant physical or psychological pressure’, and included techniques such as isolation, sleep deprivation up to 72 hours, reduced caloric intake, use of loud music or white noise, and use of diapers ‘generally not to exceed 72 hours’. The enhanced techniques included those used on Abu Zubaydah, such as attention grasp, facial and abdominal slap, cramped confinement in a dark box up to 18 hours, combining cramped confinement with the use of insects, various stress positions, sleep deprivation up to 11 days, and the waterboard technique (Daugherty Miles 2015; see also Tenet 2003). In 2004, the OLC revised its definition of torture, but the enhanced interrogation techniques were, once again, approved by the OLC in the 2005 memoranda (see Bradbury 2005a and 2005b; Levin 2004).

In December 2005, the Detainee Treatment Act prohibited the use of cruel, inhuman, or degrading treatment or punishment against anyone in US custody, and in 2006 the Supreme Court case *Hamdan v. Rumsfeld* held that Common Article 3 of the Geneva Conventions also applied to the detainees at the Guantanamo Bay detention center. The OLC again issued a memorandum assessing the conditions of confinement for CIA detainees in the light of the Detainee Treatment Act. The memorandum concerned blocking detainees’ vision, forced grooming, solitary confinement, use of white noise, constant illumination of cells, and shackling. The OLC concluded that, as described by the CIA, these techniques did not amount to cruel, inhuman or degrading treatment or punishment (Bradbury 2006).

In September 2006, the Congress passed the Military Commissions Act, which provided that particular violations of Common Article 3 of the Geneva Conventions were subject to criminal prosecution under the War Crimes Act and that the President had the authority to interpret the meaning and application of the Geneva Conventions. The OLC ultimately concluded again that the enhanced interrogation techniques were consistent with the Act (The Committee Report 2012, 447; Human Rights Watch 2006). In July 2007, the OLC issued a memorandum concluding that six interrogation techniques, namely, dietary manipulation, extended sleep deprivation, facial hold, attention grasp, the abdominal slap and facial slap, were consistent with Common Article 3 of the Geneva Conventions, the Detainee Treatment Act and the War Crimes Act (see Bradbury 2007). In conjunction with the memorandum, President Bush signed an Executive Order stating that the detention and interrogation program was fully in compliance with the Geneva Conventions, and authorized continued use of the CIA interrogation practices (Berenson 2014). President Bush also vetoed the Intelligence Authorization Act for 2008, which would have limited the interrogation techniques to those authorized by the Army Field Manual (The Committee Report 2012, 452-453). Finally, President Obama issued Executive Order banning the CIA’s detention authority and restricting the interrogation techniques to those authorized in the Army Field Manual in 2009. The authoritative status of the so-called torture memos was finally withdrawn in 2009 (Bradbury 2009).

During 2009-2013 the Democratic members of the US Senate Select Committee on Intelligence (SSCI) investigated the torture allegations concerning the CIA



secret detention sites, while the Republican members of the committee chose not to participate in the investigation. The SSCI's mandate was limited to examining the factual aspects of the CIA program, and did not include a legal assessment of the program or any of the findings. Rather, the aim of the investigation was to determine how and why the program was created, its intelligence value, and whether or not the information provided to the SSCI by the CIA had been accurate, and whether the program had been implemented in compliance with operative executive branch guidance and policy (Human Rights First).

Only the roughly 600 page long executive summary is public, apart from the names of the CIA personnel, countries that hosted the secret prisons, and some other details, while the rest of the report, extending to over 6,000 pages, remains classified (Berenson 2014). The purpose of releasing the summary of the Committee report was, according to Committee chair Senator Dianne Feinstein, to ensure that 'U.S. policy will never again allow for secret indefinite detention and the use of coercive interrogations' (The Committee report 2012, Foreword, 3).

The Committee reviewed 20 of the most frequent examples of purported counterterrorism successes that the CIA had attributed to the use of the enhanced interrogation techniques, and found them to be wrong in fundamental respects. In some cases, no relationship was found between the cited counterterrorism success and any information provided by detainees during or after the use of the enhanced techniques. In the remaining cases, the Committee found that the CIA inaccurately claimed that specific, otherwise unavailable information was acquired from CIA detainees as a result of the interrogations, when in fact the information either corroborated information already available to the CIA or acquired from the detainees prior to the use of the enhanced techniques. The Committee also found that the interrogations of detainees were brutal and far worse than the CIA represented to policy-makers and others.

The Committee's conclusions were that 1) the enhanced interrogation techniques were not effective, and their use rested on inaccurate claims of effectiveness, 2) the CIA misled other officials and actively avoided or impeded oversight of the program, 3) the use of enhanced techniques and the detention conditions were misrepresented by the CIA to other officials, policy-makers and the public, 4) the CIA program was not properly managed and the CIA overstepped its authority, and 5) the CIA's program was counter-productive to national interests. Throughout the Commission report, one of the main claims is that the other authorities, such as the OLC, relied completely on the information provided by the CIA on the efficiency of the enhanced interrogation techniques and suggests that, had the information provided by the CIA been different, the legal assessment of the techniques would have been different as well (The Committee report 2012, 2-17).

In its response to the findings of the report, the CIA insisted that the representation it had provided to other state officials on the use and effectiveness of the enhanced interrogation techniques had been accurate overall. The CIA also maintained that the information acquired from the interrogations was significant

and helped save human lives. The CIA claimed that it had sincerely believed at the time that there were no other viable options for gathering actionable intelligence to prevent terrorist attacks, and that it remains unknowable whether such information could have been acquired through other means. The CIA agreed that it was unprepared and lacked core competencies to respond effectively to the decision to introduce the detention and interrogation program, and that there was, particularly at the beginning, lapses in its 'ability to develop and monitor its initial detention and interrogation activities' (CIA 2013, Comments, 2). The CIA also agreed that it 'failed to perform a comprehensive and independent analysis of the effectiveness of enhanced interrogation techniques', 'detained some individuals under a flawed interpretation of the authorities granted to CIA' and 'fell short when it came to holding individuals accountable for poor performance and management failures' (Ibid., 3). On the other hand, the CIA disagreed with several of the Committee findings; particularly 'with the Study's unqualified assertions that the overall detention and interrogation program did not produce unique intelligence that led terrorist plots to be disrupted, terrorists to be captured, or lives to be saved'. The CIA also maintains that it did not resist internal or external oversight or deliberately misrepresent the program to other officials or the public (Ibid., 4).

In the following analysis, the Committee report and CIA's response are discussed together in order to examine the whole they create. Rather than a comprehensive discursive analysis on either of them, the analysis is intended to illustrate the discursive strategies in action. The analysis is divided into three parts, following the structure of table 1 above. I will analyze how the perception of *the self*, *harm*, and *the other* are produced in both the topos of law and the topos of threat. The analysis shows how the two topoi are intertwined and together deflect the question of torture. Furthermore, the analysis illustrates how the legal language reproduces law's irresponsibility by deflecting both individual and systemic responsibility for torture (Veitch 2007).

### 3. Perception of agency

#### 3.1. Topos of threat—sincere self

In the topos of threat, the ultimate touchstone is security; all things necessary for ensuring security are basically acceptable. The enhanced interrogation techniques, the CIA's response asserts, were always used solely for the purpose of obtaining actionable intelligence in order to prevent terrorist attacks and save lives. The perception of sincere agency is discursively produced by intention denial: causing pain was not, according to the CIA's response, a purpose in itself, but a mere by-product, which should be weighed against the legitimate aims of preventing terrorist attacks and saving innocent lives. As already mentioned, necessity arguments alleviate the apparent incompatibility of torture and liberal political culture by introducing

utilitarian logic to torture debate.<sup>13</sup> Even when the agency finds fault with its own conduct, it insists that the intention always remained sincere:

[I]n hindsight, we believe that assertions the [CIA] made to the effect that the information it acquired could not have been obtained some other way *were sincerely believed* [emphasis added] but were also inherently speculative. (CIA 2013, Comments 15; Conclusions 23.)

[...] [the] CIA did not, as the Study alleges, *intentionally* [emphasis added] misrepresent to anyone the overall value of the intelligence acquired, the number of detainees, the propensity of detainees to withhold and fabricate, or other aspects of the program. (CIA 2013, Comments 16.)

The CIA's representation of its own role in the war on terror follows the rescue narrative, in which the CIA is assigned the role of a Hero, identifying the detainees as the Enemy and the US people as the potential Victim whom the Hero is ordained to protect from the enemy:

We concluded that all of the examples fit within and support CIA's overall representation that information obtained from its interrogations produced unique intelligence that helped the US disrupt plots, capture terrorists, better understand the enemy, prevent another mass casualty attack, and save lives. (CIA 2013, Comments 13; Conclusions 21.)

### 3.2. Topos of law—law-abiding self

In the topos of law, the emphasis is on *who* is responsible for possible harm where harm is considered legally relevant to begin with (see Veitch 2007, 86, 90). For the purposes of this article, the most interesting feature of the Committee report is how responsibility is assigned between the state agencies. Throughout the report there is a tendency to balance between verifying the atrocities committed against the detainees and providing disturbingly descriptive accounts of their treatment, while assuring that the blame lies almost entirely on the CIA. The fact that other state agencies were heavily involved in the fight against terrorism and all the policies relating to it, as well as the legal assessment of the detention and interrogation program and the enhanced interrogation techniques, is not discussed in depth. The responsibility for the treatment of the detainees is compartmentalized to the CIA in the Committee report by emphasizing the way in which the other officials and policy-makers relied on the information provided by the CIA regarding the importance, effectiveness, and application of the enhanced interrogation techniques. The references to the OLC torture memos are factual and consistently combined with mentioning that the memos were based on the information provided by the CIA, which later proved to be incorrect:

---

<sup>13</sup> Luban 2005; see also Del Rosso 2014, 389; Hooks & Mosher 2005, 1633.

The office of Legal Counsel (OLC) in the Department of Justice wrote several legal memoranda and letters on the legality of the CIA's Detention and Interrogation Program between 2002 and 2007. The OLC requested, and relied on, information provided by the CIA to conduct the legal analysis included in these memoranda and letters. Much of the information the CIA provided to the OLC was inaccurate in material respects. (The Committee report 2012, 40.)

On August 1, 2002, the OLC issued a memorandum advising that the use of the CIA's enhanced interrogation techniques against Abu Zubaydah would not violate prohibitions against torture [...] The memorandum relied on CIA representations about Abu Zubaydah's status in al-Qa'ida, his role in al-Qa'ida plots, his expertise in interrogation resistance training, and his withholding of information on pending terrorist attacks. (The Committee report 2012, 409.)

By highlighting the CIA's role in providing the information on which the OLC torture memos were based, the perception of agency is altered so that all responsibility for interrogation techniques possibly amounting to torture is assigned to the CIA; not to the OLC or other authorities, who remained law-abiding at all times. Also, as if the likelihood of torture leading to false confessions and statements was not known to other officials prior to the 21<sup>st</sup> century, the Committee report represents other state authorities as completely reliant on the information provided by the CIA about the effectiveness of coercive interrogation techniques, possibly amounting to torture. The CIA, according to the report, was aware that the 'inhumane physical or psychological techniques' were counterproductive, yet the report makes no reference in this context to other authorities such the OLC, who surely were equally aware of the inefficiency of torture.<sup>14</sup>

Despite the CIA's previous statements that coercive [...] techniques 'result in false answers' [...] and have 'proven to be ineffective,' [...] by the end of November 2001, CIA officers had begun researching potential legal defenses for using interrogation techniques that were considered torture by foreign governments... (The Committee report 2012, 19.)

The CIA disagrees with the Commission report in that its reflections on the applicability of the necessity defense to possible criminal torture charges was ever meant to be the legal basis on which the detention and interrogation program activities were based. While the Commission report places the responsibility for the use of the enhanced techniques almost entirely on the CIA, the CIA makes an authority claim and maintains that it executed the policy outlined by a higher organ,

---

14 According to the Committee report 'In January 1989, the CIA informed the Committee that "inhumane physical or psychological techniques are counterproductive because they do not produce intelligence and will probably result in false answers". The testimony of the CIA deputy director of operations in 1988 denounced coercive interrogation techniques, stating that "[p]hysical abuse or other degrading treatment was rejected not only because it is wrong, but because it has historically proven to be ineffective" (The Committee report 2012, 18).

and that the CIA itself remained law-abiding:

The legal basis for the program was not a speculative ‘necessity defense’, but rather paragraph 4 of the 17 September 2001 MoN [Memorandum of Notification]. Enhanced techniques [...] were reviewed by Office of Legal Counsel [...] explicitly for the purpose of determining that they did not constitute torture or otherwise violate the law [...]. (CIA 2013, Conclusions 5.)

The CIA response explicitly states that it does not ‘engage in a debate about the appropriateness of the decisions that were made in a previous Administration to conduct a detention and enhanced interrogation program’, but instead merely assesses whether the CIA has acted according to its role as a government organ, ‘to review the performance of the CIA with regard to the program and to take whatever steps necessary to strengthen the conduct as well as the institutional oversight of CIA covert action programs’ (CIA 2013, Foreword by DCI Brennan, 2). Here the CIA transfers the responsibility to the norms guiding CIA instead of the CIA as a legal actor itself. The CIA is thus deemed responsible only so far as it fulfilled its legal obligations. This is an example of how the legal action and language conveniently allow the discussion to be defined solely to the question of legality, and legality to be equated with acceptability (see Veitch 2007, 87).

The CIA admits having ‘detained some people under a flawed legal rationale’ but at the same time finds it ‘hard to imagine how [CIA] lawyers could have developed and applied differing interpretation of the MoN’s capture and detain authorities’ (CIA 2013, Comments 5). The CIA as an institution does not accept responsibility for the legal interpretation and, as we have seen in the quotations above from the Committee report, neither does the OLC.

Despite admitting some misconduct, the CIA as a whole is presented in its response as a law-abiding institution. The CIA’s response places the responsibility for misconducts to individual officers, who did not follow the CIA guidelines sufficiently; the CIA as an organization accepts responsibility only for not holding the ‘bad apples’ responsible for their errors. By taking this stance the CIA does not, however, for practical reasons, recommend holding the officers responsible: ‘[W]e do not believe it would be practical or productive to revisit any RDI-related case so long after the events unfolded’ (CIA 2013, Comments 9). Still, the response generously accepts the report’s conclusion that the CIA did not hold officers sufficiently accountable for misconduct, and goes even further in stating that

[W]e would take the Study’s argument one step further. [...] the [CIA] did not sufficiently broaden and elevate the focus of its accountability efforts to include the more senior officers who were responsible for organizing, guiding, staffing, and supervising RDI activities, especially at the beginning. (CIA 2013, Comments 8; Conclusions 44.)

The relationship between the systemic and individual factors contributing to misconduct is interesting: the CIA seems to accept that there might be systemic



reasons underlying the individual misjudgments, but at the same time ‘the system’ is reduced to those individuals, in which case there is no need for more profound evaluation of the systemic problems and identifying systemic solutions for them. The CIA recommends that the scope of accountability reviews is broadened in order to:

[...] assess and make recommendations to address any systemic issues revealed by the case, and to expand the scope of the review as warranted to include *officers responsible for systemic problems* [emphasis added]. (CIA 2013, Comments 18.)

As the above quotation shows, the responsibility for systemic problems remains on the individual level. This is an interesting point when analyzed in the context provided by David Luban and what he calls torture culture and liberal ideology of torture (Luban 2005). Again, avoiding to discuss torture, or the misuse of the so called enhanced interrogation techniques, as a systemic question serves the same purpose as introducing the utilitarian logic to torture debate. Change in the foundations of torture culture remains impossible, if we are unable or unwilling to identify and challenge the structural factors underlying the individual choices, such as purposefully giving mixed messages to the interrogators whether or not the Geneva Conventions apply to the detainees.<sup>15</sup>

In the CIA’s response, agency is also obscured by representing the detention conditions almost as an actor in their own right, and merely ‘allowed to exist’ by someone. The ‘grim conditions’ seem, in fact, directly responsible for the death of the detainee Gul Rahman: ‘It was during those [first couple of] months that grim conditions and inadequate monitoring of detainees were allowed to exist’ culminating in the death of Gul Rahman in November 2002 (CIA 2013, Comments 2).

The ultimate legitimization of the use of the enhanced interrogation techniques in the CIA’s response is their legality. The techniques, even when used without prior approval, were legal, and therefore, although possibly in hindsight vulnerable to criticism, ultimately acceptable. The crucial point is that while the factual description of the application of the so called enhanced interrogation techniques is accepted as overall accurate, the interpretation that it amounted to torture, cruel or inhuman treatment, is denied (see Cohen 1996, 528). The CIA also claims the authority for conducting legal interpretation without the OLC approval.

[W]hile it would have been prudent to seek guidance from OLC on the complete range of techniques prior to their use, we disagree with any implication that, absent prior OLC review, the use of the ‘unapproved’ techniques was unlawful or otherwise violated policy. (CIA 2013, Conclusions 57.)

[T]he *Study* seems to misunderstand the role of OLC and its interaction with CIA. OLC is not an oversight body, and it does not act as a day-to-day legal

---

<sup>15</sup> Luban 2005, 1439, 1449; see also Del Rosso 2014a, 389; Hooks & Mosher 2005, 1633.

advisor for any executive agency. Further, OLC does not ‘approve’ executive agency activities. [...] [The CIA] will often apply the legal guidance provided in a particular OLC memorandum to other similar factual scenarios. (CIA 2013, Conclusions 33.)

## 4. Perception of harm

### 4.1. Topos of threat—relative harm

In the Committee report, the focus is shifted away from the human suffering and onto the disloyalty of the CIA towards other state authorities. Despite heavily criticizing the CIA’s interrogation guidelines (2003) which listed enhanced and standard interrogation techniques,<sup>16</sup> an explicit condemnation of the techniques as approved by the OLC is lacking in the Committee report. Instead, the explicit criticisms are that the CIA applied the enhanced techniques differently than what it represented to other authorities, left CIA officers with broad discretion to apply the techniques without prior approval, and neglected to assess whether or not certain techniques were prohibited. In other words, the critique addresses those techniques that exceeded, either qualitatively or quantitatively, the way their use was approved by the OLC. Thus the problem is not the use of these techniques per se, but the lack of their legal assessment and prior approval from the CIA headquarters; the problem is not the suffering caused by the use of enhanced techniques, but the shortcomings in the appropriate procedure and the CIA’s lack of loyalty to other authorities.

The [director of central intelligence’s] Jan 2003 interrogation guidelines listed 12 ‘enhanced techniques’ [...] that had not been evaluated by the OLC. [...] The guidelines, for example, did not address whether interrogation techniques such as the ‘rough take down,’ the use of cold water showers, and prolonged light deprivation were prohibited. [...] Thus, consistent with the interrogation guidelines, throughout much of 2003, CIA officers [...] could, at their discretion, strip a detainee naked, shackle him in the standing position for up to 72 hours, and douse the detainee repeatedly with cold water—without approval from the CIA [headquarters] if those officers judged CIA [headquarters] approval was not ‘feasible’. In practice, CIA personnel routinely applied these types of [interrogation techniques] without obtaining prior approval. (The Committee report 2012, 63.)

The CIA in turn uses the *yes, but* structure (*we agree* followed by *however*) in acknowledging the problems identified by the Commission report: first it admits that the critique is correct, but immediately insists that the problem was not as serious as the report suggests—thereby relativizing the significance of the problem:

---

<sup>16</sup> The difference between the standard and enhanced interrogation techniques was that EITs were only to be employed with the prior approval of the director of CTC, while STs required advance approval ‘whenever feasible’ and documentation of their use (The Commission report 2012, 63).

We [...] *agree* [emphasis added] with the *Study* that 'CIA did not adequately develop and monitor its initial detention and interrogation activities'. In agreeing with this statement, *however* [emphasis added] we draw particular attention to the word 'initial'. (CIA 2013, Comments 3.)

We *believe* [emphasis added] this period represents a failure at all levels of management. [...] *However* [emphasis added], in contrast to the impression left by the *Study*, the confusion over responsibility, lack of guidance, and excessively harsh conditions that detainees experienced in the early days [...] did not characterize more than a few months of our [rendition, detention, and interrogation] effort. (CIA 2013, Comments 4.)

We *agree* [emphasis added] that there were instances in which CIA used inappropriate and unapproved interrogation techniques, particularly at the program's outset. Overall, *however*, [emphasis added] we believe that the *Study* overstates the number of instances of unauthorized use of enhanced techniques as well as the number of non-certified individuals whom it alleges wrongfully participated in interrogations. (CIA 2013, Conclusions 57.)

As the above quotes indicate, the CIA emphasizes that the cases of misconduct were few in number and took place mainly in the early days of the detention and interrogation program, discursively denying and limiting the perception of harm both qualitatively and quantitatively. Spatial and temporal isolation, i.e. claiming that a certain unfortunate event was 'only an isolated incident' belonging in the past and could not happen again, are typical denial strategies (Cohen 1996, 537). To emphasize the small number of detainees subjected to the so called enhanced techniques minimizes the harm caused by their use:

One of the main flaws of the *Study* is that [...] it tars CIA's entire [rendition, detention, and interrogation] effort with the mistakes of *the first few months* [emphasis added], before that effort was consolidated and regulated under a single program management office. (CIA 2013, Comments 3.)

No more than *seven detainees* [emphasis added] received enhanced techniques prior to written Headquarters approval [...] (CIA 2013, Conclusions 47.)

Without commenting on the wisdom or propriety of the waterboard or any other technique [...] we believe it important the record be clear: CIA utilized the waterboard on *only three detainees* [emphasis added]. *The last* [emphasis added] waterboarding session occurred in March 2003 [...] [T]echniques (walling and cramped confinement) that had not been previously approved by Headquarters were applied to *two Libyan detainees* [...] [emphasis added]. (CIA 2013, Conclusions 55, 56.)

While acknowledging certain problematic features in its interrogation methods, the CIA maintains that the information obtained from the detainees by using the enhanced techniques was crucial. The perception of harm is relativized by suggesting

that abandoning the enhanced interrogation techniques might have resulted in more terrorist attacks—the implicit argument being that the possible harm caused by the interrogations must be evaluated in relation to their positive outcomes. The CIA casts doubt on whether or not the information crucial for preventing terrorist attacks could have been obtained without using the enhanced interrogation techniques, without actually saying so, and thus implicitly foisting the burden of proof onto those who oppose the use of the enhanced techniques:

Although it is indeed impossible for us to imagine how the same counterterrorism results could have been achieved without any information from detainees, we also believe [...] that it is unknowable whether, without enhanced techniques, CIA or non-CIA interrogators could have acquired the same information from the detainees. (CIA 2013, Comments, 14.)

Similar balancing between the use of the enhanced techniques and their alleged positive outcomes can be found in the Commission report. Regarding the legality of the enhanced interrogation techniques, the report asserts that the legal evaluation of the enhanced interrogation techniques might have been different had the information provided by the CIA been correct, i.e., had the information provided by the CIA been correct, the legal assessment by the OLC might have been correct as well. Thus, the use of the so-called enhanced interrogation techniques is rationalized by referring to their alleged positive outcome:

Prior to the initiation of the CIA's Detention and Interrogation Program and throughout the life of the program, the legal justifications for the CIA's enhanced interrogation techniques relied on the CIA's claim that the techniques were *necessary to save lives* [emphasis added]. (The Committee report 2012, 5.)

In March 2002, the CIA submitted to the Department of Justice various examples of the 'effectiveness' of the CIA's EIT that were inaccurate. OLC memoranda signed in May 30, 2005, and July 20, 2007, relied on these representations, determining that the techniques were legal in part because they produced 'specific, actionable intelligence' and 'substantial quantities of otherwise unavailable intelligence' that saved lives. (The Committee report 2012, 5)

#### **4.2. The topos of law—legitimate harm**

In theory, the prohibition on torture is meant to be absolute and to know no exceptions. In practice, however, law is fundamentally contingent and allows torture simultaneously to be absolutely prohibited and yet lawfully practiced. In theory, the question of whether or not torture might be useful should be irrelevant to the law. In practice, the utilitarian and pragmatic arguments justify the torture practices (Cohen 1996, 531; 2001, 91-92, 110). In stressing the importance of the effectiveness of the enhanced interrogation techniques in determining their lawfulness, the Commission report relativizes the absolute ban on torture by weighing it against its possible

positive outcomes or, does not consider enhanced interrogation techniques torture to begin with. This results in silencing the question of torture from the outset.

Relativizing the question of torture shows that the topoi of law and threat seem to merge together both in the Commission report and CIA's response, since the security arguments belonging to the topos of threat permeate the legitimacy arguments of the topos of law as the harm is considered relative to the allegedly positive outcome of causing it. In other words, relative harm is equated with legitimate harm. One would expect that the question of whether the enhanced interrogation techniques amounted to torture would be at the center of the whole discussion about the enhanced techniques and the focus of the Committee report. However, there are only a few direct references to torture in the report, and the explicit discussion of whether or not the detainees were tortured is in fact completely silenced. The only time the treatment of the CIA detainees is explicitly described as torture is in the Foreword by the committee chair, Feinstein:

[I]t is *my personal conclusion* [emphasis added] that, under any common meaning of the term, CIA detainees were tortured. (The Committee report 2012, Foreword by Chairman Feinstein, 4.)

Other explicit statements on whether or not the detainees were tortured are made by the International Red Cross, the torture victim Majid Khan, the Office of Medical Services and Senator McCain, who are quoted or referred to in the report (the Commission report, 89 [footnote 497], 160, 213, 447). In the report itself the word torture appears mainly in the contexts of legal evaluation and policy outlines without any conclusion on whether or not the enhanced interrogation techniques amounted to torture. As to the legality of the enhanced interrogation techniques, Committee chair Feinstein states in her foreword that in her opinion, the use of 'brutal interrogation techniques' was 'in violation of U.S. law, treaty obligations, and our values' (the Committee report 2012, Foreword, 2). However, in the report itself, there are no conclusions concerning the legality of these techniques other than stating that the CIA used techniques that had not been approved by the Department of Justice or by the CIA headquarters (The Committee report 2012, Conclusion no 14, 12).

