

Anne Wagner
Richard K. Sherwin *Editors*

Law, Culture and Visual Studies

 Springer

instead, it is the average everydayness of their marriage that we acknowledge as having been significant for them even before it went on public display. Typical for Peirce, as referred to earlier in relation to the recognition of a habit by way of a habit change, is his acknowledgement of our being unavoidably delayed in grasping what has already taken effect. Tracing the immediacy of signification via something else, that is, by way of a third term in a semiotic constellation, has become characteristic for Peirce.

In "Survey of Pragmaticism" (*Collected Papers*, Vol. 5, § 464–496, dated 1907) Peirce writes: "For the proper significate[sic] outcome of a sign, I propose the name, the *interpretant* of the sign" (5.473). A whole theory is implied in a short phrase. We should observe that according to Peirce, semiotics is the doctrine of semiosis (5.488). Semiosis, then, is defined as a "tri-relative influence not being in any way resolvable into actions between pairs" (5.484). Peirce interchangeably calls actions between pairs 'dyadic' and 'dynamical', on the other hand, triadic action he calls 'intelligent' (5.472). If habitual morality is triadic, it is not dynamical, but intelligent. Within the myriad of Peirce's terminology, habits are described as the essence of the interpretant (5.486), although recognizable only, as we have observed earlier, in retrospect after a habit change has taken effect. We know that the interpretant is crucial for Peircean semiotics. And because the interpretant pertains to intelligent, i.e., triadic not dynamical, action, we should be able to recognize triads in habits, which in their turn are retrospectively acknowledgeable by habit changes.

Peirce's own example of triadic action involves an army officer's command: "Ground arms!", which of course is a sign. But in what sense is this example triadic? Peirce first considers the object of the command: "the object the command represents is the will of the officer that the butts of the muskets be brought down to the ground" (5.473). If the command were merely dyadic, the expression of the officer's will by saying the words would be independent of soldiers disposed to perform the act of bringing down the weapons. If, on the other hand, such a soldier's act were to take place, this act would again be a sign, an interpretive sign, or better yet, in Peirce's terminology, an interpretant. The command (the uttered phrase), in this case, must be triadic and thus intelligent, because it simultaneously stands both *for* something (the officer's will) and *to* something (the soldiers' act). The command can be acknowledged as triadic, because it is intelligible to consider alternative outcomes to the command. In this example, if the soldiers were deaf, then the interpretant, an actual bringing to the ground of weapons, would not come about. More importantly, however, in all likelihood the army officer would not utter his command in the first place, because he already knows the senselessness of such a command. In terms of the habit change that retrospectively made us aware of the existence of the habit that went before it, it is consistent with a conceivable alternative to what has actively been going on. The habit change, then, can be thought of as 'real' but not necessarily 'actual.' In that sense, the soldier's command "Ground arms!" can be intelligent and not merely the direct expression of his will, after all.

We will come back to Peirce and his example of the soldier's command, but let us first return to *Adam's Rib*. The film's public display of privacy in the cinema can be considered as a public display of the everyday embodiment of consent taking

shape as the everydayness of marriage. Moreover, we are reminded of the limits of this public display, precisely by the film's respect for some aspects of privacy. We can see the Bonners' private life, but not all of it. Right until the end of the film, we are reminded that we are not so much seeing the Bonners' private life, counterbalancing their public lives: we have access to only a part of it. Still, the intimacy of this couple's private life is not what makes their marriage work as a marriage. In Cavell's words: "intimacy is not sufficient for marriage" (*Pursuits of Happiness*, 215). An aspect of it needs to be on display. We have already discussed the dinner party featuring the Bonner home movie, but even the courtroom sessions cannot be understood unless we acknowledge the possibility of public access to what seemed exclusively private lives – the working-class married woman on trial is contrasted with marital sophistication inside the Bonner residence. Towards the end of the film, however, the courtroom actually becomes the stage for the display of the Bonners' marital dissent. In the final scenes, the Bonner marriage seems to approach its public end.

In the office of "certified public accountant Jules Frick," the Bonners agree on a final settlement of money and property before their divorce. Again, we are witness to a public expression of doubt and this time also of consent, repeated as it is to overrule the separation of goods and money. However, there also is an emotional outburst by Adam, this time a flood of tears. As revealed in the final scene, though, Adam's crying turns out to be just another public performance. Nevertheless, the tears trigger the Bonners reminiscing about their country home. Within a few hours, they surely could be there for dinner. Still, Adam is not certain about Amanda's willingness to indeed take off and leave the accountant's office. To express his doubts, Adam exclaims "you don't really wanna go," in response to which Amanda is able, at last, to repeat the formula of her consent: "I do." To be sure, these are not Amanda's final words, because away from the public accountant's office, both in the privacy of their home and in public venues, the Bonners will, as the film suggests, inevitably address the issue of equality before the law again, and again, and again... As a result, their antics will never be an entirely private matter. Their marriage will always find itself staged, on public display. As such, the *mise-en-scène* of their privacy will be essential for the success of their marriage. At the same time, the institutions elemental to our present society are reconfirmed by the very recurrence of expressed consent, not just figuratively, although the Bonner marriage could be taken as a metaphor for our society, but also concretely in the shape of repeated vows and doubts.

The concreteness of the everyday embodiment of doubt and consent belongs to film as medium. Film actually articulates what otherwise would be considered a mere matter of course: the everydayness that would be considered to speak for itself, as a given. The remarriage comedy in general and *Adam's Rib* in particular make recognizable for us that we should acknowledge the necessity of making at least part of that privacy a substantial part of our public lives. It is the part of our private life that needs voicing, that is, the part that expresses doubt and consent, which, as Cavell pointed out, will condition the legitimacy of our democracy. True, *Adam's Rib* does not address this moral and political issue directly, although it comes close when equality before the law is concerned. But as argued before, the

way in which the remarriage comedy works, does not require film to thematize politics. Even a comedy like *Mr. Deeds Goes to Town* (1936), which more explicitly than *Adam's Rib* refers to Washington politics and to the ideology of democracy, does not need its courtroom scenes to convince its contemporary audience about, in this case, the legitimacy of Rooseveltian federalism. The courtroom scenes in *Mr. Deeds* are necessary for us, however, to understand why Mr. Deeds (Gary Cooper) is convinced to publicly voice his doubts about the homely comfort of his own habits, and to become part of our society again.⁹

34.3 *Mr. Deeds Goes to Town: Setting the Courtroom Stage for Habit-Change*

In *Cities of Words*, Cavell's chapter on *Mr. Deeds Goes to Town* accompanies his chapter on John Rawls. Mr. Deeds (Gary Cooper) is an eccentric young man living in Mandrake Falls, Vermont, and he is characterized by one of his quaint townsmen as "very democratic" because he "talks to anybody." Mr. Deeds appears to be the only heir to a 20 million dollar fortune. It brings him to the big city. He turns out to be Cavell's favorite character to address what Cavell calls an odd question about Rawls' theory of justice. In this theory, Cavell writes, we should be willing to give up "unrestrained freedom for fairness and security in being governed" (187). Cavell then wonders: "Why are those relatively advantaged prepared to consent? Who is to remind them of society's worthiness for consent?" (188). If the advantaged couple in remarriage comedies does not consent, it runs "the risk of snobbery," which Cavell explains as "a tendency to distance oneself from the cultural costs of democracy" (189). It is the snobbery tempting the Bonners to permanently retreat into the wealthy privacy of their country home, even if that would mean that they would make themselves vulnerable to skepticism toward each other. Mr. Deeds is another such character tempted to distance himself from democracy. Interestingly, though, Mr. Deeds' temptation is not the indulgence in the millions of his inheritance. In fact, toward the end film Mr. Deeds is tempted to give his fortune away in order to retreat into the privacy of Mandrake Falls. Surely, Deeds is in an advantaged position, because even before the inheritance, Deeds was a homeowner and not suffering from any financial distress. He was clearly leading a private life with relatively modest public responsibilities. The 20 million dollars, then, are not experienced by Mr. Deeds as his privilege. In other words, in Cavell's comedies the relatively advantaged are privileged, not so much because of their possessions, but because of their privacy.

⁹ Three years later, Capra upped the political ante with *Mr. Smith Goes to Washington* (1939). In this film, set for a large part in the United States Senate, the cynicism and corruption of corporate business and politics are explicitly thematized in opposition to the small-town honesty of boy scout leader Mr. Jefferson Smith (James Stewart). Compared to Mr. Deeds, however, Mr. Smith does not need encouragement to speak and take part in democracy. In fact, the film's finale is Jefferson Smith's filibuster—he does not stop speaking until he collapses from exhaustion.

The courtroom session regarding the sanity hearing of Mr. Longfellow Deeds, lasting the final 30 minutes of the film, therefore, is really about Mr. Deeds' attempt to retreat from democracy. His refusal to be represented by lawyers and his refusal to speak make it clear that indeed Mr. Deeds' character is on trial, specifically his refusal to live up to the characterization of being very democratic, willing to talk to anybody.

As in *Adam's Rib*, newspaper headlines seem to make clear what the issues are in the case. Montage sequences of headlines mark the passage of time, but they also mark the front-page moral issues involved in Mr. Deeds' sanity hearing. Is a millionaire really free? Are the dust bowl farmers of the 1930s entitled to what they were promised? Should the police prevent farmer demonstrations? As in *Adam's Rib*, public issues are important enough, but they are largely coincidental to this film. Thematically, any film could do. More specifically, the courtroom sessions in *Mr. Deeds* are the stage for the expression of Longfellow Deeds' doubts and consent concerning his worries concerning his private life becoming a public matter. When he finally does speak, his first words do not express his opinions on general issues. The "two cents worth" with which Mr. Deeds begins to speak concerns the articulation of seemingly minor observations. He specifically remarks on the so-called sanity of everyday appearances and calls attention to inadvertent aspects of the comportment of legal professionals: expert witnesses, lawyers, and judges. He makes clear that in spite of their probable attempts to conform to what their profession demands, they inadvertently convey that their behavior does not coincide with what is prescribed. Mr. Deeds explains that there is nothing wrong or insane about that: "Everybody does something silly when they're thinking." The judge fills out the letter "o" in his legal documents, the psychology expert "doodles," and there are ear pullers, nail biters, nose twitchers, and knuckle crackers among the plaintiffs. Cavell points out that Mr. Deeds' observations "may seem to be about the most trivial feature of human beings, the fact that they are fidgety." But they are crucial for film, because they are "the feature of human mortality that the *motion* of the motion picture photography cannot fail to capture" (*Cities of Words* 199).

Trivial as it may seem, the acknowledgement of fidgeting habits constitutes a series of what Andrew Klevan (2000) calls "little events," part and parcel of "undramatic achievement in narrative film" (26). Mr. Deeds' observations express a "willingness for the everyday" (Klevan 22) that will change the very everydayness of habits into showcases of 'normalcy.' In Peircean terms, the achievement that is *undramatic* would be addressed in terms of habit change. In *Mr. Deeds*, the courtroom audience at first does not notice the fidgeters cracking their knuckles, twitching their noses. Like the audience in the courtroom, we need Mr. Deeds' perceptive comments to retrospectively acknowledge that even the judge and the scientist are creatures of habit, surely able to change but only after Mr. Deeds' observations have taken effect. In fact, Mr. Deeds' observations lead to roaring laughter in the audience. But then, a masterful sequence of three shots adds a layer of self-awareness to the observations (Fig. 34.1).

Unaccompanied by dialogue, these three medium shots show us three men isolated from the crowd, catching themselves in their habits. As the camera does not occupy the viewing position of any of the characters, these are not point of



Fig. 34.1 Three medium shots of fidgeting. *Mr. Deeds Goes to Town* © Columbia

view shots. And the time it takes for these men to catch themselves in the act appears to be isolated as well: there is a noticeable but unattributable pause before Mr. Deeds continues. Inadvertent penciling, twirling, and finger tapping are observed by “the penciler,” “the twirler,” and “the tapper” themselves. And we are able to observe these observations on display. It is not clear whether or not Mr. Deeds can see what we see. For him, the inadvertent silly things themselves are proof enough in retrospect what these men were really doing was thinking. In these three shots, the three men are shown to become suddenly aware of what they were doing, that is, habitually acting in a certain way as their accompaniment to thinking. They come to realize that they always already had those habits, and that they needed Mr. Deeds’ so-called willingness for the everyday to become aware of them. What we have here, then, is the *mise-en-scène* of an everyday phenomenon;¹⁰ it is the courtroom staging of an everyday undramatic event, which makes us notice something about the everydayness which Mr. Deeds apparently desires. As Peirce would observe, the habit change lets us retrospectively know the habits of our everyday life.

Let us try to extrapolate *Mr. Deeds’* examples to what we can learn about the relationship between habits and morality in general. Are moral habits semiotically related to something like a general will? Or, when we say that moral habits are a concrete expression of the general will, do moral habits stand for the general will in a semiotic relationship? The answer to the latter question must be: not unless a third is involved. We need something else. Before we can speak of intelligent moral habits, we need something that brings the habits to the fore. And as we have seen in *Mr. Deeds*, that something else is the habit change. For this, we can go back to Peirce’s army officer (1931–1935). In the example of the command, the officer’s action of uttering the words without the actualization of the soldiers’ compliance would still stand for something, i.e., the officer’s will, but it would merely be a dynamic action, not an intelligent one. A subsequent soldiers’ act, on the other hand,

¹⁰Goffman in *The Presentation of Self in Everyday Life* also proves interested in the significance of inadvertent gestures: “the audience may (...) read an embarrassing meaning into gestures or events that were accidental, inadvertent, or incidental and not meant by the performer to carry any meaning whatsoever” (51). Goffman does not, however, go into much detail as to what exactly triggers the audience’s attention to detail.

would be the response that retrospectively changes a dynamic command into an intelligent one. As explained before, the response by the soldiers that, in retrospect, makes the command intelligent would, in Peircean terms, be called the interpretant. To be sure, our moral habit may very well be taken as an expression of the general will, but it is not immediately clear whether the habit is dynamically or intelligently related to this will. Only an interpretant would retrospectively make the habit intelligent. Such an interpretant is conceivable: it is the habit change that retrospectively makes our habit intelligent.

There is no contradiction in the claim that habits are the essence of the interpretant and the thought that habit change is best called an interpretant. To understand this, let us revisit our earlier example. The command ‘ground arms!’ can be audible, but is not necessarily heard. Similarly, our moral habit can be in plain view, but is not necessarily seen. With respect to our habits, we need a habit change to know that we had them. The habit change, and thus our intelligent morality, can settle and become habitual itself: by that time, again, in plain view but not seen. This is another way of saying that semiosis is endless; every interpretant will, in due time, lose its preliminary finality with respect to yet another interpretant.

In section 5.491 of his “Survey of Pragmaticism,” Peirce (1931–1935) describes this as follows: if, “under given conditions, the interpreter will have formed the habit of acting in a given way, [then] the real and living logical conclusion *is* that habit.” Peirce (1931–1935) continues that the verbal expression, the proposition with which the habit is caught, so to speak, may be called “the logical interpretant” of that habit. He insists, however, “that it cannot be the final logical interpretant, for the reason that it is itself a sign of that very kind that has itself a logical interpretant.” In our case, there is no ‘ultimate’ interpretant, for that would halt the semiosis of morality. Retrospectively, we should conclude that all habits, including our moral ones, once were habit changes and that the words ‘habit formation’ and ‘moral change’ are expressions of ‘semiosis.’

34.4 Conclusion: Intelligent Film

With respect to Stanley Cavell’s courtroom comedies we can conclude the following. First, we have come to understand that the courtroom mise-en-scene of the interrelated repetitiousness of marital and societal consent makes our moral habits noticeable, so that morality becomes intelligent and does not remain merely dynamical. Second, we may begin to understand why, with respect to our habitual everydayness, Cavell often refers to Ralph Waldo Emerson’s (1803–1892) definition of self-reliance: self-reliance is conformity’s aversion. A society’s unwillingness to change and its stifling influence on its members, demanding from them a definitive consent to being governed, is best characterized as a dynamical morality. It is paradoxically dynamic, and not, for example ‘ossified’, because it still concentrates on certain actions. But the actions it demands are all in conformity with the habits that have been established before. Alternatively, a society that makes pursuits of happiness

real venues for its citizens, asks from them not to conform to what has been consented to before. Instead, it lets the citizens repeat their consent by making way for scenes of doubt. The *mise-en-scène* of doubt is the precondition for repeated, but always preliminary expressions of yet other versions of consent. Dynamical morality is mere conformity; intelligent morality is conformity's aversion.

