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Law, Culture and Visual Studies

stamp. Red is the colour of the revolution and both characters are drawn using light red; they are key figures following the French Revolution period and the drafting of the Civil Code. So, red characterizes the turning point, that is, the end of the Kingdom of France and a new era for France with the creation of the Republic and the drafting of the Civil Code. The least visible colour remains white, which plays the transitory role between the two other colours. It is hardly distinguishable (see also Stamps 2, 5 and 6). The artist not only plays with colours but also with the words that are being emphasized with such colours. Indeed the key elements of the French Revolution and the drafting of the Civil Code are brought to the forefront with such a technique as shown in Stamps 2, 5 and 6. Stamp 2 was issued in commemoration of the Bicentenary of the French Revolution and the Declaration of the Rights of Man and of the Citizen written by the Marquis de Lafayette and approved by the National Assembly in August 26, 1789.[1] There is a play between the two main colours and two tints: light blue/red vs. dark blue/red. Both of them are treated equally. The background uses light tints to show the three main aspects of the French Republic, whereas the forefront privileges dark tints and visually emphasizes the key words in blue and key dates in red. The key date – 89 – in dark red is a strong visual statement. The verbal elements are also crucial in that they give the interpretant additional information on the key events being dealt with (see also Stamp 5). Indeed, 89 is really interesting as it shows that the artist emphasizes the last two digits. 89 remains vague, out of space and time, and could be deciphered as either 1789, 1989 or could even bear both meanings.

The scenic art shown in Stamp 3 brings another dimension to the study of commemorative stamps. Indeed after the dark period (the revolutionary period) represented with dark clouds and moving out from the scene, the light comes out again under the eyes of justice with a mix of colours – white and yellow. One character representing fraternity and equality with red and blue clothing unchains herself from the past and looks for new directions – the angel, freedom, pointing her finger at the sacred Tables of the Declaration of the Rights of Man and of the Citizen proclaimed after the French Revolution as shown by the sword in the middle of the tables with the Phrygian cap on top of it. Victory is expressed with the laurels in green, positioned as if they were curtains as they show new directions to the new French Republic, enshrined in the Preamble of the French Constitution of 1958. The Phrygian cap is viewed distinctively with the commemoration in particular consideration. Indeed in Stamp 2, the cap is being considered through two perspectives,

[1] The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect or contempt of the rights of man is the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable and sacred rights of man, in order that this declaration, being constantly before all the members of the social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected; and, lastly, in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all.

blue and red, merging together, whereas in Stamps 3 and 5, it has only one visual colour meaning – that of the revolution. Deciphering stamps is like being an expert in precious jewels where the interpretant uses a magnifying glass to see all the details. The artist draws the same effects as the technique of inclusions. A small detail is visible within the Phrygian cap where a small inclusion of the Eiffel tower is inserted to position the stamp under the correct context: France (see also Stamp 5).

Stamp 5 refers to the revolutionary period and the artist still uses blue and red. However, the technique of the artist is distinctive. Indeed these colours are only used with verbal elements. The revolutionary period is highlighted in red with the names of the two events at the bottom, and blue is used to emphasize the decisive change in governing the country. If we now turn to the picture itself, only black and white are used. Black still marks the dark and bloody period of the revolution. White is to the left of the weapons and emphasizes the fights in the street, whereas on the right, it would represent light and wisdom.

15.3.3 Commemoration: Space and Temporality

The stamp has the possibility to turn heterogeneous spaces into one single space, to be a place that does not exist but can represent real places and different temporalities in one single space. In other words, it creates fictions, as it gives substance to one or several fictitious spaces joined to one or several fictitious temporalities. This fictitiousness belonging to the stamp refers to its material existence used by a given community for everyday purposes. The fictitious process at work here comes from representation or from what the stamp brings to view.

For example, Stamps 2 and 3 are autonomous and independent; they can be understood individually, but their very meaning appears when they are considered as a whole, that is, including other stamps but also the paper surrounding them. Here, the whole is much more than the sum of its parts. Now, what is at stake is the re-creation of the fiction of a collective entity enduring for a long time and from whom one could claim to be a part of. Representing the French Republic, understood as a collective identity untemporal and unspatialized but one we hope to be able to temporalize and spatialize, consists in indicating its endurance in time and its materiality in space. The commemorative stamp is this other space fictitiously created to make real something that, by definition, cannot be. It succeeds in combining space and time into one fiction put into reality and then everyday life. In other words, the specificity of a commemorative stamp is to give substance to a past reality in a particular space so that a present reality can be created. A collective identity can only be constructed by adding temporality to spatiality. Stamp 2 allows the embodiment of values, seeking to turn these values into some kind of necessary reality and to turn that into norms.

While there is no doubt concerning the ideological value of a commemorative stamp, we should notice what kind of process is at work. The point is to render alive a past event through its present representation, which can only be a representation

in a present space of something that has already happened in another time. Stamps 2 and 5 are perfect examples of this construction. In Stamp 5, the postage stamp reconciles two incompatible extremes: the past event it represents and the event of its existence right here, right now. In Stamp 2, the trinity (Liberty, Equality and Fraternity) shows that (1) 'no section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof (French Constitution of 1958, article 3), visualized by a monster being killed by Liberty, and (2) the 'Government of the People, by the People and for the people' (French Constitution, article 2) shall ensure equality of all citizens (expressed with the scale of justice) and shall afford protection to all citizens 'without distinction of sex, class or race'[2] as shown with white and black children. This function of actualization is fundamental.

The fictitious process at work in the commemorative stamp has only one aim: to create a unity from a multiplicity. This can only be achieved through symbolization. One should render visible a totality by essence invisible, needed to be embodied to be seen, to be symbolized before being loved, to be imagined before being conceived. But such a unity built from a multiplicity is based on the idea that individuals composing it are no longer discernible. This is exactly why we should speak of totality rather than multiplicity. This totality would substitute for individuality. The figure of Marianne can be interpreted in this way since it is only a figure insofar as it subsumes under its totality all French women; it allows no personal or individual projection and this is precisely why it could become the symbol of the Republic.

15.4 Identities and Values (Practice)

15.4.1 Commemorative Stamps

Our last point concerns the commemorative stamp as a way to convey values. Its message is based on a mixed discourse acquiring a meaning through the complementarity between text and image. Let's go back to Stamp 6 and have a closer look. We can detect several elements: the country from where it comes (République française – French Republic), postage (2, 20), its motive (Bicentenary of the French Revolution) and year of issue (1989) with the public institution issuing stamps (La Poste). While these indications are only words and texts, they are combined with an image illustrating the reason of its issue, such as the three birds drawn by Folon. Folon's use of colours is also important and noticeable as the entire text is written in Arial white and the motif is composed of three colours, blue, white and red, with blue and red prevailing. White texts inserted on gradation of blue and red

[2] French Constitution of 1958, article 1 stipulates that: France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

are then highlighted, emphasizing the reason of issuing such a stamp in bold and italics. The meaning of this stamp is then presented as a mixed discourse combining image and text. We can then speak of a multimedial discourse amalgamating one single work in two distinct discourses. The first one, verbal, is inserted into the second, which is visual.

One last point, we said earlier the commemorative stamp conveys values. To do so, it is necessary to ensure its message is well received. Pierce (1931–1958) showed clearly the semiotic process is based on a triadic relationship between a representamen (first), an object (second) and an interpretant (third). The stamp, as a representamen, is part of a process called semiosis. The representamen can only convey meaning if it is accompanied by interpreters, for they allow interpreters to reach the object of sign: meaning. In other words, it is something representing another thing but not in relation to knowledge; before being interpreted, the representamen is a pure potentiality.

As an object open to analysis, it has three aspects: iconicity, indiciarity and symbolicity. But a stamp has a specific role; neither icon alone, indication alone nor symbol alone can exist without interpretants. Because a stamp needs all its aspects to be perceived and understood to function, the stamp, and more specifically the commemorative stamp, needs context to be taken into account to convey its meaning. It implies something like a collective memory or conscience: a covenant, an agreement and a cultural and historical common knowledge allowing some historical events to be recognized and identified as a representation of the French nation.

15.4.2 Building a Common Memory: The Identity of the French People

The typical qualities considered of identity generally include age, race, class and gender. In the present study, the identification of French identity employs culturally specific colour codes and historical key figures that conceal assumptions about members of the French people. The history of our people narrates negotiations for power and resistance to the influence of the former French Kingdom. Bennett et al. (2005, 172) define identity as 'the imagined sameness of a person or social group at all times and in all circumstances'.

The French flag – known as 'Tricolore' – is associated with the revolutionary period and later with Imperial France. The three colours in vertical stripes were first used on Naval flags in 1790 and extended to the nation in 1794. The French National Convention adopted the modern blue–white–red flag as the national flag on 15 February 1794 (27 pluviôse an II) even though it was not applied. The relevant part of the decree stipulated that:

> The national flag shall be formed of the three national colours, set in three equal bands, vertically arranged so that the blue is nearest to the staff, the white in the middle, and the red flying.

The *Tricolore* was no longer of use after Napoleon's defeat at Waterloo. It was replaced by a white flag (the old royal flag) from 1814 to 1830. The Marquis de Lafayette re-established the *Tricolore* as from the July revolution of 1830. The constitutions of 1946 and 1958 (article 2) instituted the 'blue, white and red' flag as the national emblem of the Republic. There are several ways of analysing the colours of the French flag, but the most established ones are that (1) they are believed to be derived from those of Paris (blue and red) and the Bourbon Dynasty (white); (2) they are usually associated with the ideals of the French Revolution – that is, Liberty, Equality and Fraternity (Stamp 2) – and enshrined in the French Constitution, article 2; and (3) they derive from heraldic traditions with (a) *white* symbolizing the clergy, peace and honesty; (b) *red* representing nobility, strength and pride in wartime fighting for liberty; and (c) *blue* showing vigilance, truth, perseverance and justice.

Today, the French flag enshrined in the French Constitution is flown on all public buildings for special events and/or ceremonies but is also used as an ambassador, an official representative of the French identity in French stamps with more or less colour shade (Stamps 1, 2, 5, and 6).

15.4.3 Transmission of Republican and Democratic Values

If we just insisted on the commemorative stamp's capacity to transmit values, we need to go back to our case: stamps commemorating the French Revolution. They are indeed designed to transmit some specific values: those from the French Republic and subsequent democracy. Strongly ideological and political, they are like 'little windows full of ideology' (Brunn 2000, 316). Knowing this and their function, we should investigate these transmitted values: Which are they? What are their sources? As underlined by Brunn, 'stamps are products of "windows" of the state that illustrate how it wishes to be seen by its own citizens and those beyond its boundaries' (Brunn 2000, 316).

This is particularly clear in the case of Stamp 3, which associates the French Republic and the Declaration of Human Rights as stipulated in the Preamble of the French Constitution of 1958.[3] We should even say that this stamp identifies the French Republic to the Declaration of Human Rights. Even if it is divided into four

[3] The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.

By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development.

stamps complete with illustration, as a whole they symbolize the fact that human rights are a solid foundation (stoned pillars express also this same idea). Each stamp has an autonomous and intrinsic meaning but refers to each other because of its incompleteness. Nevertheless, we can notice they all have some text and a piece of pillar as the symbol of a solid foundation is still present even when stamps themselves are considered.

Such a shared and cultural memory gives Stamp 4 all of its meaning. It is no more an issue to recognize and to build a French Republic based on human rights but to insist on its universality (a part of the Earth could be seen in the bottom right-hand corner) and hope associated to such a declaration (this stamp is a gradation of blue – which is also one of the colours used in the French flag). We could extend this interpretation and assert that this stamp glorifies the image of France through the universality and universalizability of principles on which it is founded. It is both a representation of France as well as an image of France.

Lastly, collective memory allows some stamps to refer implicitly to other stamps. This is particularly clear in the case of Stamp(s) 2: It represents the tryptic of the founding values of the French Republic and of French mottoes, which is nothing else than the social and political ideal defended in 1789. The 'Liberty' stamp refers implicitly to 'Equality' and 'Fraternity' because the French nation couldn't be depicted and understood without such unity. The commemorative stamp tries to bring up to date several elements coming from a collective and shared memory to reaffirm this consistency, cohesion and unity of the nation through founding values.

15.5 Conclusion

In a beautiful tale, Jorge Luis Borges (1976) writes about a garden of forking paths. The presented analysis here can be read in different ways. It can be read as a detective novel, in which the reader is accompanying the main character in a murder investigation. However, this is not the main point. What is most interesting about the story is like the idea of a garden of forking paths. At the beginning, the reader is led to believe that the main character is looking for an actual garden where a path leads to another and so on ad infinitum. In fact, Borges is trying to show us the difference between the traditional conception of infinity and the modern idea of it, established by German mathematician Georg Cantor. According to Cantor, there is a possibility of an abstract yet real infinity. When we say that the natural numbers are infinite, we are not only saying that to any number we can add 1 and keep the count going endlessly, but he is also saying that in the series 1–2 there is an infinite number of numbers, and if we draw a line that goes from point 1 to point 2, we are seeing actual infinity (Hernandez 2001; Hofstadter 1999). The garden of forking paths is not, then, an actual garden but an object that conveys the idea of transfinite numbers, that is, an object that has the possibility of different paths leading to an infinite number of points. In Borges, one story leads to another, and so on, until it returns to the story's beginning, keeping the paths opening endlessly. This account reminds us, as

is Borges' intention, of Scheherazade's *Arabian Nights* (Anonymous 1959) where Scheherazade, the narrator, tells the story of a girl who tells stories to the emperor in order to avoid being killed.