In the CIA's response, the word torture is only mentioned a handful of times on pages 4-5. The response does include an explicit condemnation of the enhanced interrogation techniques, but without describing them as torture, and made only in a personal comment by the director of the CIA, John O. Brennan:

*I personally* [emphasis added] remain firm in my belief that enhanced interrogation techniques are not an appropriate method to obtain intelligence and that their use impairs our ability to continue to play a leadership role in the world. (CIA 2013, Foreword by DCI Brennan, 1.)

Silencing explicit discussion on torture in this way alters the perception of possible harm caused by the use of enhanced interrogation technique to the detainees since,



as long as it was not torture, it was not that bad, and more importantly, it was legal. When the question of legality seems too difficult, it can be silenced altogether. In the CIA's response, the question of 'rectal feeding' is completely silenced. The Committee report questions the appropriateness of 'rectally hydrating' and 'feeding' detainees on hunger strikes. According to the Committee study, the detainee Majid Khan (MK) was

subjected to involuntary rectal feeding and rectal hydration [...] MK's 'lunch tray', consisting of hummus, pasta with sauce, nuts, and raisins was 'pureed' and rectally infused. Additional sessions of rectal feeding and rectal hydration followed. (The Committee report 2012, 115.)

The CIA's response lacks a single mention of 'rectal feeding' and comments only on 'rectal hydration'. The response legitimizes its use by alleging that it is a medically acknowledged technique:

The Study alleges that the CIA used rectal rehydration techniques for reasons other than medical necessity. [...] Medical personnel who administered rectal rehydration did not do so as an interrogation technique or as a means to degrade detainees but, instead, utilized the well-acknowledged medical technique to address pressing health issues. (CIA 2013, Comments 55.)

## 5. The perception of the other

### 5.1. Merging the topoi of law and threat—the dangerous and blameworthy other

The Committee report does not identify the detainees subjected to the so-called enhanced interrogation techniques as victims. Instead, the role of the victim is reserved solely for the victims of the terrorist attacks on September 11, 2001. The Committee report begins with the foreword by senator Feinstein, who creates the context for the whole report by commemorating the victims whose suffering resulted in the war on terror:

I recall vividly watching the horror of that day, to include the television footage of innocent men and women jumping out of the World Trade Center towers to escape the fire. The images, and the sounds as their bodies hit the pavement far below, will remain with me for the rest of my life. It is against that backdrop [...] that the events described in this report were undertaken. Nearly 13 years later, the Executive Summary and Findings and Conclusions of this report are being released. They are highly critical of the CIA's actions, and rightfully so. Reading them, it is easy to forget the context in which the program began—not that the context should serve as an excuse, but rather as a warning for the future. (The Committee report 2012, Foreword by Chairman Feinstein, 1-2.)

*Innocence* is almost entirely reserved for the real and potential, predominantly

American, victims of terrorist attacks. The CIA documents and OLC memoranda quoted in the Committee report show how the justification of the detention and interrogation program was built upon the rescue narrative, in which the emphasis was on the innocent lives that were saved:

As the President explained (on September 6, 2006), 'by giving us information about terrorist plans we could not get anywhere else, the program has saved innocent lives.' (The Committee report 2012, 177, footnote 1057.)

In addition to the distinction between the innocent victims of terrorist attacks and the terrorists, the Committee report constructs an implicit distinction between the detainees who were actually dangerous and wrongfully captured. The report in itself contains few qualitative descriptions of the detainees. The dangerous terrorist appears in the report indirectly, in the quotations from the material used in the Committee investigations, such as in this quote from President Bush:

On March 8, 2008, President Bush vetoed the Intelligence Authorization Act for Fiscal Year 2008 that banned coercive interrogations. [...] Addressing the use of the CIA's enhanced interrogation techniques, President Bush stated that the 'main reason' the CIA program 'has been effective is that it allows the CIA to use specialized interrogation procedures to question a small number of the most dangerous terrorists under careful supervision.' (The Committee report 2012, 170.)

The wrongfully captured detainees are discussed directly. The Committee report concludes that of the 119 known detainees at least 39 were subjected to the enhanced interrogation techniques, and at least 26 were 'wrongfully held and did not meet the detention standard in the September 2001 Memorandum of Notification' (the Committee report 2012, Conclusions 12). From the legal perspective, the distinction between the actually dangerous detainees and those wrongfully captured is very important. The Committee makes an implicit remark on the way in which the dangerousness of the detainees and the legal assessment of the enhanced interrogation techniques are linked, and effectively states that had the detainees in fact been as dangerous as the CIA claimed, the legal assessment of the interrogation techniques by the OLC would have been correct:

OLC memoranda signed on May 30, 2005, and July 20, 2007, relied on [the] representations [provided by the CIA], determining that the techniques were legal in part because they produced 'specific, actionable intelligence' and 'substantial quantities of otherwise unavailable intelligence' that saved lives. (The Committee report 2012, 5.)

The CIA's response discusses many of the detainees by name and abbreviations of their names. They are described as highly organized and trained to conduct terrorist attacks and resist various interrogation techniques, and some of them as high-ranking in their terrorist networks. This makes them the perfect enemy to fit to the

topos of threat. The possibility that individuals guilty of terrorism could also be a victim themselves at the same time is implicitly denied.

We assess to this day that Padilla was a legitimate threat who had been directed to use his training in Afghanistan, funding from al-Qa'ida, and US passport to put together a plan to attack tall residential buildings. (CIA 2013, Examples 5.)

Hassan Gul told CIA interrogators in January 2004 about al-Qa'ida's compartmented external operations training program in Pakistan's tribal areas. At the time of his arrest, CIA believed based on a body of intelligence that Gul facilitated for al-Qa'ida's senior-most leaders, placing him in a position to know details of the group's operational plans. (CIA 2013, Examples 29.)

CIA had multiple threads of reporting indicating that Zubaydah was a dangerous terrorist, close associate of senior al-Qa'ida leaders, and was aware of critical logistical and operational details of the organization, whether or not he held formal rank in al-Qa'ida. (CIA 2013, Conclusions 32.)

In general, the people subjected to enhanced interrogation techniques are referred to by the CIA as 'detainees', 'captives', 'terrorists' and 'the enemy'. These expressions impersonalize the victims of torture and attach a negative connotation to them. But more importantly, they have legal weight as well. Detainee is a term used in a legal sense for describing someone being held captive without being convicted or, possibly even suspected of or charged with a crime. Interestingly, the topoi of law and threat intertwine in the CIA's comments at this point, since the legal term detainee is not only descriptive but prescriptive, as it is inextricably combined with the connotation of danger.

The CIA acknowledges that it did indeed detain individuals who 'failed to meet the proper standard for detention', but insists that the number of such individuals was smaller than is estimated in the Committee report. According to the CIA, the report 'applies too much hindsight in reaching its conclusion that 26 individuals were wrongfully detained, ignoring key facts that, at the time, drove rational CIA decision-making' (CIA 2013, Conclusions, 51). At this point, the CIA response does not reflect further the 'rational CIA decision-making' or the facts upon which it was based. However, the connotation is that the CIA operated *rationally* and relied upon *facts* at all times. Detaining some individuals who 'failed to meet' the detention criteria was unfortunate but necessary collateral damage.

Together with the alleged effectiveness of the enhanced interrogation techniques, the perception of the other as a danger to national security is apt for relativizing the perception of harm in the CIA's response. As the detainee subjected to the enhanced techniques is dangerous (i.e., blameworthy, partially responsible for his own suffering), and the enhanced techniques are effective, the use of enhanced techniques is necessary and rational for the protection of national security, and *therefore* legally justifiable. Relativizing the perception of harm through identifying the detainees as dangerous and as such useful for intelligence purposes becomes

legally relevant when the prohibition of torture and cruel and inhumane treatment is not considered absolute in practice, despite seemingly holding on to the idea.

## 6. Concluding remarks

In this article I have applied a modified version of an analytical framework developed by Hansson, and discussed the way in which the perception of the self, harm, and the other are produced in the *topoi* of law and threat. My analysis leans on Veitch's perspectives on the law's irresponsibility. According to him, law has become the ultimate measuring stick. Law, in other words, is a moral trump card despite being strictly separated from ethics and moral, as the law extends its influence beyond the legal realm (Veitch 2007, 81).

The analytical tool presented in table 1 is intended to serve as a ready-to-hand device for analyzing responsibility and blame avoidance in texts and especially in legal language. My analytical aim was to illustrate how discursive strategies contribute to atrocities, in this case torture, possibly re-occurring by showing how the topic is ultimately silenced and deflected in the 'torture report' by the Senate Select Committee of Intelligence, and CIA's response. I have also introduced the possibilities of discourse analysis for creating a deeper understanding of how law produces irresponsibility.

As a concluding remark, it can be argued that the CIA operates with both the *topos* of law and *topos* of threat in that their own agency is portrayed as sincere and law-abiding, the harm caused as relative and legal, and the other, i.e. the victim, as dangerous and blameworthy. The Committee report in turn undermines the *security arguments* of the *topos* of threat used by the CIA. It questions the necessity of the use of the enhanced interrogation techniques and the sincerity of the CIA officials in applying those techniques and communicating with other officials and the public, and it questions the level of danger some of the detainees posed to the US.

However, the *legitimacy arguments* of the *topos* of law remain almost intact in the Commission report since, although the CIA is depicted as responsible for the flaws in the OLC's legal assessment of the enhanced techniques, the legality or illegality of the techniques is not explicitly considered, apart from senator Feinstein's personal comment that the detainees were tortured. In fact, the question of the legality of the interrogation techniques is left at the rather brief mention that had the information on the effectiveness of the techniques provided by the CIA been correct, the legal assessment of the program might have been different. This is a rather disquieting conclusion, as the prohibition of torture, cruel and inhuman treatment is not intended to be relative, i.e., should not take into account the possible effectiveness of such treatment. This brings us back to Luban's argument that despite torture being seemingly completely incompatible with liberal political culture, instrumentalization of torture transforms the 'barbaric' torture into potentially useful practices. For the same reason it is essential to emphasize the lack of intent to cause

pain to the detainees.<sup>17</sup> Moreover, despite the necessity of the enhanced techniques being disputed, their lawfulness is not, save a personal remark by Feinstein.

Rather than showing flaws in the legal assessment of the enhanced interrogation techniques, the above is a telling example of the way in which the legal language works, and is meant to work. The question of legality is always relative and contestable, and can be deflected by the use of words; for example, discussing the *enhanced interrogation techniques* rather than *torture* allows a much wider discursive leeway to begin with, and also allows the question of torture to be left untouched.

The observed merging of the topos of law and the topos of threat gives ground for another hypothesis, which, for law, is even more profound. It is quite possible that the merging of the topoi thus detected contribute to the way in which responsibility and blame are discursively deflected, and indicate that the law has an apologetic function, providing a framework onto which discursive strategies from other topoi, such as the topos of threat, can be inserted and made relevant in the logic of law. The legal language seems porous, as it absorbs arguments from foreign topoi. This finding can be used for analyzing *how* the legal language can be used to deflect responsibility.

Admittedly the Committee report was not intended as an assessment of the lawfulness of the use of the enhanced interrogation techniques or other conduct by the CIA, but was meant to serve as a fact-finding mission into the detention and interrogation program and torture allegations made against the CIA (Miller 2009). However, contrary to the explicit aim of the Senate Select Committee on Intelligence, the discursive strategies they use re-legitimize the use of the enhanced techniques.<sup>18</sup> Fact-finding, when not combined with admitting responsibility for the facts found, is not enough to ensure that the same will happen ‘never again’.

---

17 Luban 2005; see also Del Rosso 2014, 389; Hooks & Mosher 2005, 1633.

18 President Obama has announced that the Department of Justice would not pursue criminal proceedings against those CIA officers who participated in interrogations which were carried out consistently with the legal memoranda issued by the Office of Legal Counsel. The Department of Justice initially announced that it would review the legality of destruction of interrogation recordings by the CIA, and the potentially unauthorized interrogation techniques by the CIA officers. In 2011, the investigation was narrowed down to the death of two detainees, and in 2012 the Department of Justice announced that it would not seek to prosecute any CIA officers in connection to the deaths (Los Angeles Times 2014).



## Bibliography

Berenson, Tessa: A Timeline of the Interrogation Program. *Time*, 9 December 2014. Available on <http://time.com/3625181/senate-torture-report-timeline/> (visited 18 December 2015).

Bradbury, Steven G.: Memorandum for the Files: Re: Status of Certain OLC Opinions issued in the Aftermath of the Terrorist Attacks of September 11, 2001. U.S. Department of Justice, Office of Legal Counsel, 15 January 2009. Available on <http://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf> (visited 18 December 2015).

Bradbury, Steven G.: Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees. U.S. Department of Justice, Office of Legal Counsel, 20 July 2007. Available on <https://www.aclu.org/sites/default/files/torturefoia/released/082409/olc/2007%20OLC%20opinion%20on%20Interrogation%20Techniques.pdf> (visited 18 December 2015).

Bradbury, Steven G.: Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities. U.S. Department of Justice, Office of Legal Counsel, 31 August 2006. Available on: <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-rizzo2006.pdf> (visited 18 December 2015).

Bradbury, Steven G.: Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency. Re: Application of U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee. U.S. Department of Justice, Office of Legal Counsel, 2005a, 10 May 2005. Available on <http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-3.pdf> (visited 18 December 2015).

Bradbury, Steven G.: Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees. U.S. Department of Justice, Office of Legal Counsel, 2005b, 30 May 2005. Available on [http://media.luxmedia.com/aclu/olc\\_05302005\\_bradbury.pdf](http://media.luxmedia.com/aclu/olc_05302005_bradbury.pdf) (visited 4 April 2016).

Bybee, Jay S.: Memorandum for Alberto R. Gonzales, Counsel to the President. Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. US Department of Justice, Office of Legal Counsel, 1 August 2002. Available on <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf> (visited 9 May 2016).

Central Intelligence Agency: CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention and Interrogation Program 2013. Available on [http://www.nytimes.com/interactive/2014/12/09/world/document-cias-response-to-the-senate-torture-report.html?\\_r=0](http://www.nytimes.com/interactive/2014/12/09/world/document-cias-response-to-the-senate-torture-report.html?_r=0) (visited 8 March 2016).

Cohen, Andrew: The Torture Memos, 10 Years Later. *The Atlantic* 6 February 2012. Available on <http://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/> (visited 4 April 2016).

Cohen, Stanley: 'Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims'. 18 *Human Rights Quarterly* (1996) 517-543.

Cohen, Stanley: *States of Denial. Knowing about Atrocities and Suffering*. Cambridge, Polity 2001.

Cover, Robert M.: 'Violence and the Word'. 95 *Yale Law Journal* (1986) 1601-1629.

Cover, Robert M.: 'Nomos and Narrative'. 97 *Harvard Law Review* (1983) 4-68.

Daugherty Miles, Anne: Perspectives of Enhanced Interrogation Techniques. Congressional Research Service 2015. Available on <https://www.fas.org/sgp/crs/intel/R43906.pdf> (visited 18 December 2015).

Del Rosso, Jared: 'The Toxicity of Torture: The Cultural Structure of US Political Discourse of Waterboarding'. 93(1) *Social Forces* (2014a) 383-404.

Del Rosso, Jared: 'Textuality and the Social Organization of Denial: Abu Graib, Guantanamo, and the Meanings of U.S. Interrogation Policies'. 29(1) *Sociological Forum* (2014b) 52-74.

Gonzales, Alberto R.: Decision Re Application of the Geneva Convention on the Prisoners of War on the Conflict with al Qaeda and Taliban. Memorandum for the President, 25 January 2002. Available on <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.25.pdf> (visited 18 December 2015).

Fairclough, Isabela & Norman Fairclough: *Political Discourse Analysis. A Method for Advanced Students*. Routledge, London 2012.

*Hamdan v. Rumsfeld* No. 05-184, June 29, 2006.

Hansson, Sten: 'Discursive Strategies of Blame Avoidance in Government: A Framework for Analysis'. 26(3) *Discourse & Society* (2015) 297-322.

Hooks, Gregory & Clayton Mosher: 'Outrages Against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror'. 83(4) *Social Forces* (2005) 1627-1646.

Human Rights First: Senate Report on CIA Torture: Frequently asked questions. Available on <http://www.humanrightsfirst.org/sites/default/files/SSCI-Report-FAQ-FINAL.pdf> (visited 9 May 2016).

Human Rights Watch: G & A: Military Commissions Act of 2006 Human Rights Watch 2006. Available on <https://www.hrw.org/legacy/backgrounders/usa/qna1006/usqna1006web.pdf> (visited 18 December 2015).

Kerruish, Valerie: 'Responding to Kruger: the constitutionality of genocide'. 11 *The Australian Feminist Law Journal* (1998) 65-82.

Lakoff George: *The Political Mind. Why You Can't Understand 21st-Century American Politics with an 18th-Century Brain*. Penguin Group, New York 2008.

Levin, Daniel L.: Definition of Torture Under 18 U.S.C. §§ 2340-2340A. Memorandum Opinion for the Deputy Attorney General. Department of Justice, Office of Legal Counsel, 30 December 2004. Available on [http://www.justice.gov/sites/default/files/olc/opinions/2004/12/31/op-olc-v028-p0297\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2004/12/31/op-olc-v028-p0297_0.pdf) (visited 18 December 2015).

Los Angeles Times: The History of the CIA Detention and Interrogation Program. 2014. Available on <http://www.latimes.com/nation/la-na-timeline-of-cia-interrogation-program-20141209-story.html> (visited 8 September 2015).

Luban, David: 'Liberalism, Torture, and the Ticking Bomb'. 91 *Virginia Law Review* (2005) 1425-1461.

Miller, Greg: Senate to investigate CIA's actions under Bush. *Los Angeles Times*, 27 February 2009. Available on <http://articles.latimes.com/2009/feb/27/nation/na-cia-secrets27> (visited 8 September 2015).

Office of Legal Counsel: About the Office. Available on <https://www.justice.gov/olc> (visited 9 May 2016).

Powell, Colin L.: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan. United States Department of State, 26 January 2002. Available on <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.26.pdf> (visited 18 December 2015).

Reisigl Martin & Ruth Wodak: *Discourse and Discrimination. Rhetorics of Racism and Antisemitism*. Routledge, London 2001.

Schröter Melani: *Silence and Concealment in Political Discourse*. John Benjamins, Amsterdam 2013.

Scollon Ron: *Analyzing Public Discourse. Discourse Analysis in the Making of Public Policy*. Routledge, London 2008.

Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program 2012. Available on <https://www.amnestyusa.org/pdfs/sscistudy1.pdf> (visited 8 March 2016).

Taft, William H.: Memorandum to Counsel to the President. Comments on Your Paper on Geneva Convention. Department of State, 2 February 2002. Available on [http://www.nytimes.com/packages/html/politics/20040608\\_DOC.pdf](http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf) (visited 18 December 2015).

Tenet, George: Guidelines on Interrogations Conducted Pursuant to the (redacted). 28 January 2003. Available on [http://doc.wrlc.org/bitstream/handle/2041/72458/00595\\_030128\\_001display.pdf?sequence=3](http://doc.wrlc.org/bitstream/handle/2041/72458/00595_030128_001display.pdf?sequence=3) (visited 18 December 2015).

The New York Times: A Guide to the Torture Memos. 2005. Available on <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html> (visited 18 December 2015).

Van Dijk Teun A.: 'Discourse and the Denial of Racism'. 3(1) *Discourse & Society* (1992) 87-118.

Van Leeuwen Theo: 'The Representation of Social Actors'. In Carmen Rosa Caldas-Coulthard & Malcolm Coulthard (eds): *Texts and Practices. Readings in Critical Discourse Analysis*. Routledge, London 1996, 32-70.

Van Leeuwen Theo: *Discourse and Practice. New Tools for Critical Discourse Analysis*. Oxford University Press, New York 2008.

Van Leeuwen Theo: 'Legitimation in Discourse and Communication'. 1(1) *Discourse & Communication* (2007) 91-112.

Van Leeuwen, Theo & Ruth Wodak: 'Legitimizing Immigration Control—A discourse-Historical analysis'. 1(1) *Discourse Studies* (1999) 83-119.

Veitch, Scott: *Law and Irresponsibility. On the Legitimation of Human Suffering*. Routledge-Cavendish, Abingdon 2007.

Wodak, Ruth: 'Blaming and Denying: Pragmatics'. In Keith Brown (ed): *Encyclopedia of Language & Linguistics*, 2nd edn., vol. 2. Oxford, Elsevier, Oxford 2006, 59-64.

Yoo, John: Memorandum for William J. Haynes II General Counsel, Department of Defense. Application of Treaties and Laws to al Qaeda and Taliban Detainees. US Department of Justice, Office of Legal Counsel, 2002a, 9 January 2002. Available on <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.09.pdf> (visited 18 December 2015).

Yoo, John: U.S. Dept. of Justice Memo from Deputy Assistant Attorney General John Yoo To Alberto R. Gonzales, White House Counsel, 2002b, 1 August 2002. Available on <http://news.findlaw.com/nytimes/docs/doj/bybee80102ltr.html> (visited 18 December 2015).

Žagar, Igor Ž: 'The Use and Misuse of Topoi: Critical Discourse Analysis and Discourse Historical Approach'. *Rozenberg Quarterly* (2010). International Association for the Study of Argumentation. Available on <http://rozenbergquarterly.com/issa-proceedings-2010-the-use-and-misuse-of-topoi-critical-discourse-analysis-and-discourse-historical-approach/>.

# Writing Contagion as Cancer: Law, Gender and HPV Vaccination in Australia

Joanne Stagg-Taylor\*

*By way of background, HPV is a sexually transmitted infection, mostly affecting women 20 to 24 years of age. Almost all abnormal Pap smear results are caused by HPV. In 98 per cent of cases, HPV clears by itself. In rare cases, if the virus persists and if left undetected, it can lead to cervical cancer.<sup>1</sup>*

Senator Jan McLucas<sup>2</sup>

*When a girls' focus group was asked if boys could catch HPV, all of the girls answered 'no'.<sup>3</sup>*  
Cooper Robbins et al.

## 1. Introduction

Australia was the first country to implement a national human papillomavirus ('HPV') vaccination program (Leask, Jackson, Trevena, McCaffery & Brotherton 2009, 5510). The program commenced in April 2007 (Garland, Skinner & Brotherton 2011, 531-532). The HPV vaccination program targeted young women and girls from 12 to 26 for government-subsidised HPV vaccination.<sup>4</sup> The program delivered routine school vaccinations for 12-year-old girls, with older school girls offered school-based vaccinations during the initial program period. Young women up to 26 years old were

---

\* Lecturer in Law, Griffith Law School, Griffith University, Queensland, Australia.

1 Parliamentary debates, Senate, 9 August 2007, 62, Senator Jan McLucas.

2 Australian Senate Debates for introduction of the Australian *National Health Amendment (National HPC Vaccination Program Register) Bill 2007* Cth. The figures quoted are incorrect. Men are infected with HPV at approximately equal rates to women (Giuliano, Anic & Nyitray 2010 S16).

3 Cooper, Bernard, McCaffery, Brotherton, Garland & Skinner 2010, 3400-3401.

4 Similar programs based upon free or subsidized programs are available in a number of countries. Towghi (2013) discusses Indian programs, while others discuss programs in New Zealand (Parker 2010), Canada (Connel & Hunt 2010) and a global overview, including of free and subsidized programs in Europe and the UK, which they compare to the lack of similar programs in many developing countries (Mishra & Graham 2012).



offered free vaccination via their general practitioner from 2007 to 2009 (Ibid., 531-532). From 2013 the HPV vaccine was also offered to school boys.<sup>5</sup> Uptake in girls was high, with the latest statistics for 12-13-year-old girls showing 77% had received all three required doses of the HPV vaccine.<sup>6</sup> 67% of 12-13-year-old boys were also vaccinated.<sup>7</sup>

The Australian HPV vaccination program was established using ministerial powers in the *National Health Act 1953* (Cth). The Federal Health Minister may determine a vaccine to be a designated vaccine, if the Pharmaceutical Benefits Advisory Committee has recommended to the Minister that the vaccine should be a designated vaccine.<sup>8</sup> Once the Minister has made the determination, the Minister may provide for the provision of designated vaccines,<sup>9</sup> meaning that the vaccine can then be provided free or at reduced costs as part of national vaccination programs. The Gardasil quadrivalent HPV vaccine was determined to be a designated vaccine for females aged 12-27 on 23 January 2007.<sup>10</sup> Boys aged 12-16 were added to the designation on 6 October 2012 for vaccination from 2013.

This paper examines Australia's reification of gendered discourses of health, contagion and consent in those human papilloma virus ('HPV') vaccination programs. HPV vaccination programs and registers in Australia are usually based upon patriarchal gendered concepts of women, and particularly unchaste women, as irresponsible and unclean, potential reservoirs of disease who must be regulated and registered to protect both themselves and wider society from the harms of HPV contagion and cancer. Cervical cancer and HPV prevention schemes use law to write normative gendered expectations which oblige women to internalise a constant pre-illness risk state which casts their bodies as inherently unruly and pathological. These legislative and administrative schemes require women to become complicit with state- and self-surveillance to gain state-mediated health protections. Building on the reasoning of Connel & Hunt 2010 about Canadian HPV vaccination regimes and Mara's work on US HPV vaccination, I examine the discursive gendering effects of HPV governance which mandates medical surveillance and biopolitical measures for health security which posit women as a source of cancer contagion. I also examine how legislation requires or inveigles women's complicity with legislative schemes and normative gendering to reduce HPV transmission while women seek to safeguard

5 Ali, Donovan, Wand, Read, Regan, Grulich, Fairley & Guy 2013, 349.

6 National HPV Vaccination Program Register 2015b. By 2014, the coverage for girls and women was:

- For 14-15 year olds, 84% had one dose, 81% had two doses and 75% had the full three dose course of vaccination.
- 16-17 year olds: 80%—one dose, 77%—two doses and 70%—all three doses.
- 18-19 year olds: 78%—one dose, 75%—two doses and 68% all three doses.
- 20-26 year olds: 66%—one dose, 60%—two doses and 52% all three doses.