Our two films are intelligent. Mr. Deeds' intelligent morality becomes apparent when he realizes that he cannot just go home to the relative isolation of Mandrake Falls' familiar habits. He can't, because he has already changed the very habits that used to determine his home. He can't simply play the tuba anymore, because he has already spoken about his habit to play the tuba to be able to concentrate. For some time, then, his tuba playing cannot go unnoticed as a mere practice session. The people of Mandrake Falls, and the people of New York, for that matter, will recognize the reference to the courtroom display Mr. Deeds has made out of the silliness of his insanity hearing. We, the viewers, will probably recognize something of Mr. Deeds in any tuba player crossing our paths. That is, until the habit change settles, and becomes a habit itself. After which, again, we would need a character like Mr. Deeds with a willingness to resist the temptation to retreat into privacy. Most importantly, however, Mr. Deeds can't just go home, because he has heard his lover, Babe Bennett (Jean Arthur) say that there is no need for him to doubt her, because he has heard her say 'yes' in court to the question 'are you in love with him?' Nothing remains the same because he has started speaking, and there is no doubt that it was her courtroom expression of consent that made him do it.

Mr. Deeds is a comedy of *remarriage* because the courtroom is the stage for the second time consent is expressed. For the repetition of consent, relating the public and the private dimension of our everyday lives, however, *Adam's Rib* probably is a better example. Yet, recalling that the mores of morality are its habits, *Mr. Deeds*, excellently brings into focus the everydayness of our morality. But the film does so paradoxically: it shows that the habits determining our morality will have changed as soon as we have noticed them. That is why the three medium shots of reflexivity, caught in stills a few pages ago, are key: in their own time, isolated from the drive that propels the plot forward to the (re)marriage of Deeds and Babe, the three characters in these shots come to identify themselves as conforming to habits they did not know they had. They are experiencing habit change and for a moment they self-consciously appear to be inventing themselves anew.

Remarkably then, the courtroom comedy, as a sub-genre of the *remarriage* comedy, brings us closer to what is near. And what may have seemed a detour, the *mise-en-scène* of private matters in the public sphere of a courtroom setting, is, in fact, a precondition for our insights into everyday morality. What we have come to see, though, is not something that was hidden from us; instead, we have come to "understand something that is already in plain view" – this is Cavell's Wittgensteinian motto capturing the purpose of philosophical investigation (Wittgenstein quoted in *Cities of Words*, p. 294). The change of our habits made us notice the everydayness of our morality. More abstractly put: habit change is the reflexive precondition for our understanding of the process of signification that always already has taken place in the nearness of our own attempts to understand it.

References

- Bergman, Paul, and Michael Asimow. 1996. *Reel justice. The courtroom goes to the movies*. Kansas City: Andrews and McMeel.
- Cavell, Stanley. 1981. *Pursuits of happiness. The Hollywood comedy of remarriage*. Cambridge: Harvard University Press.
- Cavell, Stanley. 2004. *Cities of words. Pedagogical letters on a register of the moral life*. Cambridge: The Belknap Press of Harvard University Press.
- Cavell, Stanley. 2005. The good of film. In *Cavell on film*, ed. William Rothman, 333–348. Albany: SUNY Press.
- Goffman, Erving. 1959. *The presentation of self in everyday life*. Garden City: Anchor Books.
- Greenfield, Steve, et al. 2001. *Film and the law*. London: Cavendish Publishing Ltd.
- Goffman, Erving. 1959. *The presentation of self in everyday life*. Garden City: Anchor Books.
- Klevan, Andrew. 2000. *Disclosure of the everyday. Undramatic achievement in narrative Film*. Trowbridge: Flicks Books.
- Leitch, Thomas. 2004. *Crime films*. Cambridge: Cambridge University Press.
- Peirce, Charles Sanders. 1931–1935. *The collected papers of Charles Sanders Peirce. Vols. I-VI*, ed. Charles Hartshorne and Paul Weiss. Cambridge: Harvard University Press.

Films

- Adam's Rib*. 1949. Directed by George Cukor, written by Ruth Gordon and Garson Kanin. 101 minutes, MGM, USA.
- Mr. Deeds Goes to Town*. 1936. Directed by Frank Capra, written by Robert Riskin and (uncredited) Miles Connolly, based on the story “Opera Hat” by Clarence Budington Kelland. 115 minutes, Columbia Pictures, USA.
- Mr. Smith Goes to Washington*. 1939. Directed by Frank Capra, written by Sidney Buchman and (uncredited) Myles Connolly, based on the story “The Gentleman from Montana” by Lewis R. Foster. 128 minutes, Columbia Pictures, USA.

Chapter 35

Justice for the Disabled: Crime Films on Punishment and the Human Rights of People with Learning Disabilities

Majid Yar and Nicole Rafter

Abstract Research evidence shows considerable inequities in the administration of criminal justice and punishment when dealing with persons with learning disabilities. The difficulties encountered by such individuals when negotiating the criminal justice system are exacerbated by wider cultural framings and understandings of intellectual disability and criminality. This chapter seeks to uncover such cultural constructions through a qualitative analysis of the representation of persons with learning disabilities in popular crime films. Through this reading, we conclude that popular representations largely oscillate between those that attribute to the disabled innate criminal tendencies and those that unrealistically attribute to them qualities of childlike innocence. Neither, we suggest, are helpful in fostering appropriate and sensitive understanding of such disability or in promoting the rights of the intellectually disabled in their encounters with the criminal justice and penal systems. However, we also discern a more recent trend in which sentimentalised and stigmatising stereotypes are giving way to a more balanced and sophisticated representation of the intellectually disabled, thereby promoting a more realistic understanding of this group's rights and needs within the domain of criminal justice process.

M. Yar (✉)
Department of Social Sciences, University of Hull,
Cottingham Road, HU6 7RX Hull, UK
e-mail: m.yar@hull.ac.uk

N. Rafter
College of Criminal Justice, Northeastern University,
44 Prince Street #104, Boston, MA 02113, USA

35.1 Introduction

This chapter aims to explore the representation of the intellectually/learning disabled in popular crime films. It traces the historical development of these representations, arguing that we can discern a significant shift in the ways that such person's relationship to criminality and responsibility is semiotically coded. An earlier tendency that associated such disability with innate criminality has given way to representations that depict the intellectually disabled as the innocent victims of prejudice and maltreatment at the hands of the criminal justice system. We evaluate this shift and suggest that while more recent films sensitise viewers to the challenges faced by disabled individuals in their encounters with the criminal justice system, they tend to do so by often resorting to simplistic views of the disabled as 'childlike innocents', thereby eliding the true complexity of the issues at stake.

The expectation of fairness and equity in the administration of criminal justice is a central, enduring feature of Western discourses on human rights. Starting in the mid-eighteenth century, the language of rights placed emphasis upon citizens' protection from the arbitrary and unjust exercise of state power and a corresponding entitlement to due process, a fair trial and proportionality of punishment (Halstead 2005, 7–8; Beccaria 1963). However, those identified variously as 'intellectually disabled', 'retarded' or 'backward' have long suffered marginalisation or exclusion from the language and practice of human rights. Their exclusion stemmed from the central place attributed to *rationality* in Enlightenment discourses of humanity, such that those held to be deficient in this capacity have historically been situated outside 'universal' conceptions of the human community where it comes to rights and entitlements. In other words, Enlightenment discourse constructed an effective hierarchy of subjects who could be placed on a scale of the 'more' of 'less' rational, and these classifications were translated into conceptions of lesser eligibility for enjoyment of legal, social and political rights. Consequently, the intellectually disabled (alongside the mentally ill, subjugated ethnicities and women) have historically been conceived as less than fully enfranchised human subjects and have suffered the denial of human rights, in whole or part, as a consequence. Such denials have ranged from exclusion from political participation through voting rights, the right to marry or bear children and the right to own property, to the subjugation of 'lesser persons' to forced incarceration and medical experimentation.

Given this context, it should come as no surprise that the administration of criminal law has been far from just in its treatment of the intellectually disabled. Certainly, the origins and development of criminological thinking have been bound up with stigmatising associations of intellectual incapacity with innate criminality (Rafter 1997). Mobilising the labels of 'idiocy', 'degeneracy', 'imbecility' and the like, the nineteenth and twentieth centuries saw both scientific and practical attempts to remove from society the intellectually disabled, who were seen as an incorrigible source of criminality (Ibid.). The founder of 'scientific criminology', Cesare Lombroso, constructed a naturalistic anthropology of criminal types that included 'idiots' and 'imbeciles' amongst his categories of the incorrigibly criminal (Lombroso 2006). The psychologist Henry H. Goddard, a leading authority on the nature of learning

disabilities in the early twentieth century, insisted that ‘the moron ... is a menace to society and civilization [and] responsible to a large degree for many, if not all, of our social problems’ (Goddard 1915, as quoted in Ellis and Luckasson 1985, 418; for discussion of Goddard’s project of intelligence testing and its application to the learning disabled, see Zenderland 1998). Given that Goddard served as president of what was later to become the American Association on Learning Disabilities, the articulation of such views vividly attests to the extraordinarily negative conceptions that circulated at the heart of the institutional apparatus dealing with the intellectually disabled.

Recent decades have certainly seen profound changes in the ways in which criminologists, psychologists and policymakers situate those with intellectual disabilities, and long-established practices such as the forcible institutionalisation of the disabled have given way to programmes of assisted community living (Bleasdale et al. 1996). This has been characterised by Wolfensberger (1972) as a process of ‘normalization’ and by Scull (1984) as one of ‘decarceration’. However, the criminal justice system continues to discriminate against the intellectually disabled, partly due to the persistence of beliefs that the intellectually disabled suffer from impatience, frustration, poor impulse control and other inabilities that dispose them towards criminal conduct (Endicott 1991). People with learning disabilities have special difficulties when they encounter criminal justice officials; for example, they may have trouble lining up a lawyer, and they can be bamboozled into false confessions (Sarason and Doris 1969; also Edds 2003). They comprise somewhere between 3 and 10 % of the US prison population, an incarceration rate up to three times their presence in the general population (Endicott 1991; Russell and Stewart 2001). Not only are those with intellectual disabilities liable to suffer discrimination and a disproportionate likelihood of custodial detention, but they are also moreover vulnerable to a range of dangers in prison with which they may be ill-equipped to cope, including violence, bullying and abuse from both fellow inmates and prison personnel (Russell and Stewart 2001). The criminalisation of those with intellectual disabilities stands in stark contrast to the criminal justice system’s neglect of the same population in terms of their disproportionate likelihood of criminal victimisation. For example, the intellectually disabled are considerably more likely to be victims of assault, sexual abuse and robbery than the general population (Petersilla 2000, 9–10). It is against this background of the system’s failure to protect the human and civil rights of the intellectually disabled that we wish to examine the ways in which popular film represents this group’s encounters with crime and criminal justice.

In what follows, we first identify our research methods and outline our basic argument. The next section reviews five films in which the person with learning disabilities is portrayed as fundamentally innocent. It is followed by a section on three films in which the intellectually disabled lead character is shown to be criminalistic. This second group is of particular interest in that over time, although they do not deny the criminality of the central character, their conception of learning disabilities seems to be becoming more sympathetic and realistic, a change, we conclude, that may eventually lead to a better understanding of the special human rights problems of people with intellectual disabilities.

35.2 Methods and Argument

To identify films dealing with human rights issues related to LD (learning disabilities), we looked for titles in the relevant scholarly literature (which is very scant, consisting mainly of Devlieger et al. 2000). We also used the listings on movies about LD in the Videohound Golden Movie Retriever (Craddock 2003), on the Internet Movie Database (www.imdb.com) and on websites identified via Google. We limited our sample of films so as to include only movies in which a character with LD plays an important role (thus excluding *Rain Man*, in which the lead is autistic). We also limited the sample to films in which crime and justice issues are central (thus excluding, for example, *Forrest Gump*, 1993, and *I Am Sam*, 2001). Furthermore, we excluded non-English films, made-for-TV and direct-to-video films, overt fantasies and comedies. In short, we looked closely only at movies concerned with the criminal responsibility of people with LD. Our final list included eight films:

Film title	Date of release	Construction of LD character
<i>Of Mice and Men</i>	1939 (with remakes 1982, 1992) ¹	Inherently criminalistic
<i>To Kill a Mockingbird</i> ²	1962	Innocent
<i>Let Him Have It</i>	1991	Innocent
<i>Brother's Keeper</i>	1992	Innocent
<i>The Hand that Rocks the Cradle</i>	1993	Innocent
<i>Sling Blade</i>	1996	Criminal/but
<i>The Green Mile</i>	1999	Innocent
<i>Monster</i>	2003	Criminal/but

The first film concerned with the criminal responsibility of people with LD was *Of Mice and Men*, released originally in 1939. Not until 1962, with the release of *To Kill a Mockingbird*, did another film address these issues. Then came another long gap, from 1962 to the early 1990s. But between 1991 and 2003, six more films of this type were released, a change which no doubt reflects recent efforts to destigmatise people with learning disabilities and to mainstream them into the community.

The majority of our films portray people with learning disabilities as essentially innocent, angelic and saintlike, incapable of committing a crime. We explain this construction in terms of the historical associations between learning disabilities and childishness, but we argue that these flat, unrealistic depictions in fact sentimentalise those with learning disabilities, blocking understanding of their human rights issues. We see more hope in several of the films that portray the intellectually

¹ We discuss only the first version of *Of Mice and Men*; obviously, it tells the most about the construction of people with intellectual disabilities at the time that Steinbeck published the novel on which all three versions are based.

² Boo Radley, the intellectually disabled character in *To Kill a Mockingbird*, appears only briefly on camera, but arguably, the entire film is about learning how to look at and interpret Boo.

disabled as capable of committing crimes because here there has been a definite reconceptualisation over time, with a sloughing off of old prejudices and efforts to explore the complexity of their human rights issues.

Our analysis assumes that movies do cultural work, providing interpretive frameworks on which viewers draw to organise their own experiences and opinions (Gamson et al. 1992; Rafter 2006, Introduction). A film such as *Of Mice and Men* that frames people with learning disabilities negatively provides a bit of cultural information that viewers may draw upon in the course of daily life when they encounter intellectually disabled people accused of crimes. If the only available constructions are negative, then it is difficult for people to shift to a new way of framing experiences and analysing human rights issues, but a series of new constructions, such as those that can be found in some recent films, can cumulatively contribute to the creation of a new cultural frame. Of course, movies are not our only source of cultural information, but they are a source that is widely shared. This is why what they say about justice for the intellectually disabled is important.

The above point brings us to a reflection on methodological strategies for reading crime films. As Yar (2009) elaborates, there are a number of current methodological approaches for reading film texts, all of which can be applied to crime movies. One common strategy is that of Content Analysis, which adopts a quantitative approach by numerically mapping the occurrences of particular types of representation in films, typically on a longitudinal basis (for recent examples of criminological analysis of films using Content Analysis, see Allen et al. 1997, 1998). However, we have opted against this approach for two main reasons. Firstly, on a practical level, there are an insufficient number of relevant films to furnish an appropriately large sample for quantitative analysis. Secondly, and perhaps more importantly, we view Content Analysis as limited by the fact that while it may furnish insights about the occurrence of representations, it tells us little about their *meaning*. The symbolic and affective coding of representations can only be uncovered through a detailed *qualitative* reading of particular film texts, thereby uncovering the prescribed meanings that are offered to audiences. Therefore, we have chosen a small sample of relevant and well-known crime films upon which to focus our analysis.

The method adopted here is consistent with the principles of semiotic analysis, as developed by Barthes (1967, 1973). Here, filmic representations are read as systems of signs that encode and naturalise (mythologise in Barthes' terms) particular socioculturally contingent understandings. Particularly important for us is the distinction between the denotative and connotative levels of signification. While a signifier may denote a particular and seemingly straightforward meaning, it can and does also connote further 'second-level' meanings of an 'ideological' character. Thus, in a number of the films we examine, particular modes of speech and expression are used to denote 'disability'; however, such signs simultaneously function, at a second level, to index further clusters of meaning associated variously with 'childishness', 'innocence', 'gullibility' and so on. In this way, film texts construct a set of signifiatory associations that perform the ideological labour of communicating particular cultural understandings (both empirical and normative) about disabled persons and their place in society.