The law can be seen from the point of view of a garden of forking paths. When we read any handbook on legal theory, we see that every theory leads to another, with some paths diverting in search of new destinies, in an endless discussion about the real nature of the law. The research on law contained in this chapter draws on many theories, refining legal analysis. The meeting point of this research seems to be the relationship between law and culture and visual studies, that is, the understanding of law as a system of signs, and interpretation is the meeting point of that discussion. In fact, in the analyses of the law, contained herein, we find different common grounds and we also find that the differences between the theories can have a meeting point. Considering the complexity and diversity of the French identity construction, we have examined from a socio-semiotic perspective how the commemorative stamps shaped the identity of the French values of the Republic, and we have argued that the identity visible in commemorative stamps is constrained by a complex of sign system which is a configuration not only of historical, social and cultural conditions but also of colour-coded system.

Stamps

Stamp 1

Preparation of the Civil Code (1800–1804)

It was created by Bonaparte who appointed a six-member committee controlled by Portalis in 1800.

The draft code was elaborated in four months and was examined before it was voted as a whole in 1803. The Civil Code included 2281 articles and four volumes with different titles and was completed by experts on 21 March 1804. It is still applicable after some additions and was even adopted in most European States and as far as Asia and America and is known as the 'Code Napoleon'.

Stamp 2

Liberty, Equality, Fraternity

14th July 1989 – Paris

The motto 'Liberty, Equality, Fraternity' has represented the Bicentenary of the French Revolution and the Declaration of the Rights of Man and of the Citizen for two centuries and stands at the head of official documents as a symbol of the social and political ideal that the men of 1789 left behind as a legacy to the French Republic.

Stamp 3

DÉCLARATION
DES DROITS DE L'HOMME
ET DU CITOYEN,

Décrétés par l'Assemblée Nationale dans les séances des 20, 21, 23, 24 et 26 août 1789, acceptés par le Roi.

PRÉAMBULE

Les représentans du peuple François, constitués en assemblée nationale, considérant que l'ignorance, l'oubli ou le mépris des droits de l'homme sont les seules causes des malheurs publics et de la corruption des gouvernemens, ont résolu d'exposer, dans une déclaration solemnelle, les droits naturels, inaliénables et sacrés de l'homme, afin que cette déclaration, constamment présente à tous les membres du corps social, leur rappelle sans cesse leurs droits et leurs pouvoirs, afin que les actes du pouvoir législatif et ceux du pouvoir exécutif, pouvant être à chaque instant comparés avec le but de toute institution politique, en soient plus respectés; afin que les réclamations des citoyens, fondées désormais sur des principes simples et incontestables, tournent toujours au maintien de la constitution et du bonheur de tous.

En conséquence, l'assemblée nationale reconnoît et déclare, en presence et sous les auspices de l'Être supême, les droits suivans de l'homme et du citoyen.

ARTICLE PREMIER.

Les hommes naissent et demeurent libres et égaux en droits; les distinctions sociales ne peuvent être fondées que sur l'utilité commune.

II.

Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme; ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression.

III

Le principe de toute souveraineté réside essentiellement dans la nation, nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément.

IV.

La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui. Ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits; ces bornes ne peuvent être déterminées que par la loi.

V.

La loi n'a le droit de défendre que les actions nuisibles à la société. Tout ce qui n'est pas défendu par la loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas.

VI.

La loi est l'expression de la volonté générale; tous les citoyens ont droit de concourir personnellement, ou par leurs repeésentans, à sa formation; elle doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse. Tous les citoyens étant égaux à ses yeux, sont également admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autres distinctions que celles de leurs vertus et de leurs talens.

VII.

Nul homme ne peut être accusé, arrêté, ni détenu que dans les cas déterminés par la loi, et selon les formes qu'elle a prescrites. Ceux qui sollicitent, expédient, exécutent ou font exécuter des ordres arbitraires, doivent être punis; mais tout citoyen appelé ou saisi en vertu de la loi, doit obéir à l'instant, il se rend coupable par la résistance.

VIII.

La loi ne doit établir que des peines strictement et évidemment nécessaires et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée.

IX.

Tout homme étant présumé innocent, jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne seroit pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi.

X.

Nul ne doit être inquiété pour ses opinions, mêmes religieuses pourvu que leur manifestation ne trouble pas l'oedre public établi par la loi.

XI.

La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement; sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.

XII.

La garantie des droits de l'homme et du citoyen nécessite une force publique : cette force est donc instituée pour l'avantage de tous, et non pour l'utilité particulière de ceux à qui elle est confiée.

XIII.

Pour l'entretien de la force publique, et pour les dépenses d'administration, une contribution commune est indispensable : elle doit être également répartie entre tous les citoyens, en raison de leurs facultés.

XIV.

Les citoyens ont le droit de constater par eux-mêmes ou par leurs représentans, la nécessité de la contribution publique, de la consentir librement, d'en suivre l'emploi, et d'en déterminer la quotité, l'assiette, le recouvrement et la durée.

XV.

La société a le droit de demander compte à tout agent public de son administration.

XVI.

Toute société, dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution.

XVII.

Les propriétés étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité.

AUX REPRÉSENTANS DU PEUPLE FRANÇOIS

RÉPUBLIQUE FRANÇAISE LA POSTE 1989 5,00

RÉPUBLIQUE FRANÇAISE LA POSTE 1989 5,00

RÉPUBLIQUE FRANÇAISE LA POSTE 1989 5,00

RÉPUBLIQUE FRANÇAISE LA POSTE 1989 5,00

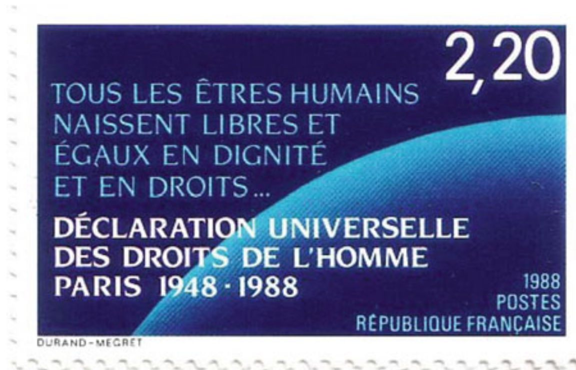
D'ap. Doc. Musée CARNAVALET

A. ROUHIER

BICENTENAIRE DE LA RÉVOLUTION FRANÇAISE
ET DE LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN

Declaration of the Rights of Man and of the Citizen – Versailles, 26th August 1789

Stamp 4



The Universal Declaration of Human Rights was adopted and proclaimed at the Palais Chaillot on 10th December 1948. It lists in a preamble and 30 articles the rights (civil, political, social, economic and cultural) to which any person can lay claim throughout the whole world.

Stamp 5

Grenoble 1788, Tiles Day

The strongest opposition to the new taxes decided by King Louis XVI was in Dauphiné. The Grenoble Parliament objected. In return, the magistrates received letters of banishment. On 7 June 1788, the date set for the magistrates to leave office, the people rose up. Some people climbed on the rooftops, took tiles and threw them at the patrols which were going through the streets. This 'tiles' day marked the beginning of a truly revolutionary turmoil in Dauphiné.

Assembly of the three chambers, Vizille

The assembly, inspired by Mounier, claimed the re-establishment of the parliaments, but above all the convening of the General Assembly which was 'the only option left to fight against the ministers' tyranny'. The assembly was becoming aware of nation-

hood. 'The three Dauphiné chambers will never distinguish between their cause and those of the other provinces and while they are standing up for their rights they will not give up on those of the Nation'. Brienne gave in and set the opening of the General Assembly on 1 May 1789.

Stamp 6

This stamp marks the beginning of events for the celebration of the Bicentenary of the French Revolution. It's the work of Jean-Michel Folon.

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Chapter 16
The Criminal Trial as Theater: The Semiotic Power of the Image

Denis J. Brion

Abstract Under the adversarial nature of the judicial process in the United States, Prague School theory provides a lens for understanding the criminal trial as a complex form of theater, with the opposing attorneys, by their trial performances, creating competing performance texts from the dramatic text of what the various witnesses potentially can offer by their evidence and testimony. The jurors, as the audience of these competing performances, have the responsibility for participating in the creation of the meaning of the dramatic text, a meaning embodied in the verdict of guilt or acquittal. The competing trial performances of the opposing counsel are, in essence, extended arguments for the meaning of the dramatic text, and the jurors will understand these performances to be extended arguments. The jurors, as well, can understand, however, much subconsciously that the trial is theatrical in nature. As such, the individual juror can understand that any element of, or action occurring anywhere within, the courtroom as being situated in the theatrical frame. And, if these elements and actions are situated within the theatrical frame, then they can be understood as part of the extended argument that constitutes the trial performance. In the course of criminal trials, particular elements and actions occurring within the theatrical frame have come under challenge as being prejudicial to the accused – such as the clothing that the accused is required to wear, the presence of uniformed officials in the courtroom, and the clothing, bearing texts or images, worn by trial spectators. Because the juror can, primarily at a subconscious level, understand that these elements and actions constitute arguments either for guilt or for the exercise of vengeance, then they are procedurally improper, coming into the trial in violation of the rules of evidence and process; they violate the due process rights of the accused. Although an argument for guilt, of itself, is substantively proper, an argument for vengeance is not; thus, an element of the theatrical frame that can be understood as an argument for vengeance is both procedurally and substantively

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improper. It is altogether prejudicial to the accused and altogether in violation of the due process rights of the accused. Unfortunately, the judiciary has only fitfully recognized the semiotic power of these elements and actions for creating prejudice to the accused.

16.1 Introduction

In 1994, in California, a domestic dispute got out of hand, and someone was killed.[1] Mathew Musladin was estranged from his wife, Pamela. She and their young son were living with Tom Studer, who was now Pamela's fiancé. On May 13, Musladin went to where Pamela was now living in order to pick up their son for a weekend visit. In the front yard outside the house, an argument between Musladin and Pamela broke out. Studer and Michael Albaugh, Pamela's brother, came out of the house in order to intervene. In the course of events, Musladin reached into his automobile, retrieved a handgun, and shot and killed Studer.

Musladin was tried in a California trial court for murder in the first degree. In his defense, Musladin did not deny that he had killed Studer. Instead, he claimed that he had shot Studer in self-defense.

During the trial, several members of Studer's family sat in the spectator area of the courtroom wearing large buttons bearing the image of the deceased, Tom Studer. Musladin's defense counsel objected, arguing that the presence of these buttons was prejudicial to Musladin and ought to be removed from the visual field of the jurors. The trial judge overruled the objection, the trial proceeded, and the jury returned a verdict of guilty.

Musladin embarked upon a long and complex series of appeals, arguing that the presence of these buttons bearing Studer's image, worn by his family members throughout the trial, denied Musladin his due process right to a fair trial. Ultimately, the courts denied his claims and upheld his conviction for the crime of murder in the first degree (*Carey v. Musladin* 2006). The judicial system in effect concluded that Musladin's appeal of his conviction for murder was simply based on the post hoc fallacy that the fact that the guilty verdict returned by the jury temporally followed the wearing of the buttons by Studer's family members did not demonstrate cause and effect.

The purpose of this chapter is to argue that there can be a causal link between image and verdict – in particular, between particular visual aspects of the courtroom scene visible to the jurors, aspects that are not part of the formal structure of the trial itself, and the decision of these jurors as to the legal meaning of the information (evidence, testimony, and argumentation) presented to the jurors within the formal structure of the trial. Thus, this chapter will argue that, in the instance of the trial of Mathew Musladin and in many similar instances, the judiciary, by not fully

[1] The facts in this case are set out in *Musladin v. Lamarque* (2005, 654–655).

understanding the process of meaning creation[2] that the criminal trial in essence constitutes, has failed to enforce the fundamental constitutional principle of due process that ought to govern the criminal justice process.

Establishing the possibility of a causal link between image and verdict will involve the exploration of three questions. To state these questions in the context of the trial of Mathew Musladin: first, why might the jurors understand the image on the buttons as a communication, integral to the trial process, to them? Second, by what process might the jurors come to understand a particular substantive content to that communication? And third, in what ways might that substantive content be prejudicial to the accused at trial and therefore a violation of the due process principle?

The exploration of these questions will begin with the constitutional and doctrinal background to these questions and the contours of the due process principle; the general principles, established in judicial doctrine, that define the constraints on the process of communication to the jury during the trial; and a general discussion of the judicial treatment of cases, like the trial of Mathew Musladin, involving what will be termed, at a substantial level of generalization, visual aspects of criminal trials that recur with some considerable frequency. The nature of the criminal trial as a process of meaning creation will then be explored through an understanding of the criminal trial as a complex form of theater. This will provide a basis for understanding the potential prejudicial effect of these visual matters and for assessing the judicial response to challenges to these visual matters as a failure of the judiciary to understand fully the impact of such matters on the process of meaning creation.

16.2 Communication to the Jury

16.2.1 The Due Process Principle

In the United States, criminal trials are governed by the constitutional principle of due process. The Fifth Amendment to the US Constitution provides, for the criminal process in federal courts, "No person shall be … deprived of life, liberty, or property, without due process of law …" (US Constitution 1791, Amend. V). The Fourteenth Amendment, which provides "… nor shall any State deprive any person of life, liberty or property, without due process of law," makes this principle applicable to the courts of the several states (US Constitution 1868, Amend. XIV).

[2] It is a fact that Musladin killed Studer. The fundamental question at trial is what is the legal meaning of that fact: Was it murder? Was it a justified homicide? Thus, the locution: Before the trial is concluded, it is not correct to say that Studer was a murder victim. Unlike the term "kill," "murder" and "victim" are legal conclusions. And those conclusions have not yet been reached. Thus, before the trial is concluded, the proper locution is that Musladin killed Studer, and Studer is a deceased. Only if the jury returns a verdict of guilt is it correct to announce these legal conclusions: Musladin *murdered* Studer, and Studer is a *murder victim*.

