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Law, Culture and Visual Studies

Crucially, the disregard of alternative points of view that characterizes closed mindedness can be both a cause and an effect of overconfidence. Paying insufficient attention to potentially contrary evidence can lead to overconfidence (e.g., Baron 1994; Koriat et al. 1980). "People are often overconfident in their judgments because they focus exclusively on a preferred hypothesis and do not devote enough resources to considering other possibilities that might instead be true" (Koehler 1994, 461). At the same time, "[t]he 'settled' subjective feeling of understanding [an explanation] that is associated with overconfidence … may be the subjective state that prompts … [the] decision that we can stop explaining or considering alternative explanations" (Trout 2002). In sum, the relationship between overconfidence and the discounting or ignoring of competing evidence and argument is reciprocal. "[O]ne reason for inappropriately high confidence is failure to think of reasons why one might be wrong. Such inappropriate confidence could, in turn, cause a person to stop searching for alternative possibilities, leading to insufficient thinking" (Baron 1994, 223). The concept of *groupthink* (Janis 1982) famously describes, in the context of small group decision making, this same reciprocal movement, in which the failure to seek out alternative hypotheses and counterarguments is both a cause and effect of overconfidence.[8]

There are both motivational and cognitive accounts for this effect of (over) confidence on information search and interpretation. Insofar as being confident is a positive affective state, people would want to maintain that feeling and be less inclined to seek out information that might change it (Briñol et al. 2007).[9] Research also shows that people are more confident about making an evaluation or decision the *less* they know about it (see O'Connor 1989). Less knowledgeable decision makers can be insensitive to gaps in information that ought to be relevant to their decisions (Sanbonmatsu et al. 1992). And consumer research studies show that "as confidence increases, a consumer's tendency to take in information declines" (Levin et al. 1988, citing research of Howard and Sheth 1969).

The causes and effects of overconfidence are thus congruent with those of naïve realism, and specifically, naïve realism about pictures. Naïve viewers' inattention to context and subjectivity yields the sense that their understanding of the

[8] The extensive research on *confirmation bias*, the "selective search, recollection, or assimilation of information that lends spurious support to a hypothesis under consideration" (Arkes 1991, 489; see Lord et al. 1979), also supports this reciprocal relationship. Arkes (1991) observes that "a primary reason for unwarranted confidence is that subjects can generate supporting reasons for their decisions much more readily than contradictory ones" (Id, 489, discussing Koriat et al. 1980). So the biased generation of arguments is reasoned to be a cause of overconfidence in a hypothesis. But since the hypothesis is posited to be "under consideration" as part of an ongoing process, it seems that (increasing) confidence in the hypothesis may cause as well as result from bias in the assimilation of further information.

[9] "[C]onfident people engag[e] in less thought than people lacking in confidence. One reason for this is that when people feel confident in their current views, there is little need to seek additional information that might lead to change" (Briñol et al. 2010, 23).

picture as a representation of reality is objectively correct and, therefore, that they needn't seriously consider other points of view – as we have seen in the *Scott* case.

5.3.3.3 Processing Fluency, Naïve Realism, and Overconfidence

Further support for the notion that naïvely realistic viewers of pictures tend to be overconfident in the inferences they draw from what they see comes from research on *processing fluency*. This is the label for a number of related phenomena (for a review, see Oppenheimer 2008) that can be summed up as follows: The easier it is for people to perceive or otherwise mentally process something, the more they tend to like it (Winkielman et al. 2003) – and the more likely they are to believe that it is true (Reber and Schwarz 1999).

Why do people tend to like stimuli that are easier to process? Psychologist Piotr Winkielman and his colleagues propose the *hedonic fluency model*: "[F]luency indicates good progress toward stimulus recognition, coherent cognitive organization, and the availability of knowledge structures to deal with the current situations[, and] such qualities tend to be associated with positive affect" (Winkielman et al. 2003, 82–83). Since people like positive feelings, fluency produces liking. People then unconsciously *misattribute* the positive affect caused by fluent processing to the target of their percept or judgment, producing a more positive evaluation of the target – that is, they like it more. This misattribution occurs "[b]ecause people have only one window on their subjective experiences, [so] they find it difficult to distinguish experiences elicited by incidental variables … from experiences elicited by the focal object of interest[.] In most cases, they assume that their experience is 'about' whatever is in the focus of their attention" (Cho et al. 2008, 272).[10] In short, people use their sense of fluency in perceiving and/or understanding a stimulus as a cue to how much they like it.

Moreover, "statements that are easier to process are experienced as familiar, thus leading participants to feel that they have heard or seen this before, suggesting that it is probably true" (Reber and Schwarz 1999, 342) (cf. the *illusion of truth* effect; e.g., Begg et al. 1992). Other studies have found that the easier it is for people to retrieve items of information from memory in response to a question, the more confident they are that their answers are correct (Kelley and Lindsay 1993; for a review, see Bjork 1999). That is, people mistake the accessibility of information for its truthfulness. Fluency also influences truth judgments through other paths. Novel aphorisms are judged more accurate when they rhyme (e.g., "what sobriety conceals, alcohol reveals") than when they do not ("what sobriety conceals, alcohol unmasks") (McGlone and Tofighbakhsh 2000). Thus, Keats' assertion that "beauty

[10] This, of course, is the *aboutness principle* (Higgins 1998), discussed above.

is truth [and] truth beauty" may well be an expression of processing fluency (Winkielman et al. 2003).

The processing fluency research thus indicates that simply seeing visual evidence, whether naïvely or not, may prompt feelings of ease of processing that get unconsciously misattributed to the judgment target. If people find it easier to understand a pictorial as opposed to a verbal description of relevant reality, they would be more inclined to like the visual depiction and to believe that it truly represents reality. Naïve viewers, though, would be especially likely to hold those beliefs with confidence. "[H]ighly fluent judgments [are] made with more confidence than judgments that are made slowly and with subjective difficulty" (Gill et al. 1998, 1102). And what leads people to make those judgments more fluently, and hence more confidently, is that people form richer internal representations of the judgment target – that is to say, representations that are better integrated and more information-rich (Gill et al. 1998). Visual evidence enables all viewers to form more information-rich ideas of reality. But because naïve realists tend to think that pictures that represent reality simply give them that reality, their internal representation of the depicted event strikes them as the only plausible one (because it simply reflects what's real). Their thoughts about the depicted reality should therefore be better integrated, more coherent; they sense fewer loose ends or inconsistencies because they imagine themselves simply to have "mentally recorded" what really happened, and tend to ignore alternative points of view that might ambiguate their internal representation. Consequently, naïve realists would be more inclined to believe in not just the truth but also the judgmental adequacy of what they derive from visual evidence, and thus to hold their beliefs about the depicted reality with greater confidence.

In sum, naïve realists tend to prefer "epistemic stability, clarity, order, and uniformity" (Jost et al. 2003, 348), which inclines them toward closed mindedness. And this closed mindedness can be derived from the basic fact that naïve realists understand their own interpretation of reality as the simple, objective truth. So naïve realists tend to assume that their own views of things are shared by others (the *false consensus effect*; Ross et al. 1977; see also Ross et al. 2010); accordingly, they tend to denigrate those who don't share their views as biased or abnormal and "fail to give assessments and judgments by [their] peers as much weight as [their] own" (Ross et al. 2010, 23). All of these features of naïve realism apply to naïve realism about pictures.

5.3.4 Naïve Realism About Pictures and Other Visual Biases

The overconfidence to which naïve realism, as a metacognitive or second-order phenomenon, leads would tend to entrench decision makers in whatever distortions of judgment that any first-order biases produce. This would be especially true where the psychological processes behind the first-order biases resemble the one that characterizes naïve realism itself. And while no one has yet experimentally tested naïve

realism about pictures,[11] its underlying logic, or something very much like it, does seem to be present in a number of other visual biases. The common theme in these biases is that seeing pictures tends to reduce the subjective uncertainty that a greater awareness of the limits of one's own knowledge base or interpretive skills ought to yield, prompting overconfidence in one's perceptions and judgments.

The *illusion of explanatory depth* (IOED) describes people's belief that they understand the world in far greater depth and detail than they actually do (Keil et al. 2004; Rozenblit and Keil 2002). When confronted with the task of explaining complex causal phenomena or devices (e.g., how helicopters fly or how a flush toilet works), people claim relatively high levels of understanding, but when subsequently tested on their knowledge, their self-rated understanding diminishes significantly (Keil et al. 2004). Psychologist Frank Keil and his colleagues reason that people get a "flash of insight" about the general, skeletal causal patterns that plausibly govern a class of phenomena, but mistake them for a more detailed, mechanistic understanding of the particular phenomenon in question (Keil et al. 2004, 228–29).

There are several sources of this overconfidence about people's understanding of complex devices, but the strongest predictor of the IOED turns out to be *the proportion of visible to hidden parts* during the normal operation of the device or process. "It appears that having visual access to mechanism information increases the sense of understanding, often falsely" (Keil et al. 2004, 244–45). That is, the more of a device and its operations that people can see, the better they think that they understand how it works – even when they don't actually understand it very well.

The overconfidence reflected in the illusion of explanatory depth parallels the overconfidence prompted by naïve realism. In both instances, people think that visual information tells them more than it actually does – that is to say, they think that seeing enables them to form an internal representation that is more adequate to the task (in IOED studies, giving explanations; in law, evaluating disputed facts and attributing legal responsibility) than they think it is.

The *visual hindsight bias* is people's tendency to incorporate after-acquired information into their judgments of what others, lacking that information, should be able to see in a picture, and thus to overestimate what those others can perceive. In one study, observers who knew the identity of a degraded visual target (e.g., a famous movie actor or politician) overestimated the ability of observers who lacked

[11] The construct that comes closest is *magic window* realism, "the central, but not the sole, component of perceived reality" in the media effects literature (Potter 1988, 27). Magic window "is concerned with the degree to which a viewer believes television content is an unaltered, accurate representation of actual life" (Id, 26). People who score high on the magic window dimension think that television "provides them with a view of how things really are. They believe that television news shows are accurate, complete, unbiased, and objective pictures of 'the way it is'" (Potter 1986, 162). To the extent that media effects researchers employ magic window and other dimensions of perceived reality primarily to measure people's ability to distinguish factual from dramatic or fictional programming, however, their measure does not get at quite the same thing as naïve realism about pictures as presented in this chapter, which concerns the extent to which people think that various factual conclusions and evaluative judgments can be uncontroversially read off from an indisputably factual evidentiary picture.

that knowledge to identify the target under the same degraded conditions (Harley et al. 2004; see also Harley 2007). Like the hindsight bias generally, the visual hindsight bias thus reflects a misjudgment about how uncertain our judgments are: in the case of the hindsight bias, how uncertain our predictions are ("I knew it all along"); in the case of the visual hindsight bias, how uncertain our visual perceptions and judgments are ("He should have seen it all along").

