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Purporting to draw a distinction between photographic and verbal information and furthermore contending that the former is more intrusive of privacy than the latter presumes that photographs are, or can be, autonomous from the phenomena they represent and the language used to describe them. Yet theorists of photography, in their various ways, challenge precisely these assumptions. Indeed, they contend to the contrary, that an understanding of photographs is dependent upon the words used to describe them.

For instance, Sontag follows her provocative statement to the effect that the informational value of a photograph is 'of the same order as fiction' by linking the importance of photographs as information to the emergence of 'illustrated newspapers'. She observes that '[p]hotographs were seen as a way of giving information to people who do not take easily to reading' (Sontag 1977, 22). She contrasts *The Daily News*, which, at the time when Sontag was writing, promoted itself as 'New York's Picture Newspaper' with *Le Monde*, which eschewed the use of photographs at all, on 'the presumption… that, for such readers [of *Le Monde*], a photograph could only illustrate the analysis contained in an article' (Sontag 1977, 22). Rather than accepting that photographic information is additional or superior to written information, as some recent judges have suggested, photographs might be viewed as superfluous to a written account.

Sontag considers the possibility of the photograph as a source of meaning in isolation from the written text and observes that

> [a]ny photograph has multiple meanings; indeed, to see something in the form of a photograph is to encounter a potential object of fascination. The ultimate wisdom of the photographic image is to say: 'There is the surface. Now think – or rather feel, intuit – what is beyond it, what the reality of it must be if it looks this way'. Photographs, which cannot themselves explain anything, are inexhaustible invitations to deduction, speculation, and fantasy. (Sontag 1977, 23)

Thus, contrary to the law's current position, the notion that a photograph can, independent of the written word, constitute a form of information is problematic. Sontag continues to develop this idea, noting that

> [s]trictly speaking, one never understands anything from a photograph…. Nevertheless, the camera's rendering of reality must always hide more than it discloses…. Only that which narrates can make us understand. (Sontag 1977, 23)

Whereas the emerging law of privacy places photographs in a privileged position as a form of information and, through disclosure, harm, Sontag contemplates the relationship and, by extension, the power structure between the photograph and the written word being inverted. The photograph itself does not convey information and therefore does not intrude upon an individual's privacy; it is only when the photograph is described or interpreted or 'read' that the photograph acquires meaning and has the capacity to harm.

Berger engages with similar issues to Sontag in his writing on visual images. As Berger states at the outset of *Ways of Seeing*, '[s]eeing comes before words' (Berger 1972, 7). He elaborates that

> [i]t is seeing which establishes our place in the surrounding world; we explain that world with words, but words can never undo the fact that we are surrounded by it. (Berger 1972, 7; Berger and Mohr 1982)

Viewed from a different perspective, Price contends that '[i]t is the act of describing that enables the act of seeing' (Price 1994, 6). For Price, the language of description is deeply implicated in the act of looking at photographs (Price 1994, 1). She argues that description entails the interpretation of the photograph, without which the meaning of the photograph is not possible (Price 1994, 5). The process of describing a photograph is important because descriptions 'set limits to expectations, direct attention to subject or context, perhaps name the time and place' (Price 1994, 71). Price explicitly connects the process of describing a photograph with the process of deriving information from the photograph. She argues that

> [t]he crucial and important question is twofold: What does this photograph convey as information, and what does that information mean? To talk about either aspect, it is necessary to describe the photograph, that is, to name what is seen as fully as possible and then to relate that description to the context, effect, and significant of the visual elements. (Price 1994, 76)

The dependence of photographs upon words used to describe them is demonstrated in innumerable ways. A small but telling example is provided by Lord Nicholls of Birkenhead in *Campbell v MGN*. His Lordship records that the article in *The Daily Mirror* was inaccurate because '[t]he street photographs showed [Campbell] leaving a meeting, not arriving, contrary to the caption in the newspaper article' (*Campbell v. MGN Ltd*. 2004, 463). The photographs did not speak for themselves; they did not yield, unaided, their information; they were ambiguous – they could have depicted an arrival or a departure; and they required the captions to disclose their information to the reader. In this instance, the captions misled the reader into placing an incorrect interpretation on the photographs.

For the purpose of deriving information from, and ascribing meaning to, a photograph, not only is there an interdependence between the photograph itself and the language used to describe it, there is also a complex interrelationship between the photograph, the photographer and the viewer. This is a point made by Sontag, when she suggests, on the one hand, that photographing a phenomenon places the photographer 'in a certain relation to the world' (Sontag 1977, 4), whilst, on the other hand, the photograph invites the viewer to deduce or to speculate or even to fantasise about its meaning (Sontag 1977, 23). According to Price, a photograph is created by the mind of the photographer (Price 1994, 75–76) but '[e]very image is also subject to the second mind, that of the viewer' (Price 1994, 77). Berger also considers this in his writings on photography. Not only is there a relationship between seeing and recording what one sees by means of a photograph, there is also a relationship between the photographer, the viewer, the photograph and the photographed which is essential to the construction of a photograph's meaning. Berger emphasises '[t]he reciprocal nature of vision':

> We never look at just one thing; we are always looking at the relation between things and ourselves. Our vision is continually active, continually moving, continually holding things in a circle around itself, constituting what is present to us as we are. (Berger 1972, 9)

Berger suggests that 'all images are man-made' (Berger 1972, 9). He does not limit the making of images to the physical process of creation. Self-evidently, the photographer is responsible for the taking of the photograph. However, Berger argues that the photographer is also involved in the creation of meaning in relation to a photograph. For Berger, a photograph embodies and reflects the photographer's 'way of seeing' (Berger 1972, 10). He explains that

> [e]very image embodies a way of seeing. Even a photograph. For photographs are not, as is often assumed, a mechanical record. Every time we look at a photograph, we are aware, however slightly, of the photographer selecting that sight from an infinity of other possible sights. (Berger 1972, 10)

Berger proceeds to suggest that it is not only the photographer's 'way of seeing' that is relevant to the derivation of meaning from a photograph but also that the viewer's 'way of seeing' informs his or her perception or appreciation of the photograph, thereby influencing the meaning he or she attributes to the photograph (Berger 1972, 10). In turn, each person's 'way of seeing' is informed by what he or she knows or believes (Berger 1972, 8). Consequently, there is no fixed meaning to be attached to a photograph. In Berger's words, '[t]he relation between what we see and what we know is never settled' (Berger 1972, 7). The interaction is dynamic, but not unstable. As Price observes,

> a photograph does not have an inherent, self-evident fixed meaning. But neither does it have a wholly arbitrary meaning. The limits of interpretation are determined by what can be seen in a photograph. (Price 1994, 7)

What emerges clearly from a consideration of these theoretical perspectives is that treating a photograph as a form of information and imposing liability of the basis of the 'information' disclosed by the publication implicitly involves a complex semiotic exercise. Perhaps the most developed account of the semiotics of the photograph is provided by Barthes, particularly through his essay, 'The Photographic Message', and his book, *Camera Lucida*. In the latter work, Barthes considers the nature of the photograph and observes that

> [a] specific photograph, in effect, is never distinguished from its referent (from what it represents), or at least it is not *immediately* or *generally* distinguished from its referent (as is the case for every other image, encumbered – from the start, and because of its status – by the way in which the object is simulated): it is not impossible to perceive the photographic signifier…, but it requires a secondary action of knowledge or reflection. It is as if the Photograph always carries its referent with itself. (Barthes 1982, 5)

Barthes' approach to the photograph denies the ready acceptance of the photograph as a form of information because, as he points out, there is a conceptual distinction to be drawn between the photograph and that which it represents. When looking at a photograph, this distinction can be, and often is, readily forgotten (Barthes 1982, 6).

In his account of the semiotics of the photograph in *Camera Lucida*, Barthes suggests:

> that a photograph can be the objects of three practices (or of three emotions, or of three intentions): to do, to undergo, to look. The *Operator* is the Photographer. The *Spectator* is

> ourselves, all of us who glance through collections of photographs – in magazines and newspapers, in books, in albums, archives… And the person or thing photographed is the target, the referent, a kind of little simulacrum, any *eidolon* emitted by the object, which I should like to call the *Spectrum* of the Photograph…. (Barthes 1982, 9)

Barthes explored his ideas of the semiotics of the photograph, explicitly in the context of the 'press photograph', in his essay, 'The Photographic Message'. He argues that the press photograph is a message which results from the interaction of 'a source of emission, a channel of transmission and a point of reception' (Barthes 1977a, 15). By 'a source of emission', he means 'the staff of a newspaper, the group of technicians certain of whom take the photo, some of whom choose, compose and treat it, while others, finally give it a title, a caption and a commentary' and by 'a point of reception', he means the reading public of a newspaper (Barthes 1977a, 15). The most difficult aspect of the semiotics of a press photograph is the 'channel transmission', which Barthes defines as the newspaper itself. However, the newspaper in turn is itself a complex semiotic structure – 'a complex of concurrent messages with the photograph as the centre and surrounds constituted by the text, the title, the caption, the lay-out and, in a more abstract and no less "informative" way, by the very name of the paper…' (Barthes 1977a). According to Barthes, the photograph poses a methodological problem because 'the photograph is not simply a product or a channel but also an object endowed with a structural autonomy' (Barthes 1977a). Although autonomous, the structure of the photograph is not isolated. It necessarily communicates with another structure: the text accompanying the photograph – the title, caption or article. Thus, according to Barthes, '[t]he totality of the information is thus carried by two different structures (one of which is linguistic)' (Barthes 1977a). The structures are co-operative, but, because one is comprised of words and the other is comprised of 'lines, surfaces [and] shades', they are necessarily separate, qualitatively and spatially. Barthes suggests that the two structures need to be analysed separately before their interaction can be understood. He further suggests that the linguistic structure is well developed, whereas 'almost nothing is known about the other, that of the photograph' (Barthes 1977a). This acknowledgement of the nascent state of understanding the meaning of photographs contrasts with the ease and certainty of the law's current approach.

Barthes proceeds to grapple with the nature of the photograph and the ascertainment of its meaning or meanings. He recognises that, on one level, a photograph is an analogue of its object. In one sense, therefore, the photograph is 'a message without a code' (Barthes 1977a). However, this is only one part of the 'message' of a photograph. Barthes distinguishes between the denoted and the connoted messages of a photograph. The denoted is the analogue of the object, whereas the connoted concerns the communication of the societal reaction to the image and its analogue (Barthes 1977a, b, 17, 37). Barthes suggests that there is a risk that, in describing a photograph in words, one will add a connotation. The act of describing a photograph is problematic because 'to describe is thus not simply to be imprecise or incomplete, it is to change structure, to signify something different to what is

shown' (Barthes 1977a, 18–19). Barthes also considers the role of text accompanying photographs, describing a change in function thus:

> Formerly, the image illustrated the text (made it clearer); today, the text loads the image, burdening it within a culture, a moral, an imagination. Formerly, there was reduction from text to image; today, there is amplification from the one to the other. (Barthes 1977a, 26)

Barthes then considers the multiple senses of connotation – perceptive connotation, cognitive connotation, ethical connotation and political connotation (Barthes 1977a, 28–30; Eco 1982, 35–38) – but all codes of connotation are always, he stresses, historical or cultural (Barthes 1977a, b, 27).

Assessing the effect of Barthes' semiotic analysis of the photograph, Victor Burgin concludes that

> [w]ork in semiotics showed that there is no 'language' of photography, no single signifying system (as opposed to technical apparatus) upon which all photographs depend (in the sense in which all texts in English ultimately depend upon the English language); there is, rather, a heterogeneous complex of codes upon which photography may draw…. Further, importantly, it was shown that the putatively autonomous 'language of photography' is never free from the determination of language itself. (Burgin 1982, 143–144)

These two key insights clearly emerge from an engagement with photographic theory, particularly semiotic approaches to photography, yet they have not been recognised by the law's treatment of photographs in the developing area of privacy. The implications of these insights for the 'reading' of photographs are profound.

Photographic theory does not allow for a ready acceptance of a rigid demarcation between photographic and written information. In different ways, theorists of photography suggest that there is an interaction, even an interdependence, between photographs and written text. In the context of a 'press photograph', this interaction involves not only the photographs and the written text themselves but also those participating in their production and those receiving them. It also entails the codes, connotations and conventions associated with interpreting photographs. According to photographic theory, the process of constructing meaning out of a 'press photograph' is a complex semiotic undertaking. By contrast, the task of 'reading' photographs, contemplated by the developing law of privacy, is assumed to be straightforward and unproblematic. The nuanced and sophisticated approach to the 'reading' of a photograph suggested by theorists, such as Barthes, contrasts markedly to the law's simplistic and unreflective approach. However, as Derrick Price and Liz Wells have suggested, '[t]he issue is not whether theory is in play but, rather, whether theory is acknowledged' (Price and Wells 2004, 24).