The Sixth Amendment implements the due process principle by establishing particular elements to the criminal process:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (US Constitution 1791, Amend. VI)

Under other constitutional provisions, the accused enjoys a right against self-incrimination (US Constitution 1791, Amend. V.), cannot be tried twice for the same offense (Id), and, in the investigation of the offense, cannot be subjected to unreasonable searches and seizures (US Constitution 1791, Amend IV.). The accused also enters the trial process favored by a presumption of innocence (*US v. Coffin* 1895). Thus, the Prosecution must come forward with a direct, positive case for guilt and must convince the jury that the accused is guilty by an exacting standard: beyond a reasonable doubt. Because, under the Sixth Amendment, the accused has a right to counsel, the criminal trial process is adversarial, rather than inquisitorial, in nature. Thus, the accused has the opportunity not only to subject the Prosecution's case for guilt to a rigorous test but also to present a positive, responsive case for acquittal.

Human institutions are not capable of perfection. Thus, stated as polar extremes, the criminal trial can have one of two goals. It can seek to maximize the punishment of people who have done wrong at the cost of sometimes punishing people who have not done wrong. Or it can seek to minimize the punishment of people who have not done wrong at the cost of sometimes allowing people who have done wrong to escape punishment. The due process principle stands as a commitment to that latter goal. The consequence is a distinct formal bias in favor of the accused in the criminal justice process.

16.2.2 Overt Communication to the Jury

Consistently with the thrust of the due process principle, the criminal trial can be understood as a strictly controlled process of communication to the jurors. This flow of communication comes in three forms: information, argumentation, and instruction. Information is placed before the jury as the evidence and testimony of the witnesses, brought out through the examination and cross-examination by the prosecutor and defense counsel. This information flow is governed by an elaborate structure of rules, and is strongly policed by the trial judge for relevance and materiality (*Federal Rules of Evidence* and *Federal Rules of Criminal Procedure*). And even evidence that is altogether relevant and material can be excluded if it had been obtained in violation of the limitations on unreasonable searches and seizures.

As a formal matter, argumentation by trial counsel is confined to two phases of the trial: the opening statement and the closing argument offered by each. The

substantive content of this argumentation is policed as well by the trial judge for prejudicial content, particularly appeals to emotion.[3] As a practical matter, a skilled trial counsel will use the process of examination and cross-examination of witnesses to bring out the elements of the overall argument that she will then arrange for effect and present in her closing argument. Thus, in this phase of the trial, she will in effect be engaging as well in a form of argumentation. The trial judge, however, will police this aspect of the examination of witnesses, rejecting questions to witnesses that are expressly argumentative, in order to prevent this phase of the trial from becoming a process of overt argumentation.

Instructional communication to the jurors comes in the form of instructions on the law determined by the trial judge. The trial judge delivers these instructions to the jurors after the evidence and testimony phase and closing arguments have been completed.[4] Trial counsel is generally not permitted, in their argumentation, to elaborate on the substance of the trial judge's instructions or to offer their own interpretations of the law.

In the context of a trial process that substantially limits the flow of communication to the jurors, the courts have in numerous instances addressed the issue of communication to the jurors from outside of the formal process, that is, communication that comes from outside of either the conceptual space created by the complex of procedural rules that govern the conduct of the trial or the physical courtroom space, inside the bar that separates the spectators from the arena of action, that includes the judge's bench, the witness stand, the jury box, and the separate places for the trial counsel and parties. Whether the communication comes in the form of the shouts of angry white men both inside the courtroom and outside the courthouse during a trial of several African Americans for the murder of a white man (*Moore v. Dempsey* 1923); an unidentified individual saying to a juror during a break in the trial that he could profit by bringing in a verdict favorable to the defendant (*Remmer v. US* 1954); two sheriff's deputies who appeared as witnesses for the prosecution and who also had custody over the jurors and openly fraternized with them during the trial (*Turner v. Louisiana* 1965, 379); a bailiff who had custody over the jurors in a trial for murder and who was heard to say to them, "Oh, that wicked fellow, he is guilty" (*Parker v. Gladden* 1966); an article from the local newspaper, brought into the jury room during deliberations in a murder trial, that stated, "The evidence against [the defendant] is very strong" (*Mattox v. United States* 1892); a juror in a trial for drug possession, in an intervening evening during the course of jury deliberations, determining the potential sentence from the Internet and reporting this to her fellow jurors despite the instruction by the trial judge that the jury not consider the matter of punishment (*People v. Kriho* 1999); or a juror bringing into the jury room during the deliberations in the penalty phase of a capital murder trial Bible

[3] Extended discussion of the bases on which the judiciary will deem particular kinds of argument improper are set out in Anderson (2002), 45–77 and Stein (2005), §§1:1–1:114.

[4] The trial judge will also deliver preliminary and interlocutory instructions, which for the most part relate to the role and conduct of the jury during the trial.

passages that had the effect of exhorting the jurors to ignore the statutory penalty phase process and vote to impose the death penalty (*People v. Harlan* 2005), the courts have developed a consistent judicial position. Whether the content of the overt communication involves information, argumentation, or instruction on the law, whether the communication is verbal or textual, and whether the communication comes from an outsider, a court official, or even one of the jurors, if the communication is made to the jurors outside of the formal processes of the trial, the courts will treat it as presumptively prejudicial to the fairness of the trial, and thus a violation of the due process principle.

The courts tend to split, however, over the matter of the proper response to the fact of such communication coming to light. Some courts treat this communication as grounds for declaring a mistrial or invalidation of a verdict of guilt.[5] Other courts refrain from such intervention if it can be shown that no actual prejudice to the deliberations of the jurors occurred.[6]

16.2.3 The Problem

16.2.3.1 Visual Communication to the Jury

The courts have had little hesitation in finding that overt verbal and textual communication to the jurors outside the formal processes of the criminal trial can be prejudicial to the accused. The judiciary, however, has found that challenges to instances of more implicit forms of communication raise issues that they have much more difficulty in resolving. Consider two cases in which the court did find potential prejudice not from a verbal or textual communication but instead from an aspect or circumstance of the accused clearly visible to the jury. In *Estelle v. Williams* (1976), Harry Lee Williams had been held in jail without bail pending his trial for assault with intent to murder. When it came time for his trial, Williams asked the jail officials for his own clothing; his request, however, was denied. Thus, he was forced to attend his trial dressed in the clothing of jail inmates: a white T-shirt with “Harris County Jail” stenciled across the back and oversized white dungarees with “Harris County Jail” stenciled down each leg (*Estelle v. William* 1976, 525).

On appeal of the verdict of guilt, the US Supreme Court held that the “defendant’s clothing is so likely to be a continuing influence throughout that trial that… an unacceptable risk is presented of impermissible factors coming into play” (*Estelle v. Williams* 1976, 505). In the words of a dissenting justice, the jail inmate clothing tended “to brand [Williams] in the eyes of the jurors with an unmistakable mark of guilt” (Id). The Supreme Court’s analysis of the circumstances in which Williams found himself was not couched in terms of the sophisticated language of visual semiotics. The Court clearly understood, however, that a visual aspect of the accused

[5] For example, *Turner v. Louisiana*, 379 US 466 (1965).

[6] For example, *Marshall v. United States*, 360 US 310 (1959).

at trial can convey meaning to the observer, particularly if it is a highly interested observer of the proceedings, the juror[7].

George Agiasottelis was kept manacled during his trial for armed robbery (Id). Defense counsel requested that the manacles be removed because they were prejudicial to Agiasottelis; the trial judge, however, denied this request. On appeal, the Massachusetts Supreme Judicial Court held that this was not improper: "Here the defendant was charged with a crime of violence while armed…. The judge might reasonably have regarded the sheriff as thoroughly justified in keeping the prisoner shackled to reduce the risk of an attempt at escape and possible injury to bystanders" (*Commonwealth v. Agiasottelis* 1957, 389).

The problem for George Agiasottelis is that this reasoning is rather circular. To an observer, most importantly, a juror, the presence of manacles marks him as a violent person, with the connotation that, as a violent person, he is quite capable of committing the violent crime for which he is being tried. Because he is charged with a violent crime, however, he must be kept in manacles.

The practice, in a trial for a crime of violence, of keeping the accused in restraints, typically manacles or leg irons, comes under challenge repeatedly. In reviewing these challenges, most courts agree that this practice is, of itself, prejudicial to the accused.[8] Most courts agree, however, that if it can be demonstrated that there is a substantial possibility that the accused will engage in disruptive acts at trial,[9] or will pose a danger to court personnel,[10] or is a substantial threat to attempt to escape,[11] then the restraints are permissible and the right of the accused to a fair trial is not violated.

Estelle v. Williams and *Commonwealth v. Agiasottelis* involved aspects of the accused, visible to the jurors, that the courts found to involve the potential for prejudice to the accused. These matters occurred inside the bar that separates the physical arena of the trial itself from the area set part for the spectators. Another common thread in these two cases is the fact that, as the Supreme Court noted with regard to the jail inmate clothing in *Estelle v. Williams*, these aspects of the accused came about by the action of public officials.

Holbrook v. Flynn (1986) involved actions that occurred outside the bar but that created a visual aspect of the accused. In this case, Charles Flynn was tried, along with five codefendants, for armed robbery. Throughout the trial, four uniformed and

[7] As a general matter, courts tend to agree that requiring the defendant to appear at trial in jail inmate or prison inmate of clothing is, of itself, potentially prejudicial. For example, Gaito v. Brierly, 485 F.2d 86 (3d Cir. 1973); Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971); Bently v. Crist, 469 F.2d 854 (9th Cir. 1972)

[8] For example, Illinois v. Allen, 397 US 337 (1970); Woodwards v. Caldwell, 430 F.2d 978 (6th Cir. 1970); People v. Boose, 337 N.E.2d 338 (Ill. 1975); State v. Rice, 149 S.W.2d 347 (Mo. 1941); State v. Roberts, 206 A.2d 200 (N.J. 1965).

[9] For example, Illinois v. Allen, 397 US 337 (1970); United States v. Bentrena, 319F.2d 916 (2d Cir. 1963).

[10] For example, Kennedy v. Cardwell, 487 F.2d 101 (6th Cir. 1973); United States v. Samuel, 431F.2d 610 (4th Cir. 1970).

[11] Loux v. United States, 389F.2d 911 (9th Cir. 1968); Hill v. Commonwealth, 125 S.W. 3d 221 (Ky. 2004).

armed state troopers sat in the front row of the spectator area immediately behind the space where the defendants sat, placed there to provide security additional to the security routinely provided by court bailiffs. Defense counsel challenged this circumstance as prejudicial to the defendants, particularly because there had been no showing that the defendants posed a security risk; the trial judge rejected this challenge. Rather than being a visual aspect of the accused, as the jail inmate's clothing and the restraints are, the visually striking presence of the troopers served to place the accused within a visual frame. The same connotations, however, arise when the accused, on trial for a crime of violence, are violent persons. In its ruling on defense counsel's appeal of the guilty verdict, the US Supreme Court held that no potential prejudice to the defendants had been caused by the presence of the troopers.[12]

Similarly to *Estelle v. Williams* and *Commonwealth v. Agiasottelis*, the visual aspect challenged as prejudicial in *Holbrook v. Flynn* was created by the actions of public officials. Now consider a variety of instances that are the principal focus of this chapter – instances, taking place outside the bar in the spectator area, that involve visible circumstances or attributes of individuals who are spectators to the trial rather than public officials, such as the troopers in *Holbrook v. Flynn* who are involved in some way in the conduct of the trial, in particular, what these spectators do and what they wear. Defense counsel challenges to these matters as prejudicial to the accused meet with success far less frequently.

In *United States v. Rutherford* (9th Cir. 2004), a case involving what spectators did, the Rutherfords, a couple, were on trial for income tax evasion. Throughout the trial, several Internal Revenue Service agents sat in the front row of the spectator area, immediately behind the prosecution table on the other side of the bar, staring at the jurors. Defense counsel challenged the validity of the verdict of guilt on the grounds that the actions of the IRS agents might have been interpreted as a threat – that, if the jury were to return a verdict of acquittal, the jurors could be subjected to retaliatory action by the IRS. On appeal, the US Court of Appeal noted that the relevant issue was not the intent of the IRS agents in doing what they did; the relevant issue is how the jurors interpreted what the IRS agents did.

The trial of Ronald Gibson for the murder of a police officer involved the matter of what particular spectators wore. During Gibson's trial, several police officers, dressed in their full uniforms, sat in the spectator area of the courtroom, apparently to show solidarity with a fallen fellow officer (Commonwealth v. Gibson 2003). The Pennsylvania Supreme Court rejected Gibson's challenge that this presence was prejudicial to him on the grounds that Gibson had not demonstrated that prejudice had occurred from the mere presence of these officers, without there having been any demonstrative acts on their part (Commonwealth v. Gibson 2003, 1139). In *Carey v. Musladin* (2006), recounted at the outset, Mathew Musladin unsuccessfully

[12] The Supreme Court did, however, make clear that it was not reconsidering its decisions in *Estelle v. Williams* and *Illinois v. Allen* that jail inmate clothing and restraints can be prejudicial (*Holbrook v. Flynn* 1986, 568).

challenged the presence of several family members of the deceased, Tom Studer, in Musladin's trial for murder, sitting throughout the trial in the spectator area of the courtroom wearing large buttons bearing an image of Studer.[13]

In Dwayne Woods's trial on two counts of aggravated first degree murder, the family members of the two young women Woods was alleged to have murdered attended the trial wearing orange and black ribbons in memory of them (*In re Woods* 2005). One of the jurors, on being questioned about the matter, stated "that he understood that the wearing of the ribbons was a sign of their mourning their loss of a daughter or loved one" (Id, 617). He also stated, "I thought the ribbons were nice, but they did not influence my decision or that of the other jurors" (Id). Because the ribbons did "not express any conclusion about Woods' guilt or innocence" (Id, 616), and because of the juror's statements, the Washington Supreme Court held "that Woods does not meet the burden of proving that his right to a fair trial was prejudiced" (Id).