Naïve realists, similarly, tend to think that pictures tell them more than they do. Just as the visual hindsight bias leads people to read into the picture after-acquired knowledge (not available to viewers at an earlier point in time) and not be aware that they are doing so, naïve realism leads people to read into the picture their own prior knowledge (not necessarily shared by other viewers) and not be aware that they are doing so. Thus, just as the visual hindsight bias reflects a misjudgment about how uncertain visual judgments are, naïve realism reflects a misjudgment about how subjective they are.[12]

More specific visual cognitive biases may also reflect a similar underlying dynamic. Consider, for instance, the effect of using images of brain scans to illustrate explanations of neuroscientific research (McCabe and Castel 2008). When an article about neuroscientific research is illustrated by brain images, readers judge it to be better reasoned than when it is accompanied by an informationally equivalent bar graph or no illustration at all. The authors of the study speculated that "[b]rain images may be more persuasive than other representations of brain activity because they provide a tangible physical explanation for cognitive processes that is easily interpreted as such. This physical evidence may appeal to people's intuitive reductionist approach to understanding the mind as an extension of the brain" (Id, 349–50). That is, the brain scan appears to present as a read-off from external reality something intangible and quite obviously the product of human investigative effort and interpretation. Like naïve realism, it converts contestable judgment into effortless perception.[13]

5.3.5 Judgmental Biases Attributable to Naïve Realism About Pictures

In addition to engendering overconfidence and entrenching other visual biases, naïve realism about pictures may well create first-order judgmental biases of its own.

[12] Relatedly, psychologist Neal Roese and his colleagues (2006) found that showing mock jurors animations as opposed to diagrams of a vehicular accident case made them twice as susceptible to hindsight bias. The authors speculated: "Our research indicates that the clarity of computer animation can obscure the underlying uncertainty of accident reconstruction, creating a biased feeling of knowing" (308). That is, seeing the animation gave mock jurors a stronger impression that they knew how the accident occurred (as the IOED research would indicate), which made them more likely to believe that, from an *ex ante* perspective, it would occur (hindsight bias).

[13] More recently, however, Nick Schweitzer and colleagues found that showing mock jurors neuroimages did not affect their judgments in criminal cases (Schweitzer et al. 2011).

For instance, consider a multimedia slide show played for the jury in an arson-murder trial, in which a sequence of photos of the firemen at the burning building was synchronized to an audiotape of communications between the firemen and their command center (Feigenson and Spiesel 2009). A critical issue in the case was whether the command's delay in ordering those inside the building to evacuate when it became apparent that the roof was on fire and in danger of collapse contributed to the death of a fireman who was trapped in the building when the roof ultimately collapsed. Visually naïve jurors might think that because the slide show simply presented them with objective reality, anyone else would see and hear that reality the same way – *including the firefighters depicted in the photos*. But no one on the scene saw and heard exactly what the jurors did, because the multimedia show was assembled from photographs taken from different points of view, at particular intervals. And the pictures, even if correctly sequenced, could not possibly have been precisely synchronized to the audiotape because the photographs captured instants in time but remained on the screen for durations of up to half a minute. Therefore, the inference that the slide show invited naïve audiences to draw – that what the firefighters and their commanders were heard saying was said in response to what could be seen in the pictures that appeared when their words were heard – may well have been flawed, as might any judgments of responsibility that followed – for instance, that the commanders should have known that the roof was in danger of collapse from the moment when the fire on the roof was visible in the photos.[14]

It may be worth remarking that the judgmental bias of which visual evidence is generally thought to pose the greatest risk – its capacity to provoke emotional decision making (e.g., Bright and Goodman-Delahunty 2006; Douglas et al. 1997) – is probably only partly due to naïve realism. The emotions prompted by a graphic crime scene or autopsy photo or the dramatic video or animated depiction of a vehicular collision result from the realism of people's responses to pictures more so than their naïveté. People use the emotions prompted by such pictures as a cue to judgment to the extent that they believe that the pictures tell them something judgment-relevant about the real world. And shouldn't we be moved to tears or anger by presumptively accurate, compelling visual representations of, say, horrific injuries, even if we are not naïve about the nature of representation? In short, pictures that purport to depict ordinarily observable reality do, to the extent that they are authentic, depict that reality, and it is to that depicted reality that viewers respond, even if they are also aware that what the picture tells them about reality is shaped and limited by the means of representation.

Yet naïve viewers' inattention to the features of the visual representation, their belief that the picture is giving them reality as it was in itself and not as it is represented, also influences their emotional responses to visual evidence and how they

[14] The same inference may also have been prompted by the visual hindsight bias if jurors, knowing that the roof did soon collapse, reasoned that the commanders on the scene should have realized that it would, based on visual evidence that, viewed without the benefit of hindsight, was highly ambiguous.

use those emotions in deciding cases. According to the aboutness principle (Higgins 1998), naïve realists would tend to attribute *all* of their emotional responses to the reality the picture depicts, and in particular, to the most salient items in the depicted reality – usually, the legal judgment targets (e.g., the defendant or the victim). They would be less likely than more critical viewers to discount their emotional responses as partly attributable to the tools and techniques used to produce the picture or its formal features. Consequently, the emotions that naïve realists feel when they see photographic or video evidence should seem to them to be more relevant to their evaluations of the judgment targets and would therefore influence their judgments more strongly than they would if the decision makers were aware of the true sources of their emotional responses.

5.4 Why Naïve Realism About Pictures (Still) Matters

Despite all this, it might be thought that visual common sense in the form of naïve realism need not be a pressing concern for the law because not that many people today, in the age of Photoshop and YouTube, are still naïve about pictures. People may well be savvier than ever before about the possibilities of digital image construction and manipulation, and perhaps even about the effects of framing and context on pictorial meaning. Yet even in our relatively sophisticated visual culture, naïve realism about pictures remains a common and psychologically powerful default.

Indeed, the increasing mediation of communication and culture through visual representations – the fact that more people spend more time learning about reality through their uptake of digital images – may on the whole make people *more*, not less, susceptible to the pull of naïve realism. As people become more accustomed to seeing any given type of representation of reality, the fact of mediation becomes less and less remarkable, even noticeable, and any resistance to simply looking through the picture to the reality it depicts diminishes. That is, people habituate to popular modes of representation. Moreover, people internalize the meaning-making codes of standard forms of representation – as legal scholar Richard Sherwin puts it, “the camera is inside our heads” (Sherwin et al. 2006, 250) – and then, as discussed above, they attribute those meanings to *what* is depicted rather than to a combination of what and *how* it is depicted.[15] They still think that they’re getting reality more or less directly, even as what they’re getting and how they’re getting it changes dramatically.

[15] Research shows, for instance, that people have assimilated standard film editing conventions to the point that they don’t notice cuts (the *illusion of continuity*; Kraft 1986), believing that highly edited Hollywood productions present the depicted reality more or less directly – as long as the structure of the film sufficiently conforms to narrative conventions to allow them to fill in the blanks with their story knowledge (Miller 1990).

That people's prior knowledge of reality itself largely consists of recollections of representations, so that their reality judgments are always already about fitting new cultural products within an existing mental framework of older ones, does not diminish the role of naïve realism. The idea of realism may well be complicated by the fact that there are often no purely unmediated conceptions of reality to which newly encountered mediations can be compared. But this does not lessen the attraction of naïveté in response to newly encountered pictures or the ensuing overconfidence that one's own subjective reading of reality is objectively and therefore exclusively right.[16]

The ease and ubiquity of making and disseminating digital pictures – consider the hundreds of millions of videos on YouTube (Russakovskii 2008) and elsewhere and the over 100 *billion* photographs on Facebook alone (All Facebook 2011) – has also helped to build a popular expectation that there should be visual evidence for every event (cf. Benkler 2006). If there's no visual record, it didn't happen. This skeptical version of "seeing is believing" is, however, readily and even unconsciously converted into a credulous one: Once we've seen the picture, the fact of the matter has been established. That, too, reflects naïve realism.

These same popular habits of making pictures and using them to engage in culture-wide conversations ought to, and do, challenge visual naïveté. As people encounter multiple representations of the same event, and/or realize how easy it is to create variant representations, they should be disabused of the default assumption that their picture-based understandings are objective, sufficient, and not open to reasonable dispute (see Feigenson and Spiesel 2009). But cognitive defaults are difficult to overcome. The sheer number and unceasing variety of pictures available to everyone cumulatively reduces both the time and the attention that people can spare on any given one, leaving them less able and less willing to reflect critically on what they see and reinforcing their default setting of credulity in the face of new information, visual, or otherwise (Gilbert 1991). In addition, the motivations for thinking that one's ideas about reality are correct, and the difficulty of ever getting to the bottom of the often implicit beliefs that shape those ideas, suggest that the hold of naïve realism will in most instances remain tenacious, even among relatively sophisticated and self-conscious decision makers. So while changing media habits in the digital age may foster tension between naïveté and greater sophistication about pictorial meaning, naïveté seems to be alive and well – and, therefore, something that judges, lawyers, and jurors still need to confront.[17]

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[16] Indeed, postmodernist anxiety about the possibility of ever having any kind of access to the "really real" may even impel people toward the sense of security offered by the objectivism of naïve realism (cf. Sherwin et al. 2006).

[17] It might be thought that even if people start out as naïve realists about pictures, their naïveté and any ensuing overconfidence need not be a major concern for the law because that naïveté can be readily corrected. A detailed analysis of the prospects for *debiasing* jurors of naïve realism is beyond the scope of this chapter, so I can merely offer my belief that it appears possible in principle and, to some extent, in practice (see Feigenson and Spiesel 2009).

5.5 Conclusion

As visual and multimedia displays proliferate in law, it becomes increasingly important to appreciate how the audiences for those displays are likely to take them up and use them in presenting evidence, making arguments, and reaching judgments. I have argued that one way in which pictures are taken up is common-sensically – that is to say, naïvely – and that naïve realism about pictures has systematic, and largely negative, implications for legal judgment. This chapter merely introduces the subject; I hope that it will provide a helpful starting point for further inquiry.

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Chapter 6
The Photographic Image: Truth or Sign?

Ira Torresi

Abstract This chapter explores the way in which mechanically or digitally acquired images (photographs and video recordings) are used in the legal, administrative and journalistic practices in the UK, USA, New Zealand, Australia, Canada, Malta and Italy. In the criminal procedure systems analysed here, mechanically or digitally acquired images tend to be accepted as evidence more uncritically than verbal testimony – as something that is harder to manipulate than words and is less prone to bias or distortion since, according to a commonly held misperception, it is generated by a machine rather than a human being. Following the same principle, in the norms and practices involved in issuing personal documents, such images tend to be uncritically taken for granted as proof of identity. A similar presupposition of truth implicitly establishes an identity relation between news reports and the accompanying images, which are shown to present verbal descriptions as incontrovertibly true and accurate. The value of absolute truth implicitly attached to photographic or filmic images, however, contrasts with both semiotic theory and practical considerations. Possible origins and traces left by the stereotype of photographic truth in semiotic theory are discussed, and an argument is made to start considering mechanically or digitally acquired images as signs rather than mere analogue representations of reality.