7 National HPV Vaccination Program Register 2015c. For boys, who had been eligible for vaccination from 2013, the coverage details were:

- As at 2014, for boys 14-15, 75% had received one dose, 71%—two doses and 63% three doses.
- As at 2014, for boys 16-17, 18% had received one dose, 17%—two doses and 15% three doses.
- As at 2013, for boys 12-13, 78% had received one dose, 74%—two doses and 67% three doses.

8 *National Health Act 1953* (Cth). s9B.

9 Id.

10 *National Health (Immunisation Program—Designated Vaccines) Determination 2007* Cth. Sched 1.

their lives and health.

The paper briefly overviews the prevalence and effects of HPV viruses. Using examples from parliamentary debates and government HPV vaccination program materials, the next sections examine how the organization and messaging of the Australian national HPV vaccination program focuses on cervical cancer such that HPV has become synonymous with cervical cancer in Australian health care. I turn to consider the discursive effects of positioning HPV vaccination as cervical cancer prevention upon women, including how women are configured as disease prone and subject to dangerous sexuality. The next sections considers how discourses of HPV as cervical cancer further medicalise women and force them into a state of cervical cancer proto-illness. I then argue that discourses of HPV that medicalise women legitimise state moral regulation and paternalistic control in purported protection of women that in fact disempowers them. The final part of the paper examines how the paternalistic 'protection' of women becomes imposition of gendered norms justified by social health claims.

## 2. Risk, science and the HPV vaccine

Human papillomaviruses (HPV) are a family of viruses with over 100 strains (Jones, Coughlan, Reid, Sykes, Watson & Cook 2007, 52). They are colloquially referred to as wart viruses, because many HPV types cause warts. Several strains of HPV are also associated with cancers of the cervix, vulva, vagina, penis, anus, neck and oral areas (Parker 2010, 27; Mishra & Graham 2012, 57). Genetic testing of tumours show that HPV types 16 and 18 are associated with the majority of cervical cancers (70%)<sup>11</sup> as well as a significant proportion of anogenital (Parker 2010, 27) and oropharyngeal cancers (Mishra & Graham 2012, 57). Testing of tumours shows that the remaining cervical cancers are caused by other types of HPV infection.<sup>12</sup> Infection with cancer-associated strains of HPV does not automatically result in cancer. Approximately 90% of HPV infections clear spontaneously, through action of the affected person's immune system (Parker 2010, 27; World Health Organization 2014, 469). Only persistent infections are linked with cancers (Parker 2010, 27). Approximately 75% of all people who have been sexually active will be infected with one of the strains of sexually transmitted HPV (Id.). Both men and women are infected at approximately equal rates.<sup>13</sup>

Many HPV related cancers can be avoided via HPV vaccination.<sup>14</sup> Two HPV

11 Parker 2010, 27; Kulasingam, Connelly, Conway, Hocking, Myers, Regan, Roder, Ross & Wain 2007, 165.

12 Kulasingam Connelly, Conway, Hocking, Myers, Regan, Roder, Ross & Wain 2007, 165; other types include 31, 33, 35, 45, 52 and 58.

13 Smith, Lew, Walker, Brotherton, Nickson & Canfell 2011 9116. Giuliano, Anic & Nyitray 2010 S16.

14 Studies have found that HPV vaccination reduces HPV infections implicated in various non-cervical cancers, including oropharyngeal cancer (Herrero, Quint, Hildesheim, Gonzalez, Struijk, Katki, Porras, Schiffman, Rodriguez & Solomon 2013) and anal cancer (Palefsky, Giuliano, Goldstone, Moreira, Aranda, Jessen, Hillman, Ferris, Coutlee & Stoler 2011). Other experts have predicted reductions in non-cervical HPV-related cancers, based on vaccine uptake and aetiology of HPV-based cancers linked to HPV strains included in vaccines (Smith, Lew, Walker, Brotherton, Nickson & Canfell 2011; Burger, Nygård, Kristiansen & Kim

vaccines are commonly used in Australia: Gardasil and Cervarix. Merck's Gardasil is a quadrivalent vaccine against HPV types 6 and 11 (which cause genital warts) plus cancer-causing HPV types 16 and 18.<sup>15</sup> Glaxo Smith Kline's Cervarix is a bivalent HPV vaccine against types 16 and 18 (Towghi 2013, 336).

In testing involving numerous trials and over 20,000 women Gardasil was found to be 98-100% effective against HPV types 16 and 18 and 70-100% effective against types 6 and 11.<sup>16</sup> In some trials, there was also cross protection observed against 10 non-vaccine but genetically related HPV types.<sup>17</sup> Cervarix similarly 'demonstrated 100% efficacy against persistent infection and 93% against cytological abnormalities associated with HPV 16 and 18' for up to 4.5 years.<sup>18</sup> No serious adverse reactions have been reported in studies of either vaccine.<sup>19</sup>

Benefits of widespread HPV vaccination have already been demonstrated with a rapid decline in Australia of genital wart presentations at sexual health clinics.<sup>20</sup> However, cervical screening remains necessary to detect the approximately 30% of cervical cancers caused by HPV types not targeted by the vaccines.<sup>21</sup>

### **3. The cure for cancer discourse: writing contagion as cervical cancer**

The dominant discourse about the Gardasil and Cervarix HPV vaccines are that they are a cure for cervical cancer. In this section I will examine how HPV vaccines are positioned as cures for cervical cancer—the developers and purveyors of the HPV vaccine, including Ian Frazer, the original developer of the vaccine, position the HPV vaccine as a vaccine for cervical cancer to the exclusion of other HPV-based conditions—and how they originally targeted it to women despite the fact that HPV and HPV cancers affect all genders. I will go on to examine how the discourse of HPV as cervical cancer and a disease of women influenced Australian legislative debate, initial HPV vaccine implementation and HPV vaccine messaging to parents, patients and doctors in Australia. Non-cervical HPV conditions,<sup>22</sup> such

---

2014; Castle & Maza 2016; Shabbir, Barod, Hegarty & Minhas 2013; D'Hauwers, Depuydt, Bogers, Noël, Delvenne, Marbaix, Donders & Tjalma 2012; Schlecht, Burk, Nucci-Sack, Shankar, Peake, Lorde-Rollins, Porter, Linares, Rojas Strickler 2012; Barroso 2013.

15 Ali, Donovan, Wand, Read, Regan, Grulich, Fairley & Guy 2013, 346; Parker 2010, 27; Towghi 2013, 336.

16 Jones, Coughlan, Reid, Sykes, Watson & Cook 2007, 54; Thompson 2010, 124.

17 Jones, Coughlan, Reid, Sykes, Watson & Cook 2007, 54; Globerson 2007, 75.

18 Jones, Coughlan, Reid, Sykes, Watson & Cook 2007, 54.

19 Jones, Coughlan, Reid, Sykes, Watson & Cook 2007, 54; Raffle 2007, 376; Connel & Hunt 2010. 26 girls at a Melbourne school who were reported to develop dizziness, syncope and neurological symptoms after HPV vaccination were found to be suffering 'a psychogenic response to mass vaccination in a school setting' (Garland, Skinner & Brotherton 2011, 533).

20 Garland, Skinner & Brotherton 2011, 533; Ali, Donovan, Wand, Read, Regan, Grulich, Fairley & Guy 2013, 347.

21 Raffle 2007, 377; Leask, Jackson, Trevena, McCaffery & Brotherton 2009, 5505.

22 As discussed throughout Schlecht, Burk, Nucci-Sack, Shankar, Peake, Lorde-Rollins, Porter, Linares, Rojas and Strickler 2012.

oropharyngeal cancers<sup>23</sup> and anal<sup>24</sup> cancers, or male-associated cancers, such as penile cancers,<sup>25</sup> are often obscured by this discourse, to the detriment of thousands of both men and women who suffer from or die from these cancers each year.<sup>26</sup>

HPV vaccine developer Ian Frazer regularly referred to HPV vaccines as cervical cancer vaccines in articles discussing development of HPV vaccines<sup>27</sup> and commentary on the development process (Frazer 2010). His clear and laudable goal was to develop a vaccine for cervical cancer, one of the leading cancers experienced by women worldwide.<sup>28</sup> In one article, he stated that ‘The main public health goals of an HPV vaccine should be to reduce the incidence of cervical cancer and its precursor lesions’ (Lowy & Frazer 2002, 111).

The pharmaceutical companies who manufacture HPV vaccines, based upon Dr Frazer’s work, developed and position their HPV vaccines as cervical cancer vaccines. By its name alone, Cervarix implies a connection between HPV and the cervix. Merck’s early Gardasil HPV vaccine efficacy testing was based only on the appearance or prevention of cervical abnormalities, which are often a forerunner of cervical cancer (Mara 2010, 135). Though male and female test subjects were tested for initial immune response, success testing was clearly targeted at cervical cancer (Id.).

While there was no parliamentary discussion for the creation of the Australian HPV immunisation program, there were Australian Parliamentary debates about the related *National Health Amendment (National HPV Vaccination Program Register) Bill 2007* (Cth). Those debates include endorsements of the HPV vaccination program and illustrate legislator’s views on HPV vaccination and the girls who would undergo vaccination. Senators and Parliamentarians in those debates refer to HPV vaccination overwhelmingly in the context of preventing cervical cancer or because HPV strains covered by the vaccine are the cause of approximately 70% of cervical cancers.<sup>29</sup> As noted in the introduction to this paper, Senator Jan McLucas described HPV and its role in cervical cancers as follows:

---

23 As discussed in Schlecht, Burk, Nucci-Sack, Shankar, Peake, Lorde-Rollins, Porter, Linares, Rojas and Strickler 2012; Herrero, Quint, Hildesheim, Gonzalez, Struijk, Katki, Porras, Schiffman, Rodriguez & Solomon 2013.

24 As discussed in Palefsky, Giuliano, Goldstone, Moreira, Aranda, Jessen, Hillman, Ferris, Coutlee & Stoler 2011; Saxton, Petousis-Harris, Thomas & Turner 2014; Parada & Veerman 2016.

25 As discussed in Castellsagué, Bosch, Munoz, Meijer, Shah, de Sanjosé, Eluf-Neto, Ngelangel, Chichareon & Smith 2002; D’Hauwers, Depuydt, Bogers, Noël, Delvenne, Marbaix, Donders & Tjalma 2012; Shabbir, Barod. Hegarty & Minhas 2013.

26 The incidence and mortality rates of various cancers in Australia, including those linked with HPV, are discussed in Australian Government 2014. Particular relevant sections include C00-C06, C18-C21, C53, and Appendix G. For worldwide cancer incidence, also including incidence of HPV-based cancers, see Ferlay, Soerjomataram, Dikshit, Eser, Mathers, Rebelo, Parkin, Forman & Bray 2015.

27 For example in Frazer 2004; Frazer, Cox, Mayeaux, Franco, Moscicki, Palefsky, Ferris, Ferenczy & Villa 2006; Lowy & Frazer 2002.

28 Frazer, Cox, Mayeaux, Franco, Moscicki, Palefsky, Ferris, Ferenczy & Villa 2006, S65; Lowy & Frazer 2002 111, Frazer 2004, 46; and his account of the process and goals throughout Frazer 2010.

29 Parliamentary debates, House of Representatives, 8 August 2007, 153, Nicola Roxon MP, 154.

By way of background, HPV is a sexually transmitted infection, mostly affecting women 20 to 24 years of age. Almost all abnormal Pap smear results are caused by HPV. In 98 per cent of cases, HPV clears by itself. In rare cases, if the virus persists and if left undetected, it can lead to cervical cancer.<sup>30</sup>

Nicola Roxon MP, in the Australian House of Representatives used the same description of HPV infection rates and effects. Their description of HPV as ‘mostly affecting women 20 to 24 years of age’ was incorrect. Studies have placed male HPV infections rates as ‘broadly similar to that in females’,<sup>31</sup> or that ‘genital HPV infection prevalence among healthy men appears to be as high, or higher, than prevalence among women’ (Giuliano, A.R., G. Anic & A. G. Nyitray 2010, S16). The legislators’ HPV infection age ranges are also skewed, as immune indicators of HPV infection in 2005 (prior to HPV vaccination implementation) were highest for Australian women in the 30-39 age group and for men in the 40-59 year age groups.<sup>32</sup> In addition, both parliamentarians mention only cervical cancers rather than the broader range of HPV-caused cancers. Both situate HPV as primarily a disease of young women, rather than of middle-aged Australians of all genders.

Similarly, other parliamentarians referred to HPV as causing cervical cancer, HPV vaccines as cervical cancer vaccines or HPV as a disease of women, saying:

The Gardasil vaccine is a breakthrough in the treatment of cervical cancer, and the Howard government is very proud to be able to make it widely available to young Australian women. (Parliamentary debates, House of Representatives, Australia, 8 August 2007. Michael Johnson MP.)

The reasons for adding this new [HPV] vaccine to the program were clear. Cervical cancer is the world’s second most common gender-specific cancer amongst women and is currently responsible for the deaths of around 200 women in Australia each year. (Ibid., Dr Mal Washer MP.)

The need for this bill arose from the government’s 2006 announcement to fund free HPV vaccine for females in the 12- to 26-year-old age group through the National Immunisation Program with the aim of reducing the incidence of cervical cancer. (Ibid., Tanya Plibersek MP.)

The National HPV Vaccination Program, announced by the government in November 2006 and introduced in April this year, funds free HPV vaccine for females in the 12- to 26-year-old age group, with the aim of reducing the incidence of cervical cancer. (Ibid., Alex Somlyay MP.)

As the father of a 12-year-old girl, I see this bill as being absolutely vital—vitally important not only for my daughter but, indeed, for me and for the rest of my family, my son included, because none of us wants to lose a wife, a daughter or an aunty (Ibid., Patrick Famer MP.)

30 Parliamentary debates, Senate, 9 August 2007, 62, Senator Jan McLucas, 62.

31 Smith, Lew, Walker, Brotherton, Nickson & Canfell 2011, 9116.

32 Newall, Brotherton, Quinn, McIntyre, Backhouse, Gilbert, Esser, Erick, Bryan & Formica 2008, 1649-1650.



One parliamentarian, Michael Johnson MP, lionised the creator of HPV vaccines, Ian Frazer as, 'God's gift to women' (Ibid.). Most did not discuss the role of HPV infection in men or HPV-linked cancers other than cervical cancer.<sup>33</sup> Members of Parliament also frequently refer to the HPV Vaccination Program Register allowing for easy cross reference of material to Australian cervical cytology and cervical cancer registers, but not other cancer registers.<sup>34</sup>

The concentration on HPV in women and its link to cervical cancer, but little or no discussion of health effects on men or of non-cervical HPV cancers, elides the role of HPV in non-cervical conditions and positions women as the only people seriously affected by HPV. The characterisation of HPV as a disease 'mostly affecting [young] women' ignores that the majority of HPV positive women will have been infected by male partners and that men carry HPV at approximately the same rates as women.<sup>35</sup> This not only misrepresents HPV prevalence and infection routes, but characterises women as the source and repository of HPV infections in Australia.

Early Australian HPV vaccination program materials reinforced this discourse by concentrating strongly on the HPV vaccine as a vaccine for cervical cancer, or HPV as a precursor of cervical cancer.<sup>36</sup> Approximately 60% of HPV vaccine newspaper coverage in a 2009 study in Australia referred to the HPV vaccine as the 'cervical cancer vaccine', while fewer than 20% referred to it as a HPV vaccine (Cooper, Pang & Leask 2012, 154). This messaging raised the vaccine's profile, especially amongst those ignorant of HPV or the effects of the virus.<sup>37</sup> It created a sense of urgency for vaccination, which may have led to greater voluntary uptake of the vaccine (Parker 2010, 32).

More recent Australian HPV vaccination brochures and posters discuss HPV disease more generally, for example saying that the vaccination is for '(HPV), which can cause cancers and disease in males and females' or 'range of HPV-related cancers and disease' (Australian Government 2013c). Most specifically mention cervical cancer, while many, especially those aimed at high school students, do not identify other HPV-caused cancers.<sup>38</sup> Materials for or specifically about boys generally mention cervical cancer and the need to protect girls from it, in terms like, 'Vaccinating males will also help to protect females from cervical cancer and HPV-related disease by reducing the spread of the virus' (Australian Government 2013c).

Medical professionals use similar discourses of HPV and cervical cancer. An

33 Parliamentary debates, House of Representatives, Australia, 20 June 2007. Parliamentary debates, House of Representatives, Australia, 8 August 2007. Parliamentary debates, Senate, Australia, 9 August 2007. Parliamentary debates, House of Representatives, Australia 30 October 1996.

34 Parliamentary debates, House of Representatives, 20 June 2007, 10, Bruce Billson MP. 10 Parliamentary debates, House of Representatives, 8 August 2007, 153 Dr Mal Washer MP, 171 Alex Somlyay, 172.

35 Giuliano, Anic & Nyitray 2010, S16; Smith, Lew, Walker, Brotherton, Nickson & Canfell 2011, 9116.

36 Cooper, Bernard, McCaffery, Brotherton, Garland & Skinner 2010, 3401.

37 Gunasekaran, Jayasinghe, Brotherton, Fenner, Moore, Wark, Fletcher, Tabrizi, & Garland 2015, 829.

38 Australian Government 2013c; Australian Government 2014a; Australian Government 2013b; Australian Government 2013c; Australian Government 2013d; Australian Government 2014e; Australian Government 2014c; Australian Government 2014d; Australian Government 2014e; Australian Government 2014f.

Australian survey showed Australian GP's relied on resources which discussed the HPV vaccine primarily as a vaccine for cervical cancer, for example, the Australian Department of Health and Aging's *Immunisation provider guidelines: cervical cancer vaccination* (Brotherton, Leask, Jackson, McCaffery & Trevena 2010, 294). In the same survey, while most knew the vaccine was protective for cervical cancer, there was substantial GP confusion about cervical cancer aetiology (Id.) and what cervical abnormalities HPV vaccination affected (Id.). The vaccination program materials encouraged even GP's to link a gender neutral virus with cervixes and women's bodies.

Advertising HPV vaccines as cervical cancer vaccines has led to public confusion about effect and effectiveness of the vaccines. A 2006 South Australian study found only 54% of women knew of the link between HPV and Cancer (Pitts, Dyson, Rosenthal & Garland 2007, 179). A 2009 study of vaccinated Australian school girls and their parents showed they had little knowledge of HPV or the effects of the vaccine. In the same 2009 study, girls assumed that the HPV vaccine was only relevant to the female reproductive system, showing confusion when asked what the vaccine was called, calling it 'The Cervix Needle' and 'The Vagina Cancer' (Cooper, Bernard, McCaffery, Brotherton, Garland & Skinner 2010, 3401). Many girls and parents responded 'no' when asked if they understood what HPV was (Id.).

For surveyed girls and parents who knew that HPV was linked to cervical cancer, many used the terms HPV and cervical cancer interchangeably and 'more often than not, participants offered that they were not sure what the difference was between the two' (Id.). The majority of study participants thought that vaccinated girls were completely protected against cervical cancer (Id.). One parent cited the then-running Australian HPV vaccination program television advertisements saying '[. . .] just the adverts on TV. It just brought across the idea to most people that this is the thing that is going to stop you getting cervical cancer' (Id.).

Even more recently in 2014, Gunasekaran et al found that many HPV vaccinated women thought that they had been vaccinated for cervical cancer (89% of the study cohort) while fewer had heard of HPV vaccines (76%).<sup>39</sup> When asked why they would get a HPV vaccine, overwhelmingly, the response was to protect against cervical cancer (96%) or to 'join the fight against cervical cancer'.<sup>40</sup> When the vaccine was described as a HPV vaccine rather than a cervical cancer vaccine, 19% of the 2014 respondents were unsure whether they had been vaccinated, which the authors considered due at least in part to the 18% gap in participant knowledge between the existences of so-called cervical cancer vaccines versus HPV vaccines.<sup>41</sup>

There are serious implications arising from conception of the HPV vaccines as cervical cancer vaccines. It creates an impression that HPV *is* cervical cancer and that the HPV vaccine prevents all cervical cancers. Women may neglect ongoing cervical testing for abnormalities caused by HPV strains not included in the vaccines.

---

39 Gunasekaran, Jayasinghe, Brotherton, Fenner, Moore, Wark, Fletcher, Tabrizi, & Garland 2015, 828.

40 Id.

41 Ibid., 829.

The idea of HPV as only cervical cancer also ignores its role in other anogenital cancers,<sup>42</sup> oral cancers and oesophageal cancers (Globerson 2007, 71). This may explain significantly lower male vaccination rates<sup>43</sup> which leave boys vulnerable to a range of preventable HPV-related cancers.

The strong public discourse of HPV created the impression that it was a uniquely female STD. This was so strong in 2009 that the girls in Cooper Robbins' focus group study thought unanimously that boys could not get HPV (Cooper, Bernard, McCaffery, Brotherton, Garland & Skinner 2010, 3400-3401). One participant stated that boys could not catch HPV because, 'Boys don't have cervix' (Ibid., 3401). Another thought 'It's an STI, and it only happens to girls' (Id.). One girl reasoned that HPV could be related to sex because 'I think if you're sexually active, then that's when, it like makes your body trigger that you can have you can contract the virus' (Ibid., 3400). Such misconceptions reinforces gendered tropes of women as having inefficient, disease prone bodies and men as healthier and physically superior to women, unable to catch or harbour HPV. It also reinforces ideas around women's sexuality as dangerous, vulnerable to disease and corruption, requiring social supervision for the safety of women and society as a whole.

#### 4. Medicalisation of women

The idea that HPV viruses, vaccines and HPV-linked cancers relate only to cervical cancer replicates a long-term discourse that medicalises<sup>44</sup> women's bodies (as canvassed in Mara 2010, 125). Healthy female-sexed bodily functions, such as menstruation, pregnancy and breast feeding, are subject to medical oversight, supervision and intervention in ways that male-specific<sup>45</sup> bodily processes rarely are (Id.). The explicit focus on cervical cancer in Australian HPV vaccination program literature<sup>46</sup> reiterates that only cervixes, usually identified with cis women,<sup>47</sup> are at danger from HPV.

The medicalisation of women's bodies arises from and reinforces the tropes

---

42 Ibid., 829-830.

43 The male immunisation rates as at 2014 (latest data) were approximately 10% of the population lower for boys aged 12-15 compared to similarly aged girls and much lower in the 16-17 year old age group (15% of boys vaccinated versus 70% of girls for full vaccination) National HPV Vaccination Program Register 2015a. National HPV Vaccination Program Register 2015b, National HPV Vaccination Program Register 2015c. National HPV Vaccination Program Register 2015d.

44 'Medicalisation describes a process by which nonmedical problems become defined and treated as medical problems, usually in terms of illnesses or disorders' (Conrad 1992, 209).

45 In this section, I am using the terms 'male' and 'female' in the same way that West and Zimmerman (1987) use 'sex' descriptors. It is not intended to denote the gender identity of possessors of vulvas and cervixes or penis and testes.

46 Australian Government 2013c; Australian Government 2014a; Australian Government 2013b; Australian Government 2013c; Australian Government 2013d; Australian Government 2014e; Australian Government 2014c; Australian Government 2014d; Australian Government 2014e.

47 The term 'cis' denotes identifying as the gender which the person was assigned at birth or not trans gendered. A cis woman is a person who identifies as a woman and who was identified female at birth because she possesses a vulva.

that men's bodies are normalised and healthy while women's bodies are, as Aristotle argued, a 'mutilated male' (Ibid., 134), inherently faulty and unhealthy, frail and dangerous in a way that men's bodies are not (Ibid., 129). Cis women's bodies are still constructed as more primitive and closer to nature than men's (Ibid., 134) via discourses around menstruation and lactation. Marketing HPV as cervical cancer and HPV vaccination as a women's issue remind us that women's bodies are constructed as more primitive, more reproductively oriented and inferior, since the common construction of HPV is that from the same sexual act, it infects women then causes cancer in women's sexual organs but neither infects men nor causes cancers of the male anogenital area (ignoring HPV's role in penile, anal and other anogenital cancers of men). In gendering tropes, men must, therefore, be immunologically and structurally superior to the primitive female and her inferior, interior organs. Such a discourse can only flourish when information about male anogenital HPV-caused cancers is largely elided from public discourse.

The administration of a 'girl vaccine' becomes a gendering performance for medicalised female bodies (Mishra & Graham 2012, 64). For girls, it is a liminal experience, a symbolic penetration forecasting future female (hetero)sexuality as involving dangerous reproductive anatomy which may turn against women at any time. It reinforces that 'femaleness is a 'nonnegotiable' consequence of 'natural' anatomy' (Id.). For boys, when they were not being vaccinated,<sup>48</sup> the message was that their anatomy is impenetrable and independent of medical supervision (Mara 2010, 127) and their sexuality is healthy and immune from disease while girls who have sex are inherently prone to disease and disaster.

For boys in Australia now, vaccination program materials targeted to them rarely discuss specific HPV-linked cancers suffered only by men, but invariably mention the link between HPV and cervical cancer and often talk about protecting future female partners, talking about how 'Vaccinating males will also help to protect females from cervical cancer and HPV-related disease'.<sup>49</sup> For them, the message is multifold, that they will be heterosexual and that as heterosexual cis-males, their role is to protect female partners from uniquely disease-prone female anatomy.