10.7 Conclusion

At the outset of *On Photography*, Sontag refers to the need to be educated about how to understand photographs. She suggests that there is a need to be taught 'a new visual code' (Sontag 1977; Berger 1971; Clarke 1997). Just as one needs to be

taught to read the written word, so one needs to be taught to read the photographic image. Both are acquired, not 'natural', skills. It is important to recognise that they are also not the same set of skills. As Diplock LJ evocatively observed in *Slim v Daily Telegraph Ltd*, '[w]ords are the tools of [the lawyer's] trade' (*Slim v. Daily Telegraph Ltd*. 1968). Simply because judges are trained to read and interpret written texts does not mean that they are automatically and necessarily equipped to read and interpret visual images. A sophisticated canon of textual construction has developed over several centuries to allow judges in the common law tradition to read and interpret the written texts they routinely encounter – constitutions, statutes, cases and treaties. An equally sophisticated but distinct approach to the 'reading' of photographs has yet to emerge.

In developing such an approach, the law can benefit from an engagement with photographic theory. Photographic theory considers questions implicitly asked and answered by law. Whereas courts do not explicitly ask these questions and assert the answers as if they are straightforward, photographic theory reveals how problematic the answers and indeed the questions themselves might be. In addition, photographic theory poses questions which the law does not even consider implicitly but questions which are nonetheless worth asking and addressing. For instance, Barthes, on a number of occasions, poses questions about photographs and then proceeds to consider their implications. In his essay, 'The Photographic Message', he asks:

> 'What is the content of the photographic message? What does this photograph transmit?' (Barthes 1977a, 16–17)

Later in the same essay, Barthes poses the questions:

> 'How do we read a photograph? What do we perceive? In what order, according to what progression?' (Barthes 1977a, 28)

In his essay, 'The Rhetoric of the Image', he asks:

> 'How does meaning get into the image? Where does it end? And if it ends, what is there *beyond*?' (Barthes 1977b, 32)

Although these questions do not allow, or require, a definitive answer, they are legitimate and stimulating and the law's treatment of photographs as a form of invasion of privacy would be more nuanced by an engagement with them. Theoretical writings on photographs and photography can at least provide the law with a consciousness of those issues involved with 'reading' photographs and attaching meaning to them, as well as the possibility of a discourse for analysing and interpreting photographs (Sherwin et al. 2006, 227). Currently, glib assumptions are made – about photographs being information; about photographic information being distinct from written information; about photographs being more invasive of privacy than written information; about the ease with which photographs can be 'read', without regard to the complex relationships of meaning by which meanings can be generated and negotiated – which are problematic and warrant explication and scrutiny.

There is a rich and diverse theoretical literature on photographs and photography. Not all of it will be directly relevant to the task confronted by judges in determining whether the publication of a photograph constitutes an invasion of privacy, but there is nevertheless much to be learned from photographic theory. Although the law has only recently engaged with the issue of interpreting or ascribing meaning to or 'reading' photographs, the critical literature considering similar issues has developed for over a century. The law's underdeveloped approach to photographs and photography could enrich its principled approach to this issue by reference to photographic theory.

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Chapter 11
Drawing Attention: Art, Pornography, Ethnosemiotics and Law

Alec McHoul and Tracey Summerfield

Abstract We compare here the everyday and legal readings of two controversial cases from mid-2008 in Australia in which the legal status of a number of photographs came into contestation. The first case turned on an exhibition of photographs by the well-known artist, Bill Henson; the second, a cover from *Art Monthly* magazine. Both cases involved young persons and nudity.

Our first approach to the cases is to look in detail at 'child pornography' law in Australia, by reference to the three jurisdictions in which the photographs were tested. We want to tease out the actual legal situation regarding the demarcation between licit and unlawful images (in terms of their pornographic status), especially where minors may be concerned.

Our second approach is ethnosemiotic. Here we investigate how non-specialist or ordinary members of the society treated the controversies. As an example, we turn to a web discussion site and describe the ethnosemiotic resources that the contributors brought into play in an effort to comprehend these matters.

Finally, we speculate on the gaps and overlaps between 'ordinary' and 'formal' modes of legal reasoning based on these two approaches.

11.1 Introduction

In mid-2008, two events that may be related in more than just their temporality conspired to bring to both general-public and legal attention the question:

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What is an unlawful image? This chapter looks at these two events—and their aftermaths—and compares the everyday and the legal readings of them.

In May and June 2008, Australian Federal and NSW State police raided a number of commercial and public art galleries and seized photographic images amidst public allegations that they were pornographic depictions of children. The raids followed the distribution of 3,500 invitations to the opening of the 2008 exhibition of the photographic works of artist Bill Henson. The invitation featured one of the works, *Untitled (#30)*. The image was a photograph of a naked 12-year-old girl.[1]

There were further tremors in July 2008 when *Art Monthly* provocatively featured on its cover a photograph of a naked 6-year-old child, sitting against a backdrop painted by her father (Robert Nelson), attracting similar public attention. The photograph in this case was by Polixeni Papapetrou and entitled *Olympia as Lewis Carroll's Beatrice Hatch before White Cliffs (detail), 2003*.[2] The Olympia in question is Papapetrou's daughter and, despite the fact that Olympia Nelson has publicly defended her mother's work,[3] an upshot of this controversy (in combination with the Henson event) has been no less than a Prime-Ministerial injunction to the Australia Council that artists in receipt of its grants must follow explicit protocols regarding the protection of the innocence of children.

Our aim in this chapter is twofold. Firstly, we want to tease out the actual legal situation in Australia regarding the demarcation between licit and unlawful images (in terms of their pornographic status), especially where minors may be concerned.

Our second aim is 'ethnosemiotic', where this term refers to the understanding and description of the kinds of interpretations and analyses that non-specialist (general-public) members of the society make vis-à-vis the signs they encounter in everyday life. Following the Henson and Papapetrou cases (particularly the former), the new civic domain, the internet, abounded with readings, interpretations and analyses of the images in question. We take a particular site as our case study. This site is a talk forum for computer enthusiasts and was chosen because its contributors are by-and-large specialists in neither legal nor aesthetic fields (though some who posted to the debate do claim amateur and professional interests in photography).[4] The range of 'laic' readings and the ethnosemiotic methods available for them on this site are discussed.

Finally, using the Henson/Papapetrou events as just one instance or case in point, we ask: What are the differences and similarities between legal and ethnosemiotic judgments[5] concerning graphic signs and their fitness (or otherwise) for public

[1] The image can nevertheless be viewed at Web pages hosting public debate. See, for example, http://www.sauer-thompson.com/junkforcode/archives/2008/05/bill-henson-6-u.html and: http://kaganof.com/kagablog/2008/06/01/bill-henson-the-nude-that-caused-all-the-trouble/.

[2] http://polixenipapapetrou.net/works.php?cat=Dreamchild_2003.

[3] http://www.abc.net.au/news/stories/2008/07/07/2296347.htm.

[4] http://forums.mactalk.com.au/8/45454-bill-henson-art-monthly-nude-child-disgusted-rudd-debate.html.

[5] We refer here to the judgements contained in statutes as well as the judgements of the courts.

display as 'art'? We hope this single case will go some way to drawing attention to the more general relations between legal and ethnosemiotic methods of reasoning about visual signs.

11.2 The Unfolding of the Henson/Papapetrou Child Pornography Allegations

The invitation to Henson's exhibition first caught the attention of journalists at New South Wales' *Sydney Morning Herald* and was reported in an opinion piece by Miranda Devine on 22 May 2008. Here she expressed concern at the naturalisation of images of children in 'sexual contexts' by various groups including 'artists, perverts, academics, libertarians, the media and advertising industries, respectable corporations and the porn industry'.[6] The story came to the attention of tabloid radio journalists ('shock jocks') who advertised the website displaying the image, attracting comment from the general public.

The media offensive that followed attracted official comment. Barry O'Farrell, leader of the New South Wales (NSW) Opposition, commented that '[I]t is definitely not OK for naked children to have their privacy and their childhood stolen in the name of art' (quoted in Marr 2008, 11). The following day, NSW Premier Morris Iemma was reported in the *Daily Telegraph* newspaper as saying '… I find it offensive and disgusting.… I'm all for free speech, but never at the expense of a child's safety and innocence'.[7] Finally, after viewing a number of the photographs, the (then) Australian Prime Minister announced on television that he thought the images 'absolutely revolting', appealing for 'kids to be [allowed to] be kids', whatever the images' artistic merit (which he thought them to be devoid of).[8]

A representation of Henson's work remains available online, including at the website of the exhibition space that was the subject of initial raids.[9] It is reported that the artist chose *Untitled (#30)* for the invitation as he thought it to be the most alive of the exhibited images (Marr 2008, 5). Asked previously why he worked with models so young, Henson is reported as answering:

> It's the most effective vehicle for expressing ideas about humanity and vulnerability and our sense of ourselves living inside our bodies; the breath-taking moment to moment existence as you're walking down a street and feel a cool change come through, feel the weather on our bodies and the way we feel about being in the world. All of this is focused more effectively through this age group, so it's the age group I work with (Marr 2008, 7).

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[6] *Sydney Morning Herald* 22 May 2008, 13.

[7] *Daily Telegraph* 23 May 2008, 4.

[8] *Today* Channel 9, 23 May 2008.

[9] Notably, the image which triggered the raids, *Untitled (#30)*, is absent from the Web page, having been withdrawn at the peak of the controversy. See http://www.roslynoxley9.com.au/artists/18/Bill_Henson/1098/. Accessed 12 January 2009. The image can nevertheless be viewed on a host of other Web pages hosting public debate. See, for example,

http://www.sauer-thompson.com/junkforcode/archives/2008/05/bill-henson-6-u.html

http://kaganof.com/kagablog/2008/06/01/bill-henson-the-nude-that-caused-all-the-trouble/.

The 127 cm by 180 cm unframed print was one of 14 pictures of the subject. She was naked in all of the images, her nipples visible in nine images, and her crotch just visible in one image. The exhibition included other images of young people,[10] as had past exhibitions, but also almost an equal number of images that did not focus on youth or nudity (Marr 2008, 6).

Despite the public controversy and the best efforts of police to find that the relevant images offended Australian child pornography criminal laws, eventually no charges were laid. Online images contained in media websites (which did not include *Untitled (#30)*) were also referred to the Classification Board by the Australian Communications and Media Authority (ACMA) which investigates complaints regarding online content. The panel of five classifiers comprising the Classification Board found on 29th May 2008 that the images warranted a G classification; that is, they were deemed suitable for viewing by all ages. Interestingly, the black bars placed on some of the images contained in a News Limited slideshow, no doubt to preserve the 'decency' of the children, were considered by some of the panel to render the images dirty and more confronting (Marr 2008, 116–117). *Untitled (#30)* was referred to the Board by the ACMA. The Board found that the image was not pornographic and warranted a PG classification; that is, it was suitable for viewing by children, with parental guidance (Marr 2008, 116–117).

The publication of the July 2008 edition of *Art Monthly Australia* put the issue back into gear. The edition had a cover story on the Henson controversy and included articles from various commentators as well as photographs by photographer Polixeni Papapetrou of her then 6-year-old daughter, Olympia. The cover image was considered by the editor to be 'a safe image on lots of levels', having been exhibited on many other occasions without attention, reproduced in many art publications and even featured on a bank's greeting card (Marr 2008, 138). In response to the renewed interest, Robert Nelson, Olympia's father and the producer of the painted backdrop of the photograph, held a press conference, where Olympia (then 11 years of age) offered her view of the image, placing the image into the combined contexts of art and family photo:

> I think that the picture my mum took of me has nothing to do with being abused. I think that nudity can be part of art. I have thought that for a long, long time. …It [the photo] is one of my favourite — if not my favourite photo my mum has ever taken of me (Marr 2008, 140; ABC 2008).

Police did not act against *Art Monthly Australia,* and the Classification Board cleared it for unrestricted sale, the publication warranting an M classification, that is, not recommended for readers under 15 years (Marr 2008, 141). It is then that the Australian Government announced new protocols would be developed for the use of images of children in the arts.

[10] For example, see *Untitled #7*, 2005/06. http://www.roslynoxley9.com.au/artists/18/Bill_Henson/458/38776/. Accessed 12 January 2009.

11.3 Australian 'Child Pornography' Law

As a federation, there is a distinction in Australia between the legislative powers of the Commonwealth and the individual States and Territories. Generally, criminal matters fall under the jurisdiction of the States, aside from areas which are constitutionally under the power of the Commonwealth, such as telecommunications. The Commonwealth criminal laws apply, amongst other things, to telecommunications services and therefore in regard to the postage of invitations and the postings of the Henson image on the gallery website. The outline of laws provided here are those in place at the time of the controversies, although significant changes are noted.

In Australia, it is an offence in most jurisdictions to possess, produce or distribute child pornography.[11] The penalties vary between jurisdictions, with possession attracting a maximum penalty of between 5 and 21 years imprisonment, production between 4 and 21 years and distribution between 5 and 21 years. This compares to penalties of between 5 and 10 years in comparable Commonwealth legal systems, Canada, New Zealand and the United Kingdom (Attorney-General's Department 2009, 72).

The age threshold for these offences is between 16 and 18 years of age.[12] It is said that this is higher than the age of consent for other sexual offences in some jurisdictions because child pornography involves the exploitation of children, usually for commercial purposes (Attorney-General's Department 2009, 3). The Henson images were tested under the classification and criminal laws of three jurisdictions—the Australian Commonwealth, NSW and the Australian Capital Territory, the Papapetrou image under the classification laws only.