A value of truth, or a truthful account of facts, persons and objects, is implicitly attached to photographic or filmed images in the legal, administrative and journalistic practices of several countries in the Western world. On the one hand, the use of photographs and video recordings is undoubtedly precious as evidence in legal proceedings, for personal identification procedures and to substantiate news reports. On the other hand, denying pictures and films the status of signs and considering them as mere simulacra of reality risks undermining their very validity and the

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validity of the systems of communication that rely on the stereotype of photographic truth. In the current understanding that one finds outside semiotic scholarly literature (and sometimes even there, see Sect. 6.3), pictures can only be absolutely true or absolutely false; unlike words, they cannot be used to argue. Thus, the risk of dismissing pictures as false without taking into account the messages they convey, or accepting as evidence pictures that may be true, but not relevant to the case in point, is a very real one, as will be shown through real-life examples pertaining to three spheres: criminal procedure, personal identification regulations and practices, and news reports. For the purposes of this chapter, photographs and video recordings will be treated as one category, i.e. mechanically or digitally acquired images.

6.1 Photographs as Evidence in Criminal Proceedings

Photographs and video recordings are admitted as evidence in several Western legal systems, although, perhaps surprisingly, the criteria for their admissibility change slightly from country to country. This is both a confirmation of the geographic reach of the attribution of a truth value to photographs and a first hint that this truth value is not as universal, absolute and immutable as one might be led to think. Due to space constraints, in this section I will limit my discussion to common law in general and, to provide a few specific examples, criminal law in Italy, and two countries where English is one of the official languages.

In common law in general, sketches and other pictorial representations produced by a person involved in a proceeding, as well as oral reports provided in previous proceedings or gestures, are considered to be ‘hearsay statements’, whose admissibility is subject to particular provisions and must be argued in court. In contrast, photographs and video recordings do not count as statements, but are considered to be ‘real evidence’:

> Photographs and films are excluded from the definition [of ‘a statement’] and continue to be admissible, at common law, as a variety of real evidence, if relevant to the issues, including the important issues of whether an offence was committed and who committed it. (Keane 2008, 273)

Apparently, the common law system does not take into account the efforts of those photographers who have gone to great lengths to have their photographs recognised as (artistic, political, cultural, gender…) statements (e.g. Spence 1988). The status of ‘real evidence’ assigned to films and photographs seems to attribute greater reliability to mechanical means of production compared to human motor skills (as in the case of deictic gestures) or the recording of past oral evidence, both of which produce ‘statements’. One might think that interpretability is the watershed here: gestures are implicit; past oral evidence was given in a different context; therefore, both must be interpreted before being admitted in evidence. Conversely, photographs and video recordings depict reality as it is; therefore, interpretation counts only up to a certain point (once the items have been found to be authentic). However, is this really so?

Biber (2007), for instance, describes the case of an Australian Aboriginal man who was wrongly convicted of robbing a bank on the basis of surveillance images

that, although genuine and not physically manipulated in any way, were misread by the police. The pictures – which were low-quality and low-definition – depicted a hooded young Aborigine. The defendant had been known to the local police, and this apparently led the latter to 'recognise' him promptly in the pictures. By the time the appeal procedure had been completed and the defendant declared innocent, he had already served most of the sentence. It might be argued that in this case the mistake was made at the point of image reading/recognition: what the police (an authoritative reader) saw in the picture was taken to be a *true account* of what was in the picture, and what was in the picture was accepted as a *true account* of reality.

The identity relationship that is commonly held between photographs and reality ('the picture *is* what it depicts') or one's representations of reality ('the picture *is* what I see in the picture') is made explicit in several criminal laws or procedure provisions. By way of illustration, Section 491.2 of Canadian Criminal Code states that (my emphasis):

> (1) Before any property that would otherwise be required to be produced for the purposes of a preliminary inquiry, trial or other proceeding […] is returned […], a peace officer or any person under the direction of a peace officer may take and retain a photograph of the property.
> (2) Every photograph of property taken under subsection (1), accompanied by a certificate […], shall be admissible in evidence and, in the absence of evidence to the contrary, shall have *the same probative force* as the property would have had if it had been proved in the ordinary way [i.e. by producing it in court].

According to the law, then, in order to gain probative status, a photograph must be certified, i.e. accompanied by a certificate stating that the photographer was a peace officer or that the photograph was taken under the direction of a peace officer and that it is a 'true photograph' (Subsection 491.2(3), ibid., 589–590). Such conditions are arguably aimed at ensuring that the photograph is not biased by the photographer's involvement in the trial, and thus acknowledge the importance of the author's gaze in the construction of the photograph's meaning. Provided that such conditions apply, the photograph becomes a piece of evidence *as valid as* the original, which means that all and any modifications introduced by the photographic process vis-à-vis reality, any nonidentity between the signifier and the signified (e.g. reducing the property to a static bidimensional object that can only be experienced visually) may be ignored for the purposes of the legal proceeding.

Similarly, Article 670 of the official English version of the Maltese Criminal Code in English provides that (emphasis in the original)

> (1) Any property which is to be released by the registrar to any person or which is to be destroyed or otherwise disposed of in accordance with the provisions of this Title shall only be released, destroyed or otherwise disposed of following the drawing up of a *procès verbal* containing an accurate description of the property released, the quantity and quality thereof and any photographs, video recordings and computer images of such property as the magistrate or the registrar may deem fit should be taken.
> […]
> (3) […] any process-verbal drawn up in accordance with the provisions of this article including any photographs, video recordings and computer images shall be admissible in evidence in any criminal proceedings as if it were the property itself described in the *procès verbal*.

Although the Maltese Criminal Code, unlike the Canadian text, does not mention certification of photographs, the *procès-verbal* is an official document drawn up by judicial officers and signed by the magistrate or officer who holds the criminal inquest (Art. 549 of the Code), who implicitly take upon themselves the responsibility for the photographs, videos and digital images of the property to be produced as evidence (although the Code does not explicitly state who is entitled to take such images). Interestingly, images obtained mechanically or digitally are once again admitted in evidence *as if they were* the original object.

Another example comes from Italy, whose Italian Code of Criminal Procedure (Section 234, 'prova documentale') states the admissibility in evidence of 'writings or other documents representing facts, persons or things by means of photography, video recording, sound recording or any other means'.[1] A peculiarity of the Italian criminal procedure is that, whereas anonymous written documents are not admissible as evidence in court, anonymous photographs are (Vele 2008, 1783) thus implicitly dismissing authorship and the question of the photographer's gaze as non-issues, at least in the legal sphere. Canadian lawmakers, as well as the feminist tradition stemming from Michel Foucault's (1963) notion of 'le regard' (e.g. Mulvey 1975), would have much to object here.

Differences aside, all the provisions about photographic evidence briefly outlined here have one thing in common: the tacit implication seems to be that once deemed authentic and if acquired following the relevant regulations a photograph or video footage cannot be read, interpreted or argued about in ways that differ from what is supposed to be the truthful account of what it depicts. Thus, the concerns recently raised by several authors about the persuasive use of visual-based presentations of arguments and evidence in court, and their acknowledgement of the fact that the lawyer's semiotic and IT competencies can – and in fact do – influence verdicts, seem to have gone largely unheeded by lawmakers, at least to date (Sherwin 2002; Feigenson 2006; Spiesel 2006; Yelle 2006).

6.2 Photographs as Proofs of Identity

A second case in point is the use of photographs to vouch for a person's identity in official identification documents such as passports and ID cards. The need for a photographic proof of identity in all identification documents is stated in the Italian Code of Criminal Procedure, Title I, Head I, Art. 3, as well as in several legally binding documents in other Western countries. For instance, Part 5.3 (terrorism), Section 100.1 of the Commonwealth Criminal Code Act 1995 valid in Australia, states that '"identification material", in relation to a person, means prints of the person's hands, fingers, feet or toes, recordings of the person's voice, samples of the

[1] 'È consentita l'acquisizione di scritti o di altri documenti che rappresentano fatti, persone o cose mediante la fotografia, la cinematografia, la fonografia o qualsiasi altro mezzo'.

person's handwriting or *photographs (including video recordings*) of the person' (my emphasis). Similarly, Schedule 1, Section 2 (personal information) of the British Identity Cards Act 2006 (which is still in force as I write) states that 'The following may be recorded in an individual's entry in the Register—(a) a photograph of his head and shoulders (showing the features of the face); […]'.

The instructions on how to apply for a passport are particularly illuminating with respect to the inconsistencies of the tenet that the photograph identifies the person it portrays. For instance, when someone applies for a British passport for the first time, one of his or her photographs must be certified in writing by a person older than 18, who has known the applicant for at least 2 years, holds a British or Irish passport and 'work[s] in a recognised profession or otherwise ha[s] good standing in the community'. The certification formula reads: 'I certify that this is a *true* likeness of [Miss, Mr, Mrs, Ms or other title and applicant's full name]' (British passports: first application webpage, my emphasis). Additionally, actual resemblance between the applicant and the photographs is ascertained during an identity interview (Identity and Passport Service 2010, 10). Interestingly, however, certification and interview are no longer necessary for passport renewal (British passport renewal webpage; Identity and Passport Service 2010, 5), since the likeness between the photograph on the old passport and the new ones that will go on the new document becomes proof of the likeness between the new photos and the applicant himself/herself, in a loop of apparent self-referentiality: a person is a photo is a photo is a photo….

Even for renewals, however, certification becomes necessary: 'if your appearance is very different from the photo in your current or last passport' (British passport renewal webpage). Providing for such a case means that the British authorities implicitly accept that people might for any period of time (shorter than the 10 years for which a passport remains valid) use photographs as proof of their identity that have grown to have little resemblance with their actual physical appearance, unless they decide to renew the document of their own free will. Once the new photo is validated as a *true* likeness by the certifying person and accepted as such by the authorities, logic would have it that the old, dissimilar photo is a *false* likeness of the passport holder, even if the holder might have used that very photograph as a means of identification for some time. At the same time, any lesser degree of dissimilarity that does not make one 'very different' from the old photo (but is nonetheless very likely to occur in the 10 years of passport validity) is implicitly ruled out and does not break the self-referentiality chain that may well accompany a passport holder from 18 to very old age, if the passport is regularly renewed at least every 10 years.

Identification document photographs also have another interesting characteristic: they must comply with certain stringent standards which may differ from place to place and from service to service (e.g. for UK, see Identity and Passport Service 2010, 16; see also New Zealand's Department of Internal Affairs – Passport Service 2010; Australian Government's Department of Foreign Affairs and Trade webpage; Passport Canada 2009). In order to help passport and visa applicants comply with its famously strict criteria, the US Department of State's Bureau of Consular Affairs

(2010) has issued a seven-page online brochure including guidelines aimed at professional photographers and visual examples of acceptable high-quality photographs for US travel documents. The Italian police, who are responsible for issuing passports through their provincial offices (*questure*), have issued a similarly detailed 3-page guide (Questure italiane photo guidelines webpage). I have personally seen printouts of the same guide in the registry office (*anagrafe*) of the town where I live as a model for identity card applications and renewals, although of course the municipality and the police are two completely separate and independent authorities that might potentially follow different rules for the documents they issue.