Medicalisation of girls also legitimises differing levels of biopolitical control of women and differing legal approaches to health based on reproductive anatomy, formulating women's bodies as sites of 'contestation and conquest' (Thompson 2010, 122). As Mishra and Graham argue:

The 'naturalisation' of femaleness enables the programmatic control of 'female' bodies (Martin 2001). Thus, selves, others, organisations, institutions and pathogens are brought together in the clinical risk discourse around the uterine cervix. (Mishra & Graham 2012., 64.)

48 As in Australia until 2013 and in a range of other countries, including India (Towghi 2013) New Zealand (Parker 2010), Canada (Connel & Hunt 2010) and Texas (Mara 2010).

49 Australian Government 2014a; Australian Government 2013c; Australian Government 2013c; Australian Government 2014e.

If women's bodies are unpredictable and dangerous, then women can be coerced into giving up autonomy and agency for their own protection. The responsibility for not only their health, but partners' and children's health become attached to the greater expectation that women should take responsibility for reproductive health (Mara 2010, 125). Simultaneously, if women's bodies are unpredictable, unstable and prone to fail, this is generalised so that women's minds, emotions and physical abilities must also be Other (Ibid., 129), erratic, frail and less than the stereotyped male norms of strength, greater physical efficiency, bodily integrity and health (Thompson 2010, 124). This then leads to the enacting and subsequent active maintenance of tropes of the masculine as norm and the institutionalisation of sexism based on alleged bodily weakness and irrationality of women (Thompson 2010, 124; Mara 2010, 129). The need to control women's reproductive health justifies legal, social and governmental intervention that furthers the backlash against women's greater participation in public spaces since the 1970's (Globerson 2007, 102).

Control of the body is a fundamental and crucial form of social control (Mara 2010, 135; Shaw 2008, 55). The medicalisation of women's bodies through HPV interventions starts the chain of control which schools women to perceive their reproductive processes, immune systems and bodies as inherently faulty (Mara 2010, 135). The interventions and discussions around them 'can become cultural issues that jeopardise women's bodily autonomy' (Id.).

## 5. Risk and proto-illness

Australian vaccination program messaging which positions girls as potential carriers of cervical cancer, and boys as protectors of girls from cervical cancer creates a risk status and identity for women as inherently prone to serious disease encourages them to create new identities based on their liminal state of risk (Gillespie 2015, 983) and a state of pre- or proto-illness. Boys are exempted from considering themselves HPV cancer prone, by a lack of penile, anogenital and oropharyngeal disease messaging.

Those who undergo regular medical surveillance for risk 'hover for extended periods of time under medical attention between sickness and health, or more precisely, between pathology and an undistinguished state of "normalcy"' (Timmermans and Buchbinder 2010, 409). Being at risk becomes a 'prototypical experience' produced by 'a society that has come to rely on statistical distributions in the management of population health instead of symptomatology in the treatment of individual pathology' (Gillespie 2015, 975). Those who are at risk may begin to 'interpret preventive measures as treatment' (Ibid., 977) and display behaviours consistent with illness, such as seeking and following medical advice (Ibid., 974). The at-risk person begins to 'reside in a space between healthy and ill, with the likelihood of progressing toward illness' (Ibid., 983).

Targeting of cervical cancer in HPV vaccination programs creates a perceived risk category, which is added to lifelong medicalisation of women's bodies around cervical screening, menstruation, childbirth, lactation, menopause and other reproductive health (Mara 2010, 125). Girls are initiated during HPV vaccination



into a proto-illness state which strongly accords with a dichotomous social view of women as ill and men as inherently healthy (Courtenay 2000, 1388-1389). As a sex women are encouraged to seek and follow medical advice for the risk of being female throughout their lifespan, and conceptualise themselves in a state of proto-illness in ways that only at-risk men experience (Gillespie 2015, 980) while other men do not. Added to social discourses of men's bodies as inviolable, healthy and strong (see Courtenay 2000), the discourses of HPV risk as cervical cancer risk with deliberate vagueness about other HPV conditions, may moderate the risk creation effect of the vaccine for boys while simultaneously creating an at-risk experience for girls. Australian girls may come to experience their own bodies as a source of extraordinary risk, perceiving like the participants in Cooper Robbins study, that only possession of a cervix makes HPV dangerous. This is reinforced in a culture which recommends ongoing cervical testing and surveillance<sup>50</sup> for HPV-based cervical cancer for girls, but where no equivalent testing for men is recommended.<sup>51</sup>

## 6. Moral regulation

The risk status of women as in danger from HPV and as a dangerous source of HPV leads to state interventions to regulate HPV risks to and from women. The need to undergo HPV vaccination is coded as a moral act to protect girls from the dangers of cervical cancer and thence their own dangerous anatomy. Individual prophylactic health care itself becomes coded as first a public good which protects the population at large and then as a moral imperative to protect others from the dangerous infectious self (Connel & Hunt 2010, 67). Self-governance and submission to governmental programs themselves then become moral virtues required by the moral imperative of public health (Ibid.).

For HPV, the moral wrongness resides in the idea of women's bodies as faulty and the coding of women's sexual behaviours as the cause of HPV infections in themselves and their partners via messaging which concentrates on the effect of infection on women. Any rejection of vaccination in the proffered program format becomes an act endangering the public and demonstrating wilful selfishness. The moralisation of girls takes place via the vaccination and cervical screening discourses which place them as a public health danger which must be curbed via the regulation of their bodies, the direct injection of preventative (moralising) agents into their bodies and their lifelong surveillance by HPV vaccination and cervical screening registers.

Girls are also expected to demonstrate autonomy—in the sense of 'self-governance' (Mara 2010, 125-126)—and moral maturity by paradoxical submission

50 Surveillance of cervical cytology and cervical HPV testing in Australia is by way of state registers of testing and results. There is no similar testing regime for male-only health testing or for the majority of non-female specific regular health testing in Australia (Stagg-Taylor 2013, 572).

51 Anal Pap smear testing can detect HPV-based anal cancers in the same way that cervical Pap smears detect cervical cancer (Globerson 2007, 72), while penile scraping can detect HPV infection of the penis, but has been rejected in at least one study because male participants disliked it (Mara 2010, 135).

to external surveillance, medical control and law. The moralisation of girls requires self-regulatory compliance with social directives which place them as inherently diseased, irrational and subject to dangerous sexuality. To reach female sexual autonomy, they are disciplined to give up their sexuality and sexual health to social control. They are then encouraged to comply with long standing tropes of women as inherently sexual and a danger to sexual morality that places them as having either a sexuality of renunciation and refusal (Connel & Hunt 2010, 71) or dangerous and disordered lasciviousness (Globerson 2007, 97).

Setting cervical cancer as the endpoint of HPV vaccine interventions in legislative debates and vaccination program materials reinforces a trope that links HPV to women's sexual behaviour and raises discourses that justify control of women and their sexuality (Thompson 2010, 127). As Mara theorised in relation to HPV vaccination in Texas, 'Reminding girls and women of the dangers of cervical cancer encourages them to be fearful of a disease that is specific to their reproductive organs, while allowing males to remain free of such fears' (Mara 2010, 133). Women's bodies are 'necessarily sexualised' (Ibid., 129) for their departures from male physical genital norms configured as the neutral human form. Women are 'often addressed or interpellated in issues of health and sex' (Connel & Hunt 2010, 67-68) which means that any health intervention for women may be interpreted as gendered or sexual, especially if it is a matter related to women's genitals or secondary sexual characteristics.

This interpellation of sexuality into vaccination has led to fears that vaccinating girls for HPV would lead to promiscuity among young girls. The promiscuity discourses urging rejection of HPV vaccination common in the USA<sup>52</sup> and present in Australia (Biggs 2007, 10) are based in fears of women's sexuality as rampant and irresistible if not carefully controlled by fears of cancer. Fears of promiscuity in Australia mirror those of the religious right in the USA (Id.) and come in part from similarly religiously conservative groups. Right to Life WA 'raised concerns that the vaccine might create "not only moral dilemmas but physical dilemmas" for young girls regarding the appropriate age for the onset of sexual activity' (Id.). Some Western Australian parents refused consent to vaccination as a result of Right to Life's assertions (Id.). Some private religious schools refused to allow vaccination programs at the school due to school beliefs (Id.). The Australian Family Association's spokeswoman Gabrielle Walsh was concerned that 'Some parents feel it [HPV vaccination] gives children a sense they are going to be sexually active'.<sup>53</sup> She had also publically stated that

A lot of people are opposed to the prescriptive approach; it's not like this is a disease everyone is going to get. It's a culture leading them in that direction and it is probably not relevant for those girls [who abstain while not married]. (Quigley 2007.)

<sup>52</sup> USA promiscuity see discussions in Globerson 2007; Biggs 2007, 10; Brotherton, Leask, Jackson, McCaffery & Trevena 2010, 296.

<sup>53</sup> Parliamentary debates, House of Representatives, 8 August 2007. Tanya Plibersek MP.

Conservative Senator Barnaby Joyce (now Deputy Prime Minister of Australia) echoed those concerns in statements to a major national daily newspaper *The Australian*, warning about ‘the psychological implications or the social implications’ of the vaccine and that ‘There might be an overwhelming (public) backlash from people saying “don’t you dare put something out there that gives my 12-year-old daughter a license to be promiscuous”’ (Caldwell 2016). He later clarified: ‘It has been said by some that this could be taken as an entree to sexual activity [...] Of course my reply to that, “If the kid is under the age of consent that is a concern and you certainly need the parent’s involvement” and I stand by that’ (ABC News 2006). Other members of Parliament, such as Tanya Plibersek (now deputy leader of the Australian Opposition), acknowledged such fears of teenage sexuality but urged support for HPV vaccination despite them. Plibersek said that early sexuality was a reason to vaccinate because, ‘The uncomfortable truth for many people is that a high proportion of teenagers are actually sexually active... and that is another good reason to say it is very important to vaccinate against human papilloma virus from a young age.’<sup>54</sup> The *National Health Amendment (National HPV Vaccination Program Register) Bill 2007 Digest* also acknowledged the concerns of Right to Life WA and refusal of consent to vaccination for fear of early sexual activity, though it ultimately argues the minority concerns should be disregarded (Biggs 2007, 10-11).

To avoid sexuality related social anxieties, Australian HPV vaccination materials avoid discussion of HPV as an STI and of safer sex messaging, deflecting controversy through deliberate elision of important disease transmission information (Mishra & Graham 2012, 65). By this omission, the Australian government signals awareness of social fears of teen sexuality and fears related to perceptions around female sexuality, promiscuity and chastity. They acknowledge that parents and patients may not wish young women to be seen as unchaste and reinforce the legitimacy and primacy of such views over accurate health messaging, creating social endorsement of sexual, moral panic related to HPV and other STI’s. To manage anxieties about women’s sexuality, female sexuality is recast as passive in vaccination program materials that ignore or downplay sexual transmission of HPV.<sup>55</sup>

Programs that focus on women’s bodies as at risk and that minimise HPV risks to boys position women as the gatekeepers of public health through explicit messaging or the implicit assertion that women must bear the burden of HPV intervention and surveillance for the benefit of the whole community. HPV vaccination programs are structured around promoting the public good by protecting female fertility from cervical cancer. In vaccine information brochures, women’s health, sexuality and social identity are deliberately constructed around desexualised motherhood and social responsibility (Hall, Howard & McCaffery 2008, 84-85; Australian Government 2013b). Some Australian government brochures have been aimed at

---

54 Id.

55 Australian Government 2013a, Australian Government 2013b, Australian Government 2013c, Australian Government 2013d, Australian Government 2014a, Australian Government 2014b, Australian Government 2014c.

mothers, strongly emphasising mothers' social responsibility for children's health, even for adult women's sexual health in catch up programs aimed at adult women (Garland, Skinner & Brotherton 2011, 531). Australian Parliamentary debates about the National HPV Vaccination Program Register included references to the responsibilities of mothers to manage children's vaccinations and vaccination records and communicated that men could not be responsible for remembering or keeping vaccination information for children.<sup>56</sup> Conversely, in HPV vaccination program materials and policy documents, men's sexuality and health is rarely linked strongly to their role as fathers (Thompson 2010, 121). In Australian government HPV vaccination documents for children, fathers are depicted as ignorant of HPV and one brochure features a cartoon father asking a responsible mother about the recommended extent of vaccine programs (Australian Government 2014a).

Messaging and HPV vaccination practices also 'focus [...] on how women will protect the public health through allowing (or preventing) border crossings of their bodies' (Mara 2010, 139). In addition to demonstrating girls' future responsibility as mothers, messaging in Australian girls' brochures more strongly encourages community care compared to boys' brochures (Australian Government 2014a; Australian Government 2013b). For example, a girls' brochure, aimed at indigenous girls, has 5 comic panels explicitly talking about receiving vaccination to keep the girl's community healthy and several more with the girl considering becoming a health worker (to help the community) (Australian Government 2013b), where the similar boys' brochure has 2 mentions of community protection and a focus on the boy being personally healthy so that he can better play football (Australian Government 2014a).

## 7. Protecting women

In addition to tasking women with protecting the community, paternalistic protection of women is a theme throughout both implementation of HPV vaccination and objections to HPV vaccination in Australia. The very name of the Gardasil vaccine invokes protection from dangers (Thompson 2010, 124). Women must be protected from themselves, either through vaccination or being denied vaccination. As Globerson says in examining US HPV vaccination processes:

Gardasil is therefore without precedent in that it forces the American public to evaluate what it means to protect women, what women need protection from, and what price our society is willing to pay to provide that protection. (Globerson 2007, 69.)

The prices paid are the creation of HPV health messaging and systems which position women as inherently physically inferior and disease-prone. Members of Parliament arguing for the adoption of the *National Health Amendment (National*

---

<sup>56</sup> Parliamentary debates, House of Representatives, 20 June 2007, 10, Bruce Billson MP. Parliamentary debates, House of Representatives, 30 October 1996.

*HPV Vaccination Program Register*) Bill 2007 (Cth), argued that the bill was required to protect women from cancer, with one saying that the new HPV Vaccination Program Register would 'provide assurance to young women that the Australian Government is doing everything possible to help protect them against HPV' (Parliamentary debates, Senate, 9 August 2007, 62, Senator Jan McLucas, 63). Others highlight the fact that 'Having a register such as this will mean that professionals and those people [vaccine recipients] will be comforted that they can access this kind of information and that it is not lost to them forever' (Parliamentary debates, House of Representatives, 8 August 2007, 169, Kay Hull MP) unlike other health information which the patient is trusted to remember. Some parliamentarians positioned themselves as the imagined familial protector, like Patrick Farmer who said,

As the father of a 12-year-old girl, I see this bill as being absolutely vital—vitally important not only for my daughter but, indeed, for me and for the rest of my family, my son included, because none of us wants to lose a wife, a daughter or an aunt and none of us wants to lose a close relative when it can be prevented. (Ibid., 173 Patrick Farmer MP.)

In each instance, the parliamentary discourse is one of benevolent protection of an endangered group, girls and women endangered by their female biology. Vaccinated girls and doctors were to be protected from uncertainty, not by the recipients' memory of vaccination, not by parental record keeping, but by the government's benevolent recording of medical information.

Since governments are acting as benevolent protectors of irrational females, publishing misinformation or incomplete information is justified to compel consent to the HPV vaccine. Messaging around HPV vaccination in Australia is tailored to push parents, children and women in the catch up programs to vaccinate. A leading Australian HPV vaccination researcher (who is not a sociologist or psychologist) recommended that 'Message should be tailored for uptake, not to create HPV vaccine experts. Parents especially make vaccine decisions from a place of emotions, not a place of random facts' (Brotherton 2015b). The implied recommendation therefore was to hide the 'random facts' from both parents and recipients and create emotional responses, especially fear for their children's health. The facts usually hidden in HPV vaccination program brochures are neither random nor unimportant for future health care. They include the fact that HPV is an STI (hidden to avoid parents considering children's burgeoning sexuality), the full range of cancers and conditions triggered by HPV, any information which may impliedly threaten masculinities of male recipients (Courtenay 2000, 1389) (such as HPV's link to 'gay' coded anal cancers) and details of the need for future cervical screening, because HPV vaccinations are not a complete protection against cervical cancer.<sup>57</sup> They may also leave recipients

---

<sup>57</sup> Gunasekaran, Jayasinghe, Brotherton, Fenner, Moore, Wark, Fletcher, Tabrizi, & Garland 2015, 830. Australian Government 2013a, Australian Government 2013b, Australian Government 2013c, Australian Government 2013d, Australian Government 2014a, Australian Government 2014b, Australian Government 2014c.



with potentially dangerous misunderstandings about the vaccine and HPV, which may expose recipients to future disease or encourage them to avoid cervical screening (Hall, Howard & McCaffery 2008, 81). They show a paternalistic disregard for fully informed consent to medical intervention.

Ignoring informed consent is problematic. It is possible that HPV vaccinated children, especially in older cohorts, may be *Gillick* competent<sup>58</sup> for the purposes of vaccination, especially if appropriately informed (Garland, Skinner & Brotherton 2011, 531). In Australia, a child is competent to give consent to medical treatment if the minor is ‘capable of giving informed consent when he or she “achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed”’.<sup>59</sup> However, Australian materials and vaccination processes do not give children age appropriate information about the full effects of the vaccine, HPV-based disease or the relative disease risks they may face.<sup>60</sup> There is no clear indication in children’s vaccination materials that they could choose to refuse or request the vaccine if their parent chooses an opposite course for them.<sup>61</sup> There is no discussion of consent in the HPV program factsheet for Australian health care professionals (Australian Government 2014f).

There is no insurmountable reason to avoid fully informed parental or *Gillick* competent child consent. In fact, the use of ‘opt off’ consent for the Australian HPV Vaccination Program Register, in which patients’ details are entered without consent at vaccination, was recommended because ‘This model of consent, it is argued, can also reduce the administrative burden on the program, because the patient’s consent does not need to be explicitly sought or recorded’ (Biggs 2007, 15). The Australian system of ignoring potential *Gillick* competence exists as it does for the convenience of doctors, school staff, and administrators.<sup>62</sup> Lack of consent by children to the vaccine itself is not a necessary part of an HPV vaccination system. The UK HPV vaccination program allows for assessment of *Gillick* competence in adolescents under 16, while UK recipients 16 and over generally provide consent to their own vaccination (Garland, Skinner & Brotherton 2011, 531).

In Australia, consent comes from parents, who are assumed to control their child’s medical and sexual state. The girl herself, even if capable, is given no space to seek or refuse the vaccination. She is taught that she has little or no control over who can touch her body or control her sexual health (Mara 2010, 136). While boys are now included in Australian HPV vaccination programs, they are late entries to a system designed to force compliance from girls and their families, rather than

58 From *Gillick v. West Norfolk AHA* [1986] AC 112.

59 *Department of Health and Community Services v JWB and SMB (Marion’s Case)* 1992) 175 CLR 218 at paragraph 19, per Mason CJ, Dawson, Toohey and Gaudron JJ quoting *Gillick v. West Norfolk AHA* [1986] AC 112, 189.

60 Australian Government 2013c; Australian Government 2014a; Australian Government 2013b; Australian Government 2013c; Australian Government 2013d; Australian Government 2014e.

61 Australian Government 2013c; Australian Government 2014e; Australian Government 2014f.

62 For schools, see discussion in Biggs 2007, 13 and Garland, Skinner & Brotherton 2011, 531. For doctors see Leask, Jackson, Trevena, McCaffery & Brotherton 2009, 5510.

founding participants in a more gender neutral system. Their participation is encouraged through exhortations to protect female peers from cervical cancer, rather than explicit messaging about dangers to male health.

The Australian de-emphasis on consent and emphasis on the need for governmental paternalistic HPV protection continues with the creation of the Australian National HPV Vaccination Program Register which contains personal and HPV vaccination details about those who have had HPV vaccinations entered automatically for anyone who undergoes HPV vaccination.<sup>63</sup> The Register inducts girls into women's disciplining lifelong medical surveillance as they undergo a health intervention which foreshadows future sexual 'autonomy' based on compliance with social controls. They are enjoined to obedience and reminded of the irrelevance of female consent to actions which touch on female sexuality as their privacy and information are seized by the state. The dangers to them from cervical cancer and from them, in the discourse that they are repositories of a gendered disease, HPV, justify overriding consent to entry on the Australian HPV Vaccination Program Register or use of their health information once registered.

The purposes of the HPV Vaccination Register include 'to ensure the successful implementation of the National Human Papillomavirus (HPV) Vaccination Program'.<sup>64</sup> To do so, it facilitates 'an electronic database of records for monitoring vaccination of participants in the HPV Program',<sup>65</sup> monitoring of vaccine effectiveness by 'future cross referencing of data against Pap Smear and other cervical cytology or cervical cancer registers',<sup>66</sup> and sending reminders to eligible people who had not completed their vaccinations.<sup>67</sup> The disclosure of personal information for the purposes of the National HPV Vaccination Program Register is exempted from the normal requirements for consent to use of private information in the Australian *Privacy Act 1988* (Cth).<sup>68</sup> Doctors can access the records of patients without patient consent.<sup>69</sup> Researchers may access de-identified information for research without patient consent.<sup>70</sup> It is not an offence or breach of an agreement to misuse or improperly disseminate information from the HPV register (which was originally designed to only contain girls' private information), unlike for other Australian vaccination registers (designed from the start to also include males' information).<sup>71</sup>

Those entered on the Register can 'opt out' by requesting that the Commonwealth remove their personal information or the personal information of a child for whom the requestor is a parent or guardian.<sup>72</sup> While, in theory, patients or parents could

63 *National Health Act 1953* [Cth], s 9BA.

64 *National Health Act 1953* [Cth], s 9BA (3).

65 *National Health Act 1953* [Cth], s 9BA (3)(a).

66 *Id.*

67 *National Health Act 1953* [Cth], s 9BA (3)(f).

68 *Health Insurance Act 1973* (Cth), s 9BA(5) *Privacy Act 1988* (Cth) Shed 1 Australian *Privacy Principle* 6.

69 *National Health Act 1953* (Cth), s 9BA(6) and (7).

70 Information for researchers requesting data from the NHVPR (2013), 1.

71 *Australian Immunisation Register Act 2015* (Cth) s 23 which creates an offence or *Health Insurance Act 1973* (Cth) now repealed s46E(2) which requires agreement to stringent conditions of use.

72 *National Health (Immunisation Program—Designated Vaccines) Determination 2012* (No.1) Cth, s 9BA(4).

choose to opt off of the HPV register at vaccination, none of the parent, student or teacher materials for the HPV vaccination program mention the register or the ability to opt off.,<sup>73</sup> If a parent wants their child to have the benefits of vaccination, there is no easy way to refuse recording of information on the Register. None of the Australian State consent forms for HPV vaccination give full details about the recording or use of information on the National HPV Vaccination Program Register.<sup>74</sup>

Entry onto the Register and potential exposure of medical records and other private information without consent becomes the cost of HPV vaccination in Australia. When debating the *National Health (National HPV Vaccination Program Register) Bill 2007* (Cth), Alex Somlyay MP considered that a safeguard for those concerned about the gathering of private information on the Register was ‘of course choice. All vaccinations are voluntary. Good sense, yes; highly desirable, yes—but still voluntary’ (Parliamentary debates, House of Representatives, 8 August 2007). The MP’s views were echoed in the Explanatory Memorandum to the Bill, which said:

Subsection (3) paragraph (a).

Paragraph (3)(a) establishes and allows for the maintenance of an electronic database which will allow for monitoring of individuals who are vaccinated with HPV vaccine. *There is no compulsion for females to be vaccinated and participation in the HPV Program is voluntary.* Nor is there any compulsion for individuals to have their personal or vaccination details entered onto the HPV Register. [My emphasis.]<sup>75</sup>

It is very clear that Somlyay MP and the writers of the Explanatory Memo, as well as those who design HPV vaccination program materials and consents, consider that entry on the Register is the price women must pay for vaccination. If women don’t want personal information recorded and released to doctors and researchers without the woman’s consent, they can forego the potentially lifesaving vaccine.

The symbolic sexualisation of HPV vaccine recipients through STI prophylaxis, leads to a discounting of normal consent boundaries. Until 2013 and the inclusion of

73 All but one individual Australian state’s HPV vaccination consent forms mention the National HPV Vaccination Program Register. The remaining state, Western Australia, does not mention the National HPV Vaccination Program Register on its form: Government of Western Australia Department of Health Public Health Communicable Disease Control Directorate 2013; ACT Government Health 2012; Government of South Australia, Department for Health and Aging 2012; Government of South Australia, Department for Health and Aging 2013; Northern Territory Government 2012; Queensland Government 2013; Tasmanian Government 2013; Victorian Government 2013; Victorian Government 2012; NSW Government Health 2015.

74 ACT Government Health 2012; Government of South Australia, Department for Health and Aging 2012; Government of South Australia, Department for Health and Aging 2013; Northern Territory Government 2012; Queensland Government 2013; Tasmanian Government 2013; Victorian Government 2013; Victorian Government 2012; NSW Government Health 2015; Government of Western Australia Department of Health Public Health Communicable Disease Control Directorate 2013.

75 *National Health Amendment (National HPV Vaccination Program Register) Bill 2007* Explanatory Memorandum, 5.

boys in HPV vaccination programs in Australia, the vaccine recipients were usually imagined as cervix bearers, and therefore, often, cis girls and women. The discounting of consent for women has a long history in rape culture. In rape culture tropes, a woman's consent to sex may be implied or assumed from one sexualised encounter or a woman's sexual history. Acknowledging a girl's sexuality reduces the validity of her refusals or consent. By acknowledging that a girl may not be chaste in future and may therefore need protection from HPV, she is sexualised. She demonstrates unruly and dangerous female sexuality and, therefore, her desire for privacy and consent may be discounted, either punitively or for protection against the irrationality of her desires. As a woman may be accused of 'leading on' a male partner to justify sexual assault, the HPV vaccination patient by agreeing to one act, vaccination, is taken to agree to a series of subsequent unrelated acts, like entry on the register and release of medical information.