In Thomas McNaught's trial for vehicular homicide and driving under the influence of alcohol, several spectators wore buttons displaying the acronym of two prominent advocacy groups, Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD) (*State v. McNaught* 1986). McNaught challenged this circumstance as prejudicial; the Kansas Supreme Court rejected McNaught's challenge on the grounds that he "had failed to show that he was prejudiced in any way by the conduct of the spectators" (468 in [44]).[14] In *Pachl v. Zenon* [46], Randol Lawrence Pachel was being tried for aiding and abetting murder. Throughout the trial, several spectators wore buttons, visible to the jurors, with the legend, "Crime Victims United." The Oregon Court of Appeals held that these buttons were "not inherently prejudicial" (Pachl v. Zenon 1996, 1093).

A successful challenge to the matter of what particular spectators wore was brought in *Norris v. Risley* (1990). In Robert Lee Norris' trial on the charge of rape, several spectators, self-styled as the Rape Task Force, wore buttons, two and a half inches in diameter, with the legend, "Women Against Rape." In an appeal from the trial judge's denial of a defense request that the buttons be removed, the US Court of Appeals held that the message of the buttons "implied that Norris raped the complaining witness" (*Norris v. Risley* 1990, 831). Thus, the implied message of the buttons eroded Norris' presumption of innocence (Id, 834). Under the formulation

[13] Other courts as well, in cases involving similar circumstances, have dismissed defense challenges for prejudice. For example, Kenyon v. State (1997) (buttons bearing image of deceased; no evidence of prejudice shown); Buckner v. State (1998) (8 × 10 photos of deceased; jurors assert that they were not prejudiced); State v. Braxton (1996) (buttons); Nguyen v. State (1998) (buttons bearing image of deceased; defendant did not show that there was prejudice); State v. Lord (2007) (buttons bearing image of deceased; there is no message that would imply guilt). In *Musladin v. Lamarque* (2005), the US Court of Appeals did hold that buttons bearing the image of the deceased in a trial for murder were prejudicial, requiring the invalidation of a verdict of guilt. This decision was overturned, however, by the US Supreme Court in *Carey v. Musladin* (2006).

[14] The West Virginia Supreme Court did find similar spectator conduct to be prejudicial to the accused in a trial for felony driving under the influence of alcohol resulting in death. State v. Franklin (1985).

of the US Supreme Court in *Estelle v. Williams*: did the buttons create "an unreasonable risk…of impermissible factors coming into play?" (*Estelle v. Williams* 1976, 505) so that the failure of the trial judge to order that the buttons be removed "tainted Norris' right to a fair trial" (*Norris v. Risley* 1990, 834).

Taken as a whole, the accumulated decisions of the courts are in considerable conflict over the issue whether these various instances of deliberate actions, visible to the jurors, by spectators do create the potential for prejudice. And, even when particular courts do recognize this potential in particular circumstances, they quite often will nevertheless hold that judicial intervention is unnecessary. The basis for such decisions varies. Sometimes, these justifications appear to be valid. For example, in the cases in which the defendant appears at trial in restraints, if there is a strong possibility that the defendant will disrupt the proceedings, pose a danger to court personnel or spectators, or attempt to escape, then the defendant has brought his situation upon himself and ought not be heard to complain about the potentially prejudicial consequences of his situation.[15]

More often, these justifications do not appear to be valid. For example, the prejudicial aspect was brief or fleeting.[16] Or, the trial judge offered curative instructions to the effect that the jurors ought not take the prejudicial matter into consideration in reaching their verdict.[17] Or, there was no actual prejudice because the evidence of guilt offered in the trial was so overwhelming.[18] Or, there is no

[15] For example, Illinois v. Allen, 397 US 337 (1970); Kennedy v. Cardwell, 487 F.2d 101 (6th Cir. 1973); United States v. Samuel, 431F.2d 610 (4th Cir. 1970); Commonwealth v. Gibson, 951 A.2d 1110 (Pa. 2003).

[16] For example, United States v. Acosta-Garcia, 448 F.2d 395 (9th Cir. 1971); McCoy v. Wainwright, 396 F.2d 818 (5th Cir. 1968); Williams v. Commonwealth, 474 S.W.2d 381 (Ky. 1971); State v. Sanders, 903 S.W.2d 234 (Mo. 1995). The problem with this reasoning is that there can be potential prejudice no matter how briefly the jurors might see the defendant in restraints. It does not matter whether the defendant is in restraints throughout the trial or just when, for example, he is brought into, or led out of, the courtroom.

[17] For example, United States v. Samuel, 431 F.2d 610 (4th Cir. 1970); Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1983); Commonwealth v. Agiasottelis, 142 N.E.2d 386 (Mass. 1957); State v. Dusenberry, 20 S.W. 461 (Mo. 1892). The problem with this reasoning is the matter of the negative suggestion. If you tell someone not to think about pink and green elephants for the next 2 h, it is highly likely that they will think quite abundantly about pink and green elephants for the next 2 h. To give curative instructions runs a substantial risk of calling attention to the action or circumstance in issue, exacerbating its prejudicial effect.

[18] For example, State v. McKay, 167 P.2d 476 (Nev. 1946). The problem with this reasoning is that, according to the hoary aphorism, beauty is in the eyes of the beholder. The standard for a verdict of guilt is not that the trial judge believes beyond a reasonable doubt that the accused is guilty; rather, it is that *the jury finds* beyond a reasonable doubt that the accused is guilty. The Prosecution case might convince the judge beyond a reasonable doubt, yet fall short of so convincing the jury. In that circumstance, the prejudicial matter that occurs during the trial might then tip the scales in favor of a verdict of guilt. Long ago, in his decision in *Bushell's Case* (1670) in 1690, Lord Chief Justice Vaughan emphatically made the point that the judge on the one hand and the jurors on the other can interpret the evidence and testimony quite differently. This same point, in the context of a video recording of a traffic stop, was made in a recent article, "Whose Eyes Are You Going to Believe?" (Kahan et al. 2009, 122:837–906).

basis for judicial intervention because the accused has not shown that prejudice actually occurred.[19]

It is the argument of this chapter that the semiotic impact of all of these instances, whether they involve visual aspects of the accused, the visual frame in which the accused is placed, or visual aspects of particular individuals seated in the spectator area of the courtroom, creates the potential for substantial prejudice to the accused. Thus, when courts reject challenges to these practices and circumstances, they in effect allow trials to go forward in substantial violation of the due process principle. What, however, is the basis for this argument? That is, why might jurors understand that these various instances constitute a communication to them that is integral to the trial process? By what process might jurors come to understand a particular substantive content to that communication? And, in what ways might that communication thereby be impermissible under the due process principle? An understanding of how these visual aspects of the criminal trial can have the potential for creating prejudice to the accused can be gained by pursuing the proposition that the criminal trial is a form of theater.

16.3 Theater

16.3.1 The Semiotics of Theater

In the 1930s and 1940s, the Prague Linguistic School developed an incisive concept of theater as a semiotic process (Aston and Savona 1991; Elam 1980; Vachek 1966). Theater, according to Prague School Theory, is "the complex of phenomena associated with the performer-audience transaction: that is, with the production and communication of meaning in the performance itself and with the systems underlying it" (Elam 1980, 2). Consider theater as a performance art that takes place within a particular physical space. Within this space, in traditional theater, there are two physically demarcated and functionally distinct elements, the stage as performance space and the audience. Because of this physical demarcation, the stage appears to

[19] For example, Allen v. Montgomery, 728 F.2d 1409 (11th Cir. 1984); State v. Wilson, 406 N.W.2d 442 (Iowa 1987); State v. McNaught, 713 P.2d 457 (Kan. 1986); Murray v. Commonwealth, 474 S.W.2d 359 (Ky. 1971); Cline v. State, 463 S.W. 2d 441 (Tex. 1971). The problem with this reasoning is twofold. First, in any inquiry into prejudicial effect, the matter under inquiry is whether the trial judge allowed impermissible matters to be placed before the jurors for their consideration in reaching their verdict. Such an inquiry, however, from the point of view of the jurors can carry the implicit suggestion that *they* may have done something blameworthy by considering these matters. Thus, in such an inquiry, they have a strong incentive to deny that the potentially prejudicial matter did consciously affect them. Second, much of the effect of a prejudicial matter takes place in the subconscious minds of jurors; thus, jurors, even if being scrupulously honest, are not in a position to say whether the matter affected them. If the standard for judicial intervention is that the accused must show that prejudice actually occurred, the accused is in an extremely disadvantageous position in being able to make that showing.

the audience within a bounded frame. This physical framing has psychic consequences when it charges all within it as meaningful. It announces all objects, persons, actions, and expressions within this space not only denote but also connote. By the fact of the framing, the stage is a highly charged physical space. Thus, the very fact of the appearance of an object on a stage suppresses its practical function in favor of a symbolic or signifying role (Id, 8).

Thus, "while in real life the utilitarian function of an object is usually more important than its signification, on a theatrical set the signification is all important" (Brusak 1976, 62). That is, everything within the theatrical frame is a sign (Applebome 1999, 74).[20] In "real life," a table, for example, placed within a room denotes a piece of furniture with a utilitarian function. In a theater space, that same table placed on a stage also connotes and does so by the fact that it is set within the theatrical frame. It acquires, as it were, a set of quotation marks (Elam 1980, 8). It now stands for the class of objects of which it is a member. And the audience is able to infer from it the presence of another member of the same class in the represented dramatic world, a table which may or may not be physically identical to the actual object on the stage, but which carries meaning in accordance with the represented dramatic world in which it occurs (Id, 8). In the terminology of Charles Sanders Peirce, the *dynamic object* of the table on the stage becomes an *immediate object*, having a meaning appropriate to the dramatic world the performance of which the table is a part (Honzl 1976, 183).

Two questions arise from the understanding of theater as "the complex of phenomena associated with… the production and communication of meaning…" (Elam 1980, 2): From what is this meaning created? And what is the process by which this meaning is created?

The process begins with a text, the script created by the dramatist. This text, the *dramatic text* (Veltrusky 1976, 83), has been created to be performed. It is, however, only an enabling text:

> Playwrights do not include because of a shortage of notation all those details of prosody, inflexion, stress, tempo, and rhythm. A script tells us nothing about the gestures, the stance, the facial expressions, the dress, the weight, or the grouping or the movements. So although the text is a necessary condition for the performance it is by no means a sufficient one. It is short of all these accessories which are, in a sense, the *essence* of performance. The literal act of reading the words of a script does not constitute a performance. (Miller 1986, 34)

The actors, thus, in the process of a "dialectical tension between dramatic text and actor" create a performance that necessarily amounts to an interpretation of the dramatic text (Pavis 1976, 29). The space within the theatrical frame – the carefully designed physical setting, the stage set, and the carefully selected objects placed within this physical setting, the props – as well can be understood as an interpretive performance of the dramatic text (Fischer-Lichte 1992, 14–15). And the carefully determined pattern of lighting in which actors and scenery are cast constitutes a further interpretive performance of the dramatic text (Id, 15). It is this complex of performances, this "web of signs," that constitutes the performance of the play (Id, 71).

[20] "All that is on the stage is a sign" (Veltrusky 1964, 83–840).

All that is contained within the theatrical frame is charged with signification.[21] The interpretations of the dramatic text, the performance, that takes place within this frame, thereby constitutes a second text, the *performance text* (Veltrusky 1976, 94–117). It is this text, made up of the charged content of the theatrical frame, that is communicated to the audience.

The meaning of the play thus is not contained in the dramatic text, the script itself. The playwright Tom Stoppard understood this when, at the end of a lecture in an academic setting, he was asked by a member of the audience during the question and answer period what his reaction was when directors staged his plays in ways that clearly got their meaning wrong. Stoppard replied, “Well, actually, I look forward to seeing my plays staged so that I can find out what they mean” (Stoppard 1981).[22]

The nature of the performance text, created by the performance of the script, is illustrated by two seminal productions of Eugene O’Neill’s *The Iceman Cometh* (O’Neill 1946). The central character is one Theodore Hickman, “The Iceman,” who, for years, had been showing up at a seedy bar in Hell’s Kitchen in New York City for one of his epic binges. When he does so, he stands all of the regulars at this bar to an extended siege of serious drinking. These regulars have come to accept Hickman as someone who ratifies the pipe dreams each has about himself; he does not, however, make any demands on them that they actually seek to fulfill their pipe dreams.

The play opens as the regulars are anticipating the arrival of Hickman for his latest binge. When he arrives, it is clear that he has now reformed his alcoholism. This time, he is coming to save his pals, to rescue them from their pipe dreams.

O’Neill completed the script of *The Iceman Cometh* in 1939. The script was not staged, however, until 1946 (Applebome 1999). That first production was modestly received. A 1956 revival, however, became a classic. Jason Robards, Jr. was cast in the lead role. His performance overflowed with a warm, slightly sticky charm. Robards played Hickman as a seducer, a master of the old blarney, selling by flirtation (Rose 1999). Hickman, however, in actuality was dead inside, a heap of cold ashes, suggesting neediness in his soul – in his loneliness, he is trying to get his old pals to accompany him in his new fate. In that 1956 revival, Robards played Hickman as a tragic figure – “a man trying to outrun his own shame” (Id).