With regard to the standards applying to identity document photographs, Zenon Bańkowski points out the arbitrariness of reducing a person to a few characteristics deemed 'salient' by external, inflexible rules:

> All that is left of me is what is on the card (a photograph, a magnetic strip). [...] I've been subsumed into the card which is one created not by me but by the rules, which is all the machine [or the bureaucratic system] applies. (Bańkowski 2001, 205)

The exclusion of gradual variation in physical resemblance, the inflexibility of identification regulations and the arbitrary selection of certain traits instead of others are the prices to pay in exchange for 'certainty and predictability' (ibid.). In denouncing the alienating potential of this system, Bańkowski seems to reject the postulate that lies behind the very use of photographs as official evidence of a person's identity: i.e. there is a purely denotative relationship between the photograph and what it depicts. According to this postulate, photographs do not interpret reality; they represent it as it is. They cannot lie; they are immutable and are therefore perfect evidence. There are, however, at least two levels where the identity relationship between the identification photograph and the person whose identity it allegedly proves can be disrupted or disturbed.

First of all, there may be problems in establishing the correspondence between the real-life person and the person depicted in the photograph. In other words, there may be disturbances at some point in the denotation process. For instance, in cases of close resemblance, the same photograph may fit two separate individuals, who may then choose to exchange documents (and identities). Conversely, someone might look so dissimilar from his/her own photograph that identification becomes difficult, perhaps on account of a sum of minor transitory changes (heavy make-up, glasses, weight loss or gain) or due to technical factors which may have distorted the face in the photograph. We have already seen that the British passport service addresses this problem by reducing all degrees of variation to two positions: either the photograph is less than 'very different' from one's current appearance (more correctly, from one's newer photos), which does not disturb the chain of referentiality that allows the photograph to identify the passport holder through its likeness to his or her older photos, or the photo is very dissimilar from that in the old passport, in which case it can be certified by another person as having a true resemblance to the applicant, however, thereby disqualifying the likeness of the previous photograph that has been used as a means of identification up to the time when the passport is renewed.

The second level at which the photograph ceases to prove the identity of the person holding the document is probably the most obvious one – forgery. In this case, the denotation process is not hindered in any way, and the photograph is in fact a truthful depiction of the user of the document; what is at stake is its status as a guarantee, as proof of what the document is supposed to show (but really does not). Thus, just as Barthes (1977a, 45) points out that in print advertising 'the denoted image naturalizes the symbolic message, it innocents the semantic artifice of connotation', the forged passport-format photograph is used as incontrovertible evidence of what is *said* to be true, but is not. In this respect, the introduction of sophisticated chips containing biometric information such as iris patterns (Daugman 1999) would have the effect of making forgery more difficult to produce but also more difficult to detect. In fact, the denotation process would only be reinforced and made all the more obvious and incontrovertible by a more detailed and accurate description of the person holding the document, even if the problem remains that such incontrovertible denotation would not necessarily be proof of the person's identity.

6.3 On the Semiotics of Photographs

All the legislative and administrative approaches discussed in Sects. 6.1 and 6.2 seem to imply that photographs cannot 'lie': by their very nature, they are objective and truthful. They are to be treated *as if they were* the object or person they represent, and their authorship is to be either neglected (as in the case of Italian criminal proceedings) or attributed to subjects who are supposed to be impartial – an officer in the case of the Canadian criminal law, 'the rules' (Bańkowski 2001, 205) in the case of ID documents.

In other words, criminal laws and administrative bodies do not seem to consider the act of taking a photograph and that of transferring the image onto a film or digital support and from there onto paper or a screen capable of interfering with the identity relation between the represented object and its representation. The signifier, in this logic, does not *stand for* the signified. It *is* the signified. This identity relation (which necessarily implies truth by the standards of classical logic, because in no case can A be other than A itself) seems to imply that in court and administrative practice, photographic images are not considered to be *signs*, which would bring them outside the very realm of semiotics. Interestingly, unlike photographs, words in court are usually recognised as signs (where no automatic identity relationship holds between the signifier and the signified) and therefore do not have a value of truth *per se* attached, while the practice of negotiating their truth value is taken much more for granted than with photographs. This brings us back to the substantial difference that exists in a common sense perception, rather than in sources of law, between the verbal and the visual modes of expression: 'The truth/authenticity potential of photography is tied in with the idea that seeing is believing. Photography draws on an ideology of the visible as evidence' (Kuhn 1985, 27).

Since the potential to be used to lie is the criterion to ascertain whether something can be considered as a sign (Eco 1975, 17), the very issue of including photographs in the realm of legal visual semiotics seems to be at stake here. In fact, the 'inherent truth' approach to photographic images has been long discussed by semioticians. Some of the fathers of semiotics seem to hold an ambiguous position in this respect. For instance, Roland Barthes in his *Le chambre claire* postulates that a photograph is so to speak, trasnparent: what we see is not the photograph itself, but what it depicts, so much so that the referent adheres without further marking or connotation. As a consequence, a photograph cannot be treated as a sign (Barthes 1980, 8). Barthes explicitly professes to be part of those semioticians who maintain that photographs absolutely adhere to reality, and nothing more (ibid., 89). However, he also concedes that society can read photographs in ways that are unpredictable for the person depicted and the photographer (ibid., 16), thus implicitly acknowledging that the interpretation of the photographic image is not universal nor can it be reduced to a true/false exclusive disjunction. And as far back as the 1960s, Barthes wrote that the objectivity and neutrality of photographs is 'mythical (these are the characteristics that common sense attributes to the photograph)' (Barthes 1977a, 19), and that this myth is perpetuated by the mechanical means of production of the image (Barthes 1977b, 44).

In a similarly ambiguous wording, Umberto Eco (1985, 36) tells us that Peirce's indices (including photographs) 'are not mirror images' that do not carry semiosis and do not count as signs 'but one reads them *almost as if* they were' (my translation, emphasis in the original).[2] Jean-Marie Peters tries to solve this conundrum by separating the two supposed natures of photographic and filmic images:

> the *form* as appearance makes the mechanical image a *medium*, an *instrument* with the aid of which one can gain a (better) knowledge of the object reproduced. The form as *vision* instead makes the image a *sign* through which the author of the image or of the sequence of images can formulate a communication. (Peters 1973, 123, my translation, emphasis in the original)[3]

According to Peters, then, photographs by virtue of their being *vision* can convey information and connotations about the referent, but at the same time, photographs are also *appearance*, and as such they only adhere to their referent, so much so that one can know and perceive a referent through the mechanical images depicting it even better than by exploring the referent itself. (It would be interesting to hear what a blind person would have to say about this specific point.)

Such semiotic approaches to photography perpetuate the common sense perception that

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[2] 'non sono immagini speculari ma si procede a leggerle *quasi come se* lo fossero'.

[3] 'la *forma* come aspetto rende l'immagine meccanica un *mezzo*, uno *strumento* con l'aiuto del quale si può conoscere (meglio) l'oggetto riprodotto. La forma come *visione* invece fa dell'immagine un *segno* con cui l'autore dell'immagine o della sequenza di immagini può formulare una comunicazione'.

> Photography's plausibility has long rested on the uniqueness of its indexical relation to the world it images, a relation regarded as fundamental to its operation as a system of representation. As a footprint is to a foot, so is a photograph to its referent. It is as if objects have reached out and touched the surface of a photograph, leaving their own traces. (Batchen 1997, 212)

Leaving, for a moment, semiotics for sociology, Bourdieu et al. (1990, 77) also focus on the delusory nature of photographic truth: 'in conferring upon photography a guarantee of realism, society is merely confirming itself in the tautological certainty that an image of the real which is true to its representation of objectivity is really objective'.

Despite the tautological and reassuring stereotype that photographs cannot be less than truthful, there is significant evidence that 'photographs can lie' (as Eco 1984, 223 finally admits), in at least three ways:

(a) Photographs can be manipulated and edited, thus altering their correspondence with their originals (which is quite common in any form of public communication, as Smargiassi 2009 amply shows, but is normally not allowed in court or identity documents).
(b) Photographs can be said to reproduce someone or something that they do not in fact depict, thus altering their correspondence with the fact, person or object they are attributed to (this is most common in identification document forgery and also quite common in the news, as will be shown in the following section).
(c) Even when the correspondence between signifier and signified is preserved, and photographs are lawfully admitted in evidence, they may be misinterpreted by the reader/viewer. The case described in Biber (2007) is an extreme consequence of such a situation. Speaking from a strictly logical point of view, in such cases it is not the photograph that lies, but it is the reader/viewer who uses it to support what he/she thinks is the truth, which does not necessarily correspond to the reality of events. However, this is also proof of the semiotic, non-analogical nature of photographs, as their meaning is clearly constructed through a process in which the receiver plays an active part, rather than being inherently and absolutely true and neutral. Forced interpretations are especially common in legal matters and perhaps constitute the ultimate proof of the fallacy of the 'inherent truth' approach, as they do not presuppose intentional forgery or alteration of the photograph itself but merely the reader's compliance with the stereotype that a photograph *must* tell the truth without retaining anything, so that the first reading is normally supposed to be the correct one.

Outrageous as it may seem, then, it does not appear to be completely out of place to conclude that, at least in the matter of photographic truth, legal and administrative systems might learn something from art photography and accept Joan Fontcuberta's suggestion to 'look out – it's photography, so it's probably false' (Caujolle 2001, 2). Fontcuberta's caveat holds especially well when applied to a third system of communication that heavily relies on photographic validation – the news.

6.4 Photographs as Evidence in the News

Another field where the dogma of photographic truth is easily revealed as a myth that is only valid as long as the encoders choose to abide by it and readers suspend their judgement about it is the news. We expect news to be truthful and assume that the photographs (or videos) that accompany news items are, first of all, genuine and, secondly, really refer to the piece of news they go with. This unwritten, unspoken rule has been violated innumerable times, many of which in turn became news (see Smargiassi 2009 for an account of dozens of historical cases of misleading photographs used as evidence to back legal, scientific and journalistic arguments).[4] However, the rule is still very much in force, as otherwise we would not be able to distinguish news from fiction. The forgery or 'fraudulent' use of visual material seems to surprise public opinion and cheat major media even more than journalists making up verbal-only news.

A case in point is the fake killing of an American citizen by Al-Zarqawi which was 'documented' by a video circulated on the Internet and broadcast by TV channels around the world in August 2004 and aroused substantial public emotion. The alleged victim was found to be alive and well in his American home, while the video turned out to be a home-made spoof whose images were promptly reproduced to support the news of the discovery of the fake (e.g. Farina 2004).

Another example of a forged piece of news whose alleged authenticity was legitimised through mechanically acquired images is the account of the killing of the crook Salvatore Giuliano circulated on the media by the Italian police. The original official version was that Giuliano, at the time one of the most wanted Sicilian criminals, had been found by the police corp of the Italian army (the *Carabinieri*) and killed in the ensuing shoot-out in the early morning of July 5, 1950. The famous photograph that documented the event backed this version: Giuliano's body lay sprawled in a rundown courtyard, face down in his own blood, his rifle and gun scattered around him, with a Carabinieri officer standing over the corpse. A few days later, a magazine article proved that this version (and its photographic documentation) was a fake and revealed how the Carabinieri had set up the scene in order to protect the real killer – one of Giuliano's accomplices, who had shot him while he slept (Besozzi 1950). A newer study of the forensic pictures hypothesises that they do not even refer to Giuliano but to some other body, a further addition to this photographic mystery (Bolzoni 2010).