35.3 Childhood, Innocence and Learning Disabilities in Crime Films

Historians such as Phillipe Aries (1965) have explored the ways in which childhood, far from being a natural and universal category, is in fact a contingent social and cultural construct subject to dramatic variation across time and place. In the pre- and early modern periods of Western society, little differentiation was made between what we would now consider to be thoroughly distinct and different categories of social subjects, namely, adults and children. As soon as the young were physically capable of doing so, they were entitled and often expected to take their place in the wider community, engaging in the full range of normal practices of work and leisure, including gruelling physical labour, sexual activity, consumption of intoxicating substances and so on. Alongside such equivalence, the young were largely treated in a manner indistinguishable from their elders where it came to crime and criminal responsibility – they were routinely tried and incarcerated alongside the old and were considered appropriate targets for the full range of punitive impositions, including corporal and capital punishment and transportation.

However, the late eighteenth century began to see the emergence of a distinct social category of the child, a being attributed with a wide range of characteristics to differentiate them from adults. There emerged an understanding of childhood as a unique developmental stage in which individuals are behaviourally, physically, emotionally, psychologically and morally unlike their elders. These constructions were variously positive and negative, valorising and stigmatising, in their orientations. However, perhaps the most influential where it came to the treatment of the young within the criminal justice system was the emergence of an equation of childhood with *innocence*. This viewpoint originated in late eighteenth-century Romantic discourses that idealised the child as an innocent, not yet sullied by the corrupting influences of the social world (Hendrick 1990). As a consequence, we see in the nineteenth century a separation of children and adults in the criminal justice system. The practice of incarcerating children alongside adults was progressively discontinued on the grounds that children would inevitably be corrupted by their proximity to criminally inclined and morally delinquent adults. The separation culminated with the legal institutionalisation of the doctrine of *doli incapax*, a legal doctrine according to which young children, due to their innate lack of moral, cognitive and emotional development, must of necessity be excused from criminal responsibility (Bandalli 1998; Crofts 2002).

The emergence of a discourse of childhood innocence is pertinent for our purposes in that a consistent feature of popular cinematic representations of the intellectually disabled is their recuperation within discourses of childhood. As we shall discuss in some detail below, one of the enduring associations in films about the intellectually disabled is a propensity to depict them as childlike, and thus by extension, fundamentally innocent.

The semiotic chain of disability-childhood-innocence is clear, for example, in the film *Let Him Have It* (1991). The film dramatises the real-life story of 19-year-old

Derek Bentley (played by Christopher Eccleston), who was tried, convicted and executed for murder in 1953. For more than 40 years after his execution, Bentley's sister Iris pursued a campaign to have her brother posthumously exonerated for what became widely held to be a gross miscarriage of justice. In 1998, Bentley was finally pardoned. The film tells the tale of how Bentley, impressionable and hungry for friends, was drawn into participating in a botched robbery by his 16-year-old friend Chris Craig. In the ensuing confrontation with the police, Craig shot and killed an officer. Both men were tried for murder, even though Bentley had already surrendered himself without resistance to the police by the time Craig shot the policeman. Both men were found guilty; while Craig was too young to receive the death penalty, Bentley was hanged. Bentley, the film reveals, was intellectually disabled by an injury during the London blitz that left him with a mental age of about 11 – a fact withheld during the trial.

Let Him Have It portrays Bentley as a naïve innocent, a big man with a childlike credulity and a basically loving nature, exemplified through his relationship with his sister. He is barely cognisant of the danger inherent in the ultimately tragic enterprise into which Craig entices him. For Bentley, the idea of going out at night wielding a gun is simply an exciting extension of the world of comic book and movie adventures that he consumes enthusiastically. In contrast to the childlike Bentley, the diminutive and skinny Craig is depicted as a cunning, pugnacious and aggressive character, cynical and knowing beyond his tender years. Thus, the film performs a semiotic reversal in which the man becomes the child and the child becomes the man. Bentley's disability is neither recognised nor appreciated by the police or the vindictive judge who is intent on seeing someone hang for the crime. The film thus exemplifies a number of motifs that organise the representation of the intellectually disabled, crime and criminal justice – innocence communicated via childlike mannerisms and enthusiasms, vulnerability to manipulation by the more intellectually able and unscrupulous, and the criminal justice system's malign indifference to individuals with mental disabilities and its insistence on treating them as 'normal' adults at best and malevolent and dangerous at worst.

Similar themes are adduced in the revenge thriller *The Hand That Rocks the Cradle* (1992). The film begins with a prosperous suburban couple, Emma and Michael Bartel, appointing a woman named Peyton Flanders as nanny to their two young children. However, Peyton is not all that she seems. She is in fact the widow of disgraced gynaecologist Victor Mott, who committed suicide after being exposed for sexually molesting his patients. As Emma Bartel was one of the women to testify against Mott, Peyton holds her responsible for both her husband's death and her own subsequent miscarriage. She insinuates herself into the Bartel household in order to secure her revenge. It is at this point that we meet Solomon, an intellectually disabled black gardener employed by the Bartels. Solomon (played by Ernie Hudson) is portrayed not only as an innocent but also as a near-saint – a gentle and loving soul, dedicated to both the Bartels and their children.

Solomon soon intuits that Peyton is far from the gentle nanny she pretends to be. Fearing exposure, Peyton frames Solomon for sexually abusing the Bartels' daughter Emma, by planting the girl's underwear amongst Solomon's things, then ensuring

that Mrs. Bartel will find the incriminating item. The shocked Bartels are all too ready to believe that their devoted gardener is in fact a dangerous paedophile and child molester, and they dismiss him. With Solomon neatly out of the way, the increasingly deranged Peyton is now free to execute her plan to kill the Bartels and take their children as her own, replacements for the child she lost. At the denouement of the film, just as Peyton is on the verge of finishing off the Bartels, Solomon returns and saves the day, culminating in a grisly death for Peyton, who is impaled on a spiked garden fence.

Throughout *Hand That Rocks the Cradle*, Solomon embodies a sentimentalised vision of childlike purity and unconditional love. His close relationship with Emma, the Bartels' daughter, appears as one between equals – he, by virtue of his disability, stands emotionally and intellectually in the preadult world. The accusation of sexual perversion is rendered particularly dramatic as the film has previously gone to great pains to depict Solomon, the man-child, as thoroughly asexual; this occurs in a scene in which the manipulative Peyton touches him in a sexualised and seductive manner, and Solomon recoils in horrified confusion. Thus, his purity of heart is demonstrated, and we are assured of his exemption from the sordid world of adult desire. Conversely, the film implicitly criticises social prejudices, as the otherwise archetypically liberal Bartels fall prey to the ancient assumption that the intellectually disabled cannot be trusted to behave in a manner consistent with moral conventions. Solomon's heroic intervention, saving the family that has shunned him, stands as a pointed rebuke to all those who would stigmatise the intellectually disabled.

Central themes adduced in *The Hand that Rocks the Cradle* also recuperated in the hit film *The Green Mile* (1999). *The Green Mile*, set in 1930s Louisiana, deals with the relationship between veteran prison guard Paul Edgecomb (Tom Hanks) and death row inmate John Coffey (Michael Duncan Clarke). Coffey is black and a veritable giant of a man. He has been sentenced to death for the rape and murder of two little girls. He is also intellectually disabled. The movie follows the relationship that develops between the cynical, world-weary yet humane Edgecomb and his charge. What intrigues Edgecomb is that Coffey's demeanour is entirely at odds with his expectations and experiences of brutally violent offenders. Coffey is gentle and childlike, devoid of any apparently violent tendencies despite his Herculean and heavily muscled physique. As the film progresses, the mystery of Coffey deepens, as it becomes apparent that he is possessed of miraculous healing powers that he uses to save lives. Coffey, it is revealed, is innocent of the child murders, yet is ultimately executed. This film, we suggest, takes the theme of those with learning disabilities as saintly innocents to its apotheosis. It operates through an overdrawn dualism of good and evil. The character is set up as the epitome of wickedness, as he is held to be guilty of the worst crimes that contemporary society can imagine, the rape and murder of children. Moreover, not only is Coffey initially depicted as a bad man; he is a *big black* bad man – a reference to the stereotype of sexually overcharged and aggressive black masculinity that has featured so consistently in America's racialised fantasies.

Against all these indicators of evil, his actual goodness and innocence shines all the brighter. Moreover, not only is he an unusually good man; he is divinely so.

Coffey appears as an allegorical Christ figure, the purveyor of unconditional love and healing miracles. In case the audience fails to spot this association, Coffey's initials (JC) advertise his divinity in a less than subtle signpost. Like the other JC, Coffey also ultimately dies for the sins of others. What are we to make of this extraordinary representation of the intellectually disabled? The mixture of race, disability and innocence certainly works effectively as an emotional device, and the film has proved wildly popular with viewers. Yet its elevation of the intellectually disabled to the status of beautiful souls does a profound disservice to those disabled people who have to negotiate the law and criminal justice. The film dangerously conflates two distinctive notions of innocence – innocence from the crime with which the individual has been charged and a total innocence or purity of being. The film does not allow the disabled to be no better or worse than other people – only if they can demonstrate purity and goodness can they be known as criminally innocent. As with Solomon in *The Hand that Rocks the Cradle*, Coffey is not allowed to be human – to hate as well as love, to experience anger and resentment, to come into conflict with others, to feel those problematic urges of desire which the non-disabled take for granted as part and parcel of being 'normal'.

The conjunction of race, disability and innocence is likewise apparent in the film *To Kill a Mockingbird* (1960), based upon Harper Lee's Pulitzer Prize-winning novel. Like *The Green Mile*, *To Kill a Mockingbird* is set in the American South in the 1930s and likewise features an innocent black man unjustly accused of a sex crime. The film narrates the defence of the innocent man, Tom Robinson, by Atticus Finch, a principled lawyer who attempts to stand up to the entrenched racial prejudice in the town where he lives. The developments around the trial are followed through the eyes of Finch's young children. However, unlike *The Green Mile* and *The Hand That Rocks the Cradle*, *To Kill a Mockingbird* disaggregates the issues of race and learning disability, the latter being explored through another character, Boo Radley. Radley is the town recluse and the object of intolerance and fear on the part of the residents. The tales of Robinson and Radley follow a parallel path as the film unfolds, as we learn of the innocence of both men – Robinson is not guilty of the rape with which he has been charged, and Radley is not the terrifying bogeyman that the children have been led to expect. When the reclusive Radley finally makes his appearance on screen towards the end of the film, it is to save the children from harm. Meanwhile, despite Finch's noble efforts, Robinson is inevitably found guilty by an all-white jury steeped in racial prejudice. While Radley never encounters the apparatus of criminal justice, the themes of his guilt or innocence are nevertheless examined through the racism of the trial. Both Robinson and Radley are victims of prejudice, and both are made to suffer because of this prejudice despite their innocence. While Robinson pays with his life, Radley also pays with his life in a more subtle yet equally devastating manner, namely, by being forced to live as a non-person, one who is isolated, shunned and excluded from the community in whose midst he resides. The film effectively uses its audience's sensitivity to issues of racism to draw attention to another kindred kind of prejudice that is largely overlooked, that against persons with intellectual disabilities.

Another significant exception to the usual maudlin treatment of accused innocents is *Brother's Keeper*, a documentary by Joe Berlinger and Bruce Sinofsky. Subtitled 'A Heart-Warming Tale of Murder', *Brother's Keeper* begins with a title card of the Cain and Abel passage from the Bible ('Am I my brother's keeper?') and moves on to the 1990 trial of Delbert Ward for the murder of his brother Bill. Delbert and Bill had passed their entire lives with two other brothers, Roscoe and Lyman, on a dairy farm in upper New York State, living in a squalid shack and tending their cows. Low in IQ (Delbert tested at 63), the elderly men had never had much education, nor had any of them married. Shy, gentle, uncomprehending, and, in old age, toothless and hard of hearing, they spent their days on farm chores. But when Bill died, local police and prosecutors brought Delbert and Lyman in for questioning and suggested, with words and gestures, that Delbert had suffocated Bill, whose health was failing, in a mercy killing. The authorities promised that things would go 'easier' for Delbert if he waived his rights and signed a confession, which he did, thinking that he would then be able to return home. As later became clear, he could not even read the documents he signed. Similarly, Lyman signed a paper testifying that Delbert had smothered Bill. Thus, Delbert went to jail and was eventually tried for the crime.

The title *Brother's Keeper* works on two levels. It refers, first, to the close and loving relationships amongst the four eccentric old men and second, to the way the local community rallied around them. Neighbours raised Delbert's bail money and packed the court with supporters during the 3-week trial. Not all of them disbelieved the charges; to some, mercy killing seemed possible given the brothers' lack of medical and other resources. But all the supporters recognised the injustice of trying someone like Delbert, who could barely follow the proceedings. The jury returned a verdict of not guilty, and the three men returned to their farm.

Brother's Keeper presents a vivid, real-life example of the human rights problems of intellectually disabled defendants. The film-makers – through trial footage, television clips and interviews with participants – push viewers to reach conclusions about what fairness would consist of in such cases.

What, then, can we conclude from this set of films? It is clear that the intellectually disabled are consistently associated with romanticised notions of childhood and innocence. They are insulated from accusations of criminality through their exemption from supposedly adult emotions of hate, envy, greed, resentment and desire – they are literally *doli incapax*, incapable of evil. Particularly noteworthy here is the exculpatory role played by sexuality in a number of these films (or, more accurately, its absence). The intellectually disabled are repeatedly equated with a kind of edenic purity, existing in a state before 'the fall', without 'knowledge of sin' (i.e., sexuality). Their pre- or asexual subjectivity is emphasised through unjust accusations of sexual crimes, especially those of a perverted nature; it is not coincidental that Coffey (*The Green Mile*) and Solomon (*The Hand The Rocks the Cradle*) are both unjustly accused of sexually molesting children. The figure of the paedophile functions in contemporary cultural discourse as a kind of leitmotif of wickedness and perversion in its most distilled sense, fuelling moral panics about the threat of evil stalking society, waiting to violate the innocence of children (Wilson and Silverman 2002; Kitzinger 2006). By juxtaposing asexuality with predatory

sexuality, the movies exonerate intellectually disabled men from charges of having dangerous criminal tendencies.

However, we must note a fundamental ambivalence in these characterisations, such that the disabled individual's exoneration from assumptions about criminality and deviance comes at a price. The innocence of the disabled is symbolically secured through the association with childhood, and as a consequence, the disabled are denied a right to a position in the adult world. Through their infantilisation, however benign, they become eternally becalmed in the realm of the pre-social, denied the right to legitimately claim adult experience, sensation or satisfaction. To recognise such rights would shatter the semiotic association with childhood – after all, the disabled cannot *simultaneously* be both innocent *and* knowing. Consequently, the disabled are consigned to a position of social passivity, at best the objects of benign paternalism, but never fully enfranchised social subjects with a right to experience the world on adult terms.

At the other end of the spectrum from these images of childish innocence lie films that frankly portray people with learning disabilities as criminals. But although criminality is a constant theme here, what this set of movies assumes about the relationship between criminality and intellectual disability has changed over time. *Of Mice and Men*, based on a novel by John Steinbeck, was made when the main cultural framework for understanding learning disabilities was to equate it with criminality (Rafter 1997). Starring Lon Cheney, Jr. as Lennie, the backward bumbler who cannot avoid harming pretty things, this film's very title likens him to an animal, a mouse, and subsequent scenes strengthen this association, showing that unlike a true adult, Lennie cannot control himself. Through overly enthusiastic patting and petting, he kills first a puppy and then the overseer's wife, crimes for which he was not criminally responsible, the film tells us, because he did not understand what he was doing. George, Lennie's friend and protector, sadly concludes that he has to kill Lennie to protect him from the justice officials who are ready to lynch him. However, even this movie does not simply indict people with learning disabilities, it portrays the justice system itself as rough and brutish (the opening and closing scenes present the most vivid lynch mob scenes in movie history), and the sadistic overseer, Curley, is himself far more evil than the well-meaning Lennie. Thus, Lennie is simultaneously childlike, naive, animalistic and criminalistic. We see the crimes through his perspective, grasping how he might want to pat the cute puppy and the sexy wife with her soft curls, but we also see them through George's perspective, and it is George who, however reluctantly, decides that Lennie must be put down like an animal to protect him from the lynch mob.