## 8. Irrationality and responsabilisation

The biopolitical approach to HPV vaccination registers in Australia treats women as inherently unreliable. They are positioned as unreliable medical record keepers.<sup>76</sup> They are assumed unable to remember their own vaccination status, despite being adolescent or adult when undergoing vaccination, thus needing the National HPV Vaccination Register to record vaccinations. A parent or patient wanting informed consent or access to or control over her health information is constructed as irrational in the scheme of the Australian HPV vaccination and register program.

Girls' irrationality is also combatted by handing control of their bodies to parents and doctors. Parents control girls' bodies by giving or withholding consent to the vaccinations. Doctors and nurses penetrate girls' bodies with needles, initiating the lifelong expectation that women will allow medical professionals access to their bodies throughout their life (Mara 2010, 135). HPV vaccination programs encourage 'preteen girls to believe that they have no control over who (medical authorities included) can touch their bodies, whether against their will or not' (Ibid., 136). The removal of physical autonomy starting with HPV vaccines against female frailty also sends clear messages to girls about their social roles, teaching them that '[w]omen's bodies and their sexualities represent the locus of both their oppression and their liberation, for to deny women the right to make their own decisions at this most intimate level of the self is to deny them selfhood, subjectivity, and agency' (Shaw 2008, 55). The HPV vaccination programs teach recipients that their boundaries and they themselves will not be respected in a world where 'understanding that respect for a person's body is an integral part of respect for the person' (Mackenzie 2001, 420-421).

The drive to control women through external medical control and surveillance and imposition of internal self-governance becomes part of the project which

---

76 Parliamentary debates, House of Representatives, 20 June 2007, 10, Bruce Billson MP; Parliamentary debates, House of Representatives, 30 October 1996.

Sheldon refers to as 'responsibilisation' of women (Sheldon 1993, 7). While undergoing medicalisation and social control, women are expected to control themselves, their sexual health and their health states for the good of society, while being simultaneously constructed as irresponsible and unable to understand medical nuance. HPV immunisation 'burdens women with a commitment to good prophylactic behaviour' (Mishra & Graham 2012, 59) which is the start of a lifetime of responsible self-monitoring of a socially constructed unruly body and sexuality, enforced via government monitoring for compliance (Id.) while men are placed in the background as protective bystanders and beneficiaries of female health monitoring (Id.).

## 9. Conclusion

HPV vaccination programs established at the national level in Australia acts not only to control the spread of a cancer-triggering virus, but to encode and enforce fundamentally patriarchal gendered tropes upon the recipients of the vaccine. The girls who were the original target of the vaccine program were configured as a social resource for population increase and as fundamentally irrational.

The Australian government's HPV messaging positioned HPV as cervical cancer. This reinforces tropes of female physical inferiority and infirmity whilst encoding female sexuality and sexual health within social fears of promiscuity, disease and female abandon. The discourse of HPV as cervical cancer, rather than a cause of multiple cancers exposes men to anogenital and oropharyngeal cancers while simultaneously bolstering social tropes of the superior, strong and impervious male body by implication that only female bodies suffer dangers from HPV.

The imagined weakness of the female body becomes justification for programs of responsibilisation and control of women's health under lifelong systems of vaccination and cervical cytology surveillance. Girls are initiated into a surveilled sexuality and health status via HPV vaccination programs which function as liminal and defining events that establish their sexuality as risky and disease-prone. Boys are encouraged by the same event to consider themselves protectors and controllers of faulty female bodies.

The HPV vaccination and recording keeping systems were designed and deployed in a culture which dismisses women's bodily autonomy and women's right to consent to bodily interventions and sexual acts. HPV vaccination and record keeping disregards consent to privacy violations and physical interventions, in a way that medical interventions for gender-neutral care do not. To reduce Australian gender inequality, vaccination processes and record keeping for all adult and teen vaccinations, including HPV, should be consistent and respectful of consent.



## Bibliography

Ali, Hammad, Basil Donovan, Handan Wand, Tim RH Read, David G Regan, Andrew E Grulich, Christopher K Fairley, & Rebecca J Guy: 'Genital Warts in Young Australians Five Years into National Human Papillomavirus Vaccination Programme: National Surveillance Data.' *BMJ* (2013) 346-355.

Australian Capital Territory Government Health: *Year 7 ACT School Based Immunisation Program, Parent/Guardian Information Sheet for Hepatitis B, Chicken Pox and Human Papillomavirus (HPV)*. 2012. Available on <<http://hpv.health.gov.au/wp-content/uploads/2013/02/ACT-YR7-Consent-Form-2012.pdf>> (visited 20 December 2015).

Australian Government, Australian Institute of Health and Welfare *Cancer in Australia an overview 2014*. 2014. Available on <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129550202>> (visited 7 December 2015).

Barroso, L. F: 'The role of Human Papilloma Virus (HPV) vaccination in the prevention of anal cancer in individuals with Human Immunodeficiency Virus-1 (HIV-1) infection.' 1 (2) *Therapeutic advances in vaccines* (2013) 81-92.

Biggs, Amanda: *National Health Amendment (National HPV Vaccination Program Register) Bill 2007, Bills Digest*, Parliamentary Library, Parliament of Australia 2007.

Brotherton, Julia ML: 'HPV Prophylactic Vaccines. Lessons Learned from 10 Years Experience'. 10 *Future Virology* (2015b) 999-1009.

Brotherton, Julia ML, Julie Leask, Cath Jackson, Kirsten McCaffery & Lyndal J Trevena: 'National survey of general practitioners' experience of delivering the National Human Papillomavirus Vaccination Program'. 7 *Sexual health* (2010) 291-298.

Burger, Emily A., Stephen Sy, Mari Nygård, Ivar S Kristiansen & Jane J Kim: 'Prevention of HPV-related Cancers in Norway. Cost-effectiveness of Expanding the HPV Vaccination Program to Include Pre-adolescent Boys'. 9 (3) *PLoS One* (2014) e89974.

Caldwell, Ross: *Five Strange Things about Australia's Next Deputy Prime Minister*. Labor Herald 2016. Available on <<https://www.laborherald.com.au/politics/five-strange-things-about-australias-next-deputy-prime-minister/>> (visited 29 May 2016).

*Cancer Vaccine Comments Taken out of Context: Joyce*. ABC News 2006. Available on <<http://www.abc.net.au/news/2006-01-27/cancer-vaccine-comments-taken-out-of-context-joyce/787132>> (visited 29 May 2016).

Castellsagué, Xavier., F. Xavier Bosch, Nubia Munoz, Chris J. Meijer, Keerti V. Shah, Silvia de Sanjosé, Jose Eluf-Neto, Corazon A. Ngelangel, Saibua Chichareon & Jennifer S. Smith: 'Male Circumcision, Penile Human Papillomavirus Infection, and Cervical Cancer in Female Partners'. 346 (15) *New England Journal of Medicine* (2002) 1105-1112.

Castle, P. & M. Maza: 'Prophylactic HPV Vaccination. Past, Present, and Future'. 144(3) *Epidemiology and infection* (2016) 449-468.

Conrad, Peter: 'Medicalization and Social Control'. 18 *Annual Review of Sociology* 1992, 209-232.

Connel, Erin & Alan Hunt: 'The HPV Vaccination Campaign. A Project of Moral Regulation in an Era of Biopolitics'. 35 *Canadian Journal of Sociology/Cahiers canadiens de sociologie* 2010 63-82.

Cooper Robbins, Spring Chenoa, Diana Bernard, Kirsten McCaffery, Julia Brotherton, Suzanne Garland & S Rachel Skinner: "Is Cancer Contagious?": Australian Adolescent Girls and their Parents. Making the Most of Limited Information about HPV and HPV Vaccination'. 28 (19) *Vaccine* (2010) 3398-3408.

Cooper Robbins, Spring Chenowa, Candy Pang & Julie Leask: 'Australian Newspaper Coverage of Human Papillomavirus Vaccination, October 2006–December 2009'. 17 (2) *Journal of Health Communication* (2012) 149-159.

Courtenay, Will H: 'Constructions of Masculinity and Their Influence on Men's Well-being. A Theory of Gender and Health'. 50 *Social Science & Medicine* (2000) 1385-1401.

*Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218.

D'Hauwers, K., C. Depuydt, J. Bogers, J. C. Noël, P. Delvenne, E. Marbaix, A. Donders & W. Tjalma: 'Human Papillomavirus, Lichen Sclerosus and Penile Cancer. A Study in Belgium'. 30 (46) *Vaccine* (2012) 6573-6577.

Ferlay, Jacques, Isabelle Soerjomataram, Rajesh Dikshit, Sultan Eser, Colin Mathers, Marise Rebelo, Donald Maxwell Parkin, David Forman & Freddie Bray: 'Cancer Incidence and Mortality Worldwide. Sources, Methods and Major Patterns in GLOBOCAN 2012'. 136 (5) *International journal of cancer* (2015) E359-E386.

Fogarty, Mignon: "Women Rule" *Grammar Girl's Quick and Dirty Tips for Better Writing*. 2008. Available on <<http://grammar.quickanddirtytips.com/woman-versus-female.aspx>> (visited 1 November 2015).

Frazer, Ian. H: 'Prevention of Cervical Cancer Through Papillomavirus Vaccination'. 4 (1) *Nature Reviews Immunology* (2004) 46-55.

Frazer, Ian. H: 'Cervical Cancer Vaccine Development'. 7 (3) *Sexual health* (2010) 230-234.

Frazer, Ian. H., J. Thomas Cox, Edward John Mayeaux Jr, Eduardo L. Franco, Anna-Barbara Moscicki, Joel M. Palefsky, Daron G. Ferris, Alex S. Ferenczy & Luisa L. Villa: 'Advances in Prevention of Cervical Cancer and Other Human Papillomavirus-related Diseases'. 25 (2) *The Pediatric infectious disease journal* (2006) S65-S81.

Garland, Suzanne M, S Rachel Skinner & Julia ML Brotherton: 'Adolescent and Young Adult HPV Vaccination in Australia. Achievements and Challenges'. 53 *Preventive Medicine* (2011) S29-S35.

Gillespie, Chris: 'The Risk Experience. The Social Effects of Health Screening and the Emergence of a Proto-illness'. 37 (7) *Sociology of Health & Illness* (2015) 973-987.

*Gillick v. West Norfolk AHA* [1986] AC 112, 189.

Globerson, Micah: 'Protecting Women: A Feminist Legal Analysis of the HPV Vaccine, Gardasil'. 17 *Texas Journal of Women & Law* (2007) 67-107.

Government of South Australia Department for Health and Aging: *Year 8 - SA School Based Immunisation Program Consent Card*. 2012. Available on <<http://hpv.health.gov.au/wp-content/uploads/2013/02/SA-consent-forms-yr8.pdf>> (visited 20 December 2015).

Government of South Australia Department for Health and Aging: *Year 9 All Male Student - Human Papillomavirus (HPV) Vaccination Program Year 9 Parent/Guardian Consent Card*. 2013. Available on <<http://hpv.health.gov.au/wp-content/uploads/2013/02/SA-consent-form-yr9-males.pdf>>. (visited 20 December 2015).

Government of Western Australia Department of Health Public Health Communicable Disease Control Directorate: *Consent Form. Human Papilloma Virus (HPV) Vaccination for Boys Attending School in Years 8, 9 or 10 in 2013*. 2013. Available on <<http://hpv.health.gov.au/wp-content/uploads/2013/02/WA-HPV-consent-form.pdf>>. (visited 20 December 2015).

Giuliano, Anna R., Gabriella Anic & Alan G. Nyitray: 'Epidemiology and Pathology of HPV Disease in Males'. 117 (2) *Gynecologic oncology* (2010) S15-S19.

Gunasekaran, Bharathy, Yasmin Jayasinghe, Julia ML Brotherton, Yeshe Fenner, Elya E Moore, John D Wark, Ashley Fletcher, Sepehr N Tabrizi & Suzanne M Garland: 'Asking about Human Papillomavirus Vaccination and the Usefulness of Registry Validation. A Study of Young Women Recruited Using Facebook'. 33 *Vaccine* (2015) 826-831.

Hall, Bronwyn, Kirsten Howard & Kirsten McCaffery: 'Do Cervical Cancer Screening Patient Information Leaflets Meet the HPV Information Needs of Women?'. 72 (1) *Patient Education and Counselling* (2008) 78-87.

*Health (Immunisation) Regulations 1995 (NZ)*.

*Health Insurance Act 1973 (Cth)*.

Herrero, Rolando, Wim Quint, Allan Hildesheim, Paula Gonzalez, Linda Struijk, Hormuzd A. Katki, Carolina Porras, Mark Schiffman, Ana Cecilia Rodriguez & Diane Solomon: 'Reduced Prevalence of Oral Human Papillomavirus (HPV) 4 Years after Bivalent HPV Vaccination in a Randomized Clinical Trial in Costa Rica'. 8 (7) *PloS one* (2013) e68329.

Immunise Australia Program, Australian Government: *HPV Vaccination Comic for Young Women*. 2013b. Available on <<http://hpv.health.gov.au/downloads/comic-for-young-women/>> (visited 15 December 2015).

Immunise Australia Program, Australian Government: *Important Information for Young Men National HPV Vaccination Program*. 2013c. Available on <[http://hpv.health.gov.au/wp-content/uploads/2014/07/ATSI\\_PosterA3\\_males.pdf](http://hpv.health.gov.au/wp-content/uploads/2014/07/ATSI_PosterA3_males.pdf)> (visited 15 December 2015).

Immunise Australia Program, Australian Government: *Important Information for Young Women National HPV Vaccination Program*. 2013d. Available on <[http://hpv.health.gov.au/wp-content/uploads/2014/07/ATSI\\_PosterA3\\_girls\\_LR.pdf](http://hpv.health.gov.au/wp-content/uploads/2014/07/ATSI_PosterA3_girls_LR.pdf)> (visited 15 December 2015).

Immunise Australia Program, Australian Government: *HPV Vaccination Comic for Young Men*. 2014a. Available on <<http://hpv.health.gov.au/downloads/comic-for-young-men/>> (visited 15 December 2015).

Immunise Australia Program, Australian Government: *HPV Factsheet for Parents*. 2014c. Available on <<http://hpv.health.gov.au/downloads/factsheet-for-parents/>>. (visited 15 December 2015).

Immunise Australia Program, Australian Government: *HPV Brochure for Aboriginal and Torres Strait Islander parents*. 2014d. Available at <<http://hpv.health.gov.au/downloads/brochure-for-aboriginal-and-torres-strait-islander-parents/>> (visited 15 December 2015).

Immunise Australia Program, Australian Government: *HPV Vaccine Poster for Aboriginal and Torres Strait Islander parents*. 2014e. Available on <[http://hpv.health.gov.au/wp-content/uploads/2014/07/ATSI\\_PosterA3\\_parents.pdf](http://hpv.health.gov.au/wp-content/uploads/2014/07/ATSI_PosterA3_parents.pdf)> (visited 15 December 2015).

Immunise Australia Program, Australian Government: *HPV Factsheet for Health Professionals*. 2014f. Available on <<http://hpv.health.gov.au/downloads/factsheet-for-professionals/>> (visited 15 December 2015).

Australian Department of Health and Ageing *Information for Researchers Requesting Data from the NHVPR*. 2013. Available on <<http://www.hpvregister.org.au/site/DefaultSite/filesystem/documents/Research/NHVPR-Pub-10-V2-May%202013-NHVPR-Information-brochure%20for%20researchers.pdf>> (visited 15 December 2015).

Jones, Ronald W, Edward P Coughlan, J Stewart Reid, Peter Sykes, Peter D Watson & Catherine Cook: 'Human Papilloma virus Vaccines and Their Role in Cancer Prevention'. 120 *New Zealand Medical Journal* (2007) U2829.

Kulasingam, Shalini, Luke Connelly, Elizabeth Conway, Jane S Hocking, Evan Myers, David G Regan, David Roder, Jayne Ross, & Gerard Wain: 'A Cost-effectiveness Analysis of Adding a Human Papillomavirus Vaccine to the Australian National Cervical Cancer Screening Program'. 4 *Sexual Health* (2007) 165-175.

Leask, Julie, Cath Jackson, Lyndal Trevena, Kirsten McCaffery, & Julia Brotherton: 'Implementation of the Australian HPV Vaccination Program for Adult Women. Qualitative Key Informant Interviews'. 27 *Vaccine* (2009) 5505-5512.

Lowy, Douglas R., & Ian H. Frazer: 'Prophylactic Human Papillomavirus Vaccines'. (31) *Journal of the National Cancer Institute. Monographs* (2002) 111-116.

Mackenzie, Catriona: 'On bodily autonomy'. In S. Kay Toombs (ed): *Handbook of Phenomenology and Medicine*, Springer Science and Business Media 2001, 417-439.

Mara, Miriam: 'Spreading the (Dis)ease: Gardasil and the Gendering of HPV'. 22 *Feminist Formations* (2010) 124-143.

Mishra, Amrita & Janice E Graham: 'Risk, Choice and the "Girl Vaccine". Unpacking Human Papillomavirus (HPV) Immunisation'. 14 (1) *Health, Risk & Society* (2012) 57-69.

*National Health (Immunisation Program—Designated Vaccines) Determination 2012 (No.1) Cth.*

*National Health Amendment (National HPV Vaccination Program Register) Bill 2007, Explanatory Memorandum.*

National HPV Vaccination Program Register: *HPV Vaccination Coverage by Dose 2007*. 2015a. Available on <<http://www.hpvregister.org.au/research/coverage-data/hpv-vaccination-coverage-by-dose-2007>> (visited 15 December 2015).

National HPV Vaccination Program Register: *HPV Vaccination Coverage by Dose 2014*. 2015b. Available on <<http://www.hpvregister.org.au/research/coverage-data/hpv-vaccination-coverage-by-dose-2014>> (visited 15 December 2015).

National HPV Vaccination Program Register: *HPV Vaccination Coverage by Dose 2013 – Males*. 2015c. Available on <<http://www.hpvregister.org.au/research/coverage-data/HPV-Vaccination-Coverage-by-Dose-2013---Males>> (visited 15 December 2015).

NCIRS: *Adult vaccination. vaccines for Australian adults | NCIRS Fact Sheet*. 2015. Available on <[http://www.ncirs.edu.au/assets/provider\\_resources/fact-sheets/adult-vaccination-fact-sheet.pdf](http://www.ncirs.edu.au/assets/provider_resources/fact-sheets/adult-vaccination-fact-sheet.pdf)> (visited 29 February 2016).

New Zealand Ministry of Health: *Questions and answers—National Immunisation Register*. 2014. Available on <<http://www.health.govt.nz/our-work/preventative-health-wellness/immunisation/national-immunisation-register/questions-and-answers-national-immunisation-register>> (visited 15 December 2015).

Newall, Anthony. T., Julia M. Brotherton, Helen E. Quinn, Peter. B. McIntyre, Josephine Backhouse, Lynn Gilbert, Mark T. Esser, Joanne Erick, Janine Bryan & Neil Formica: 'Population Seroprevalence of Human Papillomavirus Types 6, 11, 16, and 18 in Men, Women, and Children in Australia'. 46 (11) *Clinical Infectious Diseases* (2008) 1647-1655.

Northern Territory Government: *Human Papillomavirus (HPV) vaccination Year 7 boys and girls Year 9 boys (in 2013 and 2014 only). Information and Consent for Vaccination 2012*. Available on <[http://hpv.health.gov.au/wp-content/uploads/2013/02/NT-Consent-Form\\_HP\\_V\\_2012-pdf.pdf](http://hpv.health.gov.au/wp-content/uploads/2013/02/NT-Consent-Form_HP_V_2012-pdf.pdf)> (visited 20 December 2015).



NSW Government Health: *NSW School Vaccination Program*. 2015. Available on <<http://hpv.health.gov.au/wp-content/uploads/2013/01/2015-NSW-Year-7-Consent-Form.pdf>> (visited 20 December 2015).

Palefsky, Joel M., Anna R. Giuliano, Stephen Goldstone, Edson D. Moreira Jr, Carlos Aranda, Heiko Jessen, Richard Hillman, Daron Ferris, Francois Coutlee & Mark H. Stoler: 'HPV Vaccine Against Anal HPV Infection and Anal Intraepithelial Neoplasia'. 365 (17) *New England Journal of Medicine* (2011) 1576-1585.

Parada, Costanza Vargas & J. Lennert Veerman: 'Cost-Effectiveness Study of HPV Vaccination as a Primary Prevention Strategy for Anal Cancer in HIV-Positive Men in Chile'. 11 *Value in Health Regional Issues* (2016) 17-23.

Parker, Christy: 'One for the girls?: Cervical Cancer Prevention and the Introduction of the HPV Vaccine in Aotearoa New Zealand'. 24 *Women's Studies Journal* (2010) 25-39.

Quigley, Anita: *Promiscuity Fears Killing a Lifesaver*. The Telegraph 2007. Available on <[http://blogs.news.com.au/dailytelegraph/anitaquigley/index.php/dailytelegraph/comments/promiscuity\\_fears\\_killing\\_a\\_lifesaver/desc/P60](http://blogs.news.com.au/dailytelegraph/anitaquigley/index.php/dailytelegraph/comments/promiscuity_fears_killing_a_lifesaver/desc/P60)> (Visited on 29 May 2016).

*Parliamentary debates, House of Representatives, Australia*, 20 June 2007.

*Parliamentary debates, House of Representatives, Australia*, 8 August 2007.

*Parliamentary debates, Senate, Australia*, 9 August 2007.

*Parliamentary debates, House of Representatives, Australia* 30 October 1996.

Pitts, Marian K, Suzanne J Dyson, Doreen A Rosenthal, & Suzanne M Garland: 'Knowledge and Awareness of Human Papillomavirus (HPV). Attitudes Towards HPV Vaccination Among a Representative Sample of Women in Victoria, Australia'. 4 (3) *Sexual Health* (2007) 177-180.

Queensland Government: *Year 8 Students & Year 10 Male Students Human Papillomavirus (HPV) Vaccination*. 2013. Available on <<http://hpv.health.gov.au/wp-content/uploads/2013/02/QLD-HPV-Form-NQ.pdf>> (visited 20 December 2015).

Raffle, Angela E: 'Challenges of Implementing Human Papillomavirus (HPV) Vaccination Policy'. 335 *BMJ* (2007) 375-377.

Saxton, P., H. Petousis-Harris, M. Thomas & N. Turner: 'Prevention of Anal HPV Infection and Anal Cancer Among Gay and Bisexual Men in New Zealand'. New Zealand Sexual Health Society Conference 2014.

Schlecht, Nicolas. F., Robert D. Burk, Anne Nucci-Sack, Viswanathan Shankar, Ken Peake, Elizabeth Lorde-Rollins, Richard Porter, Lourdes Oriana Linares, Mary Rojas & Howard D. Strickler: 'Cervical, Anal and Oral HPV in an Adolescent Inner-city Health Clinic Providing Free Vaccinations'. 7 (5) *PloS one* (2012) e37419.

Shabbir, Majid., Ravi Barod, Paul K. Hegarty & Suks Minhas: 'Primary Prevention and Vaccination for Penile Cancer'. 5 (3) *Therapeutic Advances in Urology* (2013) 161-169.

Shaw, Susan M: 'Gracious Submission. Southern Baptist Fundamentalists and Women'. 20 *NWSA Journal* (2008) 51.

Sheldon, Sally: "'Who is the Mother to Make the Judgment?'" The Constructions of Woman in English Abortion Law'. 1 *Feminist Legal Studies* (1993) 3-20.

Smith, Megan A., Jie-Bin Lew, Robert J. Walker, Julia M. Brotherton, Carolyn Nickson & Karen Canfell: 'The Predicted Impact of HPV Vaccination on Male Infections and Male HPV-related Cancers in Australia'. 29 (48) *Vaccine* (2011) 9112-9122.

Stagg-Taylor, Joanne. 'Australian Pap Smear Registers and the Creation of Gendered Identities'. (22) 2 *Griffith Law Review* (2013) 504-531.

Thompson, Marie: 'Who's Guarding What? A Poststructural Feminist Analysis of Gardasil Discourses'. 25 (2) *Health Communication* (2010) 119-130.

Timmermans, Stefan & Mara Buchbinder: 'Patients-in-waiting Living Between Sickness and Health in the Genomics Era'. 51 (4) *Journal of Health and Social Behavior* (2010) 408-423.

Towghi, Fouzieyha: 'The Biopolitics of Reproductive Technologies beyond the Clinic: Localizing HPV Vaccines in India'. 32 (4) *Medical Anthropology* (2013) 325-342.

Victorian Government: *Human Papillomavirus (HPV) Recommended Vaccine for Boys in Year 9 of Secondary School Important Information*. 2012. Available on <<http://hpv.health.gov.au/wp-content/uploads/2013/02/VIC-HVP-Year-9-boys-A4.pdf>> (visited 20 December 2015).

Victorian Government: *Human Papillomavirus Recommended Vaccine for Boys and Girls in Year 7 of Secondary School Important Information*. 2013. Available on <<http://hpv.health.gov.au/wp-content/uploads/2013/02/VIC-HPV-Year-7-A4-web-0113.pdf>>. (visited 20 December 2015).

West, Candace & Don H Zimmerman: 'Doing Gender'. 1 (2) *Gender & Society* (1987) 125-151.

World Health Organization: 'World Cancer Report, 2014', *WHO Report*. World Health Organization, Geneva 2014.