Australian Commonwealth criminal law defines 'child pornography material' as material that depicts or represents a person who is or appears to be under 18 years of age in a sexual pose or activity in a way that would reasonably be considered offensive or which depicts for sexual purposes a sexual organ, anal region or breasts of a person who appears to be under 18 years of age, in a way that would reasonably be considered offensive.[13] The matters to be taken into account in deciding what would be reasonably offensive include the 'standards or morality, decency and propriety generally accepted by reasonable adults'; the material's literary, artistic or educational merits; and the general character of the material, including its medical, legal or scientific character.[14]

At the time of the controversies, in NSW, it was an offence to use a child (defined as under 18 years of age) for pornographic purposes[15] or to produce, possess or

[11] *Crimes Act 1900* (NSW), *Crimes Act 1958* (Vic), *Criminal Code* (Qld), *Classification (Publications, Films & Computer Games) Enforcement Act 1996* (WA), *Criminal Code* (WA), *Criminal Law Consolidation Act 1935* (SA), *Criminal Code Act 1924* (Tas.), *Crime Act 1900* (ACT), *Criminal Code Act* (NT) *Criminal Code Act 1995* (Cth).

[12] Though in some jurisdictions there is a distinction between the actual age of the child and the purported age of the representation.

[13] Section 473.1 *Criminal Code 1995* (Cth).

[14] Section 473.4 *Criminal Code 1995* (Cth).

[15] Section 91G *Crimes Act 1900* (NSW).

disseminate child pornography.[16] Child pornography was defined as material which depicts, in a manner that in all the circumstances would be offensive to a reasonable person, a child engaged in sexual conduct, in a sexual context or as a victim of abuse generally.[17] A defence lay in the material being reasonably produced for a genuine artistic purpose or other public benefit and the defendant's conduct being reasonable for that purpose.[18] The term 'offensive' was not defined in the Act. Subsequent amendments have removed the artistic purpose defence and have created a public benefit defence, the definition of which does not include artistic merit.[19]

In the Australian Capital Territory (ACT), it is an offence to produce or disseminate child pornography, which is defined as anything that represents the sexual parts of a child or a child engaged in sexual activity, substantially for the sexual arousal of another.[20] Unlike NSW (and some other Australian States), there is no specific artistic or public benefit defence, but the requirement for prosecutors to show that the object of the images is to sexually gratify limits the provision's application in regard to artistic works and places the burden of proof on the Crown.

Generally, then, in Australia, the assessment of materials as pornographic or otherwise was, and continues to be in most jurisdictions, by reference to the content of the materials, the standards of reasonable persons and the artistic (and other) merit of the work. In Australia, in addition to these criminal provisions, there are reciprocal Commonwealth and State laws regarding the classification of publications, films and computer games.[21] An Australian Classification Board has been established to determine the rating to be given to materials. The matters to be considered by the Board include the 'standards of morality, decency and propriety generally accepted by reasonable adults'; the artistic merit and general character of the work; and the intended audience.[22] It must reflect contemporary community standards and apply criteria provided by the Australian National Classification Code. The general principles are that:

(a) adults should be able to read, hear and see what they want;
(b) minors should be protected from material likely to harm or disturb them;
(c) everyone should be protected from exposure to unsolicited material that they find offensive;
(d) the need to take account of community concerns about:
    (i) depictions that condone or incite violence, particularly sexual violence; and
    (ii) the portrayal of persons in a demeaning manner.[23]

[16] Section 91H *Crimes Act 1900* (NSW).

[17] Section 91H *Crimes Act 1900* (NSW).

[18] Section 91H(4) *Crimes Act 1900* (NSW).

[19] New section 91HA *Crimes Act 1900* (NSW).

[20] Sections 64(5) and 65 *Crimes Act 1900* (ACT).

[21] It was announced in December 2010 that the Australian Law Reform Commission is to conduct a review of the classification system: Australian Government.

[22] Section 11 *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

[23] National Classification Code, paragraph 1.

The definition of 'child pornography materials' under the Commonwealth *Criminal Code 1995* has been judicially considered. In 2009, the Supreme Court of the ACT pointed to the lack of authorities on the topic of distinguishing child pornography from other images of children and noted the Australian community's tolerance, often in a commercial context, of the sexualisation of young children. It found that the meaning of offensiveness requires:

> a recognition of what appear to be general community standards of what can be tolerated in the community at large in art, literature and particularly the mass media (including what is tolerated by people who would not necessarily regard particular standards as acceptable in their own lives), including … community tolerance of various approaches to children and sexuality.[24]

The Federal Court of Australia has held that deciding if something is 'likely to cause offence to a reasonable adult' (for the purposes of classification) involves a 'judgment about the reaction of a reasonable adult in a diverse Australian society'.[25] The Court found that the question is not to be determined by reference to a majority view of society but must accommodate the standards of 'various subgroups within a multi-racial, secular society which nonetheless includes persons of different ages, political, religious and social views'.[26]

In that case, three researchers had given evidence to the Classification Review Board on the findings of research (McKee et al. 2008), to assist the Board to determine reasonable standards. They submitted that the majority of Australian adults have a 'liberal' view of sexually explicit material and are not offended by depictions of actual sexual activity where there is no coercion or violence, although views vary widely according to political, religious or other affiliations.[27] Both the criminal law and classification systems, then, generally require that the image be read by reference to the sensibilities of the reasonable person, the 'reasonable person' not needing to be represented by the majority along with the intended viewing context.

11.4 Regulation Following the Controversy

As noted above, the cases triggered the development by the Australian Government of new 'Protocols for Working with Children in Art' (2008) which are to apply in addition to criminal laws. These provide a distinction in the creation, exhibition and distribution of art involving fully or partly naked children. In the case of creation,

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[24] *R v Silva* (2009) ACTSC 108 (4 September 2009) at [20, 26, 33] per Penfold J.

[25] *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) FCA 1871 at [170] upheld by the Full Court in *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) FCAFC 79.

[26] *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) FCA 1871 at [171] per Jacobson J.

[27] Evidence provided by Professor Catharine Lumby, Ms Katherine Albury and Professor McKee: *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) FCA 1871.

evidence of parental consent is required, including a statement that the parents understand the nature and intended outcome of the work; that they commit to direct supervision of the child while the child is naked; and that they agree that the context is not 'sexual, exploitative or abusive' (Australian Council for the Arts 2008). In the case of exhibitors, a written statement is required from the artist declaring that there has been conformity with the protocols and relevant laws. If the work is to be distributed by publication, in promotional material or through digital material, images of children 1 year and older should be referred to the Classification Board.

Since the Henson and Papapetrou incidents, there has also been further review of the child pornography laws, including an extension of regulation to more broadly defined child abuse and child exploitation materials. These have not been ostensibly as a consequence of the Henson and Papapetrou cases, though they may reflect the growing moral panic surrounding paedophilia and the common view of the relationship between image and child abuse. However, the proposals do not significantly change the fundamental tests.

11.5 The Ethnosemiotic Dimension

This section of our chapter looks, as noted, at a website, begun on 8th July 2008, hot on the heels of Prime Minister Rudd's public remarks about the Papapetrou case. Again, the participants—with a few noted and statistically expectable exceptions—had no professional interest (either legal or artistic) in the matter but, rather, wrote as members of the 'general public'. In this respect, what they have to say may afford some insight into the ethnosemiotic dimension of the controversy.

Ethnosemiotics is a fairly recent area of investigation which seeks to *describe* how non-specialists (as opposed to card-carrying semioticians) work with signs, as users and interpreters thereof. In this sense, it is not a discipline as such (a *resource* for investigation) but rather a domain of *topics* of investigation where those topics are comprised of the *resources* (e.g., endogenous theories and methods) ordinary members themselves use to handle semiosis. To date, ethnosemiotic work has mostly been confined to work by Western anthropologists at non-Western sites (MacCannell 1979—but see also Hoppál 1993) and equally confined to studies of such intercultural matters as travel (e.g., Berger 2008, 2010) and plant names and taxonomies where it effectively conjoins ethnobotany (e.g., Herman and Moss 2007). Its impact on legal studies has been negligible, as has its general application to Western ethnosemiosis.

But is it not interesting to ask what ordinary members of the (in this case, Australian) society make of potential legal controversies such as the Henson/*Art Monthly* examples? Presumably, such folk have *some* knowledge of the law involved, if not at a professional level, and an interest in the legality (or otherwise) of signs such as 'artistic' photographs of naked children and whether they may or may not constitute the crime of child pornography. Indeed the law itself requires ordinary members to have some knowledge of it, the law, via inter alia the oft-held view that

ignorance is no defence. So how did the contributors to the open and off-topic forum formulate their responses? What ethnosemiotic resources, in particular, did they bring to bear on the matters in hand?

Let us begin by noting that the debate was extensive and highly varied in content, running from the view that Henson should be shot (and offering to do so) to the view that all art should be exempt from legal scrutiny. Our transcript of the site runs to some 80 pages of small-font text, the equivalent of 13 long web 'pages' of exchange. It was initiated by Special Hell with the following set of questions[28]:

> Here is one for ya:
>
> 1. when does art push the limits?
> 2. isn't art suppose to push the limits?
> 3. is it a case of nude child = abomination or just conservatives going overboard?
> 4. has fear taken over our thinking?
> 5. is there still innocence left?
> 6. what is the big issue here? the nude child, the childs consent, or the context of the art?
>
> thoughts?

Already we can see that the concerns are primarily moral-ethical ones rather than being aimed at questions of legality as such. But still, such moral-ethical matters overlap, from the outset, knowingly or not, with the legal questions of offensiveness, consent and artistic merit. The implicit resource here lies in the title of the forum: 'Bill Henson/Art Monthly/nude child/disgusted Rudd debate': the two cases are clear and, by this time, it's well known that legal action has been considered. So implicit in the talk on this site is a seen-but-unnoticed background of actual legal controversy. Effectively what we are seeing here is an underlying question: Are the images legal by virtue of having the moral-ethical virtues of artistic merit and the parties' consent? If they are, then, as an implied question: What is actually 'behind' the legal controversy (where the primary candidate is a 'conservative' moral-ethical overreaction attempting to hijack the law for its own ends)?

A fairly typical 'liberal' response to the initial questions runs as follows:

> 1. all the time, that's part of the definition of art.
> 2. absolutely
> 3. conservatives going o/board. nudity is not sexualisation.
> 4. in many cases.
> 5. was there ever? innocence of what?
> 6. there is no big issue for me - unless its fundamentalist christians trying to dictate the agenda and impose their personal moral values on others.

The reasoning is reasonably clear: the images have artistic merit because they 'push the limits' and that is 'part of the definition of art'. While there's a public controversy raging, for this poster, Galumay, 'there is no big issue', and the whole incident

[28] We keep the avatar names of the posters since they are already anonymised, and we reproduce their postings 'as is', with typos and other errors unedited except where clarity demands.

is a question of fundamentalists imposing their moral values—values which are, again for this poster, far from appropriate or majority ones.

Another resource that contributors bring to bear is an ethnosemiotic variant on precedent. The rule-of-thumb here seems to be as follows: in cases of moral-ethical controversy, see if a parallel case can be found and learn from its outcomes with a view to judgment. Hence:

> When I was living in Melbourne, there was the whole ANDRES SERRANO "piss christ" debacle.
>
> The efforts by some to insure less people see something often make the news and the whole of society gets to see it.
>
> They fail to achieve any results in minimizing the exposure, if anything the effort to ban or censor something in a society like Australia is the wrong way to get less people to see it.
>
> If there was never a complaint not many would know of these controversial pieces.

From this point of view and in light of the *Piss Christ* controversy, the 'fundamentalist' or 'conservative' position is shown to be not so much morally wrong as counter-effective.[29] By a neat turn of reasoning, the contention brought about by the moral Right defeats its own purpose: opening the viewing of art works to a general public that would normally take no interest in such matters. Or in the succinct words of another voice on the forum, 'the big issue is that this has been made such a big issue'.

Yet another resource is to turn to the 'conservatives' themselves and to the popular (as opposed to arcane and recondite, the 'artistic') media—as the instigators of the issue—and to see a space in the debate for various kinds of hypocrisy:

> How about a debate on nudity v pornography?? There is a difference but I'm not sure our hypocritical politicians understand that when they all jump up and down according to what the populist media roll-calls on any given day! K Rudd was the willing participant in a NY strip club - someone's daughters I'm assuming.... Yeah that may be beside the point but we have no perspective on this cause we've had so much tawdry imagery, advertising, TV shows, radio etc thrown at us that we're trying to put a block on total innocence. And a nude 2 or 6 year old is an innocent thing and NOT titillating. I mean - ask yourself the question in all honesty - do you find 6 year olds sexually attractive?? If not, as the MAJORITY don't, what are we protecting the kids from? The so-called dirty old men who are preying on children in awful, awful places are they buying this art? Or are they still getting their kicks from K-mart and Myer catalogues and from watching Ocean Girl???