Sling Blade presents a Lennie-like character, Carl Childers (played by Billy Bob Thornton), but isolates him on the stage of his drama, denying him an adult protector. The film begins with Carl's release from the state mental hospital where he has spent several decades since slashing his mother and her lover during a puritanical fit (he found them naked on the floor). We follow Carl's difficulties as he tries to re-establish himself in the small Arkansas town where he grew up, support himself, make friends and cope with hazing as a 'retard'. While Carl is portrayed as intellectually limited and in some ways grotesque, his character also includes a

large dose of the childlike-saint cliché. Predictably, he kills again, this time with a sharpened lawnmower blade, to get rid of the evil lover who has moved in with a widow and her son who help him. The second killing, like the first, is shown to be a function of his disability – Carl simply cannot see another way to handle the situation. However, because he putatively saves the widow and her boy (the movie assumes they have no options), he (unlike Lennie in *Of Mice and Men*) is also something of a Christ figure or avenging angel. He ends up back in the mental hospital, satisfied with having sacrificed himself for his friends. Thus, *Sling Blade* tries to sustain two contradictory interpretations, showing Carl to have been both criminally responsible and criminally irresponsible for the slayings. While it is not unsympathetic to the human rights problems of the intellectually disabled, it is conceptually incoherent.

Of all the films discussed here, the most successful at exposing the human rights issues of people with limited intelligence is Patty Jenkins's *Monster*, a biography of Aileen Wuornos, the prostitute who became known as 'America's first female serial killer' and was executed in Florida in 2002. Based closely on Wuornos's actual life and character, the film portrays her as slow-witted, socially inept and hopelessly naive. But it does not turn her into a flat character, nor does it sensationalise her. Charlize Theron, in a brilliant characterisation, shows Wuornos to have been crude, self-deluded and desperate and yet at the same time loving, brave to the point of heroism and loyal. Her mental 'backwardness' is but one factor amongst many (including an abusive childhood, alcoholism and brutalisation by customers) that push her into her killing spree. But her mental and emotional disabilities were key factors in preventing her from mounting an effective defence. Without excusing Wuornos's crimes, *Monster* shows that they were perhaps acts that any of us in similar circumstances might have committed.

35.4 Conclusion

Movies have been portraying intellectually disabled offenders for over 60 years, but only since the early 1990s have they shown anything like a sustained interest in the subject. Earlier representations (such as that in *Of Mice and Men*) clearly conform to the contemporaneous understanding of the intellectually disabled as criminalistic, as incapable of exercising appropriate control or restraint over impulses, and thereby constituting an unwitting threat to society. The more recent films track a kind of moral rehabilitation of the disabled in cultural understanding, inviting audiences to sympathise and empathise with their sufferings at the hands of 'normal' society and its institutions. However, many of them are content to portray injustice in the stark, wrenching terms of the executed innocent and the institutionalised saint. They generate their narrative force and empathetic identification via an unrealistic beatification of the disabled as pure, childlike innocents, paragons of gentleness of goodness. Thus, they buy sympathy at the price of wildly inaccurate and improbable expectations of the disabled, denying them the right to be flawed human beings with the complex emotional and behavioural repertoires that 'normal' people take for granted.

However some, specifically *Brother's Keeper* and *Monster*, are starting to explore the sources of such injustice in more depth, examining the reasons why intellectually disabled people have difficulty negotiating the criminal justice system. Such films go beyond easy dualisms of innocence and evil and address the complex and conflicting factors that contribute to offending by those with intellectual disabilities, alongside a more subtle appreciation of the practical problems they face within the justice system. If we take these films in sequence, what we see is a process of cultural reframing, a broad, slow shift in the terms in which people with learning disabilities and their criminal responsibility are understood. While we cannot conclude that there has been a definitive break with earlier popular cultural constructions, we can nonetheless suggest that a more reflective exploration of the issues is beginning to emerge in contemporary film-making, one that has the potential to contribute to a more refined and appropriate public understanding of the issues at stake.

References

- Allen, J., Sonia Livingstone, and R. Reiner. 1997. The changing generic location of crime in film: A content analysis of film synopses, 1945–1991. *Journal of Communication* 47(4): 89–101.
- Allen, J., Sonia Livingstone, and R. Reiner. 1998. True lies: Changing images of crime in British postwar cinema. *European Journal of Communication* 13(1): 53–75.
- Aries, P. 1965. *Centuries of childhood: A social history of family life*. New York: Vintage Books.
- Bandalli, S. 1998. Abolition of the presumption of *Doli Incapax* and the criminalisation of children. *Howard Journal of Criminal Justice* 37(2): 114–123.
- Barthes, R. 1967. *Elements of semiology*. Trans. Annette Lavers and Colin Smith. London: Jonathan Cape.
- Barthes, R. 1973. *Mythologies*. London: Paladin.
- Beccaria, C. 1963. *On crimes and punishments*. New York: Bobbs-Merrill.
- Bleasdale, M., B. Crumpton, K. Hardaker, and J. Tomlinson. 1996. The new millennium and empowerment of people with intellectual disability. *Interaction* 9(4): 6–13.
- Craddock, Jim (ed.). 2003. *VideoHound's golden movie retriever; 2003*. Detroit: Thomson/Gale.
- Crofts, T. 2002. *The criminal responsibility of children and young persons*. London: Ashgate.
- Devlieger, Pathrick J., Tal Baz, and Carlos Drazen. 2000. Learning disabilities in American film: A semiotic analysis. *Semiotica* 129: 1–28.
- Edds, M. 2003. *An expendable man: The near-execution of Earl Washington Jr.* New York: New York University Press.
- Ellis, J.A., and R.A. Luckasson. 1985. Intellectually disabled criminal defendants. *George Washington Law Review* 53: 414–493.
- Endicott, O.R. 1991. *Persons with intellectual disability who are incarcerated for criminal offences: A literature review*. Ottawa: Correctional Services of Canada Research Branch.
- Gamson, W.A., D. Croteau, W. Hoynes, and T. Sasson. 1992. Media images and the social construction of reality. *Annual Review of Sociology* 18: 373–393.
- Halstead, P. 2005. *Human rights*. London: Hodder Arnold.
- Hendrick, H. 1990. Constructions and reconstructions of British childhood: An interpretive survey, 1800 to the present. In *Constructing and reconstructing childhood*, ed. A. James and A. Proat. Basingstoke: Falmer.
- Kitzinger, J. 2006. The ultimate neighbour from hell? Stranger danger and the media framing of paedophilia. In *Critical readings: Moral panics and the media*, Issues in cultural and media studies, ed. C. Critcher. Milton Keynes: Open University Press.

- Lombroso, C. 2006. *Criminal man*. Trans. Mary Gibson and Nicole Hahn Rafter. Durham: Duke University Press.
- Petersilla, J. 2000. Invisible victims: Violence against persons with developmental disabilities. *Human Rights* 27(1): 9–13.
- Rafter, N.H. 1997. *Creating born criminals*. Urbana/Chicago: University of Illinois Press.
- Rafter, N.H. 2006. *Shots in the mirror: Crime films and society*. New York: Oxford University Press.
- Russell, M., and Stewart, J. 2001. Disablement, prison and historical segregation. *Monthly Review* 53: 3, Online at <http://www.monthlyreview.org/0701russell.htm>
- Sarason, S.B., and J. Doris. 1969. *Psychological problems in mental deficiency*, 4th ed. New York: Harper & Row.
- Scull, A. 1984. *Decarceration: Community treatment and the deviant: A radical view*. Oxford: Polity Press/New.
- Wilson, D., and I. Silverman. 2002. *Innocence betrayed: Paedophilia, the media and society*. Cambridge: Polity Press.
- Wolfensberger, W. 1972. *The principle of normalization in human services*. Toronto: National Institute on Mental Retardation.
- Yar, M. 2009. Screening crime: Cultural criminology goes to the movies. In *Framing crime: Cultural criminology and the image*, ed. K.J. Hayward and M. Presdee. London: Routledge.
- Zenderland, L. 1998. *Measuring minds: Henry Herbert Goddard and the origins of American intelligence testing*, Cambridge studies in the history of psychology. Cambridge: Cambridge University Press.

Chapter 36

‘Make Enough Money, Everything Else Will Follow’: Litigation and the Signification of Happiness in Popular Culture

Jason Bainbridge

**I'm gaining on happiness and I am going to get there one day.*

(Ally McBeal, Ally McBeal, ‘Sideshow’, Season 2, Episode 15)

Helping people is never more rewarding than when it's in your own self-interest.

(Richard Fish, Ally McBeal, ‘The Attitude’, Season 1, Episode 7)

Abstract In this chapter, by taking litigation as a signifier, I want to explore the multiple levels of meaning litigation can have for both the lawyer and the litigant they represent by analysing popular visual media representations of litigation. I argue that mapping how film and television have treated and tested the limits of litigation suggests a common argument arising from these texts: that while legal actions give us a sense of the social – involving litigants and practitioners in a contextual society of laws, codes and precedents – the law does not bring people together. Rather, according to these popular visual media representations, it keeps them alone and individuated, unable to express themselves without reference to a system that can only offer money as consolation. While litigation seeks to signify happiness, by most often equating it to monetary compensation, these texts suggest that those seeking ‘happiness’ must almost invariably look *outside* the legal system to find it. Indeed, in their location of happiness outside ‘the system’, be that the law, society, bureaucracy or modernity more broadly, these texts are presenting an inherently Romantic notion of happiness – a transcendent idea of ‘happiness’ that also serves as an antidote to the ubiquity of modern litigiousness that I have termed a

J. Bainbridge (✉)
Associate Professor, Swinburne University of Technology,
Victoria, Australia
e-mail: jbainbridge@swin.edu.au

postmaterial happiness. The chapter therefore concludes with the suggestion that these popular visual media texts may in fact be offering a new level of signification; in bringing Romanticism back to the lawyer rather than the legal system, they present the lawyer as signifying a kind of Romantic pioneering spirit, successful in spite of the system of which they are a part.

36.1 Introduction

In 1998, God was sued.

In a case from the second season of *Ally McBeal* ‘Angels and Blimps’ (2:13¹), litigator Ling Woo (Lucy Liu) represented Eric Stall (Haley Joel Osment), a boy dying of cancer in an action against God. She reasoned that God could be sued through the church of St. Christopher’s, for they act as an agent of God. As the family contributed generously to the church, Ling argued that an implied covenant of good faith had come into effect, and therefore there was a duty on the church to give back in Eric’s need (in regard to both his cancer and the death of his father from being struck by a lightning bolt). Ling argued that the church would settle because of the negative publicity – and they did. According to Ling, the reason behind the action was to make Eric *happy*, because it gave him something to focus on as his life slipped away.

Ling’s reasoning raises a couple of interesting questions: What is the function of civil litigation (hereinafter referred to as ‘litigation’)? What is the relationship between litigation and happiness? I want to explore these questions in this chapter. The fact that Ling Woo is a fictional character, and that the vehicle for raising these questions is a popular media representation of law, the television series *Ally McBeal*, is also important. It points to the ways in which these popular media representations contribute to wider cultural understandings of both law’s functioning and its limitations, becoming part of what the journal *law/text/culture* terms ‘law’s textuality – the texts and subjects which the law touches and shapes and which, in turn, impact on and change the law’ (1994, 1, 6).

It is clear that an expansion of how legal scholars conceive of law beyond the traditional institutions of legality has been in development for some time. Early examples of this trend would include the Critical Legal Studies movement of North America, feminist jurisprudence (Graycar 1990) and Critical Race Theory (Delgado and Stefancic 1993), all of which succeeded in not only opening law up to ‘new challenges and discourses’ (Cheah et al. 1996, xiii) but in actually taking ‘legal theory beyond the body of the law’ (Cheah et al. 1996, xiv). I would argue, following Joshua Meyrowitz (1985), that it is with popular media’s taking up of law that we are seeing a greater expansion now than at any time previously. This is because more media forms are articulating ideas about law – from the multiple texts of the *Law & Order* franchise and the law shows of former-lawyer-turned- writer/producer David E. Kelley (like *Ally*

¹References to specific episodes are presented as season number: episode number, followed by the episode name, if applicable, for example, 1: 7 ‘The Attitude’ refers to season 1 episode 7 entitled ‘The Attitude’.

McBeal and *Boston Legal*) on network television² to the films based on John Grisham's books, to the existence of Court TV and 'real law' series like *Judge Judy* (1996–). Airing these diverse conceptions of law across the mediasphere means that, in legal scholar John Denvir's words, "law" is no longer a concept limited to the law reports; it is a consciousness that permeates American – and by extension the world's – culture' (Denvir 1996, xiii). Even more importantly, these popular media representations become 'the main source of *common* knowledge about the law... (exerting) a powerful influence on ordinary people's attitudes to, and expectations of, law and the legal system' (Laster 2000, 10–11)³ simply because they *are* so much more accessible to the general public than law reports or even visiting courtrooms for themselves. How popular media represent litigation is therefore vitally important in determining how litigation is culturally defined and understood.

I have previously argued that Swiss linguist Ferdinand de Saussure's (1983 [1916]) notion of *semiotics* provides a set of tools suitable to unpack how law – and by extension litigation – is culturally defined (Bainbridge 2006). Saussure adopts a structuralist approach to communication, breaking down communication practices into a series of units that produce meaning called *signs*. Each sign is comprised of a physical component (*the signifier*) and a mental concept associated with that physical component (*the signified*) with the relationship between the signifier and the signified being defined as *signification*, the process by which meaning is made (see Saussure 1983; Hawkes 1977). In this chapter, by applying Saussurean semiotics to popular media representations of litigation, I want to explore the multiple levels of meaning (the possible signifieds) that litigation (the signifier) can produce for both the lawyer and the litigant in these popular visual media representations and thus map the ways in which litigation is culturally defined through such popular media representation.

This chapter argues that, taken together, these popular media representations of litigation suggest multiple levels of signification for civil litigation. First, litigation signifies research and development: lack of case law is represented as leading to the advancing of test cases to expand the legal system. Second, litigation signifies invasive practice: increasing litigiousness is represented as inescapable in all aspects of capitalist society, an idea that reflects and expands upon Foucault's notion of law guaranteeing freedom and privacy while actually legitimating and extending state control. Third, while litigation aims to signify happiness, by most often equating it to monetary compensation, these representations ultimately suggest that those seeking 'happiness' must almost invariably look *outside* the legal system to find it. Therefore, litigation ultimately does not signify happiness even though it appears to do so, via money.

² While this chapter acknowledges that television programmes are the product of vast numbers of people, David E. Kelley maintains an authorial voice throughout programmes bearing his name, as creator, writer/producer and showrunner. From the repetition of ideas and themes between his series to press acknowledgement of his editorial control over these programmes, it is more than arguable that the ideas audiences see on-screen are those that are being raised for debate by Kelley himself. This chapter will therefore refer to Kelley as author and source of a number of ideas that subsequently represented and debated on-screen.

³ Importantly, while I agree with Laster's proposition that texts form 'the main source of *common* knowledge about the law', I downplay the idea of 'influence' with its implications of power over the viewer.

The bulk of the examples are American because, internationally, popular American television law shows and films constitute the bulk of all popular law shows and films currently in production and circulation (both as a proportion of the total drama produced in each country and in absolute terms). Law shows have been a successful part of the American television schedule since *Perry Mason* was first broadcast in 1957 and remain an even more popular export around the world. More particularly, locally produced media programmes often follow ‘the American series’ formats (Smith 1995, 8) leading Smith to conclude that ‘one question in every mind must be whether the geographical source of an individual’s or country’s media any longer matters’ (Smith 1995, 1), while Kathke notes that even European screenwriters are being actively encouraged to follow the Hollywood model (Kathke 2006).

The key texts here are the popular television law shows *Ally McBeal*, *Law & Order* and *Eli Stone*, along with the sitcom *Seinfeld*. All are illustrative of popular media’s representation of litigation, with *Ally* being one of the few legal televisual texts that deals almost exclusively with civil litigation,⁴ gives a face and a character to that oft-used legal term, the ‘vexatious litigant’ (Ling Woo, later a litigator herself, debuting in Season Two) and, as McKee notes, that takes ‘happiness’ as its central concern – ‘What is it, how might you find it, and how would you know when you finally have it?’ (McKee 386); *Eli Stone* demonstrates that *Ally*’s ideas on happiness and litigation are still relevant in the 2000s and offers an alternative way of reconciling them, while *Law & Order* and *Seinfeld* speak to the expansion of the law of torts over the 1990s. Where relevant, other media intertexts dealing with related concerns will also be mentioned.