# Charity Law and Religion—A Dinosaur in the Modern World?

Juliet Chevalier-Watts\*

## 1. Introduction

Many of the functions and principles of charity law recognised in contemporary times in jurisdictions including Australasia, the United Kingdom and Canada, are rooted in history. Records dating back to Roman times reflect complex forms of charitable activities, and Plutarch noted, in his will, that Julius Caesar left ‘the gardens beyond the river’ (Luxton 2001, 4) to the people. Pious gifts, before the Reformation, whilst they tended to honour God and the Church, also included gifts to relief distress and suffering on earth; gifts to assist the poor; and gifts to repair hospitals, bridges, roads and dykes (Jones 1969, 3-4). Therefore many of the common law and statutory provisions that exist today take ‘their meaning from the social and economic situations of the time they were decided’. (Poirier 2013, 78; Chevalier-Watts 2014, 3-4)

If therefore we recognise the historical influences on modern day charity law, the question arises then as to its applicability in a world with social, political and economic demands that could not have been envisaged in eons past, which include, for instance, the requirement to protect a wide variety of civil and animal rights, and the demand to protect a plethora of religious freedoms. To assess whether modern day charity law is responding appropriately to such demands, and indeed whether religion is still an appropriate head of charity, this article concentrates on one heads of charity law, that of the advancement of religion. The question set by this article had the propensity to be a monumental undertaking because of the very broad scope of charity law, which unfortunately is beyond the capacity of such an article, hence, focusing on just one key aspect of charity law.

As a brief aside, in order to provide a brief explanation as to the meaning of the aforementioned heads of charity, modern day law derived much of its momentum (Picarda 2010, 11-16) from 1 key statute and 1 key case. The key statute was the Statute

---

\* Senior Lecturer in Law, Associate Dean Research, Te Piringa, Faculty of Law, University of Waitako.

of Charitable Purposes 1601 (43 Eliz I, c-4), or otherwise known as the Statute of Elizabeth, and in particular, its preamble. This preamble set out recognised charitable purposes, and although the Statute has long since been repealed, its preamble lives on through the heads of charity that were classified by Lord Macnaghten in the key case of *Commissioners for Special Purposes of Income Tax v Pemsel*<sup>1</sup>. His Lordship stated that charity ‘in its legal sense comprises four principle divisions,’<sup>2</sup> which are recognised as four heads of charity:

Trusts for the relief of poverty; trusts for the advancement of religion; trusts for the advancement of education; and trusts for other purposes beneficial to the community, not fall under any of the preceeding heads.<sup>3</sup>

This classification of charity law is the foundation of charity law that is recognised in such jurisdictions as Australasia, England and Wales, and Canada (Chevalier-Watts 2014, 39) and it is the head of advancement of religion that is the focus of this article.

## 2. The advancement of religion

To assess the contemporary issues associated with charity law, our starting point is the head of charity recognised as the advancement of religion. This head is of particular relevance in today’s world because in a number of jurisdictions, the ‘law of charities is very much the child of Judeaean-Christian traditions’ (Picarda 2010, 3), with its history reflecting changes in the focus on the Church, to the Protestant movement, and then to more liberal influences (Ibid.). The contemporary religious world however is one that is unlikely to have been conceived by those who influenced the principles and traditions of ancient charity law, therefore it is a useful indicator as to the relevance of charity law in modern times.

It is also pertinent at this stage to ask why religion is still a fundamental part of charity law, even in the face of increasing numbers of atheists and religious critics worldwide. There is no one reason that can be cited, but some answer may be found in the historical context of religion and charity. The contribution to society by religion, in a variety of guises, for example, in terms of building infrastructure and underpinning civilised values, cannot be underestimated. For instance, many of common law jurisdictions, including England and Wales, Ireland, New Zealand and Canada ‘are indebted to the religious organizations that laid much of the foundations for their present health and education systems, and that often provided the staff and resources for their functioning and maintenance’ (O’Halloran 2011, 30, cited in Chevalier-Watts 2014-2015, 170). Many of these infrastructures and influences remain today thus making the relevance of religion in contemporary society hard to ignore.

---

<sup>1</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

On the other hand, religious charitable trusts have been subject to criticism. For instance:

[...] given the very considerable concessions made to charities, and given much contemporary agnosticism and even seeming indifference in many quarters to religion, what is it that today supports the concession in favour of religious charities, and more particularly, where are the edges of this head of charity to be drawn?<sup>4</sup>

In the New Zealand case of *Liberty Trust*, Mallon J observes ‘whether there is social utility in the advancement of religion is “a very much more doubtful proposition” because the ‘effect of religion is difficult to define and measure and any effect is “usually of a very personal nature”’.<sup>5</sup>

Nonetheless, what is apparent is that charity law has always accepted the advancement of religion as charitable at law<sup>6</sup> and ‘[a]s between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none.’<sup>7</sup> Further evidence of the relevance of religion in contemporary society may be found in each of our specific jurisdictions where freedom of religion is a fundamental human right.<sup>8</sup>

As a result, therefore, regardless of the views of believers or non-believers, advancement of religion as a head of charity is here to stay, and as a result, this article can consider how the law responds to such ethereal beliefs in a contemporary society.

Before we explore charity law in the context of the advancement of religion, it is pertinent to consider firstly what is meant by the advancement of religion in charity law terms. It is notable that in spite of the ‘antiquity of trusts for the advancement of religion, judicial attempts to define religion for these purposes are scarce’ (Garton 2013, 167). Indeed, in *Bowman v Secular Society*,<sup>9</sup> Lord Parker could cite no prior judicial definition of the meaning of religion. The English case *South Place Ethical Society* is cited as being the first English case to provide an explicit definition of religion,<sup>10</sup> where Dillon J asserted that religion for charity law purposes means:

[T]wo of the essential attributes of religion are faith and worship; faith in a god and worship of that god.<sup>11</sup>

<sup>4</sup> *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA), [6].

<sup>5</sup> *Liberty Trust v Charities Commission* [2011] 3 NZLR 68, [54], citing *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HL); see also Lockhart 1984-1987.

<sup>6</sup> *Ibid.*, [55].

<sup>7</sup> *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA), [6], citing *Neville Estates Ltd v Madden* [1962] Ch, 832, 853.

<sup>8</sup> Human Rights Act 1998, s 13 (UK); New Zealand Bill of Rights Act 1990, s 13 (New Zealand); Commonwealth of Australia Constitution Act, s 116 (Australia).

<sup>9</sup> Garton 2013, 167, referring to *Bowman v Secular Society* [1917] AC 406 (HL), 448.

<sup>10</sup> *Id.*, referring to *South Place Ethical Society* [1980] 1 WLR 1565 (Ch).

<sup>11</sup> *South Place Ethical Society* [1980] 1 WLR 1565 (Ch), 1573.



In other words, a monotheistic view. However, this of course would rule out Buddhism as a religion at charity law, to which Dillon J responded by noting:

It is said that religion cannot be necessarily theist or dependent on belief in a god, a supernatural or supreme being, because Buddhism does not have any such belief.<sup>12</sup>

Whilst his Honour chose not to pursue that consideration further, because he did ‘not know enough about Buddhism’, he believed that the answer could be found with Lord Denning MR’s opinion in *R v Registrar General, ex parte Segerdal*.<sup>13</sup> In this case, his Lordship sought to find Buddhism as an exception to the monotheist view, asserting:

It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship.<sup>14</sup>

According to Dillon J in *South Place Ethical Society*:

It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god.<sup>15</sup>

This was echoed by Mallon J in the New Zealand case *Liberty Trust v Charities Commission*,<sup>16</sup> where her Honour noted that ‘[b]elief or faith in a supreme being and worship of that being is accepted as being religion in the context of charity law’,<sup>17</sup> although Mallon J did not discuss further the definition of religion.

The Australian courts have also addressed the meaning of ‘religion’ in the context of charity law and have agreed that an ‘endeavour to define religion for legal purposes gives rise to peculiar difficulties’,<sup>18</sup> one of which would be:

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world.<sup>19</sup>

Therefore, in the views of Mason ACJ and Brennan J, delivering the judgment in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (‘*Scientology case*’), the very absence of a universally-acceptable definition of religion, in reality, points

---

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., referring to *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697 (CA).

<sup>14</sup> Ibid., referring to *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697 (CA), 707; see also Chevalier-Watts 2014, 176-177.

<sup>15</sup> *South Place Ethical Society* [1980] 1 WLR 1565 (Ch), 1572.

<sup>16</sup> *Liberty Trust v Charities Commission* [2011] 3 NZLR 68, [57].

<sup>17</sup> Ibid.

<sup>18</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (‘*Scientology case*’) [1983] HCA 40, [8].

<sup>19</sup> Ibid., citing *Jehovah’s Witnesses Inc* (1943) 67 CLR, 123.

to the fundamental difficulty of adopting a definition, because a definition cannot be adopted merely because the majority of a community would be satisfied. Nor simply because it corresponds with a current view point of a majority. If that were so, then this would exclude minority beliefs. Whilst then a universally acceptable definition of religion is undoubtedly impossible, their Honours' view was that freedom of religion should be equally conferred on everyone,<sup>20</sup> and 'the variety of religious beliefs which are within the area of legal immunity is not restricted'.<sup>21</sup>

Therefore the criteria of religion, according to the courts in Australia, is wider than that of the English judicial criteria, as stated in the *Scientology* case, where the Court noted:

[T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief [...] Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.<sup>22</sup>

What this reticence of the courts to provide a universal definition of religion speaks to, in part, is the complexities of human belief systems and the difficulties of being able to apply charity law to historical, and indeed, evolving beliefs. The focus of our discussions, however, will be on the advancement of religion itself, as the gift must contribute to the advancement of religion (Warburton 2003, 73). It is this requirement of this head of charity that fundamentally illustrates the challenges facing international courts, and provides some answers to our earlier question as to whether charity law is responding appropriately to the demands of modern society, or whether indeed its ancient seams are straining under those pressures. Whilst we will inevitably see tensions between the historical context of the advancement of religion and its modern day context, what will also become apparent is that the tension is not as we might immediately presume. Our immediate presumptions may be that courts might find the requirement of assessing the advancement of religion in contemporary circumstances to be more challenging than would have been faced by historical courts. What this analysis will show, however, is that this not always the case. As a result, what we see is the relevance still today of religion in a charity law context.

Religion, as might be imagined, has long been associated with charity, with many of its roots being found in the traditional Judeo-Christian notion of religion, where salvation for the soul was purported for generous charitable gifts. Indeed, from the Middle Ages, the Church was key in providing support and succour to the needy (O'Connell and Chia 2013, 370, referring to Bird 1982, 149). What is perhaps striking then is the distinct absence from the preamble of the Statute of Elizabeth of the advancement of religion explicitly. All that is mentioned is the purpose of the

---

20 Ibid., [8].

21 Ibid., referring to *Jehovah's Witnesses Inc* (1943) 67 CLR, 132.

22 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* ('*Scientology case*') [1983] HCA 40, [17].

repair of churches.

This move away from explicit recognition of the advancement of religion as a charitable purpose can best be explained by looking to the secular position of Elizabeth I ‘and the desire of the Puritans to have a religion free of state interference’ (Dal Pont 2000, 147; Chevalier-Watts 2014, 168). Therefore the preamble set out a list of purposes that were deemed, at the time, to be of benefit to the society of the time, thus the absence of the advancement of religion was ‘a powerful expression of the increasing secularisation of charity’ (O’Connell and Chia 2013, 375; Chevalier-Watts 2014, 170).

However, even with this overt recognition of the secularisation of charity, instead of religion becoming less important in society, and therefore in relation to charitable works, it continued to play an important function in society because a number of Western societies, including New Zealand and Canada:

[...] are indebted to the religious organizations that laid much of the foundations for their present health and education systems, and that often provided the staff and resources for their functioning and maintenance. (O’Halloran 2011, 32, cited in Chevalier-Watts 2014, 170.)

So whilst very early statutory references preferred to enhance the secularisation of charity law, society itself still recognised the value of religion, thus illustrating an uneasy tension between the two concepts, suggesting that charity law was, *prima facie*, not a true reflection of the role of charity in society. However, as will be demonstrated, the courts were able to recognise the ultimate value of religion in relation to charity, meaning that religion as a head of charity was of relevance in society.

One controversial, and early example of this, is to be found in *Thornton v Howe*.<sup>23</sup> Whilst this case may need little in the way of introduction, it is worthwhile just taking a moment to set out the issue before the Court because it illustrates clearly the ability of a court to acknowledge the value of religion within charity law, thus indicating that charity law is not necessarily an inflexible relic.

The case concerned the printing and propagating of the works of Joanna Southcote, who:<sup>24</sup>

[...] labored under the delusion that she was to be made the medium of the miraculous birth of a child at an advanced period of her life, and that thereby the advancement of the Christian religion on earth would be occasioned.

Whilst Sir John Romilly MR was of no doubt that she was a foolish and ignorant woman, and that her writings were largely ‘incoherent and confused’,<sup>25</sup> this bequest did not actually undermine the charitable nature of the gift. This decision therefore

<sup>23</sup> *Thornton v Howe* (1862) 31 Beav 1042.

<sup>24</sup> *Ibid.*, 1044.

<sup>25</sup> *Id.*

shows that whilst a gift to advance religion may be untoward, a court can interpret the meaning of ‘advancement of religion’ in an extensive manner, thus providing an early reflection of not only the flexibility of this head of charity, but also of its apparent relevance in society, in spite of its controversial nature.<sup>26</sup>

More contemporary cases also show how courts are willing to demonstrate that charity law, under the head of advancement of religion, is a concept that can adapt alongside the transformation of society, which in turn reflects the relevance still today of religion within the constructs of charity law.

### 3. Australia and the advancement of religion

The Australian High Court *Scientology case* reflects the challenges facing courts with regard to novel belief systems, and whether or not such matters can fall within the rubric of charity law. Indeed, the majority of the Court referred to the ‘inherent difficulties in the case’.<sup>27</sup> The Court answered the question of whether or not the beliefs of Scientology met the criterion of religion relatively easily, however, ‘the second criterion [was] more troublesome’.<sup>28</sup> To satisfy the second criterion, the Court had to be able to determine that there was ‘acceptance of canons of conduct in order to give effect to a supernatural belief, not being canons of conduct which offend against the ordinary laws’.<sup>29</sup> The lower Court found Scientology’s appearance of religion to be a sham, however the High Court found the opposite to be true. Their interpretation of the codes of conduct, as set out in the Handbook for Scientologists, and the rites and ceremonies performed by Scientologists, echoed other recognised religious bodies. Whilst there was some question as to the motivation of the corporation behind Scientology, this aspect was not litigated, therefore it was material instead to focus whether the conduct of the believers gave effect to their supernatural beliefs. There was some discussion as to whether the commercial motivation to follow the advice of the leader was of paramount importance to believers, but even if that were true, the Court was of the view that that was not sufficient to draw the conclusion ‘that a desire to give effect to supernatural beliefs is not a substantial motive for accepting the practices and observances contained in [the] writings’.<sup>30</sup>

Therefore the High Court was of the view that Scientology, in spite of the possible commercial motivations, was analogous to other recognised religions, and that meant that it should be recognised as being a religious entity under the rubric of charity law. What this reflects then is whilst contemporary belief systems may, at first sight, appear at odds with ancient religious ideologies, charity law is more than capable of finding sufficient connections with traditional beliefs to give effect to

26 It should be noted that because the gift was a testamentary disposition of land, it was void under the Statute of Mortmain 9 Geo 2, c 36, as opposed to being given out of pure personalty, where it would have been enforced and regulated.

27 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (‘*Scientology case*’) [1983] HCA 40 [48].

28 *Ibid.*, [31].

29 *Id.*.

30 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (‘*Scientology case*’) [1983] HCA 40, [45].

modern day belief systems that have evolved with society, and as a result, this in turn gives full effect to freedom of religion for individuals in a contemporary context. As noted earlier, such freedoms have been given authority by statute in a number of jurisdictions, including our specific jurisdictions. Thus religion in charity law is, by association, given support by such authority.

The Australian High Court, in the later case of *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*,<sup>31</sup> were again required to address issues pertaining to religion and charity, and again, their decision illustrated the flexibility of charity law in a modern day context. This case echoes the notions of secular focus, even in the context of religion, to which was alluded in the preamble of the Statute of Elizabeth. What this case therefore tells us is that historical concepts, such as the secularisation of charity, can still incorporate religious activities in a contemporary context!

In this case, Word was established by Wycliffe Translators Australia, with the intention of generating funds for Wycliffe, which is an evangelical organisation that spreads the word of God through its missionary activities. The issues on appeal centred around the fact that whilst Word paid Wycliffe to carry out its bible translation on its behalf, Word does not directly carry out training, or the dispatching of missionaries overseas, nor publishing the Bible, nor the preaching of the gospel. Instead, it gives its profits to Wycliffe, and to other similar Christian organisations to enable them to conduct those activities. So in other words, can an entity be charitable where it engages in commercial, secular activities, which are then directed to the carrying out of charitable activities via other entities?<sup>32</sup> To answer this, the High Court relied on *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue*,<sup>33</sup> where MacDermott J stated:

[T]he charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than its immediate and expressed objects.

By analogy then, the High Court in the *Word* case asserted that the charitable purposes of Word Investments were to be found in the 'purpose of bringing about the natural and probable consequence of its immediate and expressed purposes'.<sup>34</sup> As a result, this meant that it was charitable because its charitability could be found in the 'natural and probable consequence of its immediate activities',<sup>35</sup> albeit secular ones. So it could be argued that because the profits were being funneled, eventually, in to charitable activities, this advanced religion, despite the manner in which the income was being raised (Chevalier-Watts 2014, 214, referring to O'Halloran 2011,

31 *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 (3 December 2008).

32 *Ibid.*, [34].

33 *Ibid.*, [38], citing *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* (1945) 26 TC 335, 348.

34 *Ibid.*.

35 *Ibid.*.



35). The manner of raising the money was irrelevant, as the probable and natural consequence of the purpose of the trust was to advance religion at some stage. The advancement of religion was therefore recognised in modern secular activities, which echoes both the notion of secularising charity by the Elizabethans, as well as reflecting the adaptability of charity law over time.

Such abilities of the Court however to find charitable purpose in rather ambiguous activities is not without criticism. Kerry O'Halloran asserted that the *Word* decision:

[M]ay be used for abusive tax behaviour, as it would seem to open the floodgates for all manner of creative business ventures by religious charities and others, which in future will not need to relate to their charitable purpose. (O'Halloran 2011, 36.)

O'Halloran's views that such a case may open floodgates for a range of creative business ventures to abuse the tax benefits afforded to registered charities may indeed be supported by the New Zealand High Court decision of *Liberty Trust v Charities Commission*,<sup>36</sup> where, again, a Court was able to find the advancement of religion in unusual circumstances.

#### 4. New Zealand and the advancement of religion

Liberty Trust's main activity is a mortgage lending scheme, mainly funded by donors, and it made interest-free loans to its donors, and others. The Trust contended that its lending scheme advanced religion by teaching, through its activities, financial principles derived from the Bible.

One of the key issues for Mallon J in this case was whether this loan scheme could advance religion, which was said by Liberty Trust to be a practical outworking of the Christian faith. It was highlighted that a difficulty with acknowledging practical outworkings as advancing religions is that 'they may embrace activities that are carried out by non-religious organisations which do not enjoy the legal and fiscal benefits that apply to charities'.<sup>37</sup> In response to this, Mallon J referred to the Australia case *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*.<sup>38</sup> This case was concerned with whether land owned by a trust was entitled to rating exemption. The rating exemption was dependent on whether the land belonged to a public charity, and was being used for charitable purposes; a retirement home was being operated on the said land.

Mahoney JA, upholding the result of the trial Judge, 'grappled with the issue of activities which may have some connection with religion but which might not

---

<sup>36</sup> *Liberty Trust v Charities Commission* [2011] 3 NZLR 68.

<sup>37</sup> *Ibid.*, [80].

<sup>38</sup> *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVCT); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA).

constitute advancement of religion.<sup>39</sup> His Honour confirmed that activities of a church, which can include the formulation of doctrine, its propagation and the persuasion of adherents to that doctrine, as well as the building of churches, the employment of ministers, and the holding of public services and ceremonies, can indeed extend beyond those activities.<sup>40</sup> This then raised the question ‘as to why those works are charitable if carried out by a church but which may not have that status if carried out by a secular organisation.’<sup>41</sup>

In response to this, Mahoney JA asserted that where a church does have a direct connection with, or direct influence on the advancement of religion such that it is charitable, then ‘even though its property may be applied to some purposes which, were they purposes of bodies of a different kind, would not be seen as charitable purposes.’<sup>42</sup> Thus:

Where a church or analogous body has as one of the purposes to which its property may be applied a purpose which is not a mere ulterior secular purpose, but one directed at able to be seen as assisting in the advancement of its religious purpose, then the purpose of that religion will be held to be religious for present purposes.<sup>43</sup>

He concluded therefore that the trust was intimately connected with the Presbyterian Church, and so fell within that principle.

Returning then to the *Liberty Trust* case, it was argued by the respondents that the *Ryde* case should be distinguished because, inter alia, the Liberty Trust is not a church, and it does not have a congregation. Mallon J, however, asserted that the respondent provided no convincing basis for distinguishing this case, and indeed, its principles could be applied to the instant case. For instance, the *Ryde* case was concerned with whether the carrying out of religious activities through secular bodies could advance religion. Mallon J confirmed that whilst the Liberty Trust is not a church, it was set up to undertake social welfare and outreach Christian ministries through two churches. It makes numerous references to its religious principles on its website, brochures, application forms, and newsletters. In *Ryde*, eligibility for the rest home did not depend on religious belief, nor were residents required to remain active or constant believers, although religious instruction was available. Likewise,

39 Ibid., [84], referring to *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVct); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA).

40 Ibid., referring to *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVct); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA), 403.

41 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 [85], referring to *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVct); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA).

42 Ibid., [86], referring to *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVct); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA), 408.

43 Ibid.

in *Liberty Trust*, whilst Christian principles are espoused, belief in those principles is not a prerequisite to receive the benefits of the loan scheme.<sup>44</sup>

Therefore, in Mallon J's view, if 'charitable status is appropriate for churches and their public ceremonies or rituals it seems logical that this status should also apply to their other activities which are carried out as part of the faith to which the church subscribes'.<sup>45</sup> Indeed, the 'mere fact that others may carry out the same activities without ascribing to the religion, does not mean that those that are doing the activities for religious purposes are not advancing religion by carrying out that activity'.<sup>46</sup>

In application therefore to the matter of a mortgage scheme, her Honour did acknowledge that such a scheme would not necessarily be an obvious candidate for the advancement of religion because it might be construed as merely being conducive to religion, which is not charitable. To advance religion, the scheme must be seen as doing more than having a connection to religion. It was argued that the scheme was more than conducive because it teaches Biblical principles, which operated in accordance with Scripture. Mallon J concluded that as a result, the scheme spread the message of religion, or took positive steps to sustain and increase religious beliefs. In other words, it advanced religion.<sup>47</sup>

I noted earlier that, in O'Halloran's view, the *Word* case may open floodgates for a range of creative business ventures to abuse the tax benefits afforded to registered charities, and that the *Liberty Trust* case may equally fall in to the same category because it was able to find the advancement of religion in such unusual circumstances, in other words, a mortgage lending scheme. My assertion lies not, however, in the recognition of the advancement of religion in those circumstances, as I am of the view that Mallon J set out a logical and rational argument in favour of finding the scheme charitable on that point. What I recognise on that point is echoes of the Elizabethan notion of the secularisation of the State, and the ability of charity law to adapt to the requirements and demands of contemporary society, rather than stultifying the development of this area of law.

Rather, my issue lies in the matter of public benefit with regard to the scheme. As a result of the scheme being found to advance religion, the starting point for a Court, certainly in New Zealand, is to presume public benefit. However, this presumption may be rebutted if, for instance, the purpose is 'too narrowly focused on its adherents'.<sup>48</sup> Mallon J was certainly aware of the issue of extending the bounds of doctrine of advancement of religion and public policy too far, as she made reference to the New Zealand case of *Hester v Commissioner of Inland Revenue*, where the Court of Appeal, in reference to the earlier case of *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue*, asserted that the findings of the

---

44 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68, [88].

45 *Ibid.*, [90].

46 *Id.*

47 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68, [93]-[94], [98].

48 *Ibid.*, [100], citing Warburton et al 2003.

*Presbyterian Church* case were at the ‘outermost limits of the existing doctrine’.<sup>49</sup> It might be argued however, that any cautions expounded in *Hester*, were set to one side by Mallon J in *Liberty Trust* in relation to the doctrine of public benefit. The purpose of the lending scheme was to alleviate financial hardship, in the hope that Christian principles would be expounded as a result of having that hardship lifted. This is certainly a laudable notion, although it was established in New Zealand, in the case of *Canterbury Development Corporation v Charities Commission*,<sup>50</sup> that purposes must be more than hopeful, in other words, the public benefit must not be too remote.

It is acknowledged that this notion of the remoteness of public benefit was not discussed in relation to the advancement of religion in the *Canterbury Development Corporation* case cited, although I would argue that the principles enunciated are analogous to the instant case, because, as *Tudor* highlights, and was mentioned earlier, the presumption of public benefit may be rebutted if the purpose is too focused on its adherents. My argument is supported by considering the fact that it is not explained in any satisfactory terms, in *Liberty Trust*, how those who benefit from the lending scheme will expound the Will of God, or specifically advance religion when the loan is granted. Further, it is not clear in fact that all loans are indeed repaid, because the Trust had only undertaken a limited survey on this point. As it stands, it appears that the private benefits available to individuals benefiting from the loan scheme outweigh the public benefit. One might say that the private benefits are far from incidental to the purpose of the Trust, which would therefore negate its charitable purpose (Chevalier-Watts 2014-2015, 191 and 2012, 413).