Not too dissimilarly, a few years ago some Italian media denounced the 'barbarian practice' of rearing kittens in bottles, taking the now infamous webpage allegedly

[4] The same, incidentally, can apply to historical documents as well as news. For instance, in *A film unfinished*, Yael Hersonski (2010) retells the story of a *Das Ghetto*, a Nazi propaganda film depicting the rich Jews of the Warsaw ghetto as cynical and indifferent towards their less fortunate neighbours. The scenes were presented as a document of real life in the ghetto and were taken to be genuine (although strongly biased) documents by historians for over half a century, until new reels revealing that they were purposefully staged were found in 1998.

selling 'bonsai' cats (Bonsai Kitten website) to be a genuine e-commerce site on the grounds of its professional-looking photographs, which were actually the result of digital photoshopping (Maffeo 2001; Sansa 2002). The website was a satirical hoax devised by a MIT student to denounce the barbarian, human-centred attitude with which humans treat pets. Semiotically innocent internet users are apparently still taking the provocation seriously and keep sending chain e-mails to campaign against the practice of bottling kittens or voice their indignation on blogs (Sophos hoax alert website; Gatti bonsai blog). On the grounds that it might have sparked off real-life imitation, the Italian version of the website was shut down by the police following an official investigation that took place well after the contents of the site had been proven and publicly denounced to be a fake. We will never know whether this would have happened had the website not contained authentic-looking photographs. (Irrespective of the police operation, the Italian website was in fact soon back online hosted by a different server, Gatti bonsai website.)

A different case is that of a photograph that depicts a real event, object or person, but is used with a piece of news that has very little or no connection with the contents of the photograph. This might happen because of an editing mistake, which is usually corrected by the newspaper or other media involved as soon as the editorial staff becomes or is made aware of the error. However, the public correction is usually far less prominent than the original (as is the case with errata corrige on newspapers). Alternatively, the 'mistake' might also be the result of a precise choice.

An example of this is a large (11 × 20.5 cm) photograph that accompanied an article in the 20 May 2010 issue of the Italian newspaper *La Stampa* (Ricotta Voza 2010). The picture managed to catch my sleepy eye while I was leafing through the newspaper over my morning coffee because it depicted an event I had witnessed first-hand some 2 years earlier. It was one of the open-air lectures that the teaching staff of my faculty (the SSLMIT of the University of Bologna at Forlì) had delivered back in October 2008 in the local main square, Piazza Saffi, as a form of public demonstration against the Berlusconi government's first reforms of the university sector (see Fabbri 2008 for an account of the event). The photograph featured Francesca Gatta standing in her black professor's gown against the background of the buildings on the square with a few dozen students facing her in the foreground. However, this referential information was not accessible to anyone who had not been there. Readers could only see a woman standing in an official-looking black robe in front of several young people (mostly women, as the SSLMIT has an overwhelmingly female student population) sitting on the pavement and holding sheets of paper. The caption did not make the context any clearer, quite the opposite; it ran, 'Retreating males – The Forlì piazza, named after Aurelio Saffi. Here one gets a visual idea of the pink power in town'.[5] Whatever a group of undergraduate students and their professor caught in the act

[5] '**Maschi in ritirata** La piazza di Forlì dedicata ad Aurelio Saffi Qui si ha un'idea visiva del potere rosa in città' (emphasis and lack of punctuation in the original).

of peacefully demonstrating against the crippling of the university system may have to do with 'pink power', or 'male retreat' for that matter, is still unclear to me. What is clearer is that the editorial staff at *La Stampa* had not found any more fitting (glamorous? good-looking?) photograph to go with an article about Forlì being the Italian municipality with the highest number of women councillors (50%). A much smaller picture (7.3 × 8.9 cm) of the town council was also shown further down the page but without a caption, as if it were a less blatant 'visual idea' of the local empowerment of women – perhaps because it featured the (male) mayor, Mr. Balzani in the foreground, a position which would have hardly fitted the 'retreating male' rhetoric of the article explicit in the caption to the main picture.

To conclude this section, we have seen that even when photographs are employed for their purely denotative qualities, the tenet of photographic objectivity and inevitable truthfulness can be revealed to be an arbitrary convention. In particular, this is the case when we consider not only the relationship between the photograph and the real-life person, object or event it depicts (which might, however, be a case of non-identity, as with the bonsai kittens) but also broaden the scope to include the role of the photograph in the context of a narrative or text that must be proven to be true. In this light, the photograph or video vouches for the reliability of a piece of information which may be deceitful irrespective of the objectivity of the photograph or video itself, because the piece of news has been made up, as in the Al-Zarqawi case, or because it has no relation whatsoever with the image that should substantiate it, as in the *La Stampa* case.

Given that in the journalistic context, as well as in court or identification documents, the photograph or video is used exclusively for its perceived truth value, it can be safely assumed that its only reason of existence is to attach the quality of reliability to something that is potentially unreliable. In this sense, 'photographs can lie' (Eco 1984, 223, already cited here) not only when the *denotation* process is intentionally altered (e.g. spoof photographs) but also when the *connotation* of truthfulness carried by the photograph or video is attached to something which is *not* true or whose relation with the mechanical or digital image itself does not hold. A first direct consequence of this theoretical conclusion is that wherever visuals (even photographs and videos) are employed, they should never be taken at face value, but recognised as important elements of the text as a semiotic whole, also capable of modifying the meaning and value of nonvisual (e.g. verbal) elements. A second consequence of the statement that 'photographs can lie' is another confirmation that photographs and films can be treated as *signs*, as elements of a semiotic *system* or *code*, and as such they can *argue* and be judged beyond the true/false dichotomy. For instance, in the *La Stampa* case, although I would be able to testify as an eyewitness to the authenticity of both the photograph in question and the event it referred to, I would be in far greater difficulty if asked to certify its truthfulness in the context of that particular article. It is not, however, the photograph that is not true; it is the *argument* that it carries – and which is expounded in the caption – that is wrong.

6.5 Conclusion

With reference to the re-enactment of the liberation of the Mauthausen concentration camp with the explicit intention of providing photographic evidence of the event (2 days after the Americans had arrived, soldiers and prisoners arranged the scene and posed in photographs that *de facto* depicted a historical fake), Michele Smargiassi argues:

> acknowledging that such images were constructed does not diminish their importance; quite the opposite, only this second-degree critical awareness can protect them from the unacceptable risk of being brought as evidence of an alleged 'construction of the Shoah myth' by negationists. (Smargiassi 2009, 240, my translation)[6]

Smargiassi maintains that the photographic image is a sign and as such it is in its very nature to lie, but '*it would sincerely confess to this if liars did not coerce it into faking sincerity*' (Smargiassi 2009, 23, my translation, emphasis in the original).[7] In other words, that photographs can lie in many ways has always been there for everybody to see. Ever since the invention of photography, photographers from Bayard to Fontcuberta have played with this tendency to prepossess. Nonetheless, the myth of photographic truth has not faltered: '[photography] can connote, doctor, pose, aestheticize, disconnect its referents, oversyntax the visible, invent new qualities […]; but it is nonetheless always credited with truth' (Didi-Huberman 2003, 60).[8] One might relate this common perception to a kind of statistical generalisation that excludes 'masses of particular exceptions': '"photographic truth" has meaning even where much photography produces the opposite, for the same reason that "surgical precision" has meaning even though some surgery is known to be imprecise' (Maynard 1997, 191).

Arguably, however, there must be a reason why one should willingly accept to rule out *masses* of cases as 'exceptions' to a generalised rule that is supposed to apply unfalteringly in sensitive fields such as criminal proceedings, identity control and, as Maynard suggests in his analogy, surgery. One justification might be that generalised trust in photographic truth is highly functional to various systems or sets of systems, three of which have been taken into account here. First, we have the system of legal procedure, where absolute truth or falsity traditionally has to be

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[6] 'Ammettere la costruzione di queste immagini non è diminuirne l'importanza: al contrario, solo questa consapevolezza critica di secondo grado può proteggerle dal rischio inaccettabile di essere impugnate dai negazionisti come prova della "costruzione del mito" della Shoah'.

[7] '*la fotografia non può che mentire, ma lo ammetterebbe sinceramente se i bugiardi non la costringessero a fingere di essere sincera*'.

[8] It may well be for this very reason that Jean-Martin Charcot established an in-house photographic service at the Salpêtrière hospital to substantiate his 'invention' of hysteria. The pictures produced by the photographer-in-residence, Paul Régnard, became extremely popular under the title *Iconographie photographique de la Salpêtrière* and became the foundation for the classification of hysterical symptoms, several of which were actually induced by the psychiatrists while the patients were under hypnosis (Didi-Huberman 2003).

established for each piece of evidence and witness, in order to come to a verdict of innocent or guilty. Secondly, there are the systems of identification and identity control which rely on photographs to identify infallibly or stand for an individual. Thirdly, the system of journalism is founded on the reader's or viewer's trust: what one reads is implicitly true, and photographs are used to make a piece of news truer than it would be if expressed only verbally.

However, although it may be functional to the *status quo*, the myth of photographic truth and the ensuing true/false dichotomy pose serious threats to those very systems they are intended to support. Article 2712 of the Italian Civil Code, for instance, states that photographs and films can be produced as 'full evidence' only provided that the defendant does not disclaim their conformity to the facts they depict.[9] In practice, it is enough for the defendant to refute a photograph or film produced as evidence against him or her on the grounds of non-correspondence to reality for the photograph or film to be ruled out of the civil proceeding. If it were possible for photographs to *argue* in court rather than just be produced as a substitute for reality that can only be authentic or fake, true or false, then this provision would not make much sense, and photographs might in fact become more relevant as evidence, since it would be understood that they can carry many more meanings and values than just truth or falsity.

In order to restore photographs to their semiotic nature, however, their visual code should be treated similarly to verbal language and not taken at face value as an *analogon* of reality (Marra 2006, 5). After all, the whole discipline of visual studies rests on the principle that all images, including photographs and films, do have a specific code which can actually be described in grammars (Kress and Van Leeuwen 1996/2006). Moreover, neuroscience tells us that

> the areas and centres [of the right hemisphere of the human brain which 'read' and store our visual experience] are structurally identical with those in the left hemisphere which process our experience of words. Furthermore, appearances in their unmediated state – that is to say, before they have been interpreted or perceived – lend themselves to reference systems (so that they may be stored at a certain level in the memory) which are comparable to those used for words. (Berger et al. 1982, 114)

Additionally, one might argue that photographic images are always physically constructed in some way, even if they are constructed by a machine which is ultimately set and/or operated by a human being. Even security cameras, which are usually not directly operated by any human being, can be said to have a gaze or *regard* in the sense that they serve a particular intention rather than being absolutely objective: they have been fixed in that position to fulfil the specific purposes of an organisation that cares for its own security. When using those images for any other purpose (e.g. if a crime was committed nearby the camera but not on the

[9] 'Art. 2712 Riproduzioni meccaniche: Le riproduzioni (Cod. Proc. Civ. 261) fotografiche o cinematografiche, le registrazioni fotografiche e, in genere, ogni altra rappresentazione meccanica di fatti e di cose formano piena prova dei fatti e delle cose rappresentate, se colui contro il quale sono prodotte non ne disconosce la conformità ai fatti o alle cose medesime'.

premises of the organisation owning the camera), one should take the specificity of their gaze into account.