The clear implication here is some equivalent to the maxim about throwing stones in glass houses; the throwing of them by those without sin. Or, in more formal logical terms, the *tu quoque* argument. Apparently it's legal for adult males to enter strip clubs—even if they happen to be Christians and Prime Ministers[30]—and equally

[29] http://en.wikipedia.org/wiki/Piss_Christ.

[30] The membership status of Kevin Rudd in this debate is interesting but cannot be detailed here. A full membership categorisation analysis (Eglin and Hester 1997) could, however, prove illuminating on another occasion.

legal for department stores to issue underwear catalogues and for TV stations to broadcast pictures of scantily clad teens. Ergo, if such things are legal, so is the viewing of certain artistic works. If one condemns one of these lawful things as morally problematic, then one ought to condemn the others.

As a brief rider, the above poster, Blinder, adds a further point which shows another common resource mobilised by the forum's contributors: the invocation of a warrant for speaking. He adds:

> I personally don't see this as art pushing the limits but conservatives sullying beautiful things. And I'm saying this as a Christian and a photographer.

Such warrants are conspicuous in such places as letters to the editor of daily newspapers (cf Heap 1978). They occur especially when one wants to either dispel a position of bias (it's a Christian speaking, hence not one automatically opposed to religious values) or to claim expertise (it's a photographer speaking, hence one with some authority on the topic).

A further resource, not to be overlooked in such cases, is humour used satirically. The following is an interesting example:

> Henson huh???

A fairly straightforward pun on one of the controversial artists' names brings up a well-known figure of the same name (Jim Henson), creator of the Muppets and other innocent characters for children's entertainment. Turning one of his most popular characters into a putative object of pornographic interest completes the point—a point taken by the follow-up poster: '…that is precisely perfect! Things with black bars look so much grubbier and filthier don't they!'[31]

We should also add that the law itself, in a rather loose way to be sure, also gets invoked as a resource in the debate. One contributor maintains her right to take photographs in public as, for her, a clearly legal right that is now jeopardised by moral outrage:

> what concerns me the most about this whole debate is the fact that our society has reached levels of absurdity and people will instantly raise their fists and scream bloody murder at anything they find contradictory to their own views. for f*cks sake you cant even bring a camera and take photos of your kids playing school sports in some schools/clubs.

This is backed by the subsequent poster:

> The anti-photography movement of anybody in public is frightening (I've had it happen once so far and told the guy to call the police if he thought I was doing something wrong in public!). No debate is needed on this surely? I want the law to protect my right to photograph innocently without fear of victimisation (I am 6ft 4 so I don't get intimidated easily!)

On the other side of the debate, there's an argument that runs to the effect that just because a claim is made for an image or event as 'art', this doesn't justify any practice whatsoever as acceptable by virtue of that classification:

> I'm not against nudity as art, far from it, but one thing that artists and the self-proclaimed cultural elite tend to forget is that not everybody has, or should be forced to have, their view on what is acceptable. If you want to appreciate the image of a naked child, then go ahead, you can't ask everybody else to look at the image in the same way.
>
> Personally, I think posed images of naked children should be left in the home and not put on public display.

And interestingly, there's a sub-resource involved in this claim: the public/private distinction. Law, the implication runs, applies in the public domain. Practices that may be acceptable in private clearly, for this writer, may not be so if allowed into broader circulation.

A number of contributors to the forum read the idea of an art gallery space as, effectively, private—more like the home than the media-sphere, for example. They pointed out that had it not been for the media's 'hyping' of the cases in point, only a select few would have even seen the images. And perhaps this is the crux of the issue—that while images remain on gallery walls, they are 'protected' images, understood as artistic and intended for a limited, appreciative audience (after all, who else

[31] Note that this 'lay' comment reflects that of the some members of the Classification Board. See above, in the paragraph following footnote 10.

would see them?), but that in the new world of mass commercialisation and distribution of images, the potential audience shifts and what were narrowly viewed artistic images become part of mass consumption. As Marr argues, it was the 'deliberately commercial purpose' of the Henson image's circulation on the exhibition invitation that was unsettling (Marr 2008, 5), and it was eventually this 'outing' that led to a take-up by the mass media. Perhaps this is what the public reaction was about—a disquiet about the mass circulation of images that would once be almost private, an expansion of the audience, whether or not by intention, from the narrow field of art purveyors, within the public walls of a public gallery, to a mainstream that could involve consumers of child pornography in their own protected private space.

A rather extremist reply to the idea of artistic 'immunity' runs:

> A man walks into an office building with a machine gun and starts shooting everyone he sees. When he walks out there is a barricade of police cars and SWAT teams pointing guns at him, and people screaming at him to drop his weapons. Instead the man says, 'no you don't understand, it was my performance art'
>
> Everyone says, 'oohh…' and they let him go free.

The counter to this runs as follows, again directly referring to the strictly legal situation:

> The issue here is... has any criminal activity occurred? clearly not. have people been offended? clearly yes... and each person to their own opinion. fa[i]r enough who is forcing who to view what? if we hide everything from public view that offends another person where does it stop? The photo of the girl on the cover offends people, so it shouldnt be on the cover. the cross you where on your necklace offends me, so you shouldnt be allowed to where it in public.
>
> The photo of the girl isnt illegal, like the wearing of a cross isnt, so why should one be hidden from public view and the other not?

On the one hand, nothing illegal has taken place. On the other, moral-ethical offence has been taken by a specific ('conservative', 'fundamentalist') sector of the society. (Hence, the neat appeal to the potential offence caused by cross wearing.) This resource (the splitting of the letter of the law from the domain of personal morality) is a significant one. For we have already seen its inverse being mobilised in the debate: the position that the law should reflect some approximation to the moral-ethical values of the *majority* of the society. The debate then hinges on just what those values happen to be. It infects both the pro- and anti- camps, as well as those in the grey areas between—noting again the warrant invocation:

> As a father of two, with another on the way, I can't see how allowing your child to be photographed nude then permitting the images to be made public is even within your right. If you want to pose nude for art, go for it, but your little ones can't adequately make that decision so don't make it on their behalf.
>
> On the issue of photographing kids' sport etc, I have to agree that it's a bit nuts. My little girl in kindy had a musical the other week and I wasn't allowed to take photos or video which was pretty disappointing.

11.6 Some Conclusions

Ordinary, non-specialist—or occasionally semi-specialist—members of the society are able to mobilise a whole range of moral-ethical and even quasi-legal resources in their handlings of culturally controversial signs. These include, but are not limited to:

1. A reliance on at least two matters that overlap with the strictly legal reading: artistic merit and consent.
2. An understanding of a variant of the concept of precedent: finding previous and parallel cases of controversial exhibition and basing judgments on them.
3. A dependence on the *tu quoque* defence: the discovery of the same offence being committed by the accusers.
4. An invocation of warrants for speaking; either to eliminate accusations of bias or to assert specialist knowledge.
5. A capacity to return the argument by recourse to satirical humour.
6. A loose knowledge of the law itself.
7. An appeal to the separation of the public and private realms.
8. A separation or conflation of the domains of the legal and the moral-ethical as required by the specifics of an argument.

These resources are certainly amongst those mobilised in our materials. But what are they mobilised for; to produce precisely what? At one level, the answer must be a debate. But a debate about what? By now it should be evident that what is in contention here is no more and no less than the meaning of the word 'reasonable' in, for example, the legal phrase 'standards of morality, decency and propriety generally accepted by *reasonable* adults'.[32] In effect, then, what we are witnessing here is something akin to what might be called ethnojurisprudence.

What we find particularly interesting is that this ethnojurisprudence does not look substantially different from traditional jurisprudence on determining a matter of moral or nonlegal content, aside from the methodological and rhetorical approaches adopted. There are parallels in the issues raised in each field, namely:

- The question of whether offensiveness is to be measured against a majority view;
- The drawing of comparisons—the sexualisation of children is commonplace in commercial circles without controversy yet artistic depictions draw attack;
- A distinction between those depictions that are offensive at a moral-ethical level, but not at a legal level;
- The importance of context in determining offensiveness.

[32] Section 11 *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

Further, our ethnosemiotic description reveals an understanding of the meta-themes of the common-law tradition (that is, the protection of fundamental rights) in the invocation of the private/public distinction and the need to find a balance between individual freedoms (of expression and of public debate) and the protection of vulnerable groups (children). The distinction between formal legal procedure and rationale and their everyday equivalents, then, is not so great, when normative concepts are embedded in the law and are therefore to be determined, in some form, by reference to ethnosemiotic resources. An elegant summation of the case by the initiator of our web forum confirms this conclusion:

> we have laws and a parent can not consent to a child [being shown in] sexually explicit photos, because it is illegal… but the argument that parents can not consent on the childs behalf in partaking in a photo session with henson is ridiculous. and it has been determined that hensons photos are not exploitative.
>
> as long as the activity is not illegal, that parent is the only and most logical choice in giving consent… you can not take away the right of a parent to decide onbehalf of a young child.
>
> now the right to place said photos on the cover of a magazine… well that ladies and gentlemen… yes is a matter of free speech, and right now it tells us we can do it and yes we have people that are offended by said photos, and they demand that said photos arent to be placed in public view…
>
> I say to these people: think about this clearly… if we took everything on public view that offended someone and hid it away?

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Chapter 12
What's Wrong with Pink Pearls and Cornrow Braids? Employee Dress Codes and the Semiotic Performance of Race and Gender in the Workplace

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Abstract American employers frequently impose dress and grooming restrictions on their employees, and courts routinely uphold their decisions to discipline and even fire workers for violating these dress codes. Workplace dress codes thus serve as a focus for contestation over the visual representation and performance of personal identity. The representation and performance of race and gender—two of the core social identities in contemporary American culture—is achieved in part through elaborate semiotic style codes in dress and grooming. The cases discussed in this chapter demonstrate worker resistance to dress codes that force them to perform core identity attributes in ways that contradict their individual sense of identity. By insisting that the performance on the job of identities such as race and gender by their workers is a matter for the employer to determine, courts are asserting the primacy for the workers of their identity as "employees" over their individualized racial and gender identities. Far from being about trivial matters of personal taste or style, conflict between employers and employees over dress codes serves both as an arena for worker resistance to employer assertions of control over the construction and performance of their "true selves" and as a prime site for cultural contests over the meaning and instantiation of race and gender identities more generally in the modern world.

12.1 Introduction

American employers frequently impose dress and grooming restrictions on their employees, and courts routinely uphold their decisions to discipline and even fire workers for violating these dress codes (Levi 2008, 353). This practice has in recent years spread to Europe, where British and German workers have likewise been subject

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to discipline for dress code violations and, like their American counterparts, have been unsuccessful in their legal challenges (Skidmore 1999, 521–524). At first glance, the frequency of these cases is perplexing. Why would so many workers risk their jobs for something so insignificant as their appearance, and, for that matter, why would employers so tenaciously enforce rules regarding employee dress even at the cost of valued employees? In this chapter, I will suggest that workplace dress codes serve as a site for contests over the visual representation and performance of personal identity. Umberto Eco once said, "I speak through my clothes" (quoted in Hebdige 1979, 100). But what exactly is being said by appearance in employee dress code challenges? I will argue that it is through practices such as the enforcement of and resistance to enforcement of dress codes that the meaning of racial and gender identity in the construction of the self is made manifest in the workplace.

12.2 The Construction of Authentic Selfhood in the Modern Social Order

In contemporary culture, selfhood is experienced as the intersection of a multiplicity of social identities and roles of shifting salience depending on context, including gender, race, sexual orientation, occupation, family role, age, nationality, religion, and political persuasion, in almost infinite scope and variety. It is in the unique intersection of these attributed statuses and roles that the self comes to be realized as one's authentic identity. This "authentic self" is to contemporary culture what the soul was to the medieval world—the purest conception of what constitutes an individual human being.

From a psychoanalytic perspective, the process through which individuals develop and express a sense of personal selfhood is key to understanding human development and flourishing. Erik H. Erikson (1946) first addressed that process in a germinal article that led to a focus in psychology on the acquisition of a sense of self. Later on, other psychologists elaborated on the process of the integrated development of a sense of the authentic self, stressing the importance of congruence between external role identity performance and internal private commitments to the salience of aspects of identity (Callero 1985; Havens 1986). It was recognized that people have multiple aspects of personal identity, with some more central to a sense of authentic self than others and some more salient than others depending on social context (Callero 1985).

Social theorists have also explored the nature of personal identity and the development of a sense of unique selfhood. Anthony Giddens (1991) asserts that modernity is marked by the primacy of the internally referential self, as individuals construct coherent senses of identity and life history. Giddens pointed to authenticity as the primary touchstone valued by individuals in the course of this process. Likewise, Robert Bellah and his coauthors (1985, 334) saw modern American culture as marked by what they called "expressive individualism," in which "the individual has a primary reality whereas society is a second-order, derived, artificial

construct." Some scholars have blended both methodological approaches, uniting the social approach that focuses on the social development of personal identities with the psychoanalytic approach that looks at the development of the psychologically mediated sense of self (Weigert et al. 1986). Identities are both uniquely personal—no one else has the same set of attributes, experiences, and emotional reactions—and, at the same time, inevitably social in nature, because what kind of attributes, experiences, and emotional reactions will count as potentially constitutive of identity is a matter of contingent social systems of meaning.