Nonetheless, Mallon J asserted that any private benefit afforded by the loan scheme was merely ‘part and parcel of Christian living’<sup>51</sup> thus the private benefits were incidental to the overall purpose of the Trust. It is not clear to the author however that the arguments of Mallon J are fully made out, as they were so eloquently made out with regard to the finding of the scheme as advancing religion because whilst the loanees may be unburdened by financial worries, which is a Christian recommendation as espoused by the Trust, the Trust only hopes that the loanees will service God more effectively as a result of being unburdened financially. Therefore, I am of the view that the limit to the existing doctrine that had been reached in *Hester* has been over reached in *Liberty Trust*, which may raise ‘very real issues both of doctrine, and public policy’.<sup>52</sup>

Regardless, however, of the author’s own misgivings with regard to the extension of the doctrine of advancement of religion, what this case really speaks to is the fact that whilst modern day society places challenges at the feet of charity law, which

49 Ibid., [55], referring to *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) [8] and *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue* [1994] 3 NZLR 363 (HC); see also Chevalier-Watts 2014-2015, 188-189.

50 *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 [67].

51 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 [121].

52 *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA), [8].

is rooted in ancient principles, this case illustrates that the courts recognise that charity law is equally at home in the new millennium as it was in the 1600s, with the courts ability to respond, through analogy and interpretation, to ensure that society benefits overall from charity law. This surely then is the underlying ethos of charity—to be available and to benefit society in as flexible manner as possible to ensure the greatest benefit available. In this regard, religion as a contemporary phenomenon is equally at home in contemporary charitable times, and its benefits are being felt in novel circumstances to assist a wide range of beneficiaries. Thus religion achieves one of its many purposes—to provide succor to those in need.

Interestingly, whilst Australasia highlights that the originally archaic principles charity law are equally as appropriate today as they were in Elizabethan times, we return now to the concept of Scientology, as considered by the Charity Commission for England and Wales, which may reflect a more conservative approach to that of its Tasman cousins. This suggests, *prima facie*, that jurisprudence in England and Wales may reflect a more limited development of charity law with regard to the advancement of religion, and that the notion of religion within charity law may be limited in a contemporary context.

## 5. England and Wales and the advancement of religion

It is acknowledged that the *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by the Church of Scientology (England and Wales)*<sup>53</sup> is not binding law, however, what this Decision graphically demonstrates is a contemporary judicial consideration of the advancement of religion. The Commissioners determined that the English legal authorities were neither clear nor unambiguous as to the definition of religion in English charity law. At best, the authorities were persuasive, with the result that ‘a positive and constructive approach,’<sup>54</sup> and one that conforms to the requirements of the European Convention on Human Rights (ECHR) principles,<sup>55</sup> to identify what is meant by ‘religion’ at charity law, could, and should be adopted.<sup>56</sup>

In order, therefore, to determine the meaning of religion in a manner that reflected the principles of the ECHR, the Commissioners thought it appropriate to refer to expert opinions and international authorities. The Commissioners, probably unsurprisingly, took account of the Australian *Scientology* case, amongst others, to assess the meaning of a belief in a supreme being. The Commissioners noted that the foreign legal authorities had adopted a broad approach to question of a supreme being, and that the expert opinions concluded that Scientology believes in a supreme being, although the place and nature of that being is not the same as the Christian

53 *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by the Church of Scientology (England and Wales)* 17 November 1999.

54 *Ibid.*, 19.

55 Specifically Art 9, concerning the right to freedom of thought, conscience and religion.

56 *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by the Church of Scientology (England and Wales)* 17 November 1999, 19.



or Jewish God. Overall, the Commissioners concluded that a belief in a supreme being remained a necessary characteristic for the purposes of English charity law. However, very interestingly, they also noted:

It would not [...] be proper to specify the nature of that supreme being or to require it to be analogous to the deity or supreme being of a particular religion.<sup>57</sup>

Nonetheless, the Commissioners did not find it necessary to conclude that the requirement of a supreme being was no longer necessary to the concept of religion in charity law. In addition, they did not find it necessary to reject the notion of theism entirely, as was evidenced in Indian law,<sup>58</sup> ‘nor to dilute the concept to the extent of the Australian case’.<sup>59</sup>

At first sight, this analysis appears equally as ambiguous and unclear as the Charity Commissioners themselves noted with regard to the English authorities, and suggests that charity law, in this context in England and Wales, may not be as flexible as international authorities. However, on closer inspection, the opposite might be said to be true. Whilst the Commissioners are undoubtedly correct as to the ambiguity of religion in charity law in English jurisprudence, this did not prevent the Commissioners seeking alternative considerations. Their conclusion that a belief in a supreme being was a requirement does not necessarily stultify the law, because they did not require a specification as to the nature of that being, nor that it be analogous to a deity or supreme being of a particular religion. What this suggests therefore is that the concept of a supreme being, whilst still being required, is undoubtedly broader than would have been envisaged in historical times, where religious beliefs were strongly monotheistic-based. Although the Commissioners did not believe it was appropriate to adopt the diluted Australian concept, nor to reject the theistic Indian approach, their more subtle interpretation of the meaning of religion still embraces the shape shifting nature of charity law, where society might determine that which is appropriate for the time.

As a result of this quietly expansive interpretation of religion, the Commissioners concluded that, for the purposes of English law, Scientology did profess a belief in a supreme being. As to the requirement of the worship of the supreme being, the Commissioners, however, were not so accepting of a broader construal. The core religious services of Scientology involve auditing and training, that Scientology submitted constituted worship. The High Court in the Australian *Scientology* case drew inferences that the general group of adherents practicing auditing, and accepting the observances and practices of Scientology because they are bid to do so

---

<sup>57</sup> Ibid., 21.

<sup>58</sup> Ibid., referring to *The Commissioner Hindu Religious Endowment Madras v Sri Lakshmindra Thirthra Swamiar of Sri Shirur Mutt* (1952) Indian Supreme Court [1954] SCR 1005.

<sup>59</sup> Ibid., referring to *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (*‘Scientology case’*) [1983] HCA 40.

by L R Hubbard enabled the adherents to give effect to their supernatural beliefs.<sup>60</sup>

In contrast, the Commissioners in the English *Scientology Decision* concluded that auditing and training, whether taken separately, or together, did not constitute the required veneration and reverence of a supreme being that they considered necessary to meet the requirements of worship in English charity law. As a result therefore, the Commissioners determined that Scientology was not a religion for the purposes of English charity law, and it did not advance religion. Whilst the Commissioners may have adopted a more narrow approach with regard to the notion of worship, this does not mean that charity law in England and Wales is less progressive than that of Australasia, nor indeed, that religion in charity law is any less relevant. Indeed, it should be noted that Mason ACJ and Brenna J, delivering a judgment for the High Court *Scientology* case, observed, that whilst they did draw positive inferences regarding the practicing of auditing and training, the material to support that inference was, in reality, not compelling.

Perhaps then, the more austere English approach on the concept of worship should be welcomed. Austerity does not mean that adaptability of the law is ruled out. Rather it means that the jurisprudence can evolve where it is appropriate to do so. In support of this consideration, the Commissioners noted that Scientology is a new religion, having emerged in the 1950s. This in itself does not mean that a new religion is less 'beneficial than one derived from antiquity',<sup>61</sup> but it does raise some important issues with regard to charity law. When one has to determine the principle of religion and worship in a new belief system, there is little basis upon which a legal authority can form any judgment because of the lack of analogous authorities, as might be present if the belief system was simply an off shoot of an established religion.<sup>62</sup> Therefore it was perhaps unsurprising that England adopted a more conservative approach overall in this Decision. However, whilst the overall impact was that of conservatism, it is evident from the considerations of the Commissioners that the advancement of religion is able to embrace contemporary principles without adversely extending the doctrine of the advancement of religion.

This theory is borne out if one considers the later Charity Commission decision with regard to The Druid Network.<sup>63</sup> Druidry is an ancient concept, and is thought to have been recognised in pre-Christian, and pre-Roman cultures, in the British Isles. Today, druidry has a diverse following, with some followers joining orders, whilst others prefer more solitary studies and practices (Owen 2013, 6). It has been described generally as being a native religious tradition of the British Isles that is 'an expression of reverence and the search for the wisdom of the natural world'.<sup>64</sup> The Charity Commission had to determine the charitable nature of this ancient religion,

---

60 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* ('*Scientology case*') [1983] HCA 45.

61 *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by the Church of Scientology (England and Wales)* 17 November 1999, 42.

62 *Ibid.*

63 *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by The Druid Network* 21 September 2010.

64 *Ibid.*

and similarly to that of Scientology, there was no real comparison to be made with other acknowledged religions to assess its charitability. One might presume therefore that the Commission would be limited in this undertaking, taking in to consideration its deliberations in the Scientology application. It certainly appears that the Commission followed its previous conservative rhetoric, however, in relation to the notion of worship of, or reverence for, a supreme being or entity, where Scientology failed, The Druid Network met the criteria.

The Druid Network asserted that druidry involved a relationship with a supreme being or entity, and that did entail, inter alia, qualities of homage and devotion, and indeed, that all druid practices focus on worship, reverence and veneration of nature, its spirits and deities. Thus there was a recognisable centrality of reverence. As a result the Board of the Commission recognised that The Druid Network facilitated and encouraged worship, or similar of a supreme being or entity.<sup>65</sup> The Commission applied, inter alia, its more conservative requirements of advancement of religion to a novel situation, and was able to determine the religious nature of this entity at charity law, which then distinguished druidry from Scientology. What this speaks to then is that even the most ancient of religions may still find a footing and be relevant in modern day times, and charity law underpins that fundamental need in so many humans to express a form of religious outreach. Whilst the concepts of religion may be antediluvian, those concepts can, and do, stretch across millennia, and are given effect by charity law. Certainly, charity law has its limitations, as evidenced to a certain degree by the Scientology decision in England and Wales, but ultimately what the Charity Commission reflects in that decision is that there are some limitations within the law in some circumstances, and where criteria is met, then the law can give a religion its full effect.

## 6. Conclusion

This article began with recognising that many of the common law and statutory provisions regarding charity law take their meaning, or standing, from the social and economic contexts of their time, and questioned therefore the relevance of ancient legal concepts in modern day society, in relation to the head of advancement of religion. It was evident that whilst religion is an ancient concept, its relevance in contemporary times is underpinned by fundamental human rights, and also more obliquely within infrastructures and social culture. As a result, whilst there is no real answer as to why religion appears equally important today as it was in millennia past, the article highlights why it is unlikely that religion will lose its value, and thus charity law reflects that same recognition of the value of religion. Indeed, perhaps charity law is the obvious vehicle to represent the value of religion, as surely one of the key aspects of religion is to provide succor to those in need—the very essence of charity itself.

---

<sup>65</sup> *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by The Druid Network* 21 September 2010, [33]-[37].

In considering that issue, this article critically reviewed some key cases from across three jurisdictions—Australia, New Zealand, and England and Wales. Australasia reflected similar expansive interpretations of the meaning of the advancement of religion, even when the religious activities were so closely connected to contemporary secular activities. However, the decisions emanating from that jurisdiction, whilst certainly novel, did not appear to strain the ancient seams of charity law. Rather the courts appeared to recognise the significance of religion in contemporary society and utilised valuable analogies to ensure that charity law met the demands of modern day. As a result it was evident that the very ability of the courts to interpret religion so broadly reflects the absolute relevance of religion as a head of charity in modern times.

England and Wales jurisprudence certainly reflects a more reticent approach than that of its Tasman cousins, and the Charity Commissioners explicitly acknowledged that they would not adopt the Australian or Indian approaches, and in doing so, appeared to limit the applicability of charity law in the present day context within the *Scientology* case. However, I would argue that the Commissioners' decision is not a reflection of English and Welsh charity law failing to adapt to contemporary requirements, nor to devaluing religion within charity. Instead, it merely speaks to a differing interpretation that is a reflection instead of society in that jurisdiction. Indeed, when one considers the Commission's approach in the *The Druid Network* case, the conservative analysis of the requirement of worship that defeated the *Scientology* application ensured that the criteria was fully met in the later religious case. This suggests that whilst England and Wales may follow a more cautious path, the law is applied rigorously, and is still able to recognise the value of even one of the most ancient of religions in modern day times. Thus charity law gives effect to a wide range of religious beliefs, which is surely a reflection of a progressive culture, highlighting the importance of the head of religion within charity law.

Overall therefore, and in conclusion, whilst charity law is rooted in history, the head of advancement of religion, whilst providing many challenges for the courts, illustrates that charity law is far from being seen as the ancient relic struggling to adapt to modern day demands. Alongside fundamental human rights, and the recognition of human diversity of beliefs and faiths, what is actually apparent is the courts' willingness to recognise the appropriateness, and the benefits, of religion in a charitable context, and adapt charity law where it is relevant to do so. Thus the advancement of religion within charity law underpins the very ethos of charity—that of providing succor and support to those that desire or need it. As a result, religion, as a part of charity law, is still just as relevant today as it was when man first began his journey on a religious path in ancient times.

## Bibliography

*Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* (1945) 26 TC 335 (NZ)

Bird, Frederick B.: 'A Comparative Study of the Work of Charity in Christianity and Judaism.' *The Journal of Religious Ethics* (Spring 1982) 144-169

*Bowman v Secular Society* [1917] AC 406 (HL) (AU)

*Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (NZ)

*Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HL) (NZ)

*Charity by the Church of Scientology (England and Wales)* 17 November 1999 (UK)

Chevalier-Watts, Juliet: 'The Operation of Public Benefit in New Zealand – Meeting Contemporary Challenges?' 17 *The Charity Law & Practice Review* (2014-2015) 173-193.

Chevalier-Watts, Juliet: *Law of Charity*. ThomsonReuters, Wellington 2014.

Chevalier-Watts, Juliet: 'Charitable Trusts and the Advancement of Religion: On a Whim and a Prayer?' 43 (3) *Victoria University of Wellington Law Review* (2012) 403-422.

*Church of the New Faith v Commissioner of Pay-Roll Tax* (Vic) ('*Scientology case*') [1983] HCA 40

*Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (UK)

*Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 (3 December 2008) (AU)

Commonwealth of Australia Constitution Act, s 116 (AU)

Dal Pont, Gino: *Charity Law in Australia and New Zealand*. Oxford University Press, Melbourne 2000.

*Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by The Druid Network* 21 September 2010 (UK)

Garton, J.: *Public Benefit in Charity Law*. Oxford University Press, Oxford 2013.

*Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) (NZ)

Human Rights Act 1998, s 13 (UK)

*Jehovah's Witnesses Inc* (1943) 67 CLR (AU)



Jones, Gareth: *History of the Law of Charity 1532-1827*. Cambridge University Press, Cambridge 1969.

*Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (NZ)

*Neville Estates Ltd v Madden* [1962] Ch 832 (UK)

Lockhart, A.W.: 'Case comment: Charitable Trusts—*Centrepont Community Growth Trust v Commissioner of Inland Revenue*'. 5 (2) *Auckland University Law Review* (1984-1987) 244-248.

Luxton, Peter: *The Law of Charities*. Oxford University Press, Oxford 2001.

New Zealand Bill of Rights Act 1990 (NZ)

O'Connell, Ann and Joyce Chia: 'The Advancement of (or Retreat?) Religion as a Head of Charity: A Historical Perspective'. In John Tiley (ed): *Studies in the History of Tax Law, Volume 6*. Hart Publishing, Oxford 2013.

O'Halloran, Kerry: 'Charity and Religion: International Charity Law Reform Outcomes and the Choices for Australia'. 17 (2) *Third Sector Review* (2011) 29-44.

Owen, Suzanne: 'Druidry and the Definition of Indigenous Religion'. In L. Cox (ed): *Critical Reflections on Indigenous Religions*. Farnham, Ashgate 2013.

Picarda, Hubert: *The Law and Practice Relating to Charities*. 4<sup>th</sup> ed. Bloomsbury Professional, Haywards Heath 2010.

Poirier, Donald: *Charity Law in New Zealand*. Department of Internal Affairs, Wellington 2013.

*Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVCt) (AU)

*Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA) (AU)

*Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue* [1994] 3 NZLR 363 (HC) (NZ)

*R v Registrar General, ex parte Segerdal* [1970] 2 QB 697 (CA) (UK)

*South Place Ethical Society* [1980] 1 WLR 1565 (Ch). (UK)

Statute of Charitable Purposes 1601 (UK)

*The Commissioner Hindu Religious Endowment Madras v Sri Lakshmindra Thirthra Swamiar of Sri Shirur Mutt* (1952) Indian Supreme Court [1954] SCR 1005 (IN)

*Thornton v Howe* (1862) 31 Beav 1042 (UK)

Warburton, Jean, Debra Morris and N. F. Riddle: *Tudor on Charities*. 9<sup>th</sup> ed. London, Sweet & Maxwell 2003.

## Book Review

Jill Stauffer: *Ethical Loneliness. The Injustice of Not Being Heard*. Columbia University Press, New York 2015.

Linda Ross Meyer\*

To read Jill Stauffer's book, *Ethical Loneliness*, is to undergo the page-turning yet profoundly uncomfortable experience of struggling to hear fractured and broken stories told by survivors of worlds' end. The critical insight of the book is that we are all responsible to attentively hear these stories of atrocity. This injunction to hear is the core of the work, and it performs that imperative as well as asserting it.

In the course of the book, Stauffer introduces the reader to victims testifying before truth commissions and before archivists, to witnesses who hear those testimonies, or fail to, and to contemporary philosophers of restorative and retributive justice. The experience of listening that went into writing this book was itself a harrowing one, as it took Stauffer to the ICC, to holocaust video archives, and to the South African Truth and Reconciliation transcripts and recordings. In that sense, the book itself is a heroic act of listening, as well as a call to listen. Stauffer presents us with the victims' own words and voices, and she puts these voices in dialogue with a gentle grace that tries to enable and not to usurp the reader's effort to hear. She asks the reader to think about what it means to hear those who suffer, because hearing is the first step out of the moral isolation of both those who endure atrocity and those who ignore it.

Through many examples and contexts, Stauffer's narrative illustrates how careful hearing is essential to the hope of reestablishing trust and community after serious violence, and how fragile selfhood is without that (normally taken for granted) trust and community. When no one hears or attends to the enormity of an

---

\* Professor of Law, Quinnipiac University School of Law.

atrocities, its victims experience 'ethical loneliness,' a term coined by philosopher and Holocaust survivor Jean Améry, and defined by Stauffer as 'the experience of having been abandoned by humanity' (1).<sup>1</sup> Stauffer explains: 'Ethical loneliness begins when a human being, because of abuse or neglect, has been refused the human relation necessary for self-formation and thus is unable to take on the present moment freely' (26). Thus, Stauffer deftly connects Améry's sense of abject abandonment with Emmanuel Levinas's insight that selfhood is created through the Other: One needs a community to maintain a world of meaning—'meaning' or 'norms' are not just out there in the ether for a cellular self to apprehend through reason. So what is lost in cataclysmic violence is not just a family member, or health, or a home, but a reliable 'world' in which neighbors reinforce survivors' judgments about injustice, care about their well-being, and share their sense of history. Victims need others to stand with them, to grant them a hearing, in order to constitute them as 'selves' and as ethical beings.

Yet the phenomenon of ethical loneliness is difficult to overcome for those whose worlds are crushed by hatred and violence, because we so often fail to hear, or fail to hear properly. Again and again, Stauffer shows us how hard it is for us to linger in the discomfort of hearing about atrocities without trying to rush through the ugly parts, forget the hard parts, dismiss the odd parts, straighten out the chronology, water down the anger, deny the complicity, stuff the story into familiar narrative frames, enforce forgiveness or victimhood, whitewash or simplify the ending, and forget to listen to what is *not* said as well as to what can be put into words. She discusses, explores, and catalogs many examples of how we refuse or fail to hear.

One striking example is an interview with Hanna F in the Fortunoff Video Archive for Holocaust Testimonies at Yale University. Hanna is a concentration camp survivor. The interviewer is determined to hear her as a 'plucky' hero with 'guts' who twice escaped from Auschwitz. But Hanna, whose testimony is resistant and fractured throughout the interview, responds, 'No, no, no. No, but there were no guts, there were just sheer stupidity' (73). The interviewer then ends the interview before we know what Hanna meant.

Jill thoughtfully points out and glosses the interviewer's failure to hear Hanna: 'while there may be redemptive stories to tell, many times survivors of grave abuse do not marvel at the strength of the human spirit, especially not their own. Instead they "mourn its fragility when the isolated self has no support"' (74). As Hanna says earlier in the interview, and as other testimonies of abuse recount,<sup>2</sup> surviving may

---

1 All page references in text are to Stauffer 2015.

2 In a recently aired NPR radio interview with Henry Wu, a formerly incarcerated Chinese dissident who valiantly returned to China undercover to document prison conditions, Wu's quiet and haunting description of his imprisonment deflects narratives of heroism: 'I forgot my dignity, future, freedom, everything. I surrendered. I cooperated with the wardens, and I beat fellow prisoners. I stole food. I begged guard's mercy at his feet while in the solitary confinement. That's how I survived the camp. You know, the heroes cannot survive the camp, the system. They are physically crushed right away.' National Public Radio, *Remembering Harry Wu, 'Troublemaker' for the Chinese Communist Party*, aired April 19, 2016.

not be 'plucky', but may only leave one 'alone in the whole world' (72).

And as I read Jill's reading of Hanna's interview, I find myself implicated in these failures to hear, wishing for a happy ending, a clear path away from the brokenness. Instead, Stauffer leaves the reader at knife's edge; she will not resolve the tension that she creates into either a narrative of retributive justice or one of restorative peace. From Stauffer's perspective of Levinasian self-understanding, she grows a book that itself embodies the productive ambivalence of that Levinasian dialogue between self and other. To read this book, then, is not to appropriate knowledge from another, but to become a new I.

The book ends with hope that suffering can be heard and trust restored, but cautions that it will not happen by rushing to a forced and storybook reconciliation, but only by lingering in anger and resentment, hearing and rehearing anguished voices without preconceptions, and working hard to recreate a safe and just world that is trustworthy.

Stauffer is clear that both retribution and reconciliation tragically over-simplify and prejudge what justice might require of us in order to recreate a trustworthy world. Yet 'justice' is nonetheless understood to be the objective of all the repair and restoration and revenge and retribution talk throughout the book. But what justice is gets articulated differently at different times. Sometimes it is the 'restoration of a lost equality' (149) or to 'regain a moral equivalence stolen ... by abuse' (124). Sometimes it is a marking of the loss of, and a 'giv[ing] back' of 'something that should have remained intact' (144). Sometimes it is the rebuilding of trust and safety (127), and sometimes it is what must *precede* the rebuilding of trust and safety—that is, a reaffirmation of normative ethos 'where the abuse and torture ... are widely and actively confirmed as harms that should never have happened' (127) enacted, at least in part, through some kind of accountability or punishment. And sometimes, justice is articulated as giving 'to each what is her own' (145) as a kind of narrative propriety. Stauffer moves toward her blended ideal of 'reparative retribution' advisedly, of course, and wants to blend the past-orientation justice of retribution and trial with the future-orientation justice of restorative justice and repair. So justice is both, and at the same time, neither one.

But perhaps something more might be said about these formulations that would not do violence to the ambivalence that is central to the book's point. For example, I would resist a formulation of justice as a 'restoration of a lost equality'. While violence sometimes unbalances equality of various sorts, it sometimes rebalances structural inequalities or simply seesaws wildly. Often, victims become offenders, as Stauffer thoughtfully recognizes and discusses (153-65), and both conditions may be manifestations of injustice, not an overcoming of it. There is no necessary 'gain' in committing acts of violence, and the point of punishment is rarely to provide a kind of disgorgement of unjust enrichment. Equality, even equality of dignity, is only contingently affected by violence. Moreover, another of the book's formulations of justice as giving 'each his own' recognizes that justice is precisely not equality, but a tailored equity, requiring unequal treatment. And if the third formulation above is



correct, that justice *is* rebuilding trust and safety, then justice in this sense reduces to restorative justice and misses something Stauffer wants us to hear elsewhere in the book.

The shortcomings of restorative justice are made plain by Stauffer's engagement with Jean Améry. Améry haunts the pages of Stauffer's book like Hamlet Senior's ghost (as Stauffer underscores through her frequent Hamlet references), urging that something is indeed rotten in the state of 'reconciliation' when no one wants to hear anger about genocide anymore. Unless we cease our 'felicity awhile' (142, quoting Hamlet) to listen to Améry's angry story, and unless we too are moved to desire to undo the wrongs that caused his suffering, we leave him, unjustly, in his unbearable and inhuman state of ethical loneliness. So whatever justice is, it is not merely conciliation or a 'renewed being-with,' as I, for one, have argued (Meyer 2010).

The book's traumatic return to Améry's voice, again and again, and its urge to take revenge and anger seriously, creates and performs a problem about justice and about time, as Stauffer so astutely recognizes. She several times returns to the problem of *ressentiment* and to Friedrich Nietzsche's remarks on *amor fati*. She asks whether Améry is 'Nietzsche's man of *ressentiment*' (124). She describes Nietzsche's concern this way: 'When you want the past to be other than it was, you tie yourself to something that you are powerless to change. In doing so, you undermine your own future' (123). But Stauffer believes Améry is not the man of *ressentiment*. She points to Améry's own answer that resentment 'is his way of saying Yes to life rather than remaining indifferent to it' or 'covering over his lack of power' (125). Demanding justice, Stauffer argues, is not *ressentiment*. On the contrary, she says, reconciliation without justice may be a despairing capitulation caused by a lack of power—a form of seething and unresolved dispossession that creates *ressentiment*.

On this point, I have a few remarks:

First, if we truly do desire Améry's 'time machine' (123) to change the past, we *are* guilty of a kind of *ressentiment* and nihilism—a rejection of our finitude and rage against the conditions of our own existence. Storming and raging to erase the past through an Act V fin-de-Hamlet total purge destroys us at the source of our humanity. *Ressentiment* is not just a form of weakness for Nietzsche, it is a denial of one's finitude, of one's being-in-time.