If we acknowledge the inevitability of a particular gaze and intention in any kind of photographic or filmic image, then it is easy to see that photography also has a cultural as well as a semiotic nature and has to be read and interpreted in its own historical context of production and reception which cannot be dismissed as superfluous (D'Autilia 2001, 10). After all, the codes or 'languages' of photographs and film productions differ dramatically across cultures. As Sontag (1992, 146–150) points out, the Chinese do not share the unwritten rule typical of Western photography according to which photographs should appear as uncontrived as possible. In fact, Sontag highlights that despite the presumed identity between photographs and reality, photography is no exception to the ambiguity of the relationship between true *analogon* and artistic representation (ibid., 6). In other words, 'photographs transform their subjects' (Savedoff 2000, 2), although 'we tend to see [them] as objective records of the world, and this tendency has a far-reaching influence on interpretation and evaluation' (ibid., 49).

Thus, there is more than one way in which photographs may be read. Ignoring this multiplicity in favour of a monolithic 'true/false' reading is a reduction of the real, complex status of photography. More importantly, once the stereotype of photographic truth is unveiled as a misleading simplification, it can hardly be said to serve the communication and legal systems that rely on it as a source for their own validation.

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Chapter 7
Visualization Between Fictitious Law and Factual Behaviour: A Pragmatic-Institutional Analysis

Hanneke van Schooten

Abstract The concept of visualization, its function, and role in the relationship between fictitious legal rules and factual behaviour will be the focus of this chapter. Based on the view that legal rules express a message that needs to be *thought* of as real, processes of visualization will be analysed, in particular in the dialogical context of the legal rule as a sequence of linguistic signs, expressing an action-idea, on the one hand, and observable behaviour in accordance with the rule, on the other. The point in question is how we can 'see' and 'know' the rule's content that is not available for direct observation. A legal rule, in the words of Alf Ross, is an indiscernible phenomenon, a 'thought object,' and an 'action-idea', compared to the factual and observable behaviour that is related to the rule. Questions arise whether processes of visualization are dominated by linear causality between rule and behaviour or whether reciprocal elements are involved. Are these processes individually determined or within groups? In the first part of this chapter, the Institutional Theory of Law as well as the Scandinavian Legal Realists and their concept of legal language as imaginary terminology together form the building blocks for the construction of an analytical framework. In the second part of this chapter, a case study will be described, focusing on the rules of war (meanly the 1945 UN Charter), on the one hand, and observable behaviour (actual warfare during 'peacekeeping missions'), on the other. The relationship between the law of war and actual warfare is situated in the aftermath of 9/11. Finally, the framework will be used as an instrument to analyse the case study. Concluding remarks will be made in the last section.

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7.1 Introduction

The concept of visualization, its function, and role in the relationship between fictitious legal rules and factual behaviour will be the focus of this chapter. Based on the view that legal rules express a message that needs to be *thought* of as real, processes of visualization will be analysed, in particular in the dialogical context of the legal rule as a sequence of linguistic signs, expressing an action-idea, on the one hand, and observable behaviour in accordance with the rule, on the other. The point in question is how we can 'see' and 'know' the rule's content that is not available for direct observation. A legal rule, in the words of Alf Ross, is an indiscernible phenomenon, 'thought object' (Ross 1968), and an 'action-idea' (Ross 1968), compared to the factual and observable behaviour that is related to the rule. Questions arise whether processes of visualization are dominated by linear causality between rule and behaviour or whether reciprocal elements are involved. Are these processes individually determined or within groups?

In the first part of this chapter, the Institutional Theory of Law, as well as the Scandinavian Legal Realists and their concept of legal language as imaginary terminology together form the building blocks for the construction of an analytical framework. In the second part of this chapter, a case study will be described, focusing on the rules of war (meanly the 1945 UN Charter), on the one hand, and observable behaviour (actual warfare during 'peacekeeping missions'), on the other. The relationship between the law of war and actual warfare is situated in the aftermath of 9/11. Finally, the framework will be used as an instrument to analyse the case study. Concluding remarks will be made in the last section.

7.2 The Legal Rule as Thought Object

7.2.1 Legal Language

Law is first and foremost a linguistic phenomenon. What has been described as the 'linguistic turn' in science, at the beginning of the twentieth century, has pushed the question of language and communication processes more and more to the centre of theorizing.[1] A dichotomy frequently referred to in this context is the dual character of language, that is, descriptive and prescriptive language. *Descriptive language* purports to represent the facts as they *are* (Searle 1979).[2] Accordingly, the information

[1] Analytical jurisprudence was based on the ideas of Frege, Russell, and the early Wittgenstein. They opened the way to a general programme in which the meaning of propositions would be displayed by a process that revealed hidden logical structure beneath the surface form of statements.

[2] On the basis of Searle's criterion of 'direction of fit', descriptive language represents a direction of fit between word (information) and world (the facts): a 'word-to-world' direction of fit.

is either true or false (Ruiter 1997; Pintore 2000). *Prescriptive language* purports to present the facts as they *ought to be*. Accordingly, the information has to be made true by people (Searle 1979; Ruiter 1997). Thus, with the use of prescriptive language, speech acts can be performed (Searle 1970). A classical example, frequently used, can be found in the Bible, where it is stated that the words of God took effect according to their literal sense: 'Let there be light' (Olivecrona 1971). And the light became into being because He commanded it. Every else on earth, herbs, animals, etc., were created in the same way. In this example, the effects of the imperatives (commands) are physical. However, the effects of legal language are not physical; they bring about 'legal effects': rights, duties, and legal qualities. This brings us to a second characteristic of legal language: the observation that its terminology has no physical counterpart or reference in the world of fact, while terms like 'chair', 'tree', and 'house' do. The terms 'right', 'duty', and 'legal quality' cannot be pointed out as 'facts'. Herbert Hart called this phenomenon 'the anomaly of legal language' (Hart 1983).

In academic literature, the distinction in language between descriptive and prescriptive has also been called *indicative* speech and *directive* speech (Ross 1968). Although the two types of speech differ in function, they have in common that they are formulated in a sentence, expressing a topic, that is, the 'meaning-content' that is 'not only thought of, but thought of as real' (Ross 1968). Legislation is one of the categories of directive speech. Alf Ross states that a legal rule can be regarded as a sequence of linguistic signs, expressing a meaning-content (the 'action-idea'), functioning as a message in a dialogical context (sender-receiver) (Ross 1968). The meaning-content of the legal rule has a directive function, that is, 'to advance it under such circumstances that it is – more or less – probable that it effectively will influence the behavior of the recipient in accordance with the action-idea of the directive' (Ross 1968).

Two elements attract the attention in this approach. First, the meaning-content of a legal rule is an indiscernible phenomenon: an action-*idea*. Legal rules can be considered 'ideal entities, available not to direct observation, but only to the understanding' (MacCormick and Weinberger 1986). Legal rules are not material objects, but *thought* objects, (MacCormick and Weinberger 1986) projecting 'images that exert pressure to be socially realized' (Ruiter 1997).[3] This is where visualization comes in. The rule's action-idea, in order to be communicated, needs to be *thought of as real* (Ross 1968). Second, in contrast to the fictitious rule, a thought construct, the actual existence of behaviour (in accordance with the rule) can be observed as an empirical fact: the actualization of the image the legal rule projects (Olivecrona 1971).[4] Considering these two features of a legal rule, like the two sides of the same coin (MacCormick and Weinberger 1986), it is tentatively concluded that *visualization* – a picture that is internally constructed – forms the pivot between the

[3] Ruiter has based his idea of legal projection upon Wittgenstein's picture theory, in particular Wittgenstein's statements 3.11 and 3.12 (Tractatus Logico-Philosophicus) where he argues that '[t]he propositional sigh is used as a *projection* of a possible situation' (my italics).

[4] In this context, Olivecrona uses the word 'supersensible' for the legal sphere.

meaning-content of a legal rule, a thought object, and behaviour in accordance with the rule, as observable acts.

7.2.2 Institutional Legal Facts

As mentioned above, Ross argues that regarding a legal rule functioning in a dialogical context, three elements can be distinguished: (1) the indiscernible rule – a thought object, involving a meaning-content expressing an action-idea – that (2) needs to be thought of as real: the internally constructed visualization, meant to be (3) materialized (to a certain extent) into actual conduct (Ross 1968). From the viewpoint of institutional legal theory, a fourth element can be added. That is, *prior* to these three elements mentioned, a fourth element can be observed, that is, (4) actual behaviour by which the rule comes into being. To explain this fourth element, the following example can be given (MacCormick and Weinberger 1986).

By getting on a bus and paying a fare to the driver, a *contract* comes into being. The observable pattern of social behaviour (getting on a bus, etc.) is related to an indiscernible rule of contract of carriage (MacCormick and Weinberger 1986). The performance of the act institutes the rule of contract of carriage (institutive rule) that produces a whole set of legal consequences (consequential rules), which form, in turn, the basis for further observable acts and behaviour. If, for instance, there should be a crash and a passenger gets injured, a whole set of consequential rules, resulting from the existence of the contract, is available for the passenger to seek compensation in law (MacCormick and Weinberger 1986), leading to new empirical patterns of conduct. Finally, terminative rules determine the end the contract, for instance, by getting off the bus.

Ruiter states that legal institutions, such as ‘contract’, ‘ownership’, and ‘corporation’, are ‘in their origin, *images* that human beings superimpose on reality’ (Ruiter 1997). Practices (getting on a bus, etc.) realize a contract insofar as it provides a picture of regular social behaviour corresponding to the ‘ideal’ image conveyed by the legal rules that together make up a contract (Ruiter 1997).

By adding the fourth element, the following instrument of analysis can be constructed. Actual and observable behaviour (getting on a bus, etc.) institutes an indiscernible rule or rules (rule of contract and its consequential rules), expressing imaginary terminology (the action-idea of the rule of contract and its consequential rules), generating an internally constructed picture, and subsequently actualizing into conduct. Finally, in the event of a conflict about the rule (of contract) and corresponding behaviour – for instance, a bus accident and injured passengers – new observable conduct will entail, that is, a lawsuit for damages before a court. In this approach, on the one hand, the rule is instituted by observable acts, and, on the other hand, the rule entails new observable consequential acts.

Some aspects of the institutional approach are similar to Ross’s view laid down in his famous article ‘*Tû-Tû*’ (Ruiter 1997). Although Ross focuses partly on penal law, MacCormick concentrates on civil law, the resemblance between the two

examples is striking.[5] In his article, Ross describes how in the Noît-cif tribe – living on the Noîsulli Islands in the South Pacific, and regarded as one of the more primitive peoples – if certain taboos are breached, a phenomenon called *tû-tû* arises. For instance, the empirical fact of killing a totem animal, the killer – a member of the tribe – has become *tû-tû*. The guilty person must be subjected to a special ceremony of purification, in order to restore the person and his tribe in their regular former states. It is very difficult to explain what is meant by *tû-tû*. Ross states that *tû-tû* is nothing but an illusion, a word without semantic reference (Ross 1957), which is analogous to modern legal terms such as 'rights', 'contracts', or 'ownership'.