Whether one takes a psychological perspective or a sociological perspective, an individual's authentic self has to be seen as more than a mere internal and private psychological state. For its complete realization, the interior self must be expressed congruently in its outward manifestations through a complex set of social semiotic codes. The more central an aspect of identity is to the individual's sense of authentic self, the greater the need to instantiate that identity through the public performance of the codes that represent the realization of that identity (Bell 2008, 147–198). Judith Butler, in her influential work on gender identity, called attention to the performative aspects of gender as an example of the way in which gender identity should be thought of as what one *does* rather than what one *is* (Butler 1990, 175–180). More generally, Baudrillard (1979, 19) expressed it this way, "It is no longer a question of 'being' oneself but of 'producing' oneself."

Not all identity performances by individuals serve to instantiate their subjectively understood authentic selves, however. Sometimes social actors will consciously downplay identity attributes, especially when those aspects of their identity are devalued or stigmatized within society. Kenji Yoshino (2002, 772–773) refers to this as "covering" or the intentional nonperformance or underperformance of a core aspect of one's identity. Yoshino borrows this term from Erving Goffman (1963, 102–104), who contrasted "covering," or downplaying key aspects of one's identity, from "passing," that is, mimicking an identity that one does not have in order to persuade others that the passing identity is one's actual identity. Covering as an interactional strategy is not always a freely chosen one by the social actor. Often, there are implied or even overt demands by others that actors cover some aspect of their identity. Racial minorities, for example, may be strongly encouraged to adopt typically white speech patterns or clothing choices to cover their racial identity. Sometimes the external demand on the social actor is not to cover identity, but rather to reverse cover and accentuate their identity markers. Women, for example, may feel pressure to dress and groom themselves in ostentatiously feminine ways to reassure others that they accept traditional gender norms (Yoshino 2002, 909–911). Identity covering thus makes difference invisible, whereas reverse covering makes difference manifest. What both covering and reverse covering have in common is that in both practices, the actor's identity performance is at odds with the individual's sense of authentic self.

Both psychologists and sociologists have studied the consequences for individuals when their external actions are inconsistent with their internal identity commitments. Callero (1985, 204–205) observed that a lack of congruence between role identity performance and internal identity commitments results in a loss of self-esteem.

A mismatch between the individual's privately felt authentic self and its public performance is experienced as alienating and even humiliating. Sociologist Bellah (1985) and his coauthors likewise saw alienation as the result when individuals had to conform to social norms instead of being able to express their authentic selves. One reason why individuals find lack of congruence between their internal commitments and their external actions so alienating may be found in research done on what people infer from the actions of others. Johnson et al.'s research (2004) determined that people conceptualize the authentic self as a relatively private, personal entity, but at the same time, they believe that they can accurately infer the nature of other people's authentic selves on the basis of their externally observable actions. In other words, since we are fairly confident that we can draw conclusions about other people's authentic selves simply by watching how they act, we may reasonably worry that our own actions that are inconsistent with our authentic selves may cause others to make false assumptions about who we really are.

12.3 The Semiotics of Dress and Appearance

Semiotics focuses on the creation and operation of systems of symbolic meaning within an overall framework of socially shared interpretive codes and practices. Scholars working within a semiotic tradition have long appreciated the potential for semiotic analysis of conventions of dress and grooming (Hollander 1978; Barthes 1983; Davis 1988; Cerny 1993; Damhorst 1999; Barnard 2002). Terrence Turner (1980, 14) called dress a "social skin through which we communicate our social status, attitudes, desires, beliefs, and ideals (in short our identities) to others." Dress as a coded symbolic system both locates an individual within a social matrix and serves as an expressive device to communicate to others the wearer's sense of personal identity (Cerny 1993, 78–80). Because individuals experience their identity as comprising multiple aspects whose salience varies contextually, so too their use of dress to signal and instantiate their identity likewise varies according to context (Roach-Higgin and Eicher 1993, 33–37). While an individual experiences the authentic self as intrinsically private and personal, since that self is configured through a unique intersection of a multitude of social roles and experiences, the relationship between dress and the expression of the authentic self is social in nature, since the codes through which identity is communicated must be created and mediated through shared cultural conventions of meaning (Roach-Higgin and Eicher 1993, 34–35; Hamilton 1993, 48–56; Cerny 1993, 72). Without shared social conventions as to what particular aspects of dress and grooming might signify, an individual's choices cannot communicate identity.

Adopted personal appearance—dress, jewelry, and grooming—provides an ever-present resource for the nonverbal communication of identity and social position. Even a person who claims complete disinterest in the clothing he wears is nonetheless signaling a particular kind of "I don't care about fashion" identity. Dress is never neutral and meaningless but is inextricably culturally coded. When a coded

signal of identity is displayed through dress and appearance, observers react based on what they infer about that person on the basis of their appearance. If others react to someone's presentation of self in the way in which the individual expects, this "co-incidence of meaning" creates a "validation of the self that leads to satisfactory social interaction" (Roach-Higgin and Eicher 1993, 34). On the other hand, a mismatch between how others "read" a person through that person's appearance and how the person would want others to perceive his authentic self potentially creates both interpersonal misunderstandings and a sense of alienation in the individual whose authentic self is misperceived (Stone 1970, 216–245).

12.4 Employer Dress Codes as Sites of Contest Over the Visual Representation and Performance of Identity: Three Case Studies

Racial and gender identities are two of the most central social identities in contemporary American culture, and not surprisingly, their representation and performance is achieved in part through elaborate semiotic codes of dress and grooming. While it is certainly true that, even absent overt employer dress codes, worker dress and appearance would be impacted by and regulated by cultural norms and perceived employer preferences (Bartlett 1994, 2549–2556), the imposition by employers of explicit dress and grooming codes greatly increases both the extent and degree of such regulation. The stringency of this regulation can result in legal contests over employee appearance. I will discuss three cases in which employees attempted to legally challenge dress codes on the job in which the employees unsuccessfully argued that their appearance ought to have been a legally protected expression of the racial and gender identity.

12.4.1 Rogers v. American Airlines

Renée Rogers was an African American employee of American Airlines who worked as an airport operations agent. She had been employed by the airline for 11 years, and the airline did not claim that her work was unsatisfactory in any way. However, the airline threatened to discipline her for wearing her hair in cornrow braids, in violation of an airline grooming policy forbidding the wearing of all-braided hairstyles by its employees. American Airlines gave her the option of either changing her hairstyle or covering it completely with a hairpiece while at work. Rogers initially did attempt to comply by covering her hair with a hairpiece, but she found that wearing the hairpiece caused her severe headaches.

Rogers sued the airline to block enforcement of the policy against braided hairstyles, arguing that it constituted unlawful race and sex discrimination for infringing on what she saw as an expression of her racial and gender identity. Her hairstyle, she

asserted, was "historically a fashion and style adopted by Black American women, reflective of the cultural, historical essence of the Black woman in American society" (*Rogers v. American Airlines* 1981, 232). American Airlines should no more ban this cultural symbol of Black female identity, she argued, than it should ban Afro hairstyles.

The response of the district court was first to contest the connection between appearance and her racial and gender identity, asserting that the policy was both race and gender neutral on its face because it equally prohibited all employees, whatever their race and gender, from wearing braided hair. Further, the court insisted that Rogers failed to establish that her all-braided hairstyle was associated exclusively or even predominately with Black women, so that the policy, even as applied, did not amount to unlawful racial discrimination. In drawing this conclusion, the court ignored Rogers' affidavit setting out the historical linkage between Black female identity and cornrow braided hair, instead speculating along with her employer that her adoption of the hairstyle might be linked to its appearance on a white actress in a recent movie. The court admitted that perhaps banning Afro hairstyles might be impermissibly discriminatory because it saw Afro hairstyles as a natural racial characteristic, contrasting what it called the "artifice" of a braided hairdo (*Rogers v. American Airlines* 1981, 232). Amazingly, the court seemed completely unaware that Afro hairstyles require extensive grooming and are in no sense a "natural" or an "immutable characteristic" of persons of African ancestry. Because the court considered Rogers' braided hairstyle a matter of choice rather than an immutable characteristic, it found that the airline was free to impose on Rogers its preferred choice of hairstyle. It accepted American Airlines' assertion that its policy was adopted to "help American project a conservative and business-like image"—an image that a Black-identified hairstyle apparently contradicted (*Rogers v. American Airlines* 1981, 233). Despite Rogers' charge that white women employed at American Airlines were permitted to wear a variety of nonconservative hairstyles, including pony tails and shag cuts, the court dismissed her complaint that the grooming policy was applied in a racially discriminatory way against her as a Black woman.

As the court conceded, it would have been unlawful for the employer to have expressly penalized Rogers for being Black, so that any immutable biological racial characteristics could not be the subject of discipline. However, in the court's view, her employer had the right to demand that Rogers efface the semiotic signals of racial identity—the adoption of a hairstyle that she insisted represented her authentic Black female self.

12.4.1.1 The Semiotics of Braided Hair and the Performance of Racial Identity

Hair and its styling have long served as a key semiotic marker of image and identity. As Susan Brownmiller (1984, 57) observed, this is due to hair's amenability to being manipulated—it can be "cut, plucked, shaved, curled, straightened, braided,

greased, bleached, tinted, dyed, and decorated with precious ornaments and totemic fancies." There are, in fact, no neutral, "message-less" hairstyles; whatever is done or not done to hair has social meaning. Barbara Miller (1998, 277) noted "There is no way to avoid the message power of hair. Even if you cover it with a hat or scarf, it still talks."

In the case of African American women, hair has long been invested with heightened symbolic meaning. The characteristic texture of the hair of many persons of African ancestry has historically served racist ideology as a marker for the "otherness" and inferiority of Black women. Sometimes it quite literally served to exclude Black women, as when nineteenth-century churches and clubs would forbid entrance to anyone whose hair could not pass through a fine-toothed comb without snagging (Bordo 1998, 48). Other times its exclusionary message was more indirect, as culturally promulgated ideal images of feminine beauty incorporated only hair types phenotypically associated with whites (Craig 2002; Caldwell 1991). Those whose hair texture and thickness differed from those of most white women were left with two choices: straighten their hair to approximate the images of "ideal" white beauty or resist the hegemonic messages of white standards of appearance and instead adopt hairstyles well suited to the characteristics of their own hair and embrace them as beautiful (Caldwell 1991).

Straightening one's hair can be problematic. It is expensive to maintain and can only be achieved by using strong chemicals that can sometimes cause hair breakage and skin lesions. In addition, some Black women see hair straightening as an act of conforming to white expectations of what all hair should be like. For them, wearing their hair in ways that do not require it to be chemically straightened is an act of claiming a specifically Black identity—one that refuses to disguise the racial characteristics of their hair but instead celebrates Black hair and its unique possibilities for beauty (Rosette and Dumas 2007). For that reason, Angela Onwuachi-Willig (2010) has argued that banning braided hairstyles ought to be unlawful because it discriminates against African American women on racial phenotypical grounds as well as on cultural grounds.

It is within in this historical and cultural context that Renée Rogers chose to wear her hair in cornrow braids, a style that took affirmative advantage of the texture and thickness of her hair rather than adopt a style that would hide or minimize its characteristic typicality with the hair of many other Black women. In a workplace such as American Airlines which turned characteristically white appearance into so-called professional appearance (Carbado and Gulati 2000), Rogers' braided hairstyle symbolized the concrete embodiment of a self-aware and self-assured Black female identity. Although American Airlines was undoubtedly aware that they could not legally discriminate against her as a Black woman, they felt within their rights to insist that their Black employees perform their identity in a way that effaced that identity to the maximum extent possible.

Camille Gear Rich (2004, 1173–1186) has pointed out the ways in which workplace identity performance deploys socially agreed-upon codes of racial and gender identity and notes that employees are not punished unless the employer recognizes the meaning of the identity performance and sees that meaning as threatening.

At the same time, she suggests, although identity performance in the workplace is arduous work for the employee, it is worthwhile because it gives the worker a sense of agency and control in a workplace environment in which employees generally have little control in other aspects of their work lives. For Renée Rogers, her hairstyle allowed her to express a connection to the historic experiences and practices of generations of Black women and at the same time to affirm the centrality of her Blackness to her own personal identity. In fact, it is entirely possible that American Airlines' act of banning her cornrow braided hairstyle invested it with heightened significance as a marker of her authentic self (Tirosh 2007, 86–87).

12.4.2 Jespersen v. Harrah's Operating Company

Darlene Jespersen had worked for more than 20 years as an employee of Harrah's casino. By all accounts, her work as a bartender at the casino was exemplary. In 2000, Harrah's implemented a policy called the Personal Best program which required employees to maintain certain gender-specific appearance standards. Female employees were photographed after being given makeup and hairstyling "makeovers" and thereafter were required to maintain their appearance in accordance with these photos given to their supervisors. Daily records were kept by supervisors of whether employees measured up to their photographs on that day. Specifically, women employees were ordered to wear full face makeup, including foundation, powder, blush, mascara, and lipstick, as well as styled, curled, and teased hair, colored nail polish, and nylon stockings. Men, in turn, were forbidden to wear makeup, nylon hosiery, and colored nail polish.