To be finite is to exist only at the expense of violence. To wish away the past, however horrific, is to wish away the conditions of our own existence, and more, the conditions of the existence of everyone we love and have loved. In this respect, we are like children of rape. Hamlet cannot exact his revenge without also causing the deaths of everyone he loves: Ophelia, Gertrude and even himself. Everyone who now exists, exists only because of everything, violent or kind, that went before. One's children are born only in this timeline—the timeline that includes murder and torture. Nietzsche's command, then, is to love one's fate—*amor fati*. So as greatly as we desire it, the wish for a time machine is nihilism.

But on the other hand, if we merely 'redraw the boundary' around the acts of the past and reject and leave the 'bad past' outside the boundaries of our 'new

self', we seem to leave Hamlet-Senior's Ghost trapped outside our shiny 'new world' in Améry's state of ethical loneliness, as one who no longer belongs in the newly-cleansed history of the world. Like Gertrude, we remarry; we forget; we move on. And, it seems, we also leave outside of the boundary any confrontation with the violence and injustice of Hamlet-Senior's murder.

So, I think Stauffer is right to quarrel with a simple reconciliation's 'new start'. A society after genocide is not the same as a society before genocide; I cannot simply redraw the boundary. In some way, Gertrude's approach carries the same flaw as the time machine; it tries to make the past as though it has not been, or at least as though it can be unplugged from the present.

So we search for a third possibility. If we live with knowledge of our world's fragility and with a sense of complicity for the past's influence on the present, we seem closest to Stauffer's solution, for the past becomes a kind of antibody we must carry forever—a story we must struggle to hear again and again to remind ourselves 'never again'.

But this living-in-complicity provokes still more thought. If we are called to pay attention, to recognize and take on our responsibility for world-sustaining justice, to 'absent [ourselves] from felicity awhile' to hear over and over the stories of horrific violence, how can we act at all, if all action *and* all inaction cause ripples of pain and suffering in ever-widening circles of time and space?

In a world of complex affinities and many kinds of crimes, are we ever free from complicity? How sweeping is this responsibility? How can we bear it? Throughout the book Stauffer stresses that we are all complicit in suffering—we buy clothes made by child labor, we benefit from institutionalized racism, we fail to stand up for the voiceless, we fail to hear suffering and violence that makes us uncomfortable, we are the 'inverted pyramid' (Améry 1980, 71) of indifference and forgetfulness that drives Améry into the chasm of loneliness and despair. Stauffer calls out to us 'lucky' ones 'who have remained relatively safe and secure' to 'perform revisionary practices' on ourselves so that we will see that we 'are implicated in the destruction of worlds and in a responsibility to rebuild those worlds' (138).

And so I return again to Hannah Arendt's famous words on forgiveness: 'Only through this constant mutual release from what they do can men remain free agents, only by constant willingness to change their minds and start again can they be trusted with so great a power as that to begin something new' (Arendt 1958, 240). As Stauffer frames Arendt's point in an earlier article, 'forgiveness is a way of rendering the past the past. It attends to the possibility inherent in the term "future", the time to come that enables humans to create things anew rather than dragging their way through a determined universe' (Stauffer 2002, 6). Even if the atrocities themselves are unforgivable (though I have elsewhere argued they may not be) (Meyer 2010), at some point our failure to respond to them exactly as we ought to must be forgivable. As finite creatures, we cannot take on the burden of an eternity of ripple-effect complicities, or we are damned from the start, if we do *and* if we don't. To be human, we need some moment in time that is not already over-burdened with guilt; we need

the contingency of a future. As humans in time, we live by jumping into the future, or we cannot live at all.

Liberalism, for all of its flaws, claimed to provide a neutral moral space where reasonable minds could differ and responsibility was bounded by choice and consent. Liberalism thus opened up a metaphysical 'free zone' in which a future could emerge, if not guiltless, then with a limited, finite guilt that could be borne by limited, finite creatures.

Stauffer is right that the old liberal account of the cellular self is simply not tenable, especially after we acknowledge that social conditions allow genocide to flourish. But is there another way to open room to move, to disagree, to start, where we are not already doomed and set against each other by a kind of predestined complicity in everything?

And so I wonder, if we take our finitude seriously, if we acknowledge the shortness of life, the limits of human power, and the limits of human knowledge, whether we could find a space where we can temper what seems to me to be a crippling complicity and overwhelming guilt. Can we find an Arendtian humility, in which we can live in some open space that allows for disagreement, for uncertainty, for newness, for joy?

Stauffer quotes the Fortunoff Archive testimony of holocaust survivor Stanley M, which, she says, demonstrates 'a complex failure of hearing made up of his own understandable cynicism, the difficulty of conveying the true horror to people who have lived safe lives, and the failure of those people to listen, truly, to what narratives of horror try to convey' (107).

Here's what Stanley says:

What can I say? Sit with a young person, woman or man, and explain her what it is to be hungry, hated and hunted and not having hope? It is very difficult. Their reaction is very, very, you know, curious one. Curious for my part. Because [...] if you start to build up the climate of brutality what men can do to men, how prejudice can lead to disaster and hatred, at one point they inject argument and say we are better generation and things like that will not happen because we are better. This puts you in a very difficult position because you cannot argue with that and try to prove, no you are just as bad as me, because that would be immoral from my point of view. So the dialogue ends and I say yes, you are better and I hope you stay that way (107).

While Stauffer is right that Stanley's listeners are not listening deeply enough to experience with Stanley the fragility of human worlds, I want to pause over Stanley's point that if he were to argue that his interlocutors are 'just as bad as me', that would be 'immoral'. While he does not believe that human nature has changed so much that racism and fear cannot create genocide today, he refuses to argue the point, because it would be 'immoral' to take the future away from these young people. Instead, he allows them to keep the hope that 'we are better'. While his own experiences have robbed him of 'the useful fiction of autonomy' (24) he refuses to deny it to

his listeners. He retreats from what he knows about humanity, offering a kind of humility in judgment, a kind of hope-as-moral-action rather than belief, that is, 'from my [Stanley's] point of view', an act of 'morality'. He refuses to pronounce the future dead on arrival, not out of epistemological uncertainty, for he himself is not uncertain, but out of moral reticence. He gives to others what he denies to himself: freedom to act.

This gentle reticence that Stanley offers his interlocutors is like the voice of a parent whose toddler insists that he can pour the milk himself. The parent knows the milk will spill, but also knows that the child must have the opportunity to pour the milk, nonetheless. The child must have a moral space in which to act, without the predestination of a guilt and failure that has always already arisen. It is a space kept open so that one might imagine oneself to be 'better', without being frozen by the responsibility one was born into. So, the child is not 'free' as a metaphysical matter, because she is not a cellular self only responsible through her own consented-to acts, but instead her (relative) freedom is a gift from the parent who steps back in a moral act of humility that refuses to prejudge. In some ways, Stanley's withholding of judgment is akin to rules of the trial that refuse to presume guilt, or refuse to infer guilt from a past crime, not because that refusal is accurate or even rational, but because it is moral—a gift of room to speak, to act, to provide a boundary, to start the trial from 'now'.

So I wonder: if we could replace the liberal understandings of metaphysical individual autonomy with Stanley's moral act of humility, a conscious withholding of judgment, then perhaps we could establish room for finite beings to face a future. To be sure, genocide is not spilled milk, and, as Stauffer exhorts us, we must hear and bear in mind the past and never forget it, recognizing that we are all responsible for responding to atrocity. She is also certainly right that we ordinarily tend to err on the side of rejecting responsibilities for past atrocities and their repair. But guilt should not turn into despair or determinism. Perhaps we may acknowledge all Stauffer's points and at the same time risk a future, with a stubborn act of moral hope that this time, maybe, we might be 'better'. Stauffer's book may not fully give us the new understanding of responsibility that would ground something like Stanley's 'morality', but it provokes us to hear and attend to the echoes of the violent past in the present, and certainly she is right that if we do not hear the past, any moral hope for the future is false.

In sum, this is a superb book. The lessons it offers on how we fail to hear others' stories of suffering are vivid and wise, and the weave of Levinas's points about self-formation with Jean Améry's account of ethical loneliness gives a rich account of both the fragility and necessity of justice and of our mutual responsibility in tending and caring for each other.

## **Bibliography:**

Améry, Jean: *At the Mind's Limits. Contemplations by a Survivor on Auschwitz and its Realities*. Translated by Sidney Rosenfeld & Stella P. Rosenfeld. Indiana University Press, Bloomington 1980.

Arendt, Hannah: *The Human Condition*. The University of Chicago Press, Chicago 1958.

Meyer, Linda: *The Justice of Mercy*. The University of Michigan Press, Ann Arbor 2010.

National Public Radio, 'Remembering Harry Wu, 'Troublemaker' for the Chinese Communist Party,' aired April 19, 2016. Available on <<http://www.npr.org/2016/04/29/476153483/remembering-harry-wu-troublemaker-for-the-chinese-communist-party>> (Visited May 23, 2016)

Stauffer, Jill: 'Seeking the Between of Vengeance and Forgiveness. Martha Minow, Hannah Arendt, and the Possibility of Forgiveness.' 6 (1) *Theory and Event* (2002).

Stauffer, Jill: *Ethical Loneliness. The Injustice of Not Being Heard*. Columbia University Press, New York 2015.



## Book Review

### Alison Young: *Street Art, Public City. Law, Crime and the Urban Imagination*. Routledge, New York 2014.

Preeti Dhaliwal\*

I'm listening to Junot Diaz on Youtube and thinking he sounds like the folks I grew up with, the voice I used to have, the one I don't use at school or in papers or for book reviews. I'm listening to Diaz and watching the audience at the same time (where the video allows). The venue looks prestigious: a minimalist aesthetic, one or two expensive looking statues (which I imagine were commissioned especially for that room). One person laughs at all his jokes—a deep-bellied laugh—as the camera scrolls across rows of expressionless people, most of whom appear to be white (Diaz 2010). I'm laughing too—his swearing and casual speech are honest and hilarious, but most of all, comforting. I found a similar comfort in the pages of Alison Young's new book, *Street Art, Public City: Law, Crime and the Urban Imagination*, where she weaves together voices of street artists, images of street art and a narrative about reimagining the city as a place of belonging and transformation through street art. Such moments—the ones where my legal and creative interests merge with the power of art as a tool for social change—are rare and precious encounters.

I'm imagining the audience of this book review consists mostly of scholars, and I know scholars love new words so let me begin with an offering for your vocabulary: 'latrinalia', the writing you see on bathroom stalls (Young 2014, 5). As we begin journeying into Young's work and the world of street art, I'd like to invite your imagination to join us. Can you imagine encountering super-sized, black and white portraits of women pasted on walls of public buildings you pass regularly (see Young 2014, 37)? How about a large heart falling out of a plastic sheet covering the

---

\* LLM Candidate, University of Victoria.

façade of a nearby building, revealing the scaffolding behind (see Young 2014, 60)? Is it easier to imagine losing a beautiful object or image you see everyday? How might these encounters impact or affect you and your daily routine?

For those whose imaginations prefer specificity, let us try a more particular encounter. If you're familiar with the street artist Banksy, imagine coming across his artwork on the building you live in (if you're unfamiliar with Banksy, feel free to google his work or imagine a stencil image of a soldier fully armed, gun poised, music notes firing from its tip or a masked figure positioned to throw a Molotov cocktail, his hand grasping a bouquet of flowers instead). Did you know Banksy's street art now increases property value? If it were your property, would you consider the artwork a nuisance and paint over it? Or would you consider it a gift and try to preserve it, perhaps placing plexiglass overtop to protect it from the elements? Perhaps you would focus on the street artwork's value in monetary terms, remove part of the building and post it on E-Bay? But to whom does the street artwork even belong? The property owner, the community, the artist or the city? If you opted for plexiglass, how would you feel if someone poured silver paint behind the glass and wrote 'Banksy woz ere' (see Young 2014, 142)? What if you were a police officer responding to a complaint—would you fine Banksy, or might you exercise your 'aesthetic judgment' and let him walk away with a warning, perhaps even a compliment for his work? These are just a few of the questions that Young, a professor of Criminology in the School of Social and Political Sciences at the University of Melbourne, considers in her book.

\* \* \*

Young's book archives her spectatorship of street art and graffiti over the past 20 years while sharing snippets from interviews with 64 street artists and snapshots of various street artworks. Her use of interview excerpts and decision to insert a short 'encounter' with a street artist or street artwork between each of the six chapters makes her book feel conversational, causing the reader to feel she is part of a community, somehow connected to a larger world through this two-dimensional thing in her hands. In this way, I find Young's writing performative: engaging, representing and including multiple voices in hopes of fostering connected, democratic communities (see Pelias 2005, 418).

Young's writing style reveals that she is not only a legal scholar but a writer, someone regularly searching for meaning in the world around her. How am I so convinced? She dared to write 'love' on the first page of the text as she shared her first memory of graffiti. It was painted on a wall next to the train line in her home town, Paisley:

MY DARLING FLOPS  
I LOVE YOU

When I asked my Australian friend, Anita, what a flop is, she said it is slang for 'failure' but that 'flops' is probably a nickname referring to a specific person. Either

way, I'd been offered an honest glance into a meaningful moment of Young's life, one that marked the beginning of a 20-year journey researching and finding beauty in street art. Autobiographical moments like this are scarce in legal scholarship despite the richness they offer, a transparency that allows a reader to see an author's position, initial connections and potential motivations in relation to her research interest.

Young argues that our responses to 'street artwork are crucially important in determining whether our urban centres can ever be(come) *public cities*' (2014, 3). Rather than reconciling competing views of whether street artists impose their works on spectators by adopting an 'autocratic' approach towards other people's property, she explores 'how public space demands a discourse of democracy when debating the issue of entitlement to make images within it' (Ibid., 28), offering opinions from the 64 artists, a wide array of scholars and her own research in New York, Paris, Melbourne, London, Berlin and Rome. To assist the reader, she offers robust discussions of what constitutes a city, what informs street art, and how law interacts with cities, street art and street artists. She does so while integrating themes of belonging, transformation and reclamation of the city, carefully unpacking how law's boundaries of authorization and permissibility criminalize graffiti and street art and how street art, by rejecting law's notions of property, facilitates embodying other possibilities and modes of legality.

The hallmark of Young's book is that the subjects are not reduced to arguments or abstractions. Young manages to keep the complexities of human experience, law, street artwork and the city intact, describing the ache that results from the loss of a piece of street art, the surprise when a new piece appears, the fear that arises when a citizen assumes policing responsibility to stop an artwork's creation (sometimes violently), the theories governments use to justify criminal and behavioural offences targeting street artwork, and the multiple ways cities are walked in, lived in, shaped and perceived. She tells a story of human experience and transformative interactions while exposing how legal systems are constructed by partial and partisan representations (see Pelias 2005, 418).

Young explicitly chooses, however, not to use 'conventional demographic attributes about age, gender, class and so on' in describing the artists, instead 'allow[ing] their identities to be read through their recounted histories, experiences and desires' (Young 2014, 24). While she considers class through the impacts of neighbourhood gentrification and street art's commodification, the absence of an analysis of race and gender in relation to the history, criminalization and practice of street art left me unsettled. I could not help but notice that the three artists featured in the five encounters were all men: Banksy, JR and Brad Downey. Where are women in the world of street art? Are the encounters a reflection of the artistic practice? I also couldn't help but wonder whether these three featured street artists are white (only aware that they are of English, French and American citizenship) and what race means in relation to fame and state violence as a street artist: who is able to safely pass through police encounters and continue making street art? Do people of colour, indigenous peoples and non-status individuals face greater challenges

and higher stakes, such that their voices are less present? To discuss criminalization and specific police encounters without discussing race, particularly in cities such as New York, concerns me as it allows readers to believe differential treatment does not exist, silently erasing histories of state violence against particular groups. Sensitive to the challenges a legal scholar must face in establishing rapport and access to people making 'illegal' artwork, I applaud Young's dedication to collecting the interviews—a hard-sought collection of data—and understand the cautions one must exercise in how that data is used in scholarship, especially when she is not an insider to a community. Yet the absence of an explicit or even embedded critical race and feminist analysis in a text that inspires reimagining the city as a place of transformation and democratic belonging is hard for me to reconcile with my deep respect and appreciation of the structure, content and arguments in her book.

\* \* \*

Before moving on, it may be helpful to attempt clarifying what 'street art' refers to and what sort of motivations inform it. Young offers broad reaching, well-researched and innovative understandings of the term. Despite avoiding conventional demographics in her interview process, Young acknowledges that street art is 'a culture in itself, with hierarchies, conventions, forms of inclusions and exclusion' (2014, 25). She notes that the term street art gained popularity in the early to mid-2000s and is therefore distinct from graffiti, which has a longer established history, though it still flows from the historical practices of graffiti writing, political protest (slogans and posters), punk culture, and situationist art (Ibid., 4-5).

More literally, street art consists of images, objects and/or words in public spaces. Genres of street artwork include: tags (a graffiti signature of sorts), stencil art (images painted from stencils), paste-up art (sheets of paper pasted to walls with a flour-based adhesive), stickers (self-explanatory), and objects (addition of new objects to an existing space or surface, or alteration of existing things). Some consider it art, law considers it a crime. It should not be conflated with urban art and cannot be reduced to a singular definition or exhaustive list of characteristics.

Young considers street art 'situational art' because its placement is political, informing the spectator's encounter with the work, the artist's choice of location and the law's desire to deem it legal or illegal (Young 2014, 8). Street art is thus 'an uncommissioned, un-author(is)ed work, visible in public space and located on private property' (Ibid., 34). Its makers are unknown, unpaid and generally do not ask permission to transform the space they use. For this reason, some scholars call it 'transgressive behaviour' while others analyse it as a 'communicative practice' or 'unauthorized intervention' (Ibid., 4, 6, 27, 2). More positive descriptions include 'an unsolicited aesthetic injection' (Riggle 2010, 249), a gift, an alternate or alternative news source (in contrast to billboards and mainstream advertising) (Young 2014, 19). Street artists tended to mention illegality, aesthetics, and impact on urban space when describing their work. Having said all that, you must negotiate and define your own relationship to street art, a contextual one that will inevitably draw on your

political beliefs, especially regarding property.

Gilles Deleuze frames all forms of art as performative gestures that invite people to come forth. Rather than representing an audience, artwork appeals to people who didn't previously exist or existed differently (Deleuze 1997). In this way, street artwork is constitutive: spectators view it, curiosity develops and relationships to the street and one another change (Riggle 2010, 249). Young invites readers to follow Michel de Certeau's idea that the paths walked in a city are 'unrecognized poems in which [your] body is an element signed by many others' (Certeau 1984, 93), so that walking in the city becomes a constitutive act where 'citizenship arises, and varies, as we traverse' (Young 2014, 90). In this same vein, many of the street artists interviewed said their work is about revitalising a sense of belonging in urban space: 'it shows people that the city is theirs. They need to see and question the objects that they engage with every day.'<sup>1</sup> Street artwork is thus a powerful tool for affecting a sense of belonging in the city.

In her thought-provoking chapter on cityscapes, where Young discusses how street art impacts the identity of six Western cities (New York, Paris, Melbourne, London, Berlin and Rome), a consideration of how histories of colonization factor into notions of belonging, particularly in cities occupied by settler societies such as New York and Melbourne, would have strengthened the discussion. While Young mentions that Aboriginal politics were part of Melbourne's graffiti writing movement in the 1990s, I can't help but wonder who is 'reclaiming' the city now? Who thinks the city is theirs to take back, and from whom are they taking it? Whose 'desire to represent things otherwise, to change the way citizens experience cities and property' are now being shared, and what 'multiplicities' are street artworks pointing towards 'within the singular city' (Young 2014, 53)?

\* \* \*

Young's book has inspired me to revisit my relationship to street art and see the city I live in through new eyes—to notice love notes dried in cement sidewalks, the almost invisible graffiti layered onto a Canada Post box (designed to deter graffiti by virtue of already being covered in writing—postal codes in various fonts and sizes—from top to bottom). In these moments, I embody what she writes, realizing how street art lifts spectators into aesthetically striking moments where they may become enchanted. Whether this enchantment offers fear and dislike or pleasure and delight, it is a space of pause and meaning-making<sup>2</sup> where all interpretations are valid<sup>3</sup>. The artwork's 'performance of criminality, contestation and creativity' (2014, 59) not only engages the spectator's urban imagination but asks her to consider what does and does not belong and why. Indeed, by taking the familiar and making it strange, street artwork becomes performative and transformative, materially, situationally and imaginatively altering the cityscape, opening space for disruption

---

<sup>1</sup> Brad Downey, cited in Young 2014, 54.

<sup>2</sup> See Bennett 2001; see Young 2014, 45-46.

<sup>3</sup> Kaffeine, cited in Young 2014, 25.



and destabilization, for re-imagining how we conceive property.

You may be familiar with law's classifications of street art and graffiti as crimes, vandalism, property damage and trespass but did you know Britain handed down Antisocial Behaviour Orders to individuals caught making graffiti under the Crime and Disorder Act 1998 and subsequent Antisocial Behaviour Act 2003 (Young 2014, 113)? Australia even augmented police powers so that officers could search without a warrant. To create new offenses in relation to street artwork and graffiti, many governments relied on the broken windows theory which speculatively muses that the presence of any social disorder encourages further disorder because it suggests crime is not regulated (Ibid., 109). Amongst this theory's many flaws, it disregards the motivations behind and consequences of graffiti: a broken window destroys the functionality of the window whereas graffiti does not destroy the functionality of the wall, but changes its appearance 'add[ing] a layer of meaning' (Ibid., 110).

Having established that street art draws meaning from its location in public space on private property, Young investigates why graffiti and street art make the law so anxious. In simple terms, law fears street artwork's rejection of boundaries and authority—its rejection of property. Where law orders, drawing lines so that the city appears smooth, organized and functional, street artwork exposes 'multiple boundaries and borders of the propertied cityscape', serving as a 'de-territorialising tactic', an *autopoietic* practice refusing to be designated to a particular space (Ibid., 145). These rejections are criminalised in order to reinforce notions of ownership, boundaries, authority and property.

Young's next question is rather profound, requiring the reader to dismantle and re-envision their understanding of the legal system: why do governments use criminal law to deal with artwork that is, by law's own structures, an offence to property? Having already described law's relationship to the city, Young slowly reveals the structures and systems barring our imaginations before offering us alternatives: why not create statutes empowering property owners to utilize procedures under administrative or property law to assert rights over their property rather than criminal statutes (Young 2014, 114)?

\* \* \*

Some scholars say ephemerality and material or artistic use of the street are essential to street art (Riggle 2010). I am left wondering what it means to record street art in a scholarly book, to document, archive and historicize a practice that is otherwise ephemeral and tends to pass knowledge through image, object and presence. Although street art is frequently documented online, I wonder what it means to translate the practice and the words of its practitioners into a book and add them to the legal archive. Repertoire, as described by Diane Taylor in relation to performance, requires presence, for people to participate in the spectatorship. The performance doesn't subsequently disappear but is generated, recorded and transmitted through bodies orally and through further performances and iterations, thus exceeding the archive's ability to capture it as a frozen moment in time (see Taylor 2003, 20). I

am happy to have this book, to have read it, to have learned from it—indeed, I am a lover of the written word—yet I am wary of the archive’s potential to validate, institutionalize, co-opt and transform ephemeral practices.

\* \* \*

*I don't think that the answer to all our problems is gonna be one book, yeah? But I do think the answers to all our problems are gonna be found in the creative...*

– Junot Diaz (2010)

You can now see how difficult it is to define the cultural practice of street art, how it ‘can be art *and* crime *and* an aspect of urban space *and* a form of communication *and* a political gesture *and* constitutive of a new movement in art’ (Young 2014, 8). If you don’t like street art or you consider graffiti to be vandalism, Young’s book will challenge your assumptions or perhaps let you see the cities you live in differently. If you love street art, you will learn about the methods, come across a brief recent history, the attempts to control it and feel like you’ve been in conversation with a global community of artists in a way you haven’t before. If you are a street artist, it’s good to see what people are writing and saying about you but you may also learn some risk minimization and community building techniques (Ibid., 106). If you are a lawyer or scholar, you will be offered new ways of understanding law’s relationship to street art and might question why street art is governed under the criminal regime. No matter who you are, I believe this book will lead you to see the city differently, to walk through familiar places with new lenses—even if there isn’t street art in your town, you may start seeing the potential for it, places where it could live or places where the city is trying to prevent it from living.

## Bibliography

Bennett, Jane: *The Enchantment of Modern Life. Attachments, Crossings and Ethics*. Princeton University Press, Princeton 2001.

Certeau, Michel de: *The Practice of Everyday Life*. Translated by Steven F. Rendall. University of California Press, Berkeley 1984.

Deleuze, Gilles: 'One Less Manifesto'. Translated by Timothy Murray & Eliane dal Molin. In Timothy Murray (ed): *Mimesis, Masochism and Mime: The Politics of Theatricality in Contemporary French Thought*. University of Michigan Press, Ann Arbor 1997.

Diaz, Junot: *Second Person is Unbearable*. YouTube 2015. Available on <[https://www.youtube.com/watch?v=vDE3\\_XvS9ok](https://www.youtube.com/watch?v=vDE3_XvS9ok)> (visited 25 April 2016).

Diaz, Junot: *Writers' Confessions—Junot Diaz Discusses the Writing Process*. YouTube 2010. Available on <<https://www.youtube.com/watch?v=WE8bO8HeuOY>> (visited on 25 April 2016).

Pelias, Ronald J.: 'Performative Writing as Scholarship: An Apology, an Argument, an Anecdote' 5(4) *Cultural Studies <—> Critical Methodologies* (2005) 415-424.

Riggle, Nicholas Alden: 'Street Art: The Transfiguration of the Commonplaces'. 68 (3) *Journal of Aesthetics & Art Criticism* (2010) 243–257.

Taylor, Diana: *The Archive and the Repertoire. Performing Cultural Memory in the Americas*. Duke University Press, Durham 2003.

Young, Alison: *Street Art, Public City. Law, Crime and the Urban Imagination*. Routledge, New York 2014.