To illustrate this, Ross gives the following example (Ross 1957):

> We find the following phrases, for example, in legal language, as used in statutes and the administration of justice:

1. If a loan is granted, there comes into being a claim.
2. If a claim exists, then payment shall be made on the day it falls due.

This is only a roundabout way of saying the following:

3. If a loan is granted, then payment shall be made on the day it falls due.
   The 'claim' mentioned in (1) and (2), but not in (3), is obviously, like *tû-tû,* not a real thing; it is nothing at all, merely a word, an empty word devoid of all semantic reference.

Here, too, observable conditioning facts (Ross 1957), granting a loan or, in MacCormick's example, getting on a bus and paying the fare to the driver, institute a rule – an ideal entity – that, in turn, entails new empirical acts, seeking compensation in law for the deluded loaner or for the injured passenger. It is stated that, between conditioning facts and consequential facts, imaginary terms are inserted, such as the right of ownership or contract (Ross 1957). Like *tû-tû*, 'right' and 'contract' are 'a power of an incorporeal nature, a kind of inner, invisible dominion over the object of the right' (Ross 1957). The legal rule is thus regarded as the indiscernible intermediary between conditioning facts and consequential facts. How is this analysis connected to the visualization of rules? This subject will be scrutinized in the following section.

7.3 Envisaging Law

7.3.1 Word, Image, and Action

First and in general, it is stated that legal discourse favours visual metaphors. Jackson states in his article 'Envisaging Law', 'We frequently consider law itself as a looking: we "observe it"; we evaluate claims "in the eye of the law", high courts "review" the decisions of inferior tribunals', etc.' (Jackson 1994).

[5] In his article, Ross, too, makes the comparison between penal law and civil law.

Second and more specifically, communicating a legal rule as described in Sect. 7.2 means that the recipient has to construct a mental picture of the rule's linguistic meaning-content (Olivecrona 1971). This raises the question of how the process of the internal construction of a picture, stemming from language, takes place and how it is related to external and observable acts. What is the connection between (legal) language, images, and acts?

Asking the question of whether visual images are more powerful determinants of sense construction than language, Jackson comes to the conclusions that (Jackson 1994):

> Generally, visual perception has claims to greater 'originality' than language (…). The visual stimulus produces an iconic image on the retina, unlike the symbolic connections characteristic of linguistic representation. The latter form of representation, characteristic of the human species, may be regarded as a later *development* in evolutionary terms.

In this way, the relationship between acts, images, and language can be seen as an evolutionary development through time from concrete and observable (actions) to more abstract phases (images of actions) and finally into the most abstract form (language). Bruner speaks of 'the successive emergence of action, image, and word as the vehicles of representation' (Bruner 1974). A similar view can be found in the work of the pragmatist George Herbert Mead. Starting with unreflective gestural interactions between two individuals, boxers for instance, Mead explains how a new stage can be attained, in which gestures are no longer unreflective but rest on pre-established ideas and meaning. When a person raises a fist in anger against another person, both know the sign's meaning, without it being necessary that the action expressing the sign leads to an actual fight (Mead 1962). Once it is separated from its original action-context, a gesture as a 'significant symbol' referring to an idea or meaning, like a raised fist as a symbol for anger, can become an independent sign. According to Mead, here we can speak of the beginning of abstract 'language' (Mead 1962). At this point, Mead states, communication starts between individuals, a conversation in gestures as abstract signs that are 'internalized as significant symbols, because they have the same meanings for all individual members of the given society or social group' (Mead 1962).

In this view, too, the origin of language is in the actions underlying the gestures that are separated from the original action-context and have become abstract 'language' signs.[6] Mead points out that although language stems from action and is based upon independent gestures referring to and arousing a meaning or idea in the beholder's mind, the origin of language cannot be compared to or confused with language in its later stages (Mead 1962). The complexity of language has to a great extent been object of research, resulting in many different views, currents, and schools, involving semantic and syntactic approaches, which go beyond the scope of this chapter.

[6] In reverse, this view is similar to Charles Peirce's pragmatic concept of the 'final interpretant': the observable action as a 'living definition.' Peirce states that the description of the action is 'the most perfect account of a concept that words can convey.' C.S. Peirce (1931–1935), (Hartshorne and Weiss 1906) (5.491).

From the above, it can be concluded that language and action are not two totally separate entities, but have in essence the same function: vehicles of representation in different degrees of abstraction. Four levels can be distinguished: (1) the action itself, (2) a symbol of the action, resulting in (3) language that refers to objects in the world of facts, to be distinguished from (4) legal language, since their imaginary terms have no physical counterpart or referent in the world of facts, for instance, the existence of institutional legal facts (right, contract, ownership). The last-mentioned category expresses a *legal state* and represents a power of incorporeal nature, an inner, invisible dominion over the object of a right. A power that, although different, is related to and grounded in the actual exercise of force by which the factual and apparent use and enjoyment of the right is effectuated.

The view of the evolutionary development from actions to words does not clarify how processes of visualization take place: Is it individually determined or determined by groups? The common view that modern society is composed of or divided into different groups – professional, organizational, cultural, territorial, religious, economic, etc. – leads to the question of whether effective communication within group settings is dominated by the group's own ideas and values. Generally, group members depend on the flow of communication to establish their own identity within the group's structure and learn to function in the group's setting. In academic literature, several theories have been developed in order to gain insight into this phenomenon. This subject will be the focus of the next section.

7.3.2 *Semiotic Groups, Social Subsystems, and Internal Goods*

The view that the rule expresses imaginary terminology that needs to be thought of as real raises the question of how linguistic legal rules are envisaged, individually or in groups. Jackson formulates the beginning of an answer by stating that images – the image projected by the rule – can be analysed by distinguishing three levels regarding the linguistic and visual aspects of the legal system: the cultural level, the causal level, and the psychological level (Jackson 1994). By 'cultural level' is meant 'the attitude expressed within particular cultures (professional, for instance) to particular forms of sense construction' (Jackson 1994). By 'causal level' is meant 'the causal relationship between sensory data inputs and the sense actually constructed (within any particular group)' (Jackson 1994). Finally, 'psychological level' means 'those processes within the brain which are activated in the transformation of sensory inputs (sight, hearing, touch, smell, taste) into perceived senses' (Jackson 1994).

Jackson insists that, as the understanding of language is governed by grammar, 'visual understanding' is 'governed by a mental grammar' (Jackson 1994). He illustrates this with an example of two crossed rectangles, one partly hidden behind the other. We can construct the unseen parts of the underlying rectangle and distinguish two distinct objects. But we can also assume that the picture is composed of three different objects. The interpretation of the image is constructed by 'visual grammar' (Jackendoff 1993).

Piaget, however, denies this assumption, arguing that the same set of structures in the mind operate equally upon different forms of sensory input. Image and language are both dependent on 'cognitive development' – the development of general intelligence – which underlies the growth of language as well as other sense construction mechanisms (Piaget 1971).

The three levels mentioned above are interrelated (Jackson 1994). In particular, the cultural and causal levels intensify each other, resulting in the existence of particular groups, dominated by internal distinctions and codes, generating a meaning distinct from other groups. Applied to legal language, we can see similarities with what Jackson calls 'semiotic groups'. In the broadest of terms, the definition of a 'semiotic group' is 'a group (professional, national, etc.) which makes sense of law in ways sufficiently distinct from other groups' (Jackson 1999). The legal system comprises a series of interacting semiotic groups.

The concept of semiotic groups, although different in some respects, comes close to the idea of 'social subsystems', developed by the German legal scholar and legal sociologist Gunther Teubner, in his book *Law as an Autopoietic System* (Teubner 1993). Functional subsystems, for instance, groups defined by profession or disciplines, are relatively closed in their self-organization, but partly open to information. If legal information 'enters' a subsystem, it will be transformed in the system's own distinctions, codes, and meanings (Teubner 1993). As a result of this phenomenon, different subsystems make sense of legal information distinctly from other subsystems. The degree of autonomy of the interpreting groups correlates with the 'resistance' they offer against different (dissenting) interpretations of other groups as well as with their power to impose their own interpretation on other groups.

At this point, we might compare Teubner's ideas of 'social subsystems' with MacIntyre's understanding of 'practices' (MacIntyre 1985). 'Practices' are defined by MacIntyre as 'any coherent and complex form of socially established cooperative human activity' (MacIntyre 1985) bound together by rules. Every practice creates what MacIntyre calls 'internal goods', that is, immaterial goods that cannot be known or acquired in any way other than by participation in that particular practice (MacIntyre 1985). This means that 'those who lack the relevant experience are incompetent thereby as judges of internal goods' (MacIntyre 1985). In this view, particular practices differ from each other, since practices create their own internal framework for interpretation. Practices originate and develop from within: the practice is self-referential. When faced with a change in its environment, a practice will react in terms that reflect its own internal organization and its own internal self-understanding. Like Teubner's social subsystems and Jackson's semiotic groups, practices will always react to its environments in terms of its own internal organizations and corresponding codes. Outside information or interaction with other groups or practices will be transformed in the system's own distinctions and meanings.

On the basis of these theories, it may be stated that images, projected by rules, differ in distinct groups and cultures. The group's own codes and internal framework determine the visualization of the rule's action-idea. If we accept that legal

language and action are not two separate entities, but two sides of the same coin, that the rule is an indiscernible thought object and an intermediary between observable conditioning facts and observable consequential facts, and that visualization of legal language is connected to and grounded in action, then the act plays a key role in the sense construction of the rule image. The case study, described in the next section, is a classic example of this phenomenon. The Court and the Prosecution Service can be regarded as two distinct semiotic groups, both envisaging the law (here the law of war) in their own distinctions, codes, and meanings, resulting in legal uncertainty and a lack of legal clarity.

7.4 A Case Study: Fictitious Law of War and Factual Warfare

7.4.1 The Legal Rules and the Picture They Project

The laws of war can be divided into (1) the rules that provide acceptable practices while engaged in war (*jus in bello*) and (2) the rules that are consulted before a war is engaged in, in order to determine whether entering into war is justified (*jus ad bellum*). The *jus in bello* – the 1949 Geneva Conventions – is only applicable in the event of a legal 'state of war', which comes into being after a 'declaration of war'. The declaration of war initiates the state of war and, in that way, reflects a clear dividing line between the 'state of peace' and the 'state of war'. This dichotomy appears to have been almost universally accepted. The *jus ad bellum* involves the rules that justify the start of a war. In the Netherlands, for instance, the Constitution requires prior approval of Parliament, before the government can declare war. Since the 1945 UN Charter, the use of force between states has been prohibited (Article 2(4)). No declaration of war has been made since.[7] The exceptions to the prohibition of interstate force can be found in Article 51 (the individual or collective right of self-defence) and in Articles 39–50 (international peace and security). In this chapter, I will focus on the last-mentioned articles.