Jespersen testified that the Personal Best appearance policy was so inconsistent with her personal identity that she was unable to follow it. Although she did try to wear makeup for a time on the job, she later testified that it made her feel "sick, degraded, exposed, and violated." Being required to adopt this hyperfeminine appearance "forced her to be … 'dolled up' like a sexual object, and … took away her credibility as an individual and as a person" (*Jespersen v. Harrah's Operating Company* 2006, 1108). She also asserted that having to adopt a hyperfeminine appearance undercut her ability to do her job well by undermining her projected authority to set boundaries over potentially unruly or intoxicated patrons.

The Ninth Circuit acknowledged that the Harrah's dress code treated male and female employees differently, which should have established a prima facie case of sex discrimination. Instead, however, the court determined that, in the context of dress codes, the plaintiff needed to show more than that she was treated differently because of her sex. She needed in addition to show that the burden that the Personal Best dress code placed on female employees was a more significant burden than that placed on similarly situated male employees. Since every requirement of the dress code for women—to wear full makeup, nail polish, stockings, and curled and styled hair—was concomitantly forbidden to men, who were *not* permitted to wear makeup, nail polish, stockings, or curled and styled hair, the Ninth Circuit found the burdens

to be equivalent (*Jespersen v. Harrah's Operating Company* 2006, 1108–1111). Moreover, the Ninth Circuit majority opinion refused to credit Darlene Jespersen's testimony that the grooming requirements were a serious burden to her sense of self. Instead they opined that these requirements would fail to present a substantial burden to most of the women employed at Harrah's.

The court also rejected Jespersen's argument that the Personal Best dress and appearance code constituted the imposition of a workplace regime based on sex stereotyping, which should also constitute unlawful sex-based discrimination. The Ninth Circuit did so by limiting actionable sex stereotyping harm to those workplace conditions that would be deleterious to women as a group in performing the job in question. Since they felt that most women bartenders would have no problem adhering to the program, the court turned a blind eye to the sex stereotypical aspects of Harrah's appearance regulations and dismissed Jespersen's claim without trial (*Jespersen v. Harrah's Operating Company* 2006, 1111–1112). Her assertion that being forced to present a hyperfeminine, sexualized appearance undercut her effectiveness in managing bar clientele was ignored entirely. The Ninth Circuit majority accepted the casino's asserted right to insist that its female employees perform their gender in a manner of the casino's choosing—a hyperfeminine, sexualized version of gender.

In dissent, Judge Kozinski—known as a conservative libertarian judge—took the majority to task for failing to acknowledge that having to adopt the external markers of hyperfemininity indeed imposes a substantially greater burden than merely being banned from doing so. The time, effort, and expense involved in applying extensive makeup, nail polish, and hairstyling represent an express and significant burden, as Kozinski saw it—a burden that only women employees suffered. Kozinski also questioned the majority's cavalier dismissal of Jespersen's assertion that she found having to comply with the appearance code degrading and intrusive. He would have remanded Jespersen's case for a jury trial on the question of whether Harrah's grooming code constituted impermissible sex discrimination (*Jespersen v. Harrah's Operating Company* 2006, 1117–1118).

12.4.2.1 The Semiotics of Makeup and the Performance of Gender Identity

Gender, gender identity, and gender ideology are frequently signaled by the dress and appearance of individuals (Kaiser et al. 1993; Workman and Johnson 1993). Fred Davis (1992, 25–28) suggests that gender-differentiated clothing and grooming practices are salient identity markers in Western societies precisely because gender, sexuality, and social hierarchy have such a fluid range of meanings depending on social context. In fact, even attitudes toward the general domain of dress and grooming practices itself are gendered, with males expected to show minimal interest in what they wear or how they look and females expected to be highly attentive to a multiplicity of details of dress and appearance (Workman and Johnson 1993, 98). Harrah's workplace appearance code is consistent with this norm—female

employees were given many detailed and specific dress and grooming requirements to adhere to, whereas male employees were mainly ordered not to engage in these specific "feminine" practices.

Of all the gender-coded appearance resources, facial makeup is undoubtedly the most strictly gender-linked. Males are not supposed to wear makeup of any kind under any circumstances, even the most subtle types. Women are the sole subjects permitted to, encouraged to, and in some instances required to wear makeup. Attitudes toward the appropriate use of makeup by women have changed over time (Peiss 1990). Before the 1920s, wearing makeup was seen as a sure sign of sexual immorality, but by the 1960s, not wearing makeup was considered a signal of the rejection of conventional, "appropriate" femininity (Merskin 2007, 592). Not only has the semiotic meaning of the wearing or nonwearing of makeup changed over time, but it has also varied according to class-linked norms and social context. In many contexts, wearing makeup represents the visible sign that women are and ought to be the decorated sexual objects of desire for men (Beausoleil 1994).

In the contemporary workplace, female workers are acutely conscious of the importance of their choices of whether to wear makeup and of what kind of makeup to wear. They worry that wearing the "wrong" amount and style of makeup will cause them to be seen as incompetent at their jobs. Not wearing makeup risks their being considered inappropriately unfeminine, and these workers understand well that being thought to be unfeminine—or even possibly lesbian—puts their job security and career advancement at risk (Dellinger and Williams 1997, 159). Employees who understand both the implicit and the sometimes overt requirement to wear "appropriate" makeup on the job nevertheless often engage in resistance to those pressures (Dellinger and Williams 1997, 170–172). The contemporary semiotic linkage between wearing makeup and the wearer's presumed endorsement of conservative, conventional female gender roles makes the compulsory wearing of makeup particularly problematic for women whose personal sense of gender identity rejects those roles. Darlene Jespersen's reported sense of "violation" by being "dolled up … like a sexual object" reflects her appreciation that the hyperfeminine sexualized image that Harrah's insisted upon would project a false portrayal of her authentic self to others—a portrayal that actively contradicted her values and beliefs about her gender identity.

Darlene Jespersen objected to having to comply with Harrah's hyperfeminine appearance rules in part because she felt they undermined her credibility as a person. She feared that her "dolled up" appearance would cause other people—her customers and coworkers, for example—to treat her differently on the basis of their reaction to how she looked. Studies by sociologists and psychologists suggest that she had legitimate cause to be concerned, because the dress and appearance of a person have been demonstrated to impact how other people react to them and to affect the judgments they make about the character, personality, values, and traits of that person (Damhorst 1990; Kaiser 1993, 1997; Nagasawa et al. 1993; Brannon 1993). Specifically, characteristically "feminine" clothing and grooming choices do, in fact, cause other people to react to those signals. Not only do others draw conclusions about an individual's biological sex from gender-linked appearance

cues, but they also draw conclusions about that person's sexuality and attitudes toward conventional gender roles based on their clothing and grooming practices. When individuals wear stereotypically "masculine" or "feminine" attire, people observing them attribute gender-linked stereotypical traits and behaviors to them because of their appearance. Gender-linked dress and grooming also encourages others to infer traditional gender-role compliance by the wearer. This in turn causes people to interact differently with the wearer on the basis of those inferences (Workman and Johnson 1993, 98–105). In addition, "masculine" clothing signifies that the wearer is powerful, whereas "feminine" clothing is coded as weak and powerless (Owyong 2009). Thus, Jespersen was also right to fear that adopting a hyperfeminine appearance would cause her customers to see her as powerless and would undercut the authority she needed to project in her job.

12.4.3 Doe v. Boeing Corporation

Plaintiff Doe, born a biological male, was hired by Boeing in 1978 as an aircraft design engineer. Seven years later, Doe notified supervisory staff and coworkers that she was transgendered and was beginning the transitioning process which would culminate in having male-to-female sex reassignment surgery. In order to qualify for the surgery, her counselor recommended that she follow the accepted protocols of the Benjamin standards, under which she would need to publicly present herself as a woman on a full-time basis for a year prior to surgery, including wearing women's clothing. The response of Doe's supervisors was ambivalent at best; she was instructed to wear either masculine or unisex attire and specifically warned against wearing "obviously feminine clothing such as dresses, skirts, or frilly blouses" (Doe v. Boeing Corporation 1993, 534). She was also forbidden to use the women's bathroom until after the completion of the sex reassignment surgery.

After receiving an anonymous report that Doe was using the women's bathroom and dressing in a feminine manner, Boeing issued a written warning to Doe reminding her to use only the men's bathroom and to refrain from wearing excessively feminine apparel. Further, she was ordered to report to a supervisor daily before beginning work who would inspect her clothing to ensure that it was acceptably androgynous. Boeing's definition of acceptable dress was attire that would be unlikely to cause a complaint if seen in the men's restroom. Two weeks later, Doe arrived for work wearing a pantsuit accessorized with a strand of pink pearls. Boeing fired her for violating its dress policy, specifically noting that the pink pearls constituted an excessively feminine aspect of her attire (Doe v. Boeing Corporation 1993, 534).

Boeing conceded that Doe's work as an engineer was entirely satisfactory throughout her employment and that there was no indication that her work group suffered any diminution in productivity or other disruption after she announced her transgendered status. In fact, her coworkers circulated a petition signed by the engineers in her group asking Boeing not to fire her. Boeing also had to admit

that Doe had always been professionally dressed on the job; had she been born biologically female, her attire would have been unremarkable and appropriate to her job. Nevertheless, Boeing terminated her for violation of their policy on gender-appropriate dress, and ultimately the Washington State Supreme Court upheld the firing. The Washington Supreme Court rejected Doe's claims that her expression of gender identity through her dress ought to have been legally protected, and that failure to do so constituted impermissible discrimination. The court instead held that Boeing had the right to determine what kind of performance of female identity by its workers was acceptable on the job. Just as Harrah's casino could insist that its female employees adopt a hyperfeminine appearance, even if that clashed with their personal sense of female identity, so too Boeing could insist that transgendered women like Doe project androgyny in their appearance as the only acceptance performance of female identity on their part that Boeing would tolerate.

12.4.3.1 Dress and the Performance of Gender Identity

Under the Benjamin protocols establishing psychological readiness for sex reassignment surgery, Doe's counselor advised that Doe present herself full time as a woman for at least a year prior to the surgery. Thus, she needed not just to have the interior state of mind of being a woman during that preparatory year but must project that identity to the outside world as well. In response, Boeing's mandate that Doe refrain from wearing what it considered excessively feminine clothing was inadequate as an accommodation to her situation. It was beside the point that a biologically born woman engineer might well have chosen to wear androgynous clothing on the job; what Doe needed was to express through her clothing an unmistakable performance of female identity in order to establish that she was prepared for the major commitment of sex reassignment surgery.

12.4.3.2 The Semiotics of Pearls and the Performance of Gender Identity

Having been forbidden from expressing her female gender identity through the most obvious means—that is, by wearing unambiguously feminine coded clothing such as dresses, skirts, and clothing whose decorations such as frills or lace are clearly coded as feminine—Doe had no choice but to resort to wearing feminine accessories if the required "unisex" outfits Boeing prescribed were to serve the function of projecting her female identity on the job. When she did so by wearing a set of pink pearls to accessorize an otherwise androgynous pantsuit, Boeing fired her, giving as their reason the wearing of the strand of pink pearls.

Both Doe and Boeing understood the semiotic meaning of the pink pearls in the same way—as a clear signal of female identity. In contemporary dress norms, jewelry and decoration such as beading, lace, and appliqués are generally coded as feminine (Workman and Johnson 1993, 97). Certain kinds of jewelry have long

been acceptable for males to wear, such as rings on the fingers—especially rings signaling married status, school ties, or membership in clubs and organizations—and functional jewelry associated with specifically masculine items of dress, such as tie tacks to anchor a tie or cuff links to secure French cuffs on men's dress shirts. In recent years, particularly in some subcultures, wearing stud earrings and chain-style necklaces has also become part of accepted masculine attire. For example, professional male athletes frequently wear diamond and gold rings, necklaces, and earrings without any sense that these items are "feminizing." Quite the contrary—they represent achievement and wealth derived from exceptional athletic prowess—both quintessentially masculine identification attributes. These athletes and those who emulate their style, however, never include pearls among the jewelry that they choose to wear.

Pearls have long been considered unmistakably feminine. In his 1912 essay entitled, "The Pearl," Gustav Kobbé (1912, 12) considered the cultural meaning of pearls. He begins:

> A pearl worn by a woman is more than a mere jewel. It is the most distinctly feminine article of adornment there is. Sexless, for after all a pearl is a thing, not a person, yet it ever has seemed so much a part of the personality of the woman it adorns, that it has come to partake of sex and may be regarded as the eternal feminine among jewels.

More recently, wearing a strand of pearls has often been interpreted as signifying an adherence to and commitment to conservative gender-specific norms of behavior derived from patriarchal ideology, as when mothers and wives in 1950s television sitcoms wore "ubiquitous pearls" and high-heeled pumps while supposedly engaged in housewifely chores of cooking and cleaning for the family (Haralovich 1989, 77–78). Thus Doe's selection of pearls to wear transformed the unisex pantsuit into a "female" outfit—a semiotic coding necessary to her purposes to publicly project her female identity and simultaneously unacceptable to her employer who insisted that the only permitted gender identity for her on the job was an ambiguous androgyny.