36.2 Litigation as Signifier

The action (or lack of action) which results in unlawful interference with an individual’s person, property or economic interests is referred to by the law as a *tort*. These torts give rise to civil causes of action (civil litigation, the signifiers) that aim to place the plaintiff in as near as possible the position they would have been in had the tort not been committed. The most common way the court achieves this is through the award of damages, that is, monetary compensation for the loss suffered. It is worth noting that where this would not be sufficient or appropriate a court order can also be issued restraining the tortfeasor (the person committing the wrongful action) from commencing or continuing such an action. But money remains the

⁴ A sample of cases from *Ally McBeal* include a class action brought against telephone companies for annoying calls in people’s private time; a rabbi goes to the antidefamation league after a lawyer calls Judaism ‘hoopla’; office women launch a same-sex sexual harassment claim against another woman they deem too sexy (thus creating a sexually charged workplace); the family of a man who perished in a plane crash sue the airlines; and a waiter discharged by a restaurant for being straight sues the restaurant for discrimination (*Ally McBeal* Season Five; 1:7 The Attitude, 1:9 The Dirty Joke, 1:13 The Blame Game, 1:20 The Inmates).

most common form of court relief, and in the United States, plaintiff lawyers are allowed to take a percentage of those winnings or settlement, which can be as high as 45% (Bagnall 31). Inevitably it seems that most civil actions will be about money, from the perspective of both the plaintiffs *and* their lawyers.

Jaap Spier (1996) opens his book on liability with an anecdote that publishers rejected Joel Bishop's proposal to write a book on tort law in 1853 claiming that not only was there no call for a work on the subject, no one would be interested in reading it. Now it seems it would be a bestseller. Throughout the 1980s and into the 1990s, Western societies became increasingly 'claim conscious' (Markesinis 1990) because fewer individuals were inclined to bear their own losses, preferring instead to find a tort and sue the tortfeasor 'responsible'. The amounts awarded similarly increased, impacting on both tortfeasors and insurers. Indeed, as Spier sees it, 'One cannot escape from the impression that legislators and/or courts are trying to find new ways to compensate victims suffering personal injury' (Spier v), or as Ally McBeal (Calista Flockhart) puts it, it would be 'almost unconstitutional for [someone] not to sue' (1:18 The Playing Field).

In *Ally McBeal* lawyers arguing the right of a family to sue an airline for the death of their father in a plane crash say that the tortious system has become 'all about blame. If you get hurt, file a claim, get money.... If you get hurt there's got to be a bad guy. Somebody to blame' (1:13). The lawyers go on to cite several instances – if you have cancer, sue a doctor; if you slip on skis, sue the government – and they finish by citing the real case study of a man whose house was destroyed by a tornado (an act of God) who successfully sued his church (as agent for God) and won (paralleling Ling's claim, which opened this chapter). In another Season One episode (1:7 The Attitude), a defence lawyer claims that the correspondingly high litigious climate may work in his client's favour as he 'sense[s] a waning public appetite with sex discrimination laws and suing people who aren't actually hurt'.

Naturally there are some limitations on how the law of torts operates. Torts require proof of fault, either intention or negligence, on the part of the defendant (the tortfeasor). As Eli Stone (Jonny Lee Miller) notes in the series of the same name: 'Litigation is only about what you can prove in a court of law' (1: Pilot). The damages that can be causally imputed to the tortfeasor can then be recovered. Liability itself is primarily moderated by the 'duty of care', that is, the idea that the defendant owed the plaintiff a duty to exercise reasonable care. The existence of a duty of care helps determine 'the situations in which the law of negligence will operate and the type of damage it will compensate' (Spier 4). The duty is wide ranging in respect to acts and physical damage, narrower regarding omissions or statements or pure economic loss, and rests on four key concepts: policy, fairness, proximity⁵ and foreseeability – the classic formulation of the 'neighbour principle' espoused by Lord Atkins in the 'snail in the bottle' case that gave rise to the modern tort of negligence.⁶ It is the vagueness of these latter three – fairness, proximity and

⁵ *Jaensch v. Coffey* (1984) 155 CLR 549 at 583 per Deane J.

⁶ *Donoghue v. Stevenson* [1932] AC 562 at 580.

foreseeability – that has given the courts some latitude in reaching their decisions and permitted the corresponding extension of the duty of care present today.⁷

This expansion of the law of torts is perhaps best illustrated by three legal examples from the popular American sitcom *Seinfeld*. While not a law show, like the other popular media examples herein, on its receipt of a 1992 George Foster Peabody Broadcasting Award, *Seinfeld* was cited as an example of ‘comedy (being) universal and instructive in many aspects of everyday life’, and across its nine seasons, the ‘show about nothing’ was equally ‘instructive’ as to the expanding duty of care.

In 1992, the Fourth Season’s ‘The Virgin’ depicts a traditional tortious claim: a lawyer sues Elaine for knocking her nephew, Ping, off his bike while on a delivery route. In this first action, we have a clear duty owed by Elaine to the bike rider, the same owed by every driver on the road to other vehicles and pedestrians. By 1995, in the Seventh Season’s ‘The Postponement’, the tort has become more unusual; Kramer is scalded with hot coffee and in the following episode, ‘The Maestro’, sues Java World with the assistance of Jackie Chiles, a character modelled after O.J. Simpson’s attorney Johnnie Cochran. In this second action against Java World, Jackie Chiles argues that a duty of care is in existence between the coffee shop and their customers regarding the temperature of the coffee served.

Chiles returns in a number of episodes but perhaps his most significant case is that of Season Nine’s ‘The Finale’ (1998), the final episode of the series. *Seinfeld* is renowned for examining the minutiae of daily life and taking them to a ludicrous extent. Therefore, in the ‘*Seinfeld* world’ in the wake of the death of Princess Diana, the law of torts has expanded to include the imposition of a *positive duty* on bystanders to assist someone in distress. This ‘Good Samaritan Law’, as it is known in Latham, Massachusetts, results in the series’ protagonists, Jerry, Kramer, Elaine and George, being arrested when they make fun of an overweight man as he is choking, rather than coming to his aid. Chiles defends the ‘Gang of Four’ as witnesses (guest stars) from across the nine seasons give evidence on the inactivity and downright maliciousness of the characters, convincing Judge Arthur Vandelay that they are all guilty and sentencing them to prison. In this third action against Jerry and his friends, we have the imposition of a positive duty of care on bystanders (the Good Samaritan Law) to come to the assistance of someone in distress. Expanding the boundaries of the duty of care in this way leads to a corresponding increase in public

⁷ This is commented upon in popular media representations too. For example, as regards the concept of ‘fairness’: in an *Ally McBeal* case involving a jilted bride (1:22 Alone Again), Judge Whipper Cone (Dianne Cannon) says ‘courts don’t legislate love’ leading to a spirited argument from lawyer Richard Fish (Greg Germann) that courts delve into marriage all the time. From alimony to prenuptials to child support, he argues, it all comes down to fairness, which is the basis for rulings on palimony and same-sex union rights. Judge Cone concedes that ‘courts are all over the institution of marriage and tort law seems to be expanding into broken hearts’. Similarly, Ally notes that Cage and Fish have become a ‘magnet for strange cases’ and because so many involving sex seem to be concerned with the violation of a legal right, it has virtually become a case of ‘do it and sue’ (2:6 Worlds Without Love) – the case here involving a nun (Chrissa Lang) who had an affair with a man and now wants to rejoin her order.

liability. Drivers owe a duty of care to other people on the road; coffee shop owners become responsible for the heat of the coffee served; bystanders must help people in distress. With each new case it becomes easier to argue that bit further, to move from a duty to avoid to a positive duty to assist, expanding the signifier – the ability to litigate – a little more each time. Therefore, while legal academics *debate* the present state of law, popular media representations are *actively* testing the limits of litigation through test cases like the one involving 'the Good Samaritan Law'.

It is important to understand this expansion of the duty of care because it is the context in which popular media representations throughout the 1990s and 2000s – be they law shows like *Ally McBeal*, medical series like *Chicago Hope* or educational series like *Boston Public* – all operate. It is what sets them apart from their thematic forbears like *Perry Mason*, *St. Elsewhere* and *Welcome Back, Kotter*, where the 'brooding omnipresence of the law', Justice Storey once referred to, has become an action-in-waiting to (potentially) remedy any and every wrong suffered – by the clients in *Ally McBeal*, the patients in *Chicago Hope* and the students and teachers in *Boston Public*.

36.3 Signifying Research and Development

Popular media representations' first proposition about civil litigation is that it is part of free enterprise, encouraging individuals to generate new ideas for creating money and thereby signifying research and development (R&D). As civil law does not keep up with technology or social change, the main task of courtrooms frequently becomes R&D – with *Ally McBeal's* Richard Fish (Greg Germann), Ling Woo and John Cage (Peter MacNicol) being part of this new wave of lawyers, finding new ways to sue, generating new ideas for creating money.

Writer producer David E. Kelley frequently constructs bizarre test cases in *Ally McBeal* to test the limits of the legal system. When Karen Horowitz (Brenda Vaccaro) wants to sue a rabbi to get out of her marriage to her comatose husband (1:7 The Attitude), the lawyers of Cage and Fish's first thought is to check whether they have a cause of action. When asked whether a sexual harassment case can be made out, lawyer Caroline Poop (Sandra Bernhardt) notes that 'the law says it's possible' and therefore the lawsuit becomes a 'tool to advance our position' (1:8 Drawing the Lines). Indeed, when confronted with a novel situation, *Ally's* lawyers respond by trying to mould or stretch the legal system to accommodate litigation.

Richard Fish, senior partner of Cage and Fish, sees this as the lawyer's role; lawyers are advocates, not judges and juries. They do not decide the merits of the case, but just fight the fight (and he keeps this argument on tape; 1:8 Theme of Life). Furthermore, where cases have no 'obvious' basis in law, then lawyers are 'pioneers' (1:18 The Playing Field), to be praised for finding new frontiers of litigation. This is a radical reinterpretation of the role of the lawyer. In popular media then, lawyers move beyond simply representing clients towards actively finding ways to expand the law, to take the law into regions it has not been before – something that would

traditionally be thought of as, perhaps, more of a judicial or even parliamentary role. Litigation therefore signifies R&D.

By way of example, litigation as signifier of R&D is demonstrated in two episodes from the first season. In 'Forbidden Fruit' (1:16), US Senator Foote is sued by his new wife's ex-husband for 'interfering with otherwise happy marital relations', something not generally recognised by the law. Here, the expansion in law is made with reference to precedent (*Beck v. Foote* on intentional interference in marital relations) and an action based in contract law. By applying these principles, the ex-husband seeks to enforce his marriage contract or at the very least find accountable the senator who breached it. Contract law is therefore applied in the context of marriage, and the law continues to expand.

Similarly in 'Body Language' (1:14), the lawyers of Cage and Fish represent a woman who wants to marry a convicted felon. They resort to Supreme Court precedent, *Turner*, but are told this does not apply to maximum security prisoners. Attorneys Ally and Georgia Thomas (Courtney Thorne-Smith) argue for both a constitutional right to be married (that fails) and then for a court order for sperm deposits from the prisoner, reasoning that if the client falls pregnant there will be a compelling state interest for them to be married. Again then litigation signifies R&D, trying to expand the scope of the law regarding marrying inmates by applying the principles of another area of law, here, constitutional law. Ally says excitedly: 'This is why I got into the law- nuance', but the client is less certain, reasoning that 'harvesting a child as a means of circumventing prison rules (is) perverse'. Eventually, however, the client backs down, and, touched by the lengths she is willing to go to, the warden agrees in his discretion to let them marry.

At the conclusion of this case, Ally suggests, half-jokingly, that the lawyers' role is 'to distort the law beyond all commonsense', and from both of these examples, it is clear that Ally and Fish alike recognise the importance of litigation as R&D; whether lawyers are 'pioneers' or 'distort[ing] the law beyond all commonsense', the end result is the same; litigation signifies research and development, expanding the reach of law, researching new ways to make money and developing new ways to sue.

John Cage's approach to test cases is demonstrated in 'Silver Bells' (1:11) where three parties, two women and a man (two of whom are lawyers), seek to be joined in a legally recognised marriage. They argue that this is the next step in the evolution of the nuclear family, and the case falls to John Cage, the 'whiz on unorthodox arguments', according to Ally. Cage tries two arguments, one based in science (procreation is supposed to be with multiple parties) and one based in emotion (that following the heart does not necessarily lead to monogamy), but both fail. As Judge Whipper Cone says, 'Your timing might be right on this issue but you picked the wrong judge'.

In *Ally McBeal*, it is Ling Woo who most often uses litigation as R&D, first as a litigant and then, when it is revealed she has a law degree, as a lawyer. In her first appearance (2:2 *They Eat Horses Don't They?*), she sues shock jock Harold Wick on the basis that his show contributes to a sexually charged workplace. Attorney Nelle Porter (Portia de Rossi) argues that Wick has a duty against discrimination,

analogous to the duty tobacco companies have to non-smokers in regard to second-hand smoke. 'Courts are willing to clamp down on free speech where it leads to discrimination or oppression', says Nelle and points out how ludicrous the law is that an employer can be sued for playing Wick's show but Wick himself cannot be sued. This, she claims, is an issue of fact (proof) for the jury (not an issue of law for the judge). Nonetheless, the sexual harassment claim is dismissed for, as a matter of law, it is untenable that a radio talk-show host could be held liable for 'employmental' discrimination at place where he does not work.

However, Ling also claims for negligent infliction of emotional distress based on the notion that Wick's gratuitous sexual comments systematically devalue women – and on this ground, she is successful. Judge Peters (David Ogden Stiers) reasons that free speech is not always protected: 'if it is foreseeable that some product put out there is capable of causing harm then liability is right around the corner.' Since movies have been sued, Judge Peters considers radio talk shows may be next, and while Wick's lawyer argues this is 'a slippery slope', Judge Peters maintains this is a question for the jury: whether or not they value free speech over the harm it causes (incidentally the same question that writer/producer David E. Kelley often poses for his viewers when he raises these issues). Tellingly Ling dismisses her own case by giving a press release implying Wick's impotence (but as Wick's lawyers cannot prove reckless disregard for the truth, the firm remains safe from further action).⁸

This idea of litigation signifying research and development is also regularly taken up by the *Law & Order* franchise, where the DAs use text cases as ways of expanding liability – such as suing parents for raising a homicidal child or suing a gun manufacturer for the multiple deaths of victims of a gunman (the design of the gun allowing the assailant to rapidly reload). An episode of *Law & Order: SVU* reveals how this R&D works in a medicolegal context. Here, the police investigate the rape of a female coma patient (Stephanie) that has left her pregnant. At first, they suspect a necrophiliac. Later it turns out that it is Stephanie's doctor, Dr Mandel (Bruce Davison), who is responsible. It then turns out that Mandel has done this previously, impregnating women in comas and then having the foetus' aborted so the embryonic stem cells can be used in researching a cure for diseases like Parkinson's and Alzheimer's.

ADA Cabbot admits that the law is not up with technology on the theft of body parts like foetal tissue for stem cell research. Defence counsel tries to argue that as Stephanie was an organ donor she would have consented to this. Ultimately, Cabbot's prosecution fails because Stephanie's pregnancy is not the result of Mandel's *rape* but rather the result of Mandel artificially inseminating Stephanie with semen from

⁸ Other examples of Ling Woo's pioneering litigation from the Second Season include an action for misrepresentation brought against a nurse on the basis the surgeon claimed her breasts were his work (they weren't, they were real), and her sister's breasts are not as good as hers (the suit is abandoned because the sister assumed that risk) (2:3 Fool's Night Out), suing the environment (2:12 Love Unlimited) on the basis that, if the land has rights and a tree has standing, then they should be capable of being sued too and drafting a boilerplate she has partners sign before sex, involving a waiver and confidentiality agreement (as she has trade secrets) (2:22 Love's Illusions).

millionaire David Langley, himself dying of Parkinson's and funding much of the research. 'There is just no precedent for this kind of case yet', ADA Cabbot is forced to admit; the law lags behind technology. Even more unsettlingly, the episode ends with Langley preparing an action for custody of the unborn child, claiming that the earlier case against Mandel has in fact proved his paternity. In other words, Langley has used the case as R&D to assert his right to ownership of the embryonic stem cells. While the outcome of this (second) action is never revealed, it is clear that the case itself is developing a new area of law, R&D into property laws regarding embryonic stem cells, another potentially lucrative (and litigious) field of law.