The Iceman Cometh was revived again in 1999. Kevin Spacey played the lead role. His performance, however, differed markedly from the performance of Robards. Hickman now had the aggressive energy of a used-car salesman who yells at us on television – we must come down to his sales lot at once, and he is going to sell us even if he has to choke us to do it (Id). This Hickman is never more at peace with himself as he shoots down the pipe dreams of his pals, pipe dreams that constitute their reasons to live. This performance portrays Hickman not as a tragic figure but instead as a figure of malevolence.

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[21] “Everything that makes up reality on the stage - the playwright’s text, the actor’s acting, the stage lighting – all these things in every case stand for other things. In other words, dramatic performance is a set of signs” (Honzl 1976, 74).

[22] The self-selected title of Stoppard’s lecture, *The Text and the Event*, reveals that he well understood that the script – the dramatic text – is distinct from the performance, the performance text.

Thus, from the same dramatic text, Eugene O'Neill's script, *The Iceman Cometh*, there are, between Jason Robards, Jr. and Kevin Spacey, two different performance texts. And these two performance texts, each an interpretation of the same dramatic text, are offered to the audience. Similarly, two:

> performances of, say, *Agamemnon* may give more or less the same dramatic information (regarding the state of Greek society, the course of events in the Trojan Wars, the interaction between the dramatis personae, etc.), but if one performance is austerely 'poor', limited to reproducing the main elements of the Greek stage, and the other lavishly modern in its representational means, the differences in signal-information involved will have drastic effects upon the spectator's decoding of the text (one performance may be understood, say, in terms of universal metaphysical conflicts and the other in terms of personal and material struggles between the participants). (Elam 1980, 41–42)

Do these two performance texts, then, constitute alternative meanings of the play? In Prague School theory, the audience has the responsibility, coequal with that of the performers, to create the meaning of the play. The audience "enter[s] the theatre and agree[s] to participate in the performer-spectator transaction" (Id, 52). The performance text is presented to the audience, the audience reads it, and, in reading it, interprets it, creating meaning.

A seminal dramatic text illustrates the audience role. Hamlet, Prince of Denmark, asserts, "The play's the thing, wherein I'll catch the conscience of the king" (Shakespeare 1601, act 2, sc. 2). Hamlet has learned in a dream that the King, Claudius, has come to the throne by murdering Hamlet's father, King Hamlet. A troupe of actors has come to the royal castle, Elsinore. Hamlet rewrites the script of the performance that the troupe is to offer that evening, changing it in a way that suggests that Hamlet knows of the King's crime. The actors perform the rewritten script in a way that suggests that fact. The King, himself performing as a well-skilled audience member, interprets the performance in the way in which Hamlet desires. The conscience of the King has been caught, and in the wake of his violent reaction to the play, his guilt is no longer his secret.

Thus, Prague School theory teaches us that the meaning process of theater progresses from dramatic text, through performance text, to audience. And, in answer to the question, do the performance texts in the Jason Robards and Kevin Spacey productions constitute the meaning of *The Iceman Cometh*?, we understand that the meaning of the play does not lie in these alternative performance texts. It lies in the performer-audience transaction.

What, then, is the play? Arthur Miller's script, *Death of a Salesman* (Miller 2006), is not the play, *Death of a Salesman*. The original 1949 production of *Death of a Salesman*, with Lee J. Cobb in the lead role of Willie Loman, is not the play, *Death of a Salesman*. "The play happens halfway between the stage and the audience."[23] The play *Death of a Salesman* is a matrix of meaning emerging from an evanescent event, the creation of a performance text, based on a dramatic text, offered to an

[23] The author remembers this statement from an interview of a playwright on National Public Radio several years ago. Efforts to track down the particulars have been, unfortunately, unsuccessful.

attending and attentive audience. It comes into being in the event, arises from a performer-audience transaction, and, at the end of the event, ceases to be.[24]

16.3.2 The Criminal Trial as Theater

It is a commonplace that a criminal trial is *like* theater. The fact of the matter is that a criminal trial *is* theater. It is, however, a complex form of theater, consisting of two distinct, but interrelated, theatrical productions that are directed toward two distinct audiences for two different purposes. And, within that second production, there are two distinct performances of a dramatic text.

These two productions might be called the *formal theater* and the *real theater*. The formal theater takes the form of a public ritual. Its function is to announce to the community at large the purpose of the criminal process, which is to reinforce the commitment of the society to the principles of due process and The Rule of Law. The fact of conducting a trial following the proper form and process announces that the awesome power of the State to punish is exerted against the accused only in a way that is consistent with the strong array of civil rights with which all citizens are endowed.

The performers in the *formal theater* are the judge, the accused, prosecutor and defense counsel, the witnesses, the bailiff and other functionaries, and the jury. The audience is made up of the spectators and journalists attending the trial who function as the representatives of the community at large. The audience, on behalf of the

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[24] Erika Fischer-Lichte captures the concept of the play as evanescent event in this way:

> A further important feature of theater arises from this, the specific ontological state of theatrical performance: namely, its complete contemporaneity. Whereas I can observe pictures that were painted many hundreds of years ago, read novels that were written in times long past, I can only watch theater performances that occur today, in the present. I can, as Steinbeck fittingly puts it, only involve myself theoretically, and not aesthetically, with past theater performances. For the web of signs of the performance is indissolubly bound up with the actor who creates them, present only in the moment of their production. Nothing is changed by bearing in mind that some of the signs here – such as costumes, props, stage decor – outlast the performance. For what can endure are individual signs torn out of their context. but never the web of signs from which they originate. This cannot be handed down as tradition. (Fischer-Lichte 1992, 7)

Interestingly then Judge of the New York Court of Appeals Benjamin N. Cardozo, in his Storrs Lectures at Yale University in 1920, described the trial in similar terms:

> [P]ast decisions are not law. The courts may overrule them. For the same reason present decisions are not law, except for the parties litigant. Men go about their business from day to day, and govern their affairs by an ignis fatuus. The rules to which they yield obedience are in truth not law at all. Law never *is*, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires. There are no such things as rules and principles: there are only isolated dooms. (Cardozo 1921)

community at large, ratifies and internalizes the implicit message announced by the fact of conducting the trial, thereby completing the ritual.

The function of the second, simultaneous, production, the *real theater* of the criminal trial, is to determine the meaning of the events that form the basis of the charge against the accused, a meaning expressed in the form of the general verdict, guilty or not guilty. The principal performers are the trial counsel and the trial judge. The script, the dramatic text, is made up of the evidence and testimony of the witnesses, what they come to the trial able to say – the recollections of the witnesses to the event; the results of the scientific, medical, and technological investigations carried out by the expert witnesses; and the reports of the investigations and interrogations of the police investigators. Unlike the script created by a playwright, the dramatic text of the real theater of the criminal trial exists in written form only in part. And, because it is made up of what the several witnesses come to the trial able to say, the dramatic text has not been composed by a single author.

Everything that trial counsel does at trial is an argument, in two senses. Everything that trial counsel does at trial ought to feed into the overall argument that lies at the essence of her performance, for either the guilt or the innocence of the accused. And, in any event, everything that trial counsel does at trial will be understood by the audience to be an argument.

Trial counsel overtly engages in argumentation in her opening and closing arguments. When she engages in the direct examination of the witnesses sponsored by opposing counsel, she in effect is trying to bring out particular elements of the overall argument that she is trying to make, elements that she will weave into a logical form in her closing argument. Thus, in the process of examining witnesses, she also is engaging in argumentation. Thus, as well, in the process of examining the witnesses, she is seeking to interpret what they have to say – she is in fact performing the dramatic text. In effect, unlike theater generally, where the dramatic text preexists the performance in express form as the script, in the theater of the criminal trial, the dramatic text remains latent behind the performance. Thus, it is a further measure of complexity that this dramatic text does not come fully into existence until it is brought out through the examination and cross-examination of the witnesses by opposing counsel. And, depending on the skill and effectiveness of trial counsel, their examination may or may not bring out all that the witnesses are able to say. They may well not perform the entirety of the dramatic text.[25]

As a yet further measure of complexity, because of the adversarial nature of the trial, the audience is presented with two performance texts. In different productions of *The Iceman Cometh*, Jason Robards, Jr. and Kevin Spacey can perform the dramatic text of the role of Theodore Hickman in different ways, thereby offering different meanings of who Theodore Hickman is. Similarly, although

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[25] It is not a peculiarity of the criminal trial as theater that the dramatic text is not always fully performed. For example, a comparative analysis of two productions of Thomas Beckett's *Krapp's Last Tape*, which observes that the performances of each of the productions intentionally omitted different portions of the dramatic text, is set out at pp. 162–168 in *Theatre As a Sign-System* (Aston and Savona 1991).

this takes place in the same production, the prosecutor and defense counsel can perform in different ways the dramatic text of what the witnesses are able to say, thereby offering different meanings of who the accused is in the law, whether or not, that is, he is to be subjected to punishment at the hands of the State. The prosecutor seeks to perform the dramatic text as an argument for culpability; defense counsel seeks to perform the dramatic text as an argument for non-culpability.

The audience of the real theater of the criminal trial is the jury. As an audience, the jury is responsible for determining the meaning of the events on which the charge against the accused is based. Unlike the audience in theater generally, the criminal trial jury determines meaning collaboratively, through deliberation carried out in secret. The jury-audience then announces its collaboratively determined meaning publicly.[26]

Because the performance text is made up of all that is contained and occurs within the theatrical frame – not only the interpretations of the dramatic text offered by the performance but also the interpretation offered by the stage sets, the props, and the lighting – then central to the understanding of the criminal trial as a complex form of theater is the identification of what constitutes the stage. In the formal theater, the criminal trial as public ritual, the stage is all that space inside the traditional bar that separates the formal elements of the trial from the spectators. This includes the judge's bench, the witness stand, the tables for prosecution and defense, and the jury box. The audience space is that remaining part of the courtroom outside the bar, set aside for the spectators and journalists in attendance. The audience for the real theater of the criminal trial is the jury. The jury box is the space set aside for the jury-audience. Thus, the stage for the real theater includes all that area inside the bar except the jury box. This area is the principal scene of action of the trial.

What, however, is the status of the balance of the courtroom space, the spectator area? For several reasons, it is altogether possible for the jurors to understand that the spectator area is included within the theatrical frame. First, at an altogether basic level, the spectator area is well within the view of the jury. Despite the presence of the bar, the spectator area is visually a contiguous part of the scene of the trial, the courtroom. The architecture, the treatment of the interior surfaces of walls and ceiling, the design of the windows, and the furnishings are all the same within and outside of the bar. The entirety of the courtroom space outside the jury box appears as a visual whole.

Second, there is a palpable sense at a criminal trial that a public ritual is taking place, however much this sense is experienced by the jurors in their subconscious. In a ritual, the spectators have an integral role, that of the internalization and ratification of the message of the ritual. Thus, the spectators, as well as the jurors,

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[26] In the *formal theater* of the criminal trial, the announcement of the verdict is a salient part of the performance. In the *real theater* of the criminal trial, the announcement of the verdict comes in the aftermath of the performance; it is, in an important sense, a commentary on the quality of the competing performances.

are part of the ritual, and the spectator area thereby is part of the performance space of the formal theater. Particularly if this understanding takes place in the subconscious, however, the juror might not understand that two distinct productions are taking place, let alone keep these two productions distinct in her mind. If that is the case, then, because, in terms of physical space, the two productions largely overlap, the juror could well understand that the spectator area lies as well within the theatrical frame of the real theater of the trial.

Third, on a functional level, the spectator area can often be a scene of action. A court official stands at the door, seeing to the admittance and exit of witnesses as their turns to testify occur. As well, the trial judge will exert control over the conduct of the spectators,[27] just as she does over the actions and expressions of opposing trial counsel, implying that the spectators are part of the action, in a sense, potential performers. And, consistently with the constitutional requirement that trials be public,[28] as a check on the State to insure that the proper process is followed, the spectators and the space set aside for them are an essential part of the trial, carrying out the function of establishing publicness.

Thus, the jurors can understand that, visually, psychically, and functionally, the performance space for the real theater of the criminal trial includes the spectator area. So understood, the spectator area is within the theatrical frame. Everything within the theatrical frame is charged with significance. And, everything that occurs within this space can be understood to be an integral part of the performance.

The essence of the performance of trial counsel is argumentation. The jurors will understand that everything that the principal performers, prosecutor and defense counsel, do within the theatrical frame is argumentative in nature. Little wonder that the jurors will understand that everything else that occurs within the theatrical frame is also argumentative in nature. And, because the trial judge does exert control over the spectator area, then the juror will understand that everything that is present in, or occurs in, this area without objection by the judge is properly there.

An understanding of the criminal trial as theater thus makes it possible to see that everything within the visual field of the juror can have significance to her in the performance texts that emerge from the conduct of the trial – whether it is the clothing that the accused is wearing, the immediate setting in which the accused is placed, the actions of the spectators, or the accouterments with which the spectators might be adorned. If these matters can have significance in the performance texts, then, to the extent that they do so, they are integral to the meaning creation process of the criminal trial. With this understanding, we can turn to the question of what substantive effect these matters have on the meaning created in the carrying out of these performances.

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[27] For example, State v. Gevrez, 148 P.2d 829 (Ariz. 1944); Doyle v. Commonwealth, 40 S.E. 925 (Va. 1902).

[28] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial… (US Constitution 1791, Amend VI.).