12.4.3.3 The Semiotics of the Color Pink and the Performance of Gender Identity

If the semiotics of pearls gave Doe's jewelry the power to convert a unisex outfit into a feminine one, the pink color of the strand underlined that message and made it unmistakable. Far from being an incidental aspect of objects, color carries with it a range both of cognitive effects and social meanings. From the perspective of social psychologists, the cognitive semantics of color perception and color naming is crucial to an understanding of the links between visual perception, memory, and language use (Rosch 1972; Gage 1995, 1999). From the perspective of social semiotics, color serves as a rich and complex source of semiotic meaning in human culture (Kress and Van Leeuwen 2002). Combining these approaches demonstrates how the structured systems of meaning given to particular colors

may be grounded in visual perception and cognition but are then given cultural salience through semiotic coding (Koller 2008, 396–398). The meanings that are culturally ascribed to particular colors may come to seem universal and natural, but even the most entrenched color associations are products of historically and culturally contingent semiotic codes. For example, the association of pale blue with male infants and pale pink with female infants, however obvious and natural it seems to us today, is of relatively recent origin. In fact, until World War I, the association was the other way around. Pink was seen as a lighter version of the strong masculine color red, associated with blood and bravery, and was thus the "right" color for baby boys, whereas blue was the traditional color of purity associated with the Virgin Mary, and thus the "right" color for baby girls to wear (Koller 2008, 404).

Veronika Koller (2008) recently conducted an extensive survey on color attitudes and associations. Not surprisingly, perhaps, the color pink sparked both more consistent associations than other colors and stronger reactions as well—some positive but many more negative—on the part of subjects (Koller 2008, 404–408). Overwhelmingly, both male and female respondents associated pink with femininity. In comparison with other colors, pink was not a particularly favored color, with only 7.7% of respondents claiming it as their favorite color, but more than 10% singling it out as their least favorite color. Here, male respondents were far more negative in their evaluation of pink than were female respondents; better than 20% called pink their least favorite color, and not a single male respondent picked pink as his favorite color (Koller 2008, 401).

Pink clearly acts as a sign indexing femininity, but it does so in complex ways because the discourses of femininity and female identity are themselves complex and at times contradictory (Koller 2008; Kress and Van Leeuwen 2002, 363). Penny Sparke (1995, 198) has suggested that pink serves as a semiotic marker through which women are able to "constantly reaffirm their unambiguously gendered selves." For that reason, women who chafe at traditional gender roles often react very negatively to pink and actively avoid it because they associate the color with conventional ideas about women and femininity. Many of the respondents' unprompted associations linking pink to femininity did so in overtly negative ways; pink was associated with "false femininity," "stupidity," and "being too sweet" (Koller 2008, 408, 415). Respondents also associated pink—particularly bright, saturated hues of pink—with such negative gender stereotypes as artificial "fake" femininity, cheapness, and working class femininity (Koller 2008, 404).

Saturated hues of pink were associated not just with problematic versions of feminine identity but also specifically with exaggerated female sexuality (Koller 2008, 409; Sparke 1995, 198). It is this twin association of pink with feminine identity and aggressive female sexuality that may explain why so many men reported that pink was their least favorite color and why none of Koller's male respondents were willing to claim it as his favorite color. As this semiotic analysis of the color pink suggests, Doe's wearing of pink pearls so directly indexed both female identity and threatening female sexuality that this one seemingly

insignificant sartorial item was enough for Boeing to justify the ultimate disciplinary sanction of firing her.

12.5 Workplace Culture and the Contested Construction of Identity as "Employee"

From the point of view of the employee, the workplace is of crucial importance as a site in which personal identity is performed. The workplace is not just the place in which employment duties are carried out; it is the physical space in which most people spend the majority of their waking hours, the place where much quotidian human interaction occurs. Because of this, workers think of the workplace as a primary venue for the realization and projection of their authentic selves. Workers often seek to personalize their workspaces in an attempt to communicate who they "really are," displaying family photographs, sports team logos, comics clipped from periodicals, bits of artwork, Bible verses, inspirational aphorisms, drawings of cats or angels, pornographic images, stuffed toys, potted plants, and other symbolic items of their identity, their relationships, and their values. So it can come as no surprise that workers tenaciously fight for the right to perform central aspects of their authentic selves—especially race and gender identity—in the workplace.

What is at stake for employers is a bit more subtle but no less powerful as a motivator to enforce worker appearance codes. While employers sometimes try to assert that employee dress codes serve a business need—the desire to project a particular corporate image to the outside world through the bodies of their employees, as argued by American Airlines in the *Rogers* case—this appears to be a rationalization for a deeper motivation on their part. After all, these dress codes are enforced even in circumstances in which the employee is never seen on the job by members of the public, as in the case of the transgendered Boeing employee who worked in a cubicle and had no contact with customers or anyone other than fellow employees. It seems entirely counterproductive for employers to fire good workers simply because they desire to express their identity in ways that stray from employer-preferred norms. As Judge Kozinski wrote in his dissent in the *Jespersen* case:

> I note with dismay the employer's decision to let go a valued, experienced employee who had gained accolades from her customers, over what, in the end, is a trivial matter. Quality employees are difficult to find in any industry and I would think an employer would long hesitate before forcing a loyal, long-time employee to quit over an honest and heartfelt difference of opinion about a matter of personal significance to her (*Jespersen v. Harrah's Operating Company* 2006, 1118).

So, why do employers so often act this way when it would appear to be clearly against their long-term interests? To understand why employers insist on worker adherence to dress codes, even to the point of firing workers whose job performance is in every other way superlative, it is important to consider the modern workplace and its self-conscious development and imposition of workplace culture as a set of values and practices. Workplace culture has always existed, of course, but it is only

in recent years that employers have consciously and deliberately inculcated an explicit "company culture" as part of the workplace environment. Attention was first drawn to workplace culture in the late 1970s, as American businesses became fearful that they could not compete with what they saw as the corporate juggernaut of Japan, Inc. Japanese corporations were thought to be successful because they had developed an explicit corporate culture which was intentionally and comprehensively implemented in the workplace. This kind of corporate culture, it was argued, leads to committed, loyal, productive workers, which in turn would lead to corporate dominance. Authors like William Ouchi (1981), Thomas Peter and Robert Waterman (1982), and Terrence Deal and Allen Kennedy (1982) wrote best sellers urging American businesses to rise to the Japanese challenge by inculcating their own forms of corporate culture in the workplace. Ever since, there has continued to be a cottage industry in books, consultants, and mandatory managerial training emphasizing the importance of developing and maintaining workplace culture (Green 2005, 639–640).

Developing a solid workplace culture, these workplace culture advocates argue, means cultivating a sense in employees of loyalty to the company and its values. Ideal workers put the company's interests above their own. They identify with the company, are unswervingly loyal to the company, and adopt the company's values as their own. Above all, ideal workers make work the central focus of their lives and consider their identity as employees the central identity in their lives (Roberts and Roberts 2007, 372–374).

A second overarching value in contemporary workplace culture is an emphasis on cohesion and homogeneity. Because worker cohesion and homogeneity are valued as promoting a harmonious and efficient working environment, identity difference lurks as a threatening source of potential discord and inefficiency. Thus, overt displays of difference in identity performance by employees must be policed lest they erupt into worker conflict or, worse, encourage workers to think of identity attributes other than their identity as employee as core to their identity on the job (Roberts and Roberts 2007, 373–374).

Since workplace culture unselfconsciously expresses white, middle-class male norms of behavior and values (Green, 643–650), its imposition of those norms in the name of corporate cohesion creates terrific pressure on those whose core identities diverge from those unspoken norms. Either they must conform to the corporate culture and suffer from a sense of insincerity and betrayal of their authentic selves or they must risk engaging in behavior which is congruent with their sense of their authentic selves, with the ever-present possibility that their employers will notice and will take punitive actions against them (Green 2005, 651–653; Roberts and Roberts 2007, 383). No wonder the burden of assimilating one's behavior to the requirements of corporate culture can seem like a double bind in which employees are unable to fully conform to the expectations of the employer and simultaneously unable to fully be true to their authentic selves, either.

Dress codes in the workplace, then, can be seen as an instantiation of the employer's desire to impose a homogenous corporate culture in the workplace—in this case, through dress and appearance codes that will create a consistent personal

appearance in employees. Appearance codes promote employee conformity in order to increase their worker's identification with the employer and to make their identity as employees visually primary. This may explain why they are insisted upon even in circumstances in which the employer will potentially lose a valuable worker in the process. The clash between employer and employee over whether the worker's primary identity is as employee or something else—race and gender in these cases—gives both sides of these cases powerful incentives to pursue conflicts over dress and appearance codes even at the cost of jobs, in the case of the worker, or valuable workers, in the case of the employer.

12.6 Conclusion

The cases discussed demonstrate worker resistance to dress codes that force them to perform perceived core identity attributes—in this case race and gender—in ways that contradict and undermine their individual sense of racial and gender identity. For the employee, it is not just hair or makeup or jewelry that is at issue, it is their sense of the authentic self that is at stake. For the employer, what is at stake is control of worker identity within the workplace. By insisting that the performance on the job of identities such as race and gender by their workers is a matter for the employer to determine, employers are asserting the primacy for the workers of their identity as "employee" over their racial, gender, and sexual identities. The courts' approval of these codes gives apparent legitimacy to the employers' demand for primacy.

The employer's choice of how their employees should perform their gender and racial identity is to a considerable extent a reflection of the hegemonic racism and sexism of the dominant culture. What Camille Rich calls the "aversive racism" of employers causes them to demand that nonwhite employees dress and comport themselves in ways that efface their racial identity to the greatest degree possible (Rich 2004, 1186–1194). Likewise, gay male employees may be forced by heteronormative workplace dress codes to adopt hypermasculine attire—and lesbians' similarly hyperfeminine attire—to "cover" their sexual orientations. In some instances, an employer might demand that employees "reverse cover" or wear an exaggerated version of women's clothing to emphasize the presumed natural differences between the genders (Yoshino 2002, 781). Darlene Jespersen's case can be seen just such an example of an employer using a dress and grooming code to impose stereotypical notions of appropriate femininity on its female employees, regardless of how they might individually choose to express their gender identity. Employer demands like these are expressions of more generally held ideologies of racial and gender hierarchy and superiority. But there is more to the story than that.

By controlling the expression by employees of the culturally salient categories of race and gender, employers are insisting that worker identity as "employee" trumps other asserted roles and identities. Because the "employee" identity is being asserted

as the primary identity of the worker, the employer has the right to control the expression of other, supposedly lesser and subordinate identities in the workplace. Take expression of gender identity, for example. Darlene Jespersen's case is a prime example of the many cases involving women workers whose employers required them to dress and groom themselves in a fashion exemplifying a conservative ideology of hyperfemininity that many workers find at odds with their authentic female selves. However, female employees have also been fired for expressing themselves in too feminine a manner on the job, as when Marsha Wislocki-Goin was fired from her teaching job in a juvenile detention facility for wearing her hair down and wearing what her employer thought was too much makeup for what was considered a "man's workplace" (Wislocki-Goin v. Mears 1987). That is, Wislocki-Goin's employer demanded that she cover her female identity, whereas Jespersen's employer demanded that she reverse cover and exaggerate the stereotypically feminine aspects of her appearance. What unites both of these lines of cases is not a consistent ideology of appropriate feminine appearance but, rather, the insistence that employers have the unilateral power and the right to decide which standards of feminine grooming they will impose on their female workers.

As the discussion of these case studies has demonstrated, dress codes regulating employee appearance occur at the crossroads of power and meaning in the workplace. Far from being about trivial matters of personal taste and style, conflict between employers and employees over dress codes serves both as an arena for worker resistance to employer assertions of control over the construction and performance of their authentic selves and as a prime site for cultural contests over the meaning and instantiation of race and gender identities more generally in the modern world.

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Chapter 13
Semiotic Interpretation in Trademark Law: The Empirical Study of Commercial Meanings in American English of {  } "Checkered Pattern"

Ronald R. Butters

Abstract In trademark law, commercial entities may assert a proprietary interest in images as well as words and sentences. No trademark may be "generic," and even trademarked images have to mean something other than merely "a kind of thing." Thus, a marketer of bananas could not prevent others from using all images of bananas in their advertising, though they could own a particular unique image of a banana (say, a blue one, half peeled). Thus, the use of "checkered patterns" (e.g., ) in product marketing exemplifies how the semiotic sense of signs can be crucial in trademark litigation. Checkered patterns are widely used ornamentally in packaging and advertising, and the issue of the acceptability of a particular pattern as a legitimate trademark depends in part upon the relevant public's ordinary analysis of the meaning of the pattern in relationship to the product being identified. The issue of genericness arises because the checkered pattern in itself has identifiable meanings that extend beyond that of particular products: legal and semiotic issues arise as to whether a particular checkered pattern will be understood as signifying (1) a particular brand of products and services or (2) the general class to which the product or service belongs.