In *Eli Stone*, attorneys Taylor Wethersby (Natasha Henstridge) and Matt Dowd (Sam Jaeger) even argue that tort law extends to chimpanzees (more specifically two gay chimpanzees the zoo is trying to separate to the detriment of the chimpanzees' health), on the basis that chimpanzees are emotionally, behaviourally, morally and even genetically similar to humans. The judge entertains this 'Theory of Chimpanzee Tort Protection', creating new law, even though it will undoubtedly be overturned on appeal in between 6 and 12 months (11: Patience).

Common across all these examples is the idea of litigation signifying R&D, testing out new areas for law (new ways of interpreting the marriage contract, new ways of applying constitutional law, new ways of defining family) motivated by the desire to find new ways of making money (boilerplates for sexual secrets, being able to sue the environment, asserting a proprietary claim to embryonic stem cells) that reveals litigation to be an inherently capitalist tool – capitalist in the sense that it is not only interested in making money but in generating *new ways* of making money.

36.4 Signifying Invasive Practice

Popular media representations' second proposition about litigation is that it signifies invasive practice, leading to unacceptable interference with state institutions. Indeed, Kelley suggests that the problem with the expansion of litigation is the law's corresponding intrusion into all aspects of life. There are two parts to this argument. First, there is the very traditional, very Romantic suggestion that some aspects of life *should* be outside the reach of the law (and thus of modernity – of equality and fairness and all that modernity implies) and, second, that law is unduly invasive in the running of state institutions.

The first idea, that some elements of life should be outside the reach of law, comes through phrases like Ally's criticism of sexual harassment laws that over-protect women and make them feel like victims in *Ally McBeal* (1:9 The Dirty Joke), lawyer Anna Flint's admission it is sad her client 'had to come to court for that verdict. Sad in these times he has too' (1:16 Forbidden Fruit) and John Cage's concern about pursuing a relationship with associate, Nelle Porter, because the law might require her removal (2:9 You Never Can Tell). His fears are borne out in a

wrongful termination suit against Cobb Company (2:14 Pyramids on the Nile) who introduced a 'date and tell' policy amongst their co-workers as a by-product of sexual harassment laws to act as a safeguard against liability, leading to the sacking of a couple who were dating there. Cobb Company's lawyers 'establish the law as villains and them as victims' effectively putting 'the law on trial' to defend their policy. 'You're a beautiful woman Nelle', says Cage, 'I know it goes without saying but the law shouldn't require it to go unsaid.' He argues the couple were fired for trying to keep their private lives private and they win the suit.

David E. Kelley consistently suggests there should be limits to the invasiveness of law and that privacy (in the sense of private places) should be enshrined – but invariably people resort to litigation as the only way of making their voice heard and therefore make the private public. Litigation therefore comes to signify invasive practice. When Ling sues an employee for having sexually charged thoughts about her (the issue being whether the conduct of the defendant results in a hostile working environment for the plaintiff), the judge is quick to deliver a directed verdict that courts cannot legislate thoughts (2:9 You Never Can Tell). Similarly, when Georgia sues Cage and Fish for contributing to the breakdown of her marriage to Billy (3:11 Over the Rainbow), the court recognises 'the expanding exposure and liability stemming from workplace environments. Be it civil rights, health or sexual harassment we're only too happy to get in there and legislate when we don't like what's going on. But assessing blame when it comes to marriage, that's still a path we're loathe to go down.' Here Kelley seems to be arguing for keeping privacy sacred from litigation.

Second, there are many demonstrations of how litigation signifies invasive practice that interferes with the running of state institutions. At its best, law remains a safeguard, a restraint on abuse of power offering protection for those at risk of harm. At its worst, it is an impediment that interferes in the efficient running of these institutions. By way of example, recourse to the law makes it difficult for doctors to discharge their functions. *Ally McBeal's Goldstein v. Butters* involves a case for intentional and negligent infliction of emotional distress brought by the patient when her doctor, Greg Butters (Jesse L Martin), temporarily transplants a pig's liver into her body because there was no human organ available for transplantation (the hospital was insulated from liability in this case because they did not authorise the pig-liver transplant). Cage says the saddest thing about the action is that 'when she (the patient) woke up she didn't say thank you... she called her lawyer' (1:17 Theme of Life), the implication again being that law has become the automatic response, even before simple etiquette. *Ally McBeal* is therefore endorsing negative assessments of litigation (see, e.g. Bagnall 2001) as being the only way left for people to communicate with each other. Rather than providing a dialogue, litigation is presented as a form of dependency for people trying to settle any and every perceived wrong.

Here, Kelley is clearly playing into the old debates between modernity and humanity and Romanticism and bureaucracy – but Kelley also transcends these old binaries by presenting the issues uncritically, often using a few characters as counterpoints and leaving uneasy resolutions. So when Bobby Donnell (Dylan

McDermott) and Helen Gamble (Lara Flynn Boyle) debate the ethics of euthanasia in *the practice*, Kelley's script endorses neither one's view. Similarly in *Ally McBeal*, Fish's capitalism is presented without criticism, as is Ally's reluctance to date a bisexual man; it is left to the audience to debate, to engage with the popular media representation and make their own conclusions.

Kelley's series therefore operate in a similar way to legal novelist Philip Friedman's claim that a legal context is functional not only because it allows him to deal with every societal issue (as every societal issue shows up in the courtroom) but because it also leaves it to the reader to judge which outcome is best (qtd Lawson (1994) *The Bestseller Brief*). Taking this idea also makes it very hard (and dangerous) to say whether any one character is indicative of Kelley's personal viewpoint.

This view of litigation signifying invasive practice also intersects with Foucault's ideas on social contract theory and how, even as the theory promises individual freedom, it perversely legitimates state control. Foucault describes how the system of rights and the domain of law together actually act as 'polymorphous techniques of subjugation' (Foucault 1980, 96) '[where] right should be viewed... not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates' (1980, 96). As presented in these popular media representations, litigation can be understood in a similar way; as a tool designed to protect our freedoms and articulate our rights, it actually signifies how every aspect of our lives is governed, with judges and lawyers desperately seeking to keep some spaces (most notably love and marriage) private.

The problem with medicolegal issues in this regard is aptly demonstrated in Kelley's series *Chicago Hope*. Alan 'The Eel' Birch (Peter MacNicol, later John Cage on *Ally McBeal*), the in-house attorney for the first few seasons, is charged with maintaining the delicate balance between medical misadventure and negligence in a hospital using cutting-edge and experimental medical procedures. As Chief Surgeon Jeffrey Geiger (Mandy Patinkin) tells him, hospitals require in-house attorneys like Birch to 'keep [them] all afloat'. Here again, litigation signifies invasive practice, as the threat of litigation actively threatens the operation of the hospital.

A typical example occurs where Alison (Rosalind Chao) asks to be impregnated with the sperm of her husband, who is being kept alive on life support. This raises a host of ethical issues, not least of which is 'necrophilia' and the argument that harvesting sperm and impregnating Alison without her partner's consent violates every principle of reproductive choice. The difficulty with such actions is highlighted when Chief of Staff Watters (Hector Elizondo) asks Birch if there is any case law and Birch is forced to confess that 'post-mortem sperm retrieval is too new for case-law', despite his ethical objections that Alison's husband should not be made a father against his will.

As demonstrated above in the *Law & Order: SVU* example, lack of case law is a major problem in medical cases and forces lawyers to become creative, using litigation as research and development. In this instance, the lawyers for Ellen (Alison's mother-in-law) try to stop the retrieval by making a motion to annul Alison's marriage and thereby hold the hospital civilly and criminally liable for rape. Ultimately the case is not resolved; Alison decides not to proceed with the retrieval, and mother and daughter-in-law are reconciled as the husband dies. Kelley raises the issue,

debates the ethics and teases at the possibility of litigation signifying R&D but most importantly demonstrates how litigation signifies invasive practice through the inadequacy of law to keep pace with medicine. This lacuna in the law of precedent allows for more test cases to be run; indeed, it is this *inadequacy* of law to keep pace that *encourages*. The different levels of signification litigation offers are therefore not discrete but often function together; litigation signifies R&D which can also function as invasive practice just as litigation signifying invasive practice can also lead to R&D.

When seeking a court order to *induce* a coma (2:11 In Dreams), Ally McBeal asks Judge Cone to rule on one case, not on 'the bigger picture'. 'Why do we get so focused on procedure?' she asks, saying that it seems silly to apply precedent when it comes to medicine because technology is completely different today from yesterday. Importantly Judge Cone agrees with her argument, and the request is granted to put the litigant 'out for a week' and see how it goes. As in the Butters case, the law is presented as ill equipped to deal with experimental medical practices; litigation that signifies invasive practice becomes R&D.

The examples here all demonstrate how litigation can signify invasive practice, interfering in the operation of state institutions. Presenting litigation this way suggests an added desire on Kelley's part for some aspects of life, what may conventionally be termed 'the private' – such as love, marriage and etiquette – being kept apart from the law. What Kelley seems to be arguing for here is an alegal space – a space without law – and the reasons for this become clearer in the context of 'happiness'.

36.5 Signifying Happiness

Popular media representations' third proposition about increased litigiousness is that litigation has limitations – it cannot provide happiness, only money. If we conceive of litigation as an outgrowth of capitalism and being tied up with notions of free enterprise, then it is hardly surprising that the remedy litigation provides for almost any and every wrong (with limited exceptions) is money. In his address to the jury in *A Civil Action* (1998), a corporate attorney (Robert Duvall) acting for the parent company of a company accused of polluting a small town's water supply, resulting in the deaths of eight children, neatly summarises the aim of the civil court:

The idea of criminal court is crime and punishment. The idea of civil court and of personal injury law by nature – though no-one likes to say it out loud, least of all the personal injury lawyer himself – is money. Money for suffering, money for death. As if that could somehow relieve suffering. As if that could somehow bring dead children back to life.

Ultimately then litigation cannot provide happiness for litigants, only money. Here happiness is defined, as the Greek philosophers who first pondered the question defined it, 'the activity of the soul in accordance with virtue' (Colebrook 2001, 9 qtd McKee 2004).

Similarly, David E. Kelley consistently presents litigants who really *are not* just after money but rather, happiness; the discriminated, the jilted, the accused, all seek a positive resolution, a happy outcome. Foot fetishist Mark Henderson (Barry Miller) really wants to win the woman of his affections, rather than the case. He believes that if the jury ‘lets him off’, then maybe so will she (1:19 Happy Birthday Baby). ‘Will suing make you feel better?’ Georgia asks a jilted bride (1:22 Alone Again). The bride says yes, the ‘lawsuit is an alternative to castration’. An ex-boyfriend of Ally’s (Dennis – Craig Bierko) sues Ally not because she rear-ended him but because she dumped him (3:12 In Search of Pygmies). Ally tells Georgia (then going through a messy separation from husband and fellow lawyer Billy Thomas) that she does not have to ‘fight a law suit to spend time with us’ (3:11 Over the Rainbow), again getting to the real reason for her action. This is echoed in *Eli Stone* where a mother suing a pharmaceutical firm for mentally damaging her son states ‘All the money in the world isn’t going to make my son better’ (1: Pilot) and again where 15-year-old Peter Johnson hires Eli to sue anaesthetist Dr Agon, whose perceived negligence killed his mother on the operating table:

Peter: ‘Going to court was supposed to make it all better, but I feel worse now than I did before’.

Eli: ‘I’m going to make you a promise that I’m not supposed to. There’s no amount of money that we can win for you that’s going to make up for what happened but that’s not why you’re here anyway. You want justice right? [Peter nods] Well, that’s the promise I’m going to make to you. I won’t stop until you get it. OK?’ (7: Heal the Pain)

More commonly litigation signifies revenge, as if getting even can provide the client with a sense of happiness. *Ally McBeal*’s John Cage encourages a woman seeking to get out of a prenuptial to ‘put yourself in our hands, we’re in the business of getting even’ (1:8 ‘Drawing the Lines’), and a prolonged example occurs in ‘The Green Monster’ (2:21), in the case of *Mannix v. Mannix*, involving a wife (Christine Estabrook) who drops her husband’s antique piano on his Porsche. She says to Cage and Fish that ‘I want you both to be everything people hate about lawyers’ and later admits to her husband, ‘I want you to hurt’. Cage concludes that ‘The thing about lawsuits, especially divorce [is]... it’s often more about people trying to get each other rather than work it out’. Mannix agrees, calling the attempted settlement ‘pound of flesh time’. Cage concludes, referring to her husband’s serial cheating, that ‘you can call her a vandal if you want, what’s he? Consider what he did. She’s not allowed to sue him for his infidelity’ because it is a no-fault state and therefore Mr Mannix cannot be blamed for his cheating or his affairs. ‘Maybe we can’t hold this lying, cheating philanderer liable in a court of law, but we would be damn fools to reward him’. Correspondingly damages against Mrs Mannix are awarded... in the amount of 35 cents.

Law firms certainly present litigation as signifying happiness. Fish promises victory for every client ‘as a way of attracting new business’ (2:21 The Green Monster) and instead of counselling encourages them to ‘go forth and be vicious’, citing ‘redemption, revenge and retainer’ as three reasons to sue (1:22 Alone Again), all of which are supposed to bring happiness and all of which, once again, reinforce

the idea that litigation is a capitalist tool and therefore its endpoint is money, damages, even where this is sorely inadequate, as where a family member suing the airlines for the death of his father in a plane crash realises, 'My father's dead and we're in here trying to win the lottery' (1:13 *The Blame Game*).

What clearly emerges across a number of *Ally McBeal* cases is that the law cannot provide happiness as it cannot provide the remedy litigants are really seeking. When Georgia sues her law firm for sexual harassment, Cage warns her 'you'd get money not future employment' (1:7 *The Attitude*). Jilted bride Mary drops her lawsuit because she no longer feels sorry for herself (1:22 *Alone Again*). Harold Wick claims that 'buying fame' is the most common reason people sue – 'anyone with enough money today to afford a lawyer can buy some fame' (2:2). Nelle confronts frequent litigant Ling with the revelation that she is 'emotionally inaccessible... you're an unpopular person (who finds it) easier to deal with if you're fighting everybody' (2:3 *Fool's Night Out*).

In all these instances, it is not the law itself that provides happiness. Rather happiness becomes something similar to Lyotard's (1988) notion of a *differend*, something not recognised by law: 'in the differend, something "asks" to be put into phrases, and suffers from the wrong of not being able to put into phrases right away...' (xi). This is distinguished from 'damages' which, as Litowitz (1997) notes, 'can be *proven* to the satisfaction of the dominant system of justice and which are therefore repairable in "litigation" under the law' (120). In the above cases then, litigation is incapable of signifying happiness because it is incapable of awarding that which the parties truly desire. Rather, the best litigation can offer is provide a public forum wherein parties can find their own forms of happiness, the 'differends' unrecognised by law that therefore have to exist *outside* the law.

In *Ally McBeal* Richard Fish delineates the practice of law in a sweeping statement that is particularly applicable to civil litigation. Fish says, 'The Law sucks! It's boring'; rather, he favours using it as a weapon to 'bankrupt somebody, cost him all he's worked for. Make his wife leave him. Maybe even cause his kids to cry' and as a way of making 'piles and piles of money. If I help someone along the way, that's great!' So law is not only equated with money for the litigants, it is equated with money in the eyes of the lawyers as well. This idea of legal practice is aptly displayed in the opening credits of *L.A. Law*, featuring a number plate on an expensive car, or in the law show *Philly*, where the show's title is superimposed over a banknote. Indeed, in *L.A. Law* Brigham notes how the courtroom becomes 'subordinate to the boardroom. Recurring in the opening of each episode, the long table around which attorneys gather to discuss business becomes the unifying frame for the show... it serves as a prominent and realistic expression of the corporate core of modern law' (Brigham 30), an image replicated in subsequent series including *Family Law*, *The Guardian*, *Ally McBeal* and *Eli Stone*. Clearly, the assumption here is that lawyers are supposed to derive their happiness from the money they make.