16.4 The Visual Semiotics of the Criminal Trial

We have seen several cases in which defense counsel has challenged either a visual aspect of the accused or a visual aspect of the spectators on the grounds that the visual aspect was prejudicial to the accused, thereby undermining the fairness of the trial. In many of these cases, the courts have rejected these challenges. Are the courts improperly rejecting these challenges? What, specifically, is the potential meaning that a juror might understand as being offered by these various visual circumstances? And in what ways might this potential meaning be prejudicial to the accused?

16.4.1 Visual Aspects of the Accused

Begin with a case in which the court did find prejudice. In *Estelle v. Williams* [20], Harry Lee Williams was on trial for assault with intent to murder. During the trial, he was made to wear jail inmate clothes stenciled with the prominent legend, "Harris County Jail." In considering the challenge before it to this circumstance, the US Supreme Court defined the issue as whether this circumstance was so likely to be a continuing influence throughout the trial that "an unacceptable risk was presented of impermissible factors coming into play" (*Estelle v. Williams* 1976, 505). The Court held that this indeed was prejudicial – it undercut the presumption of innocence by branding Williams "in the eyes of the jurors with an unmistakable mark of guilt" (Id, 518).

Exactly how, however, did the particular clothing that Williams was required to wear brand him with a mark of guilt? And exactly how can this cause prejudice to Williams? Consider the position of a juror in Williams' trial. Assume that, as is strongly possible, she understands, however subconsciously, the trial to be a form of theater. Williams is situated well within the theatrical frame. Every aspect of everything within that frame has significance: "All that is on the stage is a sign" (pp. 83–84 in [67]). Thus, the clothing that Williams wears "acquires a set of quotation marks" (p. 8 in [62]). The juror-audience member will subconsciously understand that it is there for a purpose. The purpose is to contribute to the meaning intended to be conveyed by the overall performance. And the function of that overall performance is argumentation.

The juror thus could interpret the presence of the jail inmate clothes as part of the overall argument over the culpability of Williams, thereby engaging, however subconsciously, in this chain of reasoning:

1. Williams is on trial for assault with intent to commit murder.
2. He is wearing jail inmate clothing.
3. Thus, he is already incarcerated.
4. Thus, he must be a convicted criminal, a violent person.
5. This violent person is on trial for a violent crime.
6. As a violent person, he is altogether capable of committing a violent crime.

7. Thus, he most likely is also guilty of the violent crime for which he is being tried today.

Charles Sanders Peirce incisively distinguished between experience and understanding. Experience is the dyadic encounter of the individual with her environment – reality – the effect of an object or event on her sensory organs.[29] This is the ordinary meaning of *seeing*. Understanding is the triadic product, mediated by the sign, of that encounter with her environment, its meaning.[30]

Attributed to Paul Valéry is the assertion, "To see is to forget the name of the thing one sees" (*Grand Strategy: The View from Oregon* website). Here, Valéry can be understood to be using *see* not in the sense of *experience* but instead in the sense of *understanding*. Thus, we have the object within the theatrical frame, Williams' clothing – "What in real life the utilitarian function of an object is usually more important than its signification, on a theatrical set the signification is all important" (Brusak 1976, 62). The juror observes – experiences – Williams' jail inmate clothing, the utilitarian function of which is to facilitate the recapture of the inmate in the event of an escape from confinement. The juror sees – understands – Williams' clothing as an argument for his guilt, thereby forgetting the name of the clothing, its utilitarian function. The jail inmate clothing, situated within the theatrical frame, functions as an argument, an argument for guilt. The US Supreme Court was correct when it recognized that the clothing branded Williams with a mark of guilt.

Res ipsa loquitur – "the thing speaks for itself" – goes the hoary phrase in the law.[31] A fact, however, does not speak for itself. It simply *is*. A juror experiences that fact – an action, an object, or an event – within a theatrical frame and then speaks that fact, giving it meaning.

This argument for guilt is doubly improper. It is procedurally improper because it comes to the juror from outside of the formal processes of the trial, which in concept function as a carefully controlled and restricted flow of communication to the jurors. Courts routinely hold that, within the *formal* processes of the trial, it is substantively improper for, say, a prosecutor to refer to the prior criminal record of the defendant. And the prosecutor may not use evidence of prior criminal acts to suggest the propensity of the defendant to commit the offense for which he is on trial (Stein 2005, §1:43). In order to gain a verdict of guilt, the prosecutor is to demonstrate, beyond a reasonable doubt, through relevant, material, and admissible evidence and testimony, that the defendant committed the acts that underlie the charge for which he is on trial, and not to argue that the defendant has engaged in similar acts at other times. If the substance of this argument is improper if it is made expressly within the formal process of the trial, it is no less improper if it is made

[29] *See* Pierce (1931, 163).

[30] *See* Pierce (1935, 73).

[31] Res ipsa loquitur:

> The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. (Garner 1999)

subtly, by implication, outside of the formal process of the trial but well within the theatrical frame.

The procedurally and substantively improper argument that the juror understands from Williams's jail inmate clothing is especially prejudicial because it is powerful and persuasive. It is powerful because it is continuous throughout the trial and not episodic and expressly rebutted as the counter argument of defense counsel necessarily is. Although Williams carries a formal presumption of innocence, the argument from his clothing, continuously throughout the trial insists to the juror that Williams is guilty. And the argument is powerful because it is, in a sense, subliminal; to the extent that it comes to bear in the subconscious of the juror, she is not in a position to resist it – the argument brings its power to bear outside of her consciousness.

The argument is, as well, especially prejudicial because it is persuasive. It is persuasive because of the way in which it comes into being – it is not offered expressly by one of the principal performers; instead, it is constructed, consciously or subconsciously, in the mind of the juror herself. By constructing the argument herself, the juror unavoidably becomes invested in it, and thereby is more strongly open to being convinced by it – she now has a stake in the argument being persuasive. And it is persuasive because the juror, by completing the argument, solves something of a puzzle. The jail inmate clothing, situated within the theatrical frame of the trial, "acquires a set of quotation marks." Thereby, the juror is subtly challenged to determine its meaning within the performative event of the trial. By determining a meaning, the juror experiences, however subconsciously, a measure of satisfaction in successfully answering that challenge.

The physical restraints involved in *Commonwealth v. Agiasottelis* (1957) function in a similar way: the restraints mark George Agiasottelis, on trial for the violent crime of armed robbery, with an attribute of violence, just as the jail inmate clothing so marks Harry Lee Williams. The four uniformed state troopers who surrounded Charles Flynn in *Holbrook v. Flynn* (1986) thereby placed him within a visual frame – a subframe within the theatrical frame. And this frame functioned, in exactly the same way as the jail inmate clothing and the restraints, to mark Flynn with an attribute of violence: because he is a violent person, he must be guilty of the violent crime, armed robbery, for which he is being tried.

In *Moore v. Dempsey* (1923), the US Supreme Court did not hesitate to hold that the express and emphatic demands for a guilty verdict by angry spectators denied the accused of a fair trial. It is no less a denial of a fair trial if the improper argument for guilt, no less insistent than the angry spectators, comes subtly and by implication.

16.4.2 Visual Aspects of the Spectators

What is the potential impact of actions and circumstances involving the spectators themselves? In *Commonwealth v. Gibson* (Pa. 20003), several uniformed police officers sat in the spectator area while Ronald Gibson was being tried for the murder of a police officer. Although there was no allegation that these officers stared at the

jurors in a menacing way, as the IRS agents did in the trial for tax evasion in *United States v. Rutherford* [36], nevertheless a juror could interpret the visually striking presence of the police officers as a threat of repercussions were the jury to return a verdict of acquittal. This in itself is highly prejudicial to the accused.

This is not, however, the only visual impact that the presence of the police officers might engender. On a more complex level, a juror could also interpret the visual impact of their presence in this way:

1. Ronald Gibson is on trial for the murder of a police officer.
2. Police officers always act in solidarity with a fallen fellow officer.
3. The fallen police officer in this trial was our colleague.
4. As police officers, we wish to see his murderer punished.
5. We are here because we believe that Gibson did murder our colleague.
6. Thus, you must find Gibson guilty.

Again, the visual impact of the presence of the officers can be interpreted as an argument for guilt. In its opinion, the Pennsylvania Supreme Court, by way of rejecting Gibson's claim of prejudice, noted that it was not shown that the police officers in attendance engaged in any disruptive activity, a circumstance that "would establish a significant irregularity in the proceedings" (Id, pp. 1138–1139 and n. 20). The problem with this reasoning is that the challenge was not to the mere presence of the police officers. Given the Sixth Amendment guarantee that the trial be public, the presence of these officers was altogether legitimate. The matter under challenge was indeed a demonstrative act, however muted – the choice by the police officers to attend the trial wearing their very visible and striking uniforms, even though their attendance was not a part of their official duties. And demonstrative acts, despite the Sixth Amendment guarantee that the trial be public, can be grounds for the exclusion of particular spectators.[32]

The argument that can be understood by the visually striking presence of the police officers, like the arguments in *Estelle v. Williams, Commonwealth v. Agiasottelis*, and *Holbrook v. Flynn*, is both procedurally and substantively improper and highly

[32] Courts have long understood the potential for prejudice by demonstrative acts by spectators at trial, for example, Moore v. Dempsey (1923) (murder trial; angry, shouting spectators inside and outside the courtroom); White v. State (1933) (manslaughter trial; widow shouting form spectator area); State v. Gevrez (1944) (murder trial; mother of deceased loudly weeping); Cartwright v. State [86] (manslaughter trial; applause for prosecutor). A number of courts, however, as many courts do in instances of potentially prejudicial visual matters, do not hold that a mistrial must be declared when demonstrative acts occur. For example, State v. Killian (1915) (murder trial; applause for prosecutor; defendant did not show that jurors were prejudiced); State v. Dusenberry (1892) (rape trial; applause for prosecutor; trial judge gave curative instructions); Doyle v. Commonwealth (1902) (assault & battery trial; applause for prosecutor; spectators reprimanded). An especially relevant case in point is *State v. Franklin* (1985), a trial for homicide during which, while the accused was on the witness stand, the mother of the deceased screamed four times in rapid succession, "He killed my son." Although the Kansas Supreme Court held that there was no prejudice to the accused in the particular circumstances of that trial, the Court observed that, in a proper case, exclusion of even a highly interested spectator engaging in demonstrative acts can validly be done.

prejudicial to Ronald Gibson. It is procedurally improper because it comes to the jurors outside of the formal processes of the trial. It is substantively improper because of the fifth term of the argument: "We are here because *we believe* that Gibson murdered our colleague." It is improper for the prosecutor, in express argumentation, to state a personal belief in the guilt of the defendant (Anderson 2002, 51–52; Stein 2005, §1:86).[33] This is an opinion, not an argument based on the evidence and testimony adduced at trial. The prejudicial problem is that the prosecutor, as an official of the State, is an authority figure, and his statement of belief can carry considerable persuasive authority.[34] The uniformed police officers attending Ronald Gibson's trial as spectators as well can be perceived by the jurors to be authority figures, and their implicit statement of belief to be similarly authoritative.

A trial judge assuredly would not allow a prosecutor to argue to the jury:

> Look at those police officers sitting out there. Why are they here, dressed in their uniforms, even though they are off duty and on their own time? Do you really think that they would be wasting their time to be here if they didn't think that the accused would be guilty?

Surely the same argument, engendered by their visually striking presence, is equally disallowable.

In *Carey v. Musladin* (2006), the case recounted at the outset, Mathew Musladin was on trial for the murder of Tom Studer. Members of Studer's family sat in the spectator area wearing large buttons that carried Studer's image. How might a juror interpret these images? Consider this assertion by a linguist, William Labov, a student of urban street language:

There are many ways to tell the same story, to make very different points, or to make no point at all. Pointless stores are met (in English) with the withering rejoinder, "So what?" Every good narrator is continually warding off this question; when his narrative is over, it should be unthinkable for a bystander to say, "So what?" Instead, the appropriate remark would be "He did?" or similar means of registering the reportable character of the events of the narrative. (Labov 1972, 366)

Note how Labov elides from *story* to *narrative*. What do these terms mean? And what lies behind this elision? E.M. Forster observed, "The king died and then the queen died" is a story. "The king died, and then the queen died of grief" is a plot (Forster 1927, 136). Substitute *narrative* for *plot*. Labov's narrator asserts, "The king died and then the queen died." The likely response is, "So what?" Labov's narrator asserts, "The king died, and then the queen died of grief." The likely response is, "She did?" In Labov's usage, a story is a mere chronology and is pointless. A narrative is a chronology that offers the meaning of events. The *reportable character* refers to that quality of the narrative that answers the "So what?" question.

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[33] It also is a violation of the rules of professional ethics: "A lawyer shall not … [i]n trial … state a personal opinion as to … the guilt or innocence of an accused …" (American Bar Assoc. 1998, Rule 2.4(e)).

[34] Just as the Bible passages brought into the jury room in *People v. Harlan* (2005), carry considerable weight because of the authoritative status of the Bible in the culture of the United States.

The same rejoinder is appropriate for assertions and arguments – pointless assertions and arguments as well are rightly met with the withering rejoinder, “So what?” What, however, is it that renders an expression, a story, assertion, or argument, *pointless*? To answer that question, consider the nature of the human mind. In our encounters with reality, our environment – in Peirce’s terms, experience – we seek the meaning of those encounters – in Peirce’s terms, understanding. That is, we seek to become *conscious of* our environment. In doing so, we create a World, a model of our environment that explains it, a normative milieu that forms the substantive content of consciousness.

Thus, a pointless expression is one that offers no meaning. Thus the rejoinder to such an expression – “So what?” What the rejoinder is asking is, “Why are you saying this to me?” “What is it about what you are saying that helps me in the urgent task of fashioning my World – the ongoing, dynamic, normative model of the environment that enables me to function successfully?”