My analysis of commercial advertising and product labeling identified four fields in which the checkered pattern is generic in the United States: (1) automobiles, (2) food and food service, (3) tile floors and walls, and (4) cleaning products and services. Marrying basic semiotic analysis and lexicosemantic pragmatic research within a legal framework, I have relied on the methodology that lexicographers normally use in studying names and common nouns: inductively analyzing systematically collected data.

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In trademark cases under American civil law, linguistic testimony has a lengthy history reaching back at least several decades (Butters 2007b, 2008b, 2010). This chapter proposes to show how the standard linguistic methodology that language specialists have applied for decades in preparing testimony in such cases can be fruitfully extended to the analysis of semiotic aspects of trademarks. While there is a small body of scholarship generated largely by law-school professors that concerns itself with general theoretical semiotic analysis of trademarks (e.g., Beebe 2004; Dinwoodie 2008; Gibbons 2005; Durant 2008), little of the existing scholarship addresses images per se (but see Morgado 1993), and the linguistic semiotic analysis of trademarks in court cases has been rare (and even somewhat controversial; see Sect. 13.2)—it is my contention that such methodological extensions can greatly assist the courts in determining the facts in trademark suits where semiotic issues are relevant. The relative rarity of semiotic-based testimony seems to stem from three historical issues: (1) the reluctance of some linguists to work with semiotic data, (2) the general conservatism of the American legal system, and (3) the absence of a widely discussed use of linguistic methodology for analyzing the semiotic data of trademarks. It is hoped that the present essay will remedy all three of these problems.

13.1 Reluctance of Forensic Linguists to Work with Semiotic Data

A scholar who is rightly generally considered the foremost American forensic linguist writes, concerning the taxonomic question of the borderline between pragmatics and semiotics:

> There is some disagreement about the boundaries of pragmatic meaning.… Whether it extends to conventional areas of semiotics (the study of signs, traffic lights, colors, and Christmas trees), is still debated. [Shuy 2002: 23]

It is important to note that Shuy does not himself declare semiotic methodology to be outside the competence of linguists. Later in the same book, in commenting on my own analysis of semiotic data in my arguments in a case in which he and I testified on opposing sides,[1] he writes:

> Butters then pointed out how the use of color, type case, and size indicate important semiotic differences [between the two trademarks at issue in the case].… [The two parties,]

[1] *AutoNation, Inc., v. Acme Commercial Corp., d/b/a CarMax the Auto Superstore, and Circuit City Stores West Coast, Inc., No. 98–5848 (S.D. Fla., Dec. 9,* 1999*).* The contested marks were *AutoNation,* the name of the firm, and CarMax's senior mark, *AutoMation*, which CarMax used only as the name of its in-house computerized inventory display system. (Although AutoNation is listed as the complaining party in the caption, CarMax was actually the putatively aggrieved party, its mark being the older of the two.) Part of the argument between the parties had thus to do with whether the public could find the marks confusing as to source, given that they referred to quite different entities in contexts in which they were at best in very weakly contrasting. The case was decided by the jury in favor of AutoNation.

> AutoNation USA and CarMax, were different in these respects, AutoNation USA making extensive [advertising] use of US interstate highway geographical informational signs …. [Shuy 2002:135]

Thus, Shuy does not rule it out as scientifically inappropriate for other linguists to consider semiotic features and context in analyzing trademarks; he simply declines to do so himself because his "comfort level" does not extend to the consideration of semiotic features as part of the context of interpretation based on his own linguistic specialization and knowledge. Importantly, his discussion offers no reason why, in principle, a linguist should view the consideration of culturally understood meanings for contrasting shapes and colors as any different from other aspects of marks and their contexts that linguists regularly take into account. Sociolinguists and pragmatic analysts regularly interpret texts and conversations on the basis of their own intuitive knowledge of the relevance of such contextual features as the age and sex of speakers, the formality of the utterance situation, and speaker expectation that hearers will assume that they are telling the truth. Even in the case of *AutoNation v. CarMax*, Shuy was willing to consider the relevance of "the context of a car store and the use of AutoMation as a computerized inventory system that was the first step in CarMax's car store operation" (2002, 141). If linguists can consider these aspects of context even though they are not marketing experts or car-store inventory specialists, other aspects of context should not be ruled out simply because they have to do with the color and shapes of advertising images associated with the marks rather than with the location and inferred purpose of the marks in their presentation to the public.

Indeed, in still other cases that involved his legal testimony, Shuy has shown no reluctance to consider data that seem clearly "semiotic." For example, in a published account of one of his legal consulting experiences, Shuy (1990) criticized the clarity of a printed product-directions insert because (1) it employed too few bullets, (2) with respect to what he called (2002: 135) "type case," a portion of the text was entirely in capital letters, and (3) there was too little white space.[2]

It is not apparent that any principle of linguistics allows Shuy (1990) to consider "type case" and other semiotic features in discussing the readability of product inserts but not in discussing the likelihood of confusion of trademarks. Shuy's own semiotic criticisms were based on putative principles for effective document design that he noted in a government publication, *Guidelines for Document Designers* (Felker et al. 1981), which itself merely cites other scholarly resources for its precepts. Shuy (1990) reports on no empirical testing of the materials he was evaluating, nor does he cite to any primary legibility research of his own or others. Likewise,

[2] "The Warning Labels section is crowded with words, in sharp contrast with the Usage section. Bullets are used to highlight equivalent points in the Usage section but are totally absent in the Warning section" (300–301); "The Warning section contains twelve consecutive lines of all capital letters, producing a readability problem … since readers are unaccustomed to seeing texts all in capital letters" (301); "more white space should [have] be[en] provided" (302).

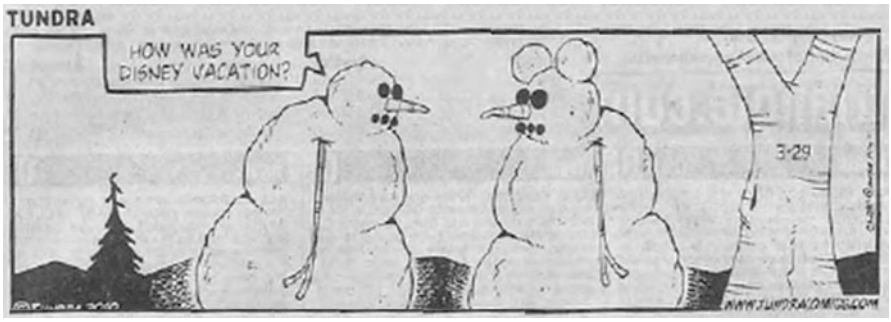

Fig. 13.1 "Tundra" Cartoon Strip, Raleigh, NC, *News and* Observer, 29.3.2010, 5D

there appears to be no clear principle that would (1) rule out the consideration of the simple distinctiveness for readers of differing shapes of highway signs in trademark representations—while at the same time (2) allow, in a product-liability case, Shuy's unanalyzed opining that the warning label's "three … line illustrations" of a uterus cross section "are simple, but effective" visual devices for demonstrating proper tampon-insertion technique for a feminine hygiene product (1990, 301). And while Shuy was silent about the insert's apparent lack of use of color (which could have contributed greatly to the clarity of the document that he analyzed), he freely opined about the effects of the absence of "white space."

Certainly, ethical and practical considerations ought always to preclude linguists from testifying about matters that they feel are outside their areas of expertise (Hollien 1990; Butters 2009). One must applaud Shuy for refusing to enter into areas of forensic analysis that he feels are beyond his competence. However, just as there are widely agreed-upon meaning associations that distinguish traffic-light colors and just as there are iconic shapes that will be interpreted as pine trees and associated in American culture with Christmas, so, too, are shapes and colors meaningfully associated with specific trademarks (think of McDonald's golden arches, the apple-with-a-bite-out trademark of Apple computers, or the shape of the head and ears of Mickey Mouse that is instantly associated with Disney). A telling example of the strength of such icons as Disney's Mickey's head trademark is apparent in the comic-strip cartoon shown in Fig. 13.1.

Shuy's reluctance to consider semiotic aspects of trademarks also precluded the consideration of important semiotic differences in form and meaning between the trademarks, differences that would assist potential users of the products and services so named to distinguish the one trademark from the other. The likelihood of confusion of the trademarks at issue in *AutoNation v. CarMax* was clearly lessened because of the association of iconic interstate highway signs with the name *AutoNation* in advertisements and signage that did not appear in the CarMax ads, and the predominance of green and white in AutoNation's ads and signage contrasted dramatically with the blue and yellow of those of CarMax. One does not really need to be a "color expert" or a psychologist specializing in the differentiation

of shapes to consider the effects of such meaningful contextual features. A linguist's knowledge and experience with standard linguistic methodology concerning the interaction of context and meaning will be enough.

13.2 Conservatism of the American Judicial System and the Implementation of Semiotic Methodology in Forensic Linguistic Trademark Work

American courts place upon judges the responsibility for deciding on the qualifications of expert witnesses.[3] Judges base their decisions on the positive answers to three questions: (1) Is there enough data for anyone to make a reliable scientific decision? (2) Is the proffered expert someone who will most likely arrive at an expert opinion by reliably employing an established scientific methodology? (3) Will the expert's knowledge assist the jury in understanding issues that are not open to analysis that is based only on the education and training of laypersons?[4] Linguistic experts have traditionally been deemed qualified to testify about phonology, orthography, and the semantics of words and phrases because these aspects of linguistics have long been established as complex sciences which require study and training to gain a scientific understanding—and trademark cases often hinge upon (1) the relationship between spelling and pronunciation and (2) the acoustic properties of the pronunciations of words that are alleged to be confusingly similar. In addition, with respect to trademark issues that turn upon the meanings of words and phrases, the courts in American trademark litigation have long held great respect for the authority of dictionaries—and, therefore, lexicographers, as well as linguists who specialize in lexicology, morphology, and dialectology.

Thus, the use of semiotic methodology must be seriously proposed to the courts in a way that demonstrates its scientific credentials if it is to be accepted as a legitimate aide to the judge and jury who are trying to understand complex issues of communicative symbolic behavior based only on their layman's knowledge of the scientific basis of the enterprise. The purpose of this chapter is to make precisely such a serious proposal—by examining a case in which semiotic material, the

[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993): "The trial judge is generally the final arbiter of the admissibility of expert testimony and the qualification of witnesses as experts (the 'gatekeeper' function). Almost never is a trial judge's decision to allow or exclude the testimony of an expert overturned on appeal."

[4] "Federal Rule of Evidence 702 (2011)": "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." See also Ainsworth (2006), Howald (2006), and Wallace (1986).

checkerboard pattern, was the center of successful forensic linguistic analysis and describing the methodology that was employed.

There is a further reason why the linguistic relevance of semiotic data has not been much in evidence in trademark cases, and this is the lack of availability of the quantity and quality of data that would meet the court's announced stringent criteria for admissibility. The central focus of my discussion in this chapter addresses the extent to which the advent of the internet and of powerful personal computers makes semiotic data available to us today in manners and in quantities that simply was never before possible. The linguist who undertakes forensic semiotic analysis of trademarks can now make use of precisely the same data and inductive methodology that is used by lexicographers, lexicologists, and scholars of morphology in more traditional analyses.

13.3 Forensic Linguistic Trademark Analysis

Linguistic testimony in trademark cases generally is almost always concerned with one of two areas of the law.[5] Litigation about (1) likelihood of confusion originates because the law limits the use of proposed trademarks to those that are not likely to be confused with existing trademarks. For example, a court agreed, basing the decision in part on my linguistic testimony, that an established pharmaceutical firm's established trademark *Aventis* was too likely to be confused with a start-up firm's mark *Advancis*, and the junior firm therefore was forced to abandon its proposed used of *Advancis* as a trademark (see Butters 2008b). Litigation about (2) strength of mark stems from the general legal denial of the validity of trademarks that are generic names for the product or service they are intended to refer to or merely descriptive of the product or service. For example, *Delivery Service* is a generic identifier; *Speedy Delivery Service* would be merely descriptive. A term such as *Rocket* would have stronger trademark protection as the name for a delivery service (because it suggests a metaphorical connection between the name and the speed of the service); this class of marks[6] is technically termed suggestive. Even stronger would be an arbitrary term such as *Lighthouse* (one with little or no connection to

[5] Linguists have also consulted on cases involving allegations that potential or actual trademarks are derogatory (Butters 1997, 2009; Nunberg 2009) or obscene (Butters 2008b). In addition, linguistics may bear on the question of the FAME of marks that is involved in claims of trademark dilution (Butters 2008b) as well as the criterion of FAME that is often addressed in attempts at establishing proprietary rights for descriptive trademarks on the basis of what is known as secondary meaning. It is not inconceivable that semiotic analysis could be relevant to these areas of trademark law, but that is not the focus of this chapter.

[6] Because the term trademark itself is distinguished in trademark law (as the name of a particular product or family of products, e.g., *Xerox*) from the term service mark (the name of a service, e.g., *Federal Express*), the term mark is employed to refer in general to commercial symbolic identifiers of all sorts.