But as I have previously noted (Bainbridge 2003) in a number of popular media texts, including those derived from the work of John Grisham and the comedy-law show *Ed*, happiness is not found *within* the legal system but rather *apart* from it. This is characterised by leaving the legal system to return to a more 'natural' state,

moving closer to an 'ideal' of law through education, running a small (often rural) legal practice or just providing 'a sense of building (or rebuilding) a family by learning how to be a better friend or a better husband, or by simply starting over' (Bainbridge 2003, 25).

These are ideas that are mirrored in *Ally McBeal*. Ally herself came to the law out of love, love for law student Billy (Gil Bellows) and later had an affair with her evidence law professor (1:4 The Affair). Billy notes that Ally 'work(s) through [romantic] things with work' (1:4 The Affair) and while she complains that 'happiness is overrated' (1:5), she spends most of her time searching for it in various ways from 'smile therapy' and theme songs with Dr Tracy (1:17 Theme of Life) to kick-boxing (1:17), to religion (or at least the confessional) (2:6 Worlds Without Love). Ally even admits to longing for emotional dependence as an avenue of happiness, to be *so* in love (2:18). Ultimately happiness for Ally – as it is for Kelley's other protagonists, Bobby Donnell and Lindsay Dole in *the practice* and Jeffrey Geiger in *Chicago Hope* – is similarly away from the law, raising a 10-year-old daughter, Maddie, a product of a mix-up at a fertility clinic she discovers she has in Season Five:

You know, I've always had a hole too Maddie. And I always thought that it was going to be filled up with a man. And yet I could never picture... him. Well, maybe the man turned out to be you. Maybe it's been you. And I know that this sounds crazy but it's as if I have always known that you were out there... It's as if a part of me just knew. And now it just makes so much sense that you're here. Oh, if you only knew how much money I've spent at therapists trying to work out who is that guy. And now it turned out that the guy is a ten year old girl. And she's home. (5.11)⁹

In each of these popular representations, happiness is achieved away from law, through familial interaction. But as McKee notes: 'Kelley's first proposal [in *Ally McBeal*] is that in search of happiness, it might be desirable to deny reality and embrace fantasy... Indeed, it was Ally's fantasy sequences, visualising a world where the diegesis was altered by the altered perceptions of the main character (expanding breasts, exploding heads) that was one of its first selling points in the media' (McKee 399), with the second and third seasons depicting 'Ally wrestling with the desirability of madness, refusing medication, uncertain as to whether sanity is desirable' (McKee 400). The programme's ambivalence is perhaps best summarised in Billy's defence of a bonds trader who saw a unicorn: 'We all want to be happy. Different people get there different ways. So you could never see a unicorn? Good for you. Or maybe not' (2.10) – and confirmed only an episode later ('In Dreams') where Ally successfully fights for the rights of her terminally ill old teacher, Bria, to spend the rest of her life in a coma (2.11), a clear rejection of reality as a source of happiness in favour of an internal fantasy world.

Eli Stone develops these ideas of fantasy, happiness and litigation to present another alternative, where litigation *is* capable of signifying happiness. Indeed, Stone's closing argument (on behalf of a man who believes God is telling him

⁹For more on *Ally McBeal* and happiness, see McKee (2004).

not to have chemotherapy and wants to die) directly mirrors Billy's argument (in *Ally McBeal*) when he says:

A few months ago, I started hearing and seeing things that indicated the presence of God in my life. I tried to follow what I thought God wanted. And I paid the price. Looking back, I think it's been the best time of my life. David had a feeling. I saw George Michael. Is that crazy? If it inspires us to change our lives for the better, then I hope, I pray, we're all crazy. (1: 13 Soul Free)

Here, Stone, a high-profile attorney who previously 'worship[ed] the holy trinity of: Armani, accessories, and my personal favourite, ambition' (1: Pilot), starts having visions that appear to have been caused by a 3 mm brain aneurysm. While the option to remove the aneurysm seems clear, his acupuncturist and spiritual adviser Dr Chen (James Saito) advises it may not be that simple:

Chen: 'Everything has two explanations Eli, the scientific and the divine. It's up to us to choose which one we buy into. Science explains the enlarged vessel in your head. But does it explain how the girl you lost your virginity to [Beth] happened to be suing your law firm, how her son happened to spell out a message to you with his blocks?'

Eli: 'Okay, so what would your divine explanation for all of this be?'

Chen: 'Almost all religions believe that there are those sent to help us find our way. Some people call them prophets.'

Eli: 'A prophet? You think I'm a prophet. Like Moses?'

Chen: 'God told Moses he'd send a prophet to every generation. Why not a lawyer? A high profile attorney handling cases that got a lot of notoriety that the world would read about.'

Eli: 'The difference between those guys and me is... I don't believe in God.'

Chen: 'Sure you do. You believe in right and wrong. You believe in justice, in fairness. And you believe in love. All those things, they're God, Eli'. (1: Pilot)

The series presents Stone's efforts to follow Chen's advice, using the visions as a sign 'I need to somehow change my life and start using my legal skills to make the world a better place' (1: 2 Freedom), representing the poor and disenfranchised through pro bono work, often against the corporate clients of the firm he works for, Wethersby, Posner and Klein. Through the combination of Eli's fantasy world and his practical skills as a litigator, litigation comes to signify happiness for those he represents. This is explained, by Eli himself, when he is charged with violation of the State Bar Act Article 12: Incapacity to Attend Law Practice (1: 6 Something to Save):

Eli: 'I was a very good lawyer before all this and I think I would've grown into a great lawyer. But I wouldn't have been a great person. Two months ago, I cared about winning my cases, but now I care about helping my clients.... I know that each case could be my last and I try that much harder. I take cases that are that much more important to me. And I think I'm a better lawyer for it. Yes, my behaviour has been a little odd, but odd isn't always worse. My father had the same condition and it didn't prevent him from raising two sons, one who became a doctor and another who became a lawyer. And being a lawyer is all I ever wanted to be. One day I may have to stop being one. But that's not today. Today, I can still do some good. All I'm looking for from this hearing is the chance to keep doing it'. (1: 6 Something to Save)

Eli continues successfully practising law, defending the disenfranchised and changing his firm in the process; managing partner Jordan Wethersby (Victor Garber) tells his daughter Taylor that ‘I’m changing. The firm is changing’ (1: 13) because of Eli, and even after the aneurysm is removed, Eli continues having visions, becoming a partner and takes pro bono cases (Season Two).

Though Eli is glimpsed in one vision as a well-known prophet who may, indeed, have abandoned the day-to-day practice of law (and therefore found happiness away from law, like Grisham and Kelley’s protagonists, again through family) for the duration of the series, he continues to reconcile his visions with his lawyering. This is because, ultimately, Eli’s visions seem to point him towards the lacunas, the limits to the law, the ‘differends’ that should otherwise exist apart from the law. As Eli describes them to an associate: ‘It’s like I see things now, you know, things that were always there, but that I just never noticed before’ (7: Heal the Pain). Eli Stone therefore offers a way of reconciling the practice of law with the production of happiness, meaning that litigation can become a productive and positive discourse capable of signifying happiness for both litigants and lawyers.

The idea of Eli Stone being a reconciliatory figure, able to bring together opposing ideas, is repeated throughout the series. For example, when he is described as a ‘man whose words and deeds reminded us that there is no faith without hope, no justice without compassion, no humanity without fairness; the man who reminded us that every one of us, the least of us, is still divine’ (David Mosley in 11: Patience). Similarly when Eli is defended by managing partner, Jordan Wethersby (Victor Garber), Jordan notes that ‘Miss Klein’s [a senior partner at WPK attempting to oust Jordan because of his support to Eli] problem with Mr Stone isn’t that he’s eccentric, it’s that he applies his considerable talents to underdogs and individuals instead of conglomerates and CEOs. He reminds us that in business there is still room for humanity, that capitalism without mercy is tantamount to evil. He reminds us of the best part of ourselves. Yes, I have protected Eli Stone because I believe this firm needs Eli Stone. I believe that every firm, every company, everyone needs an Eli Stone. And by your vote you’ll say whether or not you agree. If you don’t, then this place has become something I don’t want my name on anyway’ (12: Waiting for That Day). Eli therefore offers the possibility of litigation signifying happiness, but only, it seems, if lawyers themselves remain moral, ethical and involved in pro bono work – or capable of receiving visions from an indeterminate source. Even in its optimism then, *Eli Stone* seems to be suggesting that in most cases, litigation and happiness will remain separate things.

36.6 Conclusion

In the United States, happiness is constitutionally guaranteed by the state. However, these popular visual media texts suggest that law, through litigation, does not signify happiness. Rather, happiness actually exists outside law – through interpersonal

interaction, a new job away from law or a more nebulous 'fantasy' world. Indeed, in their location of happiness outside 'the system', be that the law, society, bureaucracy or modernity more broadly, these texts are presenting an inherently Romantic notion of happiness – a transcendent idea of 'happiness' that also serves as an antidote to the ubiquity of modern litigiousness.

This is what I term a *postmaterial* happiness, one that transcends the materiality of legal culture. In this way these popular media representations bring Romanticism back to the lawyer rather than the legal system, representing the lawyer as signifier of a kind of Romantic pioneering spirit. Whether they are involved in R&D (like *Ally McBeal's* Ling) or pro bono work (like the titular Eli Stone), they are successful in spite of the limitations of the system of which they are a part. While this may seem a hopelessly old-fashioned and Romantic view of happiness, privacy and the function of litigation, these popular visual media texts' challenges to litigation remain important – not because they suggest that litigation is good for business but because they present litigation as signifying the very limits of law, as a way of exploring the law's limitations (through its inability to signify happiness) as much as its potential (by signifying R&D) and its excesses (by signifying invasive practice).

Talking about *Eli Stone*, Jason Winston George (who plays attorney Keith Bennett in the series) said: 'Well a friend said to me one time... who do people pay more attention to now? Their clergy or their lawyer?' ('Turning a Prophet: The Creation of Eli Stone', 2009). Such a comment brings to mind cultural theorist Douglas Rushkoff's (1994) statement that 'popular cultural forums' (like film and television) offer a 'conceptual interface between the order of our laws and the chaos of our world' (51) that makes them:

the place for us to evaluate our rules and customs... because lawyers, unlike detectives or policemen, are well-suited for open discussion of such issues as they are nominated as our culture's best professional debaters. (Rushkoff 1994, 52)

Popular media texts therefore allow us to debate what litigation can and cannot achieve, and through the application of semiotics to these texts, we can explore how and what litigation signifies, to both the lawyers and litigants involved in its practice. In this way, these popular media representations contribute to wider understanding of the functioning of litigation, becoming important parts of 'law's textuality' in that they change and impact on popular understandings of what litigation currently is and can become.

References

- Bagnall, Diana. 2001, March 20. The blame game. *The Bulletin* 119: 26–31.
- Bainbridge, Jason. 2003. Discovering the law again: John Grisham, Ed Stevens, and the postmaterial lawyer. *Australian Journal of Communication* 30(2): 15–31.
- Bainbridge, Jason. 2006. Lawyers, justice and the state: The sliding signifier of law in popular culture. *Griffith Law Review* 15(1): 153–176.

- Cheah, Pheng, David Fraser, and Judith Grbich (ed.). 1996. Introduction. In *Thinking through the body of the law*. St Leonards: Allen & Unwin.
- Colebrook, Claire. 2001. Narrative happiness. Unpublished Manuscript.
- Delgado, Richard, and Jean Stefancic. 1993. Critical race theory: An annotated bibliography. *Virginia Law Review* 79: 461–473.
- Denvir, John. 1996. *Legal reelism: Movies as legal texts*. Chicago: University of Illinois Press.
- Foucault, Michel. 1980. Two lectures. In *Power/knowledge: Selected interviews and other writings, 1972–1977*. Trans. Colin Gordon et al. ed. Colin Gordon. New York: Pantheon.
- Graycar, Regina (ed). 1990. Introduction. In *Dissenting opinions: Feminist explorations in law and society*. Sydney: Allen & Unwin.
- Hawkes, Terence. 1977. *Structuralism and semiotics*. London: Methuen.
- Kathke, T.C. 2006. 'Lack of what?' *Euro screenwriters*. http://zakka.dk/euroscreenwriters/articles/european_film_future_54. Accessed 19 June 2006
- Laster, Kathy. 2000. *The drama of the courtroom*. Sydney: Federation Press.
- Lawson, M. 1994. *The bestseller brief*. UK: BBC 2. 2 Feb.
- Litowitz, Douglas. 1997. *Postmodern philosophy and law*. Lawrence: University Press of Kansas.
- Lyotard, Jean-Francois. 1988. *The differend: Phrases in dispute*. Trans. Georges Van Den Abbeele. Minneapolis: University of Minnesota Press.
- Markesinis, B.S. 1990. Litigation-mania in England, Germany and the USA: Are we so very different? *Cambridge Law Journal* 49(2): 273–276.
- McKee, Alan. 2004. Views on happiness in the television series ally McBeal: The philosophy of David E. Kelley. *Journal of Happiness Studies* 5(4): 385–411.
- Meyrowitz, Joshua. 1985. *No sense of place*. Oxford: Oxford University Press.
- n/a. 1994. Introduction. *Law/Text/Culture* 1: 6.
- n/a. 2009. *Turning a prophet: The creation of Eli stone*. Documentary. DVD extra. ABC Studios.
- Rushkoff, Douglas. 1994. *Media virus: Hidden agendas in popular culture*. New York: Random House.
- Saussure, Ferdinand de. 1983 [1916]. *Course in general linguistics*. Trans. Roy Harris. London: Duckworth.
- Smith, A. 1995. The natives are restless. *Media Studies Journal* 9(4): 1–6.
- Spier, Jaap (ed.). 1996. *The limits of liability: Keeping the floodgates shut*. The Hague: Kluwer Law International.

Chapter 37

Trial by Ordeal: CSI and the Rule of Law

Christina O. Spiesel

Abstract The popular American television dramatic series, *Crime Scene Investigation (CSI)*, with its emphasis on forensic analysis, has become an icon for anxieties within the legal system about truth-finding and legal outcomes. This chapter reviews empirical research on the “CSI effect” and then explores cultural dimensions of the show as suggested by analysis of its paradigms and style rather than the narrative content of specific episodes. *CSI* is related to larger trends within American legal culture and raises questions about the future of the rule of law.



Photo: Gunshot Residue Lab, Connecticut State Forensic Science Laboratory, 2006. Christina Spiesel, All rights reserved.

The author wishes to thank Pamela Hobbs, Elaine Pagliaro, Ann Kibbey, Neal Feigenson, and Sydney Spiesel for their contributions to her thinking. The opinions expressed are her own.

C.O. Spiesel (✉)

Yale Law School, 127 Wall Street, SLB Box 167, New Haven, CT 06520, USA

Quinnipiac University School of Law, Hamden, CT, USA

e-mail: christina.spiesel@yale.edu

37.1 Introduction

Television, like film, is fertile ground for what we might call cultural dream time analysis.¹ Their works are mostly made to please large and diverse audiences, and their production budgets are high, so decisions during production about their content and style are closely scrutinized. They are, for the most part, nonrandom, highly determined cultural expressions that are useful tools to explore the temper of the moment. American television is glutted with programs that one way or another have to do with the law: There are courtroom dramas (on the prosecutorial side, *Law and Order*; on the defense or plaintiff's side *Boston Legal*) shows about investigation, or reality television shows like "Cops," actual trials broadcast, and made for television small claims proceedings like *Judge Judy* to name just a few. The "new" entrant into the mix at the millennial moment was *CSI: Crime Scene Investigation*, set in Las Vegas, debuting in 2000 on CBS, followed by *CSI: Miami* in 2002 and *CSI: New York* in 2004. The Las Vegas show commands the most audience, 22.71 million viewers in the week of March 26–April 1, 2007, and now down, along with all television viewing, to 14,287 million for the second week in January 2010.² With its emphasis on forensic investigation, *CSI* brought science into the mix of crime-solving entertainment and with it new kinds of reasoning about what happened often aided by the demonstration of many kinds of new technologies, making it "the *how-dunnit* rather than the *whodunnit*" (Robbers 2008, 89).

Anecdotal press reports began to appear by 2002, with gathering frequency, claiming that prosecutors and judges were blaming failed prosecutions on jurors' expectations about evidence formed by television programming that features forensic analyses. Their fears were gathered under the coined name "the CSI effect," which refers to the putative influence of this kind of television programming on legal decision making with reference to kinds of proof, especially scientific proof, offered in legal proceedings. This chapter will survey the research that tries to establish the claims for the effect and then offer a rather different reading of what the show represents and why its effects, differently understood, may be important for the rule of law.