What is it, then, that keeps the story, assertion, or argument from being pointless, that enables it to offer meaning? In Peirce’s terms, what is the link between experience and understanding? Peirce asserts that understanding is the triadic product, mediated by the sign, of the encounter with the environment, its meaning, whether the encounter is with an object, event, or an expression. How, however, does the sign go about its function of mediation?

Peirce defined the sign in this way:

> A sign or *representamen* is something which stands to somebody for something is some respect or capacity. … The sign stands for something, its *object*. It stands for that object, not in all respects, but in reference to a sort of idea, which I have called the ground. (Pierce 1933, 228)

What, however, is the *ground*? The anthropologist Mary Douglas explains:

> Anything whatsoever that is perceived at all must pass by perceptual controls. In the sifting process something is admitted, something rejected and something supplemented to make the event cognizable. The process is largely cultural. A cultural bias puts moral problems under a particular light. Once shaped, the individual choices come catalogued according to the structuring of consciousness, which is far from being a private affair. (Douglas 1982, 1)

The cultural bias, or cosmology, provides a cognitive frame that makes the meaning of the event possible. It provides the substantive content of the ground of the Peircean sign. In Douglas’s anthropology, there are four different cosmologies – individualism, hierarchy, communality, and naturalism. These are alternatives, available to the choice of the individual for fashioning the individual’s world, the substantive content of her consciousness. The sign, then, goes about its function of mediation of the encounter with the environment through the cosmology, which forms content of the ground of the sign. A pointless expression is one that is not grounded in a cosmology.

A juror at the trial of Mathew Musladin observes that there are spectators, situated within the theatrical frame, wearing buttons bearing the image of an individual. From the evidence and testimony already introduced, she knows that this image depicts Tom Studer, who died in the incident that led to this trial. The medical examiner

is on the witness stand, describing in a soporific drone, laced with abstruse medical terminology, the physiological mechanism by which the bullet from Mathew Musladin's handgun caused Studer's death.

The juror's attention drifts back to the images on those buttons. The buttons, quite overtly, announce, "This is an image of Tom Studer." In her subconscious mind, the juror would like to respond, "So what?" This, however, she cannot actually do. As her attention repeatedly is drawn to those images, however, that question is repeated, each time becoming more nagging. It is entirely possible that the juror will, sooner or later, enter into a dialogue with herself, a dialogue through which she seeks to answer for herself that nagging question:

1. This is an image of Tom Studer, who died in the incident involving Mathew Musladin. *So what*?
2. You are presented with this image so that you will not forget Tom Studer. *So what*?
3. Studer should not be forgotten because he is the victim of a heinous act – gunned down at his own home defending his fianceé from violence. *So what?*
4. The victim of such a heinous act must be vindicated so that the community can have catharsis. *So what*?
5. Studer can be vindicated by avenging this heinous act, an act that cries out for vengeance. *So what*?
6. Vengeance can best be served by visiting punishment – literally, "taking it out on someone." *So what*?
7. You have the power to avenge this heinous act, to visit punishment on someone, by finding the defendant, Mathew Musladin, guilty.

The substantive problem is that the buttons can be understood as presenting an argument that the juror vote for a verdict of guilt on a basis other than the formally proper basis, that, under the evidence and testimony adduced at trial, the prosecutor has proven beyond a reasonable doubt that Mathew Musladin is properly culpable for the death of Tom Studer. In the aftermath of the occurrence of a shocking event, such as the altogether public and doubtlessly newsworthy incident in which Studer died, there is a natural psychic need for community catharsis – the community must be cleansed of an instance of evil that has occurred in its midst. Indeed, serving this need for catharsis is one of the justifications for requiring that the criminal trial be conducted in public.

It is not the case, however, that this catharsis can be achieved only by the public trial of the suspected perpetrator. Visiting punishment on *anyone*, if it is announced that the act of punishment is tied to the shocking event, can have the same cathartic effect. This in fact is the basis for the ancient scapegoat ritual, by which a society cleansed itself of accumulated evil by the ritual killing of a selected individual (Douglas 1982; Frazer 1950, 655–675; Girard 1986). For the ritual to be efficacious, the scapegoat need not be in any way culpable for any of that accumulated evil. The buttons bearing Tom Studer's image thus can engender the highly prejudicial argument for vengeance that Musladin be found guilty not because he is culpable for Studer's death but instead because Studer's death must be avenged, and that this can

be achieved by placing responsibility on Musladin and symbolically removing him from the community.[35]

In *In re Woods* (2005), a trial on two counts of aggravated first degree murder, family members attended the trial wearing orange and black ribbons in memory of the two young women who died in the incident that was the subject of the trial. In holding that Dwayne Woods's right to a fair trial was not thereby prejudiced, the Washington Supreme Court observed that the ribbons did "not express any conclusions about Woods's guilt or innocence" (*In re Woods*, 616), and that one of the jurors had stated afterward "that he understood that the wearing of the ribbons was a sign of their mourning their loss of a daughter or loved one" (*In re Woods*, 617). The problem with the ribbons, however, is not what express message that they might offer; instead, it is what chain of reasoning that the visual impact of the *presence* of the ribbons might *imply*. The juror who stated that he understood the ribbons to be a sign of mourning on the part of those spectators was tacitly admitting that he understood the ribbons to be a memorial to the deceased. This, however, is the same as the third element of the chain of reasoning engendered by the image buttons in *Carey v. Musladin* – "Studer should not be forgotten." The ribbons in *In re Woods* thus can be understood as offering the highly prejudicial and highly improper argument for vengeance.

The *Woods* juror asserted, "I thought the ribbons were nice, but they did not influence my decision or that of the other jurors" (*In re Woods*, 617). It may well be that, in his conscious mind, the juror was not prejudiced by the presence of the memorial ribbons. What that juror cannot do is know what the effect of the ribbons was on his subconscious mind, or on the conscious or subconscious minds of the other jurors.

In *Norris v. Risley* (1990), in which Robert Lee Norris was on trial for rape, several women sat in the spectator area wearing large buttons with the legend, "Women Against Rape." This text can be interpreted in two different ways. First:

1. We are against rape.
2. We wouldn't be here if we didn't believe that there had been a rape.
3. If this was a rape, then the accused defense of consent does not hold – there could not have been consent.
4. Thus, the accused must be found guilty.

The term *rape* is not a statement of fact; instead, it is a legal conclusion, the answer to the fundamental question posed to the jurors by putting Norris on trial. The buttons can be interpreted as offering the same prejudicial and improper "We believe" argument for guilt that could be engendered by the presence of the uniformed police officers in *Commonwealth v. Gibson* (2003). The US Court of Appeals

[35] The argument for vengeance is grounded in the cosmology of Communality. In the noteworthy murder trial of the English *au pair* Louise Woodward in Massachusetts in 1997, the prosecutor offered an implicit argument for vengeance, expressly grounded in the cosmology of Communality. As discussed in *Transferring Blame* (Douglas 1995), it seems to be clear that, in reaching a verdict of guilt, the jury engaged in what was in effect the scapegoat ritual.

for the Ninth Circuit was correct in its conclusion that the buttons "implied that Norris raped the complaining witness" (*Norris v. Risley* 1990, 831).

The women wearing the buttons are not, of course, patently authority figures as are the uniformed police officers in *Commonwealth v. Gibson*. With each wearing the same button, however, and given the text on the buttons, they could appear to be an organized, formal group. Because they are present within the theatrical frame and because the trial judge has to power to control the actions of the spectators within that frame, and even to exclude particular spectators on the grounds of improper conduct, then the presence of the women as an organized group can be understood to have been sanctioned by the judge. Thus, though they are not authority figures of themselves, their presence can carry implicit, derivative authority from the trial judge, and the "We believe" argument that they can be seen to offer becomes authoritative in the eyes of the juror.

The "Women Against Rape" buttons do not call attention to the complaining witness as the image buttons in *Carey v. Musladin* call attention to Tom Studer or the memorial ribbons call attention to the two deceased young women in *In re Woods*. Because rape is primarily a crime of male against female, and because all of the spectators who wore those buttons at Norris' trial were women, it is possible that, very subtly, the buttons could call attention to the complaining witness. If that is the case, then the "Women Against Rape" buttons can also be understood to offer a second argument, the prejudicial and improper argument for vengeance:

1. We are against rape.
2. We wouldn't be here if there hadn't been a rape.
3. Rape is a horrific crime, devastating in its impact on the victim.
4. The victim of this rape thus must be vindicated.
5. This can be done by achieving vengeance for her.
6. You have the power to do this by finding the defendant, Norris, guilty.

The "Crime Victims United" buttons worn by spectators in *Pachl v. Zenon* (1996) have a similar potentially prejudicial effect. The terms *crime* and *victim* are legal conclusions, thereby suggesting an authoritative "We believe" argument for guilt. And, because the buttons appear to call attention to the alleged victim more subtly than an image or a memorial ribbon would but less subtly than the "Women Against Rape" buttons would, then the "Crime Victims United" buttons can well be interpreted as suggesting the argument for vengeance.

In *State v. McNaught* [(1986)], a case in which Thomas McNaught was on trial for vehicular homicide and driving under the influence of alcohol, several of the spectators wore large buttons bearing the letters "MADD," the acronym of the well-known national advocacy group, Mothers Against Drunk Driving. The term *drunk driving*, however, is not a statement of fact; it is a legal conclusion about one of the charges for which McNaught was being tried. Thus, the buttons could be interpreted as presenting the "We believe" argument for guilt. And, to the extent that MADD, as a well-known, principled advocacy group carries, by its presence, derivative authority, this argument can be understood as authoritative.

In these nine cases, it is possible to understand that jurors might interpret these various visual circumstances, aspects, and images within the theatrical frame as offering three distinct improper arguments. The jail inmate clothing in *Estelle v. Williams* (1976), the restraints in *Commonwealth v. Agiasottelis* (1957), and the framing of the defendant with uniformed state troopers in *Holbrook v. Flynn* (1986) can be understood as offering the *argument from character* grounded in the cosmology of Individuality: "The defendant is a violent person; therefore, he must have committed the crime of violence for which he is charged." The uniformed police spectators in *Commonwealth v. Gibson* (2003), the Women Against Rape buttons in *Norris v. Risley* (1990), the Crime Victims United buttons in *Pachl v. Zenon* (1996), and the MADD buttons in *State v. McNaught* (1986) can be understood as offering the *argument from authority* grounded in the cosmology of Hierarchy: "We, authoritatively, believe that the defendant is guilty of the crime charged." And the image of the deceased buttons in *Carey v. Musladin* (2006), the memorial ribbons in *In re Woods* (2005), the Women Against Rape buttons in *Norris v. Risley* (1990), and the Crime Victims United buttons in *Pachl v. Zenon* (1996) can be understood as offering the *argument for vengeance*, grounded in the cosmology of Communality.

16.5 Conclusion

In a considerable number and variety of instances in the ongoing stream of criminal trials in the United States, the visual aspect of a circumstance, practice, or action in a particular trial has come under challenge on the basis of its effect on the mental processes of the jurors, resulting in prejudice against the defendant. This prejudicial effect is the consequence of the semiotic power of these various visual matters. Everything within the theatrical frame is a sign (Veltrusky 1964, 74). Analyzing the criminal trial as a complex form of theater provides an understanding of the *Why*, the *How*, and the *What* of this semiotic power.

In terms of *Why*, theater functions as a complex form of meaning creation; thus, everything contained within the theatrical frame has auditory or visual semiotic impact. In terms of *How*, an understanding of the meaning creation process of theater through the performer-audience transaction reveals how this meaning is created in the mind of the juror-audience. In terms of *What*, this analysis reveals the particular substantive meaning that these visual matters can generate: the Argument from Character, the Argument from Authority, and the Argument for Vengeance.

The courts in the United States, taken as a whole, have only a fitful understanding of this semiotic power and the consequences of this power coming into play. Some courts, in some circumstances, do recognize the prejudicial effect of some visual aspects; most courts, in most circumstances, do not. And even when particular courts do recognize the potential for prejudice of a particular visual aspect, quite often these courts, for one or another of a variety of not entirely convincing reasons, will nevertheless allow it to occur. The result is that, in practice, many criminal trials

proceed in substantial violation of the due process principle. In these widespread instances, practice trumps principle.

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Part III
Law and Iconic Art

Chapter 17
Do You See What I See? Iconic Art and Culture and the Judicial Eye in Australian Law

Marett Leiboff

Abstract Visuals and images challenge law's positivistic faith: they are ambiguous and threatening to law's stability precisely because they cannot be corralled into a safe territory – unless they are read literally. Because they are always open to interpretation, law will rein them into a reading that suits and that does not transgress, for instance, sanctioned narratives or accounts of national identities. A 'juridical-aesthetic state of exception' enables the courts, as sovereign, to create and constitute the aesthetic mode in which visuals and images are read, allowing them to radically create and recreate the image or visual to achieve a desired aesthetic or political reading. By being 'rule-exempt', the courts create the law of the visual as they go along, saturating them with meanings as they choose, deploying interpretations and readings of images as it suits. Their purported indifference is made in deference to art, but as I suggest, the very act of disengagement is ascriptive, through the intervention of the judicial eye. In its place, I suggest the deployment of a Panofskian iconological schema in order to give law some tools to assist with the reading of images beyond the literal and formal. It is precisely for the reasons that Panofsky is criticised by art historians that I see a value in the use of this hermeneutic in the legal context through its creation of a 'synthetic intuition'. Iconology not only demonstrates that empiricist and literal readings of images and visuals are misleading and partial, but its schema offers a certainty and methodological rigour enabling 'the vibe' of art, culture and images to move from being a mere feeling to something which can be ascertained through a method, providing a sense of certainty while curtailing unbounded interpretations that abound in the juridical-aesthetic state of exception.