Three studies, all from 2006, question the claims for the existence of a *CSI effect*. Psychologist Tom Tyler argued in the *Yale Law Review* that, based on what we know of the psychology of jury decision making, a *CSI effect* could cut equally both ways—that is, juries could demand more in scientific proof and would then be less apt to convict if the cases are weak and if they are less trusting of the authority of

¹ American television shows are broadcast around the world, but this discussion is confined particularly to the United States.

² Nielson ratings: The 2007 statistics are drawn from a report: <http://www.sfgate.com/tvradio/nielsen/>. Accessed April 9, 2007. 2010 statistics are from <http://en-us.nielsen.com/rankings/insights/rankings/television>. Last accessed January 30, 2010.

prosecutors, judges, and lawyers. On the other hand, juries have a desire for the closure that conviction and punishment can bring. Tyler concludes that there are at least three “alternative explanations for the allegedly increasing acquittal rate that has led to speculation about a possible *CSI* effect. First, juries may have increased sympathy for defendants. Second, juries may simply be less likely to convict than people with legal training and court experience expect them to be. Third, as the public’s trust and confidence in the courts and the law decline, jurors may be increasingly skeptical of, and less inclined to defer to, the arguments of legal authorities” (Tyler 2006, 1085). Tyler suggests that to the degree that any of these three alternative explanations is correct, “there may be an increase in acquittals that is not linked to watching *CSI*. The effect may exist, but it may not be a ‘*CSI* effect’” (Tyler 1084). (Later studies have shown that there is no increase in acquittals. I would also point out that a decrease in deference may or may not mean a lack of trust or confidence in the system but may mean, instead, a higher commitment to participation.)

The two empirical studies published in the same year—Dr. Kimberlianne Podlas’ “The *CSI* Effect: Exposing the Media Myth” (2006) and Donald Shelton and coauthors’ (2006) “A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the *CSI* Effect Exist?”—conclude that there is no solid evidence of the television show having a specific effect on juror decision making. Podlas decides that the *CSI* effect is “nothing more than a fiction.” Shelton suggests that there may well be a “tech effect” from the fact that jurors are coming to court with a more sophisticated general knowledge of technology and scientific forms of proof rather than a specific influence from *CSI* programming in particular.³

In 2008, Monica Robbers did a study of the social construction of forensic reality in television shows and its effect on criminal trials from the point of view of judges and counsel working in the criminal justice system and their perspectives on jury behavior. She concludes the study, which is qualitative and anecdotal (but with a large statistically valid sample), claiming that “Overall, results from the current study support the notion popular media are actually hindering the criminal justice process” (Robbers 2008, 100). She suggests that jurors generally do not have experience of real forensic analysis and so they fall back on television viewing experiences which are out of synch with the reality of the criminal justice system and prosecution in particular, and that legal professionals, in response to their perceptions about the “*CSI* effect,” may alter their work patterns in various ways, adding up to more concerns about their cases. It may be that it is the response to these shows in the minds

³ In a more recent article, Judge Shelton reports on empirical studies on this notion of a “tech effect.” He concludes that there is an expectation of increased science in evidence, but the *CSI* itself is only a small part of the media stream that molds expectations. He does envision a problem of raised expectations for all parts of the criminal justice system, from changed legal strategies in argument to pressures on an inadequately funded justice system (Shelton 2010). For very recent coverage on the reality of medical examiner’s work in contrast to television drama, see A.C. Thompson et al. (2011).

of criminal justice professionals she interviewed that is causing the effect.⁴ This is, in fact, the ultimate conclusion drawn from an empirical study published the next year, 2009, in the *Stanford Law Review* by Simon Cole and Rachel Dioso-Villa. They looked at the show(s), their ranking, anecdotes from legal actors, jury surveys, and psychological experiments and compared acquittal rates before and after the introduction of the *CSI* franchise of shows into the media sphere. For comparison, they examined data reflecting the reality or unreality of media concern with “the litigation explosion”—too many torts cases being brought—which, according to their research, is largely a myth lacking supporting empirical data. They conclude: “Whereas the litigation explosion [theme] may have resonated with a societal anxiety about relying on law too heavily, the *CSI* effect would seem to resonate with anxieties about using the law too little, increasingly abrogating its truth-producing function to science” (Cole 2009, 1373). It is very hard to know whether anxieties come from a comfortable system being disrupted by a more assertive public, whether that public properly or improperly wants better proofs, subconscious issues being activated in participants in the professional criminal justice system by the scrutiny, or from a whole host of other considerations including the state of modern forensic science.

These two studies, the 2008 and the 2009 studies discussed above, both suggest that the *CSI* effect is more in the minds of those who have devoted their lives to the criminal justice system than in those of the juries they convene for cases.⁵ Also in 2009, Kim, Barak, and Shelton published an empirical study using a much larger sample of people called to jury duty (in contrast to the typical university student subjects used by many empirical researchers) in a district in Michigan. They used a survey with some written case examples. Employing a variety of analytic tools, their research shows the following: (1) In circumstantial cases, those who were *CSI* watchers had higher expectations of scientific evidence, and “their increased expectations lowered the willingness to convict defendants without scientific evidence of any kind,” and (2) these expectations did not influence jurors’ willingness to convict on the basis of eyewitness testimony. Jurors’ age, race, gender, education, and political views, not surprisingly, were significantly related to jurors’ willingness to convict older, less well-educated, more conservative respondents were more willing to convict on circumstantial evidence without scientific evidence (Kim et al. 2009, 458–59).

So the available empirical research on the *CSI* effect suggests that it is a media creation—with strong assertions that it exists, those most persuaded are those in

⁴ It is perhaps our own naiveté to imagine that people who serve in the justice system are not immune to the same media influences that the rest of us are. It should be no shock to us that Justice Scalia can say, seemingly without irony, that Jack Bauer, a character in Fox’s dramatic series *24*, “saved Los Angeles.” Quoted by Peter Lattman (2007), “Justice Scalia hearts Jack Bauer.” *Wall Street Journal Law Blogs*. <http://blogs.wsj.com/law/2007/06/20/justice-scalia-hearts-jack-bauer/tab/article/>. Last accessed August 8, 2010.

⁵ This is perhaps indirectly substantiated in a recent article by Tamara F. Lawson (2009, 119). She examines specific cases and lays out her argument for a “*CSI* infection” in the ways the cases were handled. The term infection carries the emotional force of disease, corruption, and perhaps even epidemic in the criminal justice system from something outside, a viral presence, perhaps.

the justice system who, of necessity, pay attention to media representations of the law. Not just entertainment media but news and opinion. There are (and have always been) concerns around the truth-finding function of legal proceedings. On what basis shall we determine the truth of the matter at hand in a reliable manner? The problem is that legal truth and scientific truth are different, even if the one takes advantage of the insights of the other. To establish scientific facts, researchers have to take all the time necessary; others have to repeat the experiments; new knowledge has to be tested against old knowledge. Legal cases happen within a much shorter time frame; their variables are full of confounds; narrative is important as well as facts; broad community standards are different from in-group standards of scientific professionals. A decision has to be made absent full knowledge with the best means available. To this reader, the empirical studies of the *CSI* effect have shown us that it is essentially a cultural problem. In the analysis that follows, I discuss the sort of cultural problem that I think *CSI* reflects. But first, a look at the show.

37.2 Some Aspects of the Cultural Envelope

The audience for the *CSI* franchise shows is hard to define because it is so large. Other than viewership numbers, I have been unable to locate any detail on demographics. It is safe to assume that it includes young people—there has been an explosion in applications for forensic training on the part of young adult students.⁶ But that the dramatic formula retains features from the youth of the parents of these viewers, suggests that we have both cultural continuities and cultural differences in audiences for the show. In terms of social class, there is little difference from a 1973 study that reported that most “TV crime is committed by middle-class people who simply are not satisfied with what they have and desire more. Their motivations are obvious. The threat to society comes not from people who are fundamentally dissatisfied with the existing *system* (italics added) but from people who are fundamentally greedy” (Dominick 1973, 250).⁷ While this is still true and speaks to continuity, crime is more broadly presented as coming from people who are somehow misfits but still individually culpable (Dowler 2003). This content analysis applies reasonably to the plots that *CSI* viewers consume three nights a week now, so older viewers will find much that is familiar. The really new feature is all the technology, about which I will have more to say. Certainly, there is probably a culture gap in technological familiarity between younger viewers and older viewers, as there is in the rest of society, but it is not at all clear that this would be relevant to the issues I wish to raise.

⁶From an interview with Elaine Pagliaro in March 2006. She is the former Acting Director of the Connecticut Forensics Science Laboratory. Notes on file with the author.

⁷For an analysis of specific crimes and their frequency in *CSI*, see Deutsch and Cavender (2008).

I am going to look closely at aspects of the television show(s) and suggest ways in which it undermines the law (thought of as the product of the work of legislators, lawyers, and judges, the legal academy, and within a crime show, especially prosecutors, the defense bar, and prison system) and also undermines notions of science, substituting a closed system that has only a superficial connection to either law or science as immensely important human activities. Unlike the empirical studies referenced above, this essay reflects a rather ethnographic approach, a semiotic reading of what appears to be there. Full disclosure: I have watched the 2004 and 2005 seasons intensively and subsequently checked in on all three shows in the franchise to be sure that my conclusions were still relevant. Recently, I have watched portions of the first season, including the pilot. This was very illuminating: While many of the show's strategies were observable in the beginning, *CSI* underwent a sharpening of its inspiration and development of its visual style after that first season that strengthened the elements that I am particularly focused on. Without a doubt, success brought more resources—from CBS, from technology companies interested in placing their products, from the “accident” of history that the show was rolled out just as a revolution was in motion in all aspects of digital visualization.

To see this in a technological context, Photoshop 1.0 was marketed in 1990 (people could use scanners to digitize pictures and then edit them with a Macintosh). *Toy Story*, the first American animated feature length film entirely animated with computers, came out in 1995. The first megapixel digital camera for consumers came out in 1997. It was not cheap. Public video surveillance began in the 1990s, and many viewers had, no doubt, seen themselves on camera in stores and banks. While the first uses of DNA evidence go back to 1986, the human genome project began in 1990, and the “first draft” was published in 2002; illustrations of genetic code were ubiquitous in press coverage. In 2000, average Americans had access to a variety of consumer film and video cameras, including Polaroid technology used in the first season of *CSI*. If they were technologically inclined, they had access to computing and knew about using software to edit photographs and create wholly new pictures with graphics software. We were used to family snap shots, home video, and appearing in low-resolution surveillance video; we were being shown pictures of data that could not be seen by the human eye—those DNA strands, for instance.⁸ *CSI* with its many tools, especially tools of visualization, was not only leading the culture, it was and is reflecting it.

⁸See Wikipedia for technological history: <http://en.wikipedia.org/wiki/Photoshop>; http://en.wikipedia.org/wiki/History_of_the_camera#Digital_Cameras; http://en.wikipedia.org/wiki/Polaroid_camera; http://en.wikipedia.org/wiki/Toy_Story; <http://en.wikipedia.org/wiki/MRI>; http://en.wikipedia.org/wiki/Human_Genome_Project http://en.wikipedia.org/wiki/DNA_profiling. This report details the history of surveillance technology in the United States: <http://www.library.ca.gov/CRB/97/05/crb97-005.html#overview>

37.3 CSI: The Television Show

The first *CSI* series, *CSI: Crime Scene Investigation*, now in its eleventh season, set the pattern for all shows in the franchise, and the formula has been scrupulously maintained across shows set in Las Vegas, Miami, and New York. The titles all preserve the same format—shots made by cameras on planes flying over and closer in on the natural environment and urban texture in the named city. (This is one of the stylistic elements that was clarified, intensified, and expanded upon when the show developed after the first season.) The “eye/I” begins above the action, a bird’s (or God’s?) eye view, with broad establishing shots of the cities in wide-angled vision. The credits then come in very close-up onto portraits of the forensics team associated with the specific locale interspersed with graphic material from the evidence visualizations frequently displayed during evidence analysis. (A marker for change: in the first season, the character Warrick Brown is shown holding and examining an athletic shoe, trying through his serious expression to signal that it is important evidence; subsequently, it would have been a print of the sole or some other visualization rather than the shoe itself.) The camera of the long overview shots moves us to the close-ups, connecting the scientific material (implicitly derived from universal truths) with the characters who are professional and technically proficient (but who are actually neither police nor scientists) and who mediate viewers’ relationship with the science. We overhear their conversations, see what they are showing to each other, and sometimes look with them down a microscope eyepiece or at a large screen monitor, but they control what we see and tell us how to see it, thereby asserting that there is only one possible view and that they are its interpreters. They are photographed most often in ways that separate them from the background, a partial, at least, extraction from context.

Most often, the episode will begin with the discovery of a homicide and the arrival of the forensics team. Grisly details are withheld in the first views. Often the team shows up seemingly without a phone call or dramatization of how they knew there had been a crime, how they got there, etc. Rarely are uniformed police officers seriously a part of the dramatic mix. After establishing the main investigative problem, a secondary situation is introduced, and the show moves toward the resolution of both plot lines by the end of the hour through forensic investigation and, very importantly, through flashbacks imagining how the crimes leading to the investigation might have happened. That is, investigators faced with wounds of one kind or another will imagine the scenario that might have caused them. These flashbacks are attached to branching narrative considerations—it could be this or that might have happened. Time is a layered construct right from the beginning, moving between the present of the investigation, possibilities from the past, reconstructions based on deductive reasoning or imaginative recreation. The story told is not the fleshed out narrative of the human situations that led to homicide or other criminal acts (personal histories are sketchy at best, and human motives are finally reduced to a single sentence) but what engages us is the story of the progress of forensics professionals puzzling through the evidence, considering various versions until the evidence leads them to focus on a particular explanation.

The team starts with detailed inspection of the scene for circumstantial evidence that can be evaluated back in the labs. Wearing gloves, they carefully place bits and pieces of stuff in plastic envelopes or arrange for large items to be hauled away. Police are shown to be too casual and thoughtless in their treatment of the scene, “They see evidence just in terms of the obvious.”⁹ Most importantly, copious numbers of photographs are taken, and to this viewer anyway, it can seem as if the scene only becomes real to the investigators when it is captured by the camera. And it is the camera that most frequently inspires the thoughts of the investigators as they imagine various scenarios to explain what they are seeing. These mental pictures, “movies of the mind,” are photographed differently so that viewers are clearly cued as to what is outside and what is inside the heads of the team. (Recreations are signaled by lower-resolution pictures.) Making forensic findings explicit (not to mention entrancing), the show also includes computer-generated animations of things the naked eye could not see—the path of a bullet inside a body, for instance, which Sue Tait has called “the *CSI* shot” (Tait 2006, 53). Sometimes, investigators are shown watching the same “movie,” joining in a common fantasy about what the precipitating or immediately prior events were, or who might have been involved. And it is the camera that allows us to see, too: the camera recording the show and the pictures made by cameras within it.

Most frequently, the homicide turns out to be murder, often with ingenious methods of inflicting death—not just the usual weapons but also insects, animals, poisons, and odd chains of events. The “special features” included on the first season’s DVD explains that all of the cases are based on some real episode. That said, obviously stories would be tweaked to make them satisfying to audiences and to fit into the hour-long format, they are fictions based on some facts; life is rarely so neat. Sometimes, the death itself is accidental, but then people involved get into trouble with the justice system out of their desires to cover up information fearing that they will be improperly implicated or have secrets revealed. Once the puzzle of the scene has been solved, the narrative made clear and attached to human agents who can be considered responsible, the perpetrator is identified from among various candidate suspects. The “properly” accused is brought into the offices of the forensic investigative team and then confronted with the accumulated evidence. This happens across a table in conversation, most often with one of the women on the team; the tone of the interchange is warm, intimate, even, full of understanding and encouragement. Everyone feels better for it. The perpetrator confesses and feels better. The team has successfully solved the puzzle and can feel good. And once confession is achieved, society need not worry further. We know who did what to whom, and we never see the cases go to trial or other judgment or how they have come under authoritative control. Order is restored.

In spite of the fact that all three shows take place in urban areas that are culturally defined as places of entertainment, action, nightlife, and glamour (not to mention big

⁹ Gil Grissom, explaining to his team, first episode, October 6, 2000 (http://en.wikipedia.org/wiki/CSI:_Crime_Scene_Investigation). Last accessed February 4, 2011).