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17.1 Talking to Strangers

Law, as a practice, makes the claim that it deals in clear, verifiable and ascertainable facts and knowledge, eschewing the insensible, or what can only be 'felt' or 'sensed'. And this is the rub; what happens when the courts make decisions about visuals and images? What *exactly* do they *see*?

My purpose in this chapter is to explore how Australian courts, in a diverse set of circumstances, have 'seen' visuals or images, such as art or other cultural and creative outputs, and to propose a corrective to their empiricist reading of them, through the use of a Panofskian iconological schema. As in other jurisdictions, Australian courts have engaged in decision-making about matters typically relevant to images and visuals in disputes over copyright law, commercial transactions, blasphemy and taxation law. But for the purposes of this chapter, I explore how Australian judges 'see' visuals and images in areas of law concerned with, or drawn upon, uniquely Australian experiences: in broadcasting law, cultural heritage law and the trust establishing a famous annual portraiture prize featuring Australians – the Archibald Prize.

The examples provide extraordinary insights into the choices the courts make when looking at art. They show that the courts will acknowledge or occlude what is in front of them in ways that under- or overread the visual in question, from focussing on literal identifiable physical minutiae on the one hand, while floridly embroidering national narratives associated with visuals on the other. The examples have been chosen because all deal with a very public vision of *Australia*, albeit one that is grounded in a mythologised and imaginary conception of an idealised Australia. The examples reveal a series of paradoxes that characterise the judicial reading of visual texts. Like other common law jurisdictions, the Australian courts ground their readings of visuals in empiricist analytical terms, which, it is claimed, will result in clear sighted decision-making in cases involving art or culture (Leiboff 2001). For this reason, ostensibly at least, they purport to avoid entering into questions concerning aesthetics in deference to art itself (Kirby 2006). Yet the courts maintain that they can tell 'what makes something art' or 'what makes some creative output recognisably Australian', despite such disavowals. So in the course of reaching a decision about whether an image was or was not painted, Harrison J in New South Wales Supreme Court could claim that 'I do not think it goes outside the bounds of judicial knowledge, but is common knowledge, that line drawing is among the techniques used by painters in the course of creating paintings in the strictest sense'.[1]

17.1.1 The Juridical-Aesthetic State of Exception

Examples of this kind reveal that law's claimed disengagement with the visual is weak and, as this chapter will reveal, latently corruptible (in the sense that perverse

[1] *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [18].

and peculiar readings of the visual and thus the law will result). The courts engage in readings that are fundamentally *a*scriptive (not *de*scriptive as they would hope) that can result in a judicial reinscription of the image or visual itself (Douzinas and Nead 1999; Barron 2006; Leiboff 2006, 2007, 2009). Yet rather than achieve certainty in fact and law, the methods used by the courts are radically *uncertain*, able to vouchsafe only the *elements* or *indicia certa* used to that construct the visual. This leaves the visual, as rendered by law, in a juridical-aesthetic state of exception, able to be deployed and redeployed for the desired and desirable legal outcome, reflecting Richard Sherwin's observations that 'Aesthetics isolated from some grounding in the ethical offers no protection against, and might even invite, a sense of law as being rooted in no more than subjective preferences, or perhaps the will to power alone' (Sherwin 2007, 71).

The idea that these judicial readings could be conceived as a juridical-aesthetic rendering of the politically grounded Schmittian state of exception may seem surprising, given that Schmitt asserted that the political and the aesthetic are radically distinct, opposing domains (Levi 2007, 33), and the state of exception is itself problematic. However, the state of exception as conceived by Schmitt functions in realms that 'cannot be circumscribed factually, made to conform to a preformed law, or be otherwise anticipated' (Levi 2007, 29). And this is precisely what happens when the courts read images: the object is discursively stripped of its narrative, and the empiricist eye of the naïve judicial everyman, or court as sovereign, radically reconceives it for the purposes of legal interpretation. The resulting visual may bear no resemblance to its existence in other dimensions and other domains, or as conceived by its creator, but is now open to be deployed in aid of whatever legal purpose it needs to fulfil. By treating visuals and images as 'rule-exempt', textual recreations of the visual needed to fill the void created through their initial abnegation of the visual are both tolerated and sanctioned. The courts have freed themselves to construct the law of the visual as they go along, saturating the visuals with meanings as they choose, deploying interpretations and readings of images as it suits.

This juridical-aesthetic state of exception has another dimension to it. For Schmitt, the aesthetic in all of its variants 'negates and threatens' the political (Levi 2007, 38), making the 'aesthetic not simply a rival term to the political but its enemy' (Levi 2007, 40). In many respects, visuals and images are also law's enemy, being profoundly anarchic in contradistinction to law's serious enterprise. Paradoxically, this facilitates the conditions that allow the court as 'artistic everymen', knowing everything and nothing about images, to hide behind an aesthetic naïveté to impose readings of images that conform with sanctioned national narratives. And this is doubly problematic for images and visuals that can be read as Australian only through their 'vibe'. For if the courts cannot 'see' them in the first place because they do not meet the expectations of literally, truthfully, obvious Australian archetype, then the image and its legal fate sit in the aporia created by juridical-aesthetic state of exception.

17.1.2 What Do You See?

One of the few identifiably Australian features of the defunct Australian band, *Hunters & Collectors*, is that its members were (mostly) Australian and the place they created most of their music was Australia. Few other indicia point to the band's place in the world. Its name came from a track by the German band *Can*, but the band's cultural status meant it was a natural choice as the title of a scholarly cultural history of the people who developed ethnographic and archaeological collections in Australia (Griffiths 1996).[2] Growing out of late 1970s Melbourne, the band blended an art house style intellectualism with a post-punk grinding, percussion and horn sound,[3] a 'reggae-funk fusion with rock roots and a tinge of New York underground in the guitars' (Forster 2008).[4] Their first single, 'Talking to a Stranger', released in 1982 (*Hunters & Collectors*, Seymour 1982), began with a line repeated throughout: 'Souvent pour j'amuser [sic] les hommes d'équipage', an imperfect rendering of the opening line of Charles Baudelaire's poem, 'L' Albatros',[5] while the title referenced a path-breaking 1966 BBC television drama series (Janet Moat, 'Talking to a Stranger' 1966). Curiously, European ears heard the raw pulsating sound as that of indigenous Australians, which was not intended by the band (Seymour 2008, 215–218).[6]

Despite critical acclaim, the band changed course during the 1980s, and now answering to (though not wearing) the abbreviated moniker of 'Hunnas', the band reinvented themselves as exponents of a quintessential, mainstream, Australian-style 'pub rock'.[7] Now archetypally Australian as captured through its popularity,

[2] Griffiths' book is entitled *Hunters and Collectors: the antiquarian imagination in Australia*. Griffiths notes: 'To European eyes, Australia had relic forms of nature and a primitive people. It was a land of living fossils, a continental museum where the past was made present in nature, a 'palaeontological penal colony' (Griffiths 1996, 9). One of the areas of law which will be explored in this chapter is Australia's *Protection of Movable Cultural Heritage Act* 1986 (Cth), which protects these kinds of cultural objects.

[3] To most Australian ears, this could not possibly be an Australian song in the literal sense, though it was embraced by an Australian art-punk subculture who adored this band and its raw sound and reliance on extraordinary visual images created by the filmmaker Richard Lowenstein in their early film clips.

[4] Forster was a founding member of another iconic Australian band, *The Go-Betweens*, whose song 'Cattle and Cane' is a classic that drips with the torpor of a blindingly hot, humid Queensland summer.

[5] The actual first line of the Baudelaire poem is 'Souvent, pour *s'amuser*, les hommes d'équipage'.

[6] Seymour refers to a Swedish press conference in 1988 where local journalists made this connection, which the band sought to disabuse.

[7] 'Hunnas' is the phonetic rendering of the first part of the band's name. The 't' consonant is often lost in the working class 'broad Australian' accent where it meets another softer consonant, so that 'hunter' sounds like 'hunna' and 'winter' like 'winna'. Not all Australians have this accent, but the phonetic spelling of the first part of the name became a nickname for the band. The contraction of the name to its first word only is typical of Australian speech in general, where contractions will be used whenever they can – so 'sunglasses' become 'sunnies', 'journalists' become 'journos' and 'hunters and collectors' become 'hunters' or 'hunnas'.

the songwriting of its lead singer, Mark Seymour, continued to be esoteric. It was into this mix that the band had a hit that seemed to capture an enduring image of Australia in the 1987 lament, *Do You See What I See*?, from which this chapter's title is taken.[8] With its invocations of heat and summer, love and memories lost, existential and discordant, and redolent of a blinding and harsh summer light, this song signifies a singular Australian experience. With a grinding bassline and references to suburbs and cities, 'tea towels flying by', 'long drives north to the ocean', 'light shining … hotter than the sun', this could only be Australia in summer. But the linear notes about the song published on a compilation album 16 years later confound this reading (*Natural Selection*, Liberation Records, 2003). Its inspiration is not Australian at all; instead the song comes from an experience in neighbouring New Zealand, a three-hour flight from the east coast of Australia. The linear notes reference archetypically *New Zealand* images, including references to an Auckland suburb, a beach region near Auckland called Coromandel, the city of Dunedin, a hangi, an Aoteroroa tea towel, a Steinlager shower and among other things.[9] A song which could only be about an Australian experience has its provenance shattered and its origins confused.[10]

The information about the song's New Zealand origins confounds its status and character as an Australian song. A song like this, with an invisible invocation of place and identity, is emblematic of the porosity of text, language and experience – there is nothing that obviously makes it Australian, except, perhaps, its vibe.[11] It does not accord to 'typical' notions or images of Australia: koalas or kangaroos, Uluru, the Sydney Opera House or Bondi Beach. A decision by the Australian High Court in 1998, the year that *Hunters & Collectors* broke up, decided that the phrase the 'Australian content of programs' meant television content typically 'Australian'.[12] A song like *Do You See What I See*?, within the parameters of the test created by the court, would struggle to be treated as an Australian song and would instead, at best,

[8] The song has been confused with the gentle 1960s American Christmas song, Noël Regney and Gloria Shayne Baker, *Do You Hear What I Hear*?, which includes the phrase 'do you see what I see' throughout.

[9] http://www.humanfrailty.com.au/songs/do_you_see_what_i_see.htm

[10] New Zealand and Australia are near neighbours, fierce sporting rivals, share a common bond through the loss of its troops in World War I along with the Anzac memorial and are parties to a Closer Economic Relationship Treaty, but are not the same culturally, politically or socially. Ask a New Zealander to say 'six', and Australian ears hear 'sex' or 'sucks'; ask an Australian to say 'six', and New Zealand ears will hear 'seeeks'.

[11] The idea that Australian creative outputs can only be truly Australian if they 'look' or 'sound' Australian is not confined to the courts. When an Australian music writer, Craig Mathieson, suggested in 2009 that there was such a thing as an 'Australian sound', the author of a letter to the editor in Sydney's major daily newspaper bristled, claiming that only *lyrics* about Australian culture, history or politics would qualify, or singers with certain accents, but there could certainly not be an Australian sound. The author of the letter approached the question of 'sound' as the courts do, by extracting out those things that are 'typical' and can be known with certainty (Conomy 2009).

[12] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 255.

be characterised as a *New Zealand* song.[13] If it ever became a legal question to be resolved, however, the song would 'count' as an Australian song, but not because of its content – its provenance, genesis, lyrics or sound – but solely because of the barest of reference points: the nationality of its creators.

So this is the problem. Because the judicial eye is empiricist (Leiboff 2007, 2009) and relies on literal and 'common-sense' readings of the visual or other cultural texts (Hasenmueller 1989; Leiboff 1998), it can identify elements that are typically or archetypically Australian only because it draws on visual clues that conform to a preimposed vision of what should be 'there'. The method discards images and visuals unrecognisably Australian, easily comprehending clichéd images or visuals but failing to comprehend anything else (Mount 2006). Law can find identifiable ideas and elements – *indicia certa* – which it will trust as a vehicle capable of truth-telling. But these *indicia certa* are untrustworthy, capable only of knowing parts of an image or visual and the resulting image that discards what it cannot comprehend results is partial, distorted and incomplete. What is left is a misshapen, misapprehension of the image that is now used as the basis for legal decision-making in which the juridical-aesthetic state of exception can operate to achieve whatever legal outcome is desired in the case.

So *Do You See What I See*?'s national identity, in law, would be ascertained outside the song's frame, in the linear notes that will identify song's content as verifiably New Zealand images, thus shrinking the unverifiable Australian 'vibe' of the song from view. The content of the song is read absent its content, in effect, leaving a nonsensical reading behind. Because New Zealand origins aside, the sound and lyrics of this song speak with an Australian vernacular, were created out of the Australian experience and are experienced as Australian by other Australians. This, for what it is worth, is what *I* see. What, then, did you see?

17.2 'The Vibe'

17.2.1 Hooked on a Feeling: The Vibe

'Vibe' is a word of the late twentieth century; its origins found in the world of rock and pop music. Included in its uses in the *Oxford English Dictionary* is one of its verb forms: 'To transmit or express (a feeling, attitude, etc.) to others in the form of intuitive signals or "vibes"'. In the Australian Macquarie Dictionary, 'vibe' is defined as a colloquial term meaning 'a dominant quality, mood or atmosphere'. 'Vibe', then, captures the notion of a communication of a 'feel' without recourse to the sensational or verifiable. For this reason, it lacks the quality that law prizes, namely, an ability of things to be determined with certainty. Law must, because of

[13] The reading of Australian content by the High Court will be considered later in this chapter.