International security postulates the institutionalization of the lawful use of force. The collective security system is constructed in Chapter VII (Articles 39–50) of the UN Charter. The Security Council determines the existence of any threat to the peace, breach of peace, or acts of aggression and decides what measures must be taken to maintain or restore international peace and security (Article 39 of the Charter).[8]

[7] However, there is one exception. In 1989, Iran formally declared was against Iraq with which it had been engaged in hostilities since 1981.

[8] Article 39: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

The idea of restoring international peace and security suggests that such a breach has already happened. This being the case, the Council has to employ enforcement measures calculated to re-establish international law and order. On the basis of the Charter, the Council has a whole array of powers, enabling it to maintain or restore international peace. Article 41 authorizes the Council to put into operation measures not involving the use of force, such as complete or partial interruption of economic relations, cutting off communication, and severance of diplomatic relations.[9] If the measures provided by Article 41 prove to be inadequate, the Security Council is authorized by Article 42[10] to maintain or restore international peace and security by military force, either on a limited or on a comprehensive scale.

The common denominator of all UN forces created so far is that they are *ad hoc*, as and when required in specific cases, and their dependence on voluntary cooperation by Member States has been absolute (Sommereyns 1982). Subsequently, UN forces have come to be known as 'peacekeeping' forces and may have manifold missions. 'Peacekeeping' is a broad, generic, and often imprecise term to describe the many activities of the UN forces.

Changes have occurred, especially since the end of the Cold War.[11] Not only the number but also the size, functions, and strategies of peacekeeping missions have been altered. The function of peacekeeping missions has moved beyond interposition and ceasefire monitoring to include election supervision, nation building, and a wide range of other functions. Peacekeeping has also adopted more coercive tactics and strategies, making it increasingly less distinct from collective enforcement actions. In essence, peacekeeping forces are not designed for combat. Nevertheless, it has been understood that they are entitled to defend themselves. Moreover, the Security Council has granted some peacekeeping forces permission to use force in circumstances that go beyond self-defence.[12]

[9] Article 41: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.

[10] Article 42: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations'.

[11] 1989: the fall of the Berlin wall.

[12] Already in Bosnia-Herzegovina, UNPROFOR (United Nations Protection Force) was explicitly authorized in Resolution 836 (1993), 'acting in self-defence, to take the necessary means, including the use of force, in reply to bombardments against the safe areas' (free from hostile acts) established by the Council, as well as to protect freedom of movement and humanity convoys (Security Council Resolution 836, 48 RDSC 13, 14 (1993)). In Resolution 1101 (1997), the multinational protection force in Albania was authorized 'to ensure the security and freedom of movement' of its personnel (Security Council Resolution 1101, 52 RDSC 58 (1997)). Most significantly, ONUB (United Nations Operations in Burundi) was authorized by the Security Council, in Resolution 1545 (2004), 'to use all necessary means' to carry out its extensive mandate (Security Council Resolution 1545, 43 ILM 1453, 1455 (2004)).

With the evolution of new functions of peacekeeping forces, since the end of the Cold War, scholars have begun to refer to more recent operations as 'new peacekeeping' (Ratner 1995) or 'second-generation' missions (Mackinlay and Chopra 1992). The development from strictly peacekeeping operations to 'enforcement peacekeeping' operations entails the increase of military force towards a full-scale war, which is still denominated under the term peacekeeping. A legitimate peacekeeping enforcement mission is *de facto* indistinguishable from a war, which, in the words of the Charter, is an illegal act of aggression. The fact that war is banished linguistically does not mean that it has vanished empirically.

7.4.2 The Rules Interpreted by the Prosecutor and by the Court

The contradiction between the linguistic ideal of the Charter to ban war and the reality of actual warfare during peacekeeping missions became clear in several cases brought before courts concerning acts during the peacekeeping operation in Iraq, in particular the *Eric O.* case and the *Sleeping marines* case. In both cases, Dutch military personnel participating in the peacekeeping mission in Iraq were prosecuted for actions while fulfilling tasks (*Eric O.*) or neglecting tasks (*Sleeping marines*) during the mission. In both cases, the final question was: Is the peacekeeping mission in Iraq a state of peace (*Eric O.* case) or is it a state of war (*Sleeping Marines* case)? Depending on the answer to this question, the law of peace or the laws of war should be applicable.

Focusing on the *Eric O.* case, the Prosecution Service held to its standpoint that the peacekeeping mission in Iraq was a state of peace and prosecuted Eric O., a commander of the battalion Quick Reaction Force, for manslaughter on the basis of Article 307 of the Dutch Penal Code (*Wetboek van strafrecht*), since O. had fired a warning shot in a threatening situation that killed an Iraqi civilian by accident. Penal law is valid law in times of peace. Eric O. was arrested as a suspect on 31 December 2003. He was directly flown to the Netherlands, where he was imprisoned. Besides manslaughter, O. was accused of deliberately breaching the official instructions (*dienstvoorschriften*) causing danger to someone's life or resulting in someone's death, as stated Article 136 of the Military Penal Code (*Wetboek militair strafrecht*). These official instructions were laid down in the *Aide Memoire for SFIR Commanders* (AM) and the Instructions on the Use of Force (IUF) *(Geweldsinstructies)*.

The District Court, as well as the Court of Appeal, acquitted Eric O. of the charge. Their arguments concentrated on the Rules of Engagement (ROE) which authorized 'the passing of warnings to any person by any means' (Article 151 ROE). The Court of Appeal declared that O.'s conduct could not be regarded as substantially imprudent, negligent, or careless. O.'s behaviour was necessary under the threatening circumstances, sketched by several witnesses (necessity requirement). He could not have acted in any other way, given the lack of military personnel in the threatening

situation (subsidiarity requirement). Nor did he act out of proportion, giving the warning shots in order to remove the threat and the hindrance for the mission (proportionality requirement).

By declaring the ROE, as a part of the Memorandum of Understanding, ratified by the Netherlands before engaging in the Iraq mission, applicable and valid law for the peacekeeping mission in Iraq, both Courts held to their standpoint that this mission was clearly *not* a state of peace, in which soldiers function like police officers, as the prosecutor stated, and have to act in according with the existing 'Instructions for police officers concerning the use of force'. But if it is not a state of peace, what *is* the legal status of this peacekeeping mission? The Court of Appeal declared that several legal states can be distinguished between the ultimate state of war, on the one hand, and the ultimate state of peace, on the other. However, based on the idea of the separation of powers, one of the basic principles of the Dutch *Rechtsstaat*, the judiciary is not allowed to decide upon this matter. It has to be left to the legislature, since the Constitution empowers the legislature with supremacy over the judiciary. However, by ratifying and declaring the ROE applicable law, the Court of Appeal concluded in this case that these rules guarantee military units in Iraq a sufficiently 'robust action'. In fact, *de facto* warfare could be observed in Iraq during the peacekeeping mission. Thus, the judges could not decide what *precisely* the legal status of the peacekeeping mission was. Negatively formulated, the mission was not a regular state of peace but was dominated by the ROE, rules for a situation of 'war', and instituted in particular for this mission. In its judgment, the Court of Appeal criticized the Public Prosecution Service as well as the Minister of Defence. The judges pointed out that the questions about the legal status of the mission had to be answered by the Public Prosecution Service itself, in mutual deliberation and agreement with the military experts of the Ministry of Defence, being part of the legislative power. The answers must function as the basis of a balanced policy for instruction and prosecution. Unfortunately, there had not been such deliberation between the Public Prosecution Service and the Minister of Defence.

Next, the Court of Appeal observed, much to its regret, that in the *Eric O.* case, the Public Prosecution Service had evidently been *insufficiently* prepared for the question of how to react to the described shooting incident. Secondly, the Court of Appeal made the direct and clear statement that, in the comparison with similar rules, such as the instructions for police officers, the fact that a military action during an international mission is *of a totally different order* had been completely ignored. The court observed, however, that further elaboration of ideas had been initiated within the Public Prosecution Service, leading to a different procedure: a soldier who fires will no longer be regarded as a *suspect*. Finally, the Court concluded that, in similar future cases, the Public Prosecution Service's attitude could result in the absence of the necessary legal certainty for soldiers on international missions acting under dangerous circumstances. The Public Prosecution Service was told to work on its 'situational awareness'.

7.5 Applying the Framework to the Case Study

Based on the theoretical notions described in Sects. 7.1, 7.2, and 7.3, an analytical framework can be constructed and applied to the case study. In the classical view, legal rules are directive language involving an action-idea in a dialogical context, in order to influence the behaviour of the recipient in accordance with the rule. On the one hand, we find the indiscernible rule that needs to be thought of as real, that is, the internally constructed visualization, and, on the other hand, observable action that can be regarded as the actualization of the internally created picture. This rather unilateral concept of the relationship between law and conduct can be extended and completed with the aid of institutional legal theory and the concept of law of Ross and Olivecrona.

In institutional legal theory, the fictitious rule and factual behaviour are regarded as two sides of the same coin. Actions express and simultaneously institute rules. This phenomenon is called 'institutional legal fact'. The rule, in turn, entails in new factual conduct of execution and judgment. Ross's exposure on the phenomenon *tû-tû* and its modern version of claims and rights show analogous aspects. Thus, the rule, regarded as an indiscernible action-*idea* that needs to be thought of as real, that is, a visualization in the mind, stands between institutive (or conditional) facts and consequential facts. In this way, the conversion from internal visualization into external acts involves a reconstruction in which reciprocal elements are involved, revealing the rule's meaning-content as a result of action, which Peirce calls 'final interpretant' and 'living definition'.

Eric O.'s shooting incident can be regarded as the conditioning fact that instituted the rule, which resulted in consequential facts, execution and judgment. In this 'fact-rule-fact' sandwich structure, the legal rule forms the indiscernible intermediary between the observable facts. The actual execution and judgment of the prosecutor and the judge determined what (distinct) images were projected by the rule(s). In this respect, the Prosecution Service and the Courts can be seen as two distinct semiotic groups, defined by profession and divided by the principle of the Trias Politica. Members of such groups generate images of the legal rules within the group's own inner framework. Thus, the images, the legal language projects, vary within distinct semiotic groups in society, since they 'transform' the legal information into their own distinctions, meanings, and codes. In the *Eric O*. case, prosecutor and judge each applied their own distinct framework, resulting in a conflict on sense construction of the rule involved. Here, not one rule was central to visualization, but two totally different (sets of) rules. The Prosecution Service insisted upon the law of peace, that is, the Dutch Penal Code, which is valid law in times of peace. The Courts insisted on the law of war, that is, the ROE, which are valid rules in times of war. This discord resulted in legal uncertainty and lack of legal clarity and was in flagrant contradiction with the rule of law. The Courts, as one semiotic group, stuck to their conclusions. However, they could not decide upon creation of legislation, in which the legal status of robust peacekeeping missions needs to be regulated, since this competence is reserved to the legislature.

From the theoretical notions that language is grounded in and developed from action, that legal language forms an abstraction and a representation of the action, that the rule is a fictitious intermediary between actions, and that action is the 'final interpretant and a living definition', we might conclude that acts play an essential role with respect to the imaginary terminology of the legal rule that becomes manifest twice, first, visualized in the conditioning acts of Eric O.'s shooting incident and, second, in the consequential acts of the Prosecution Service and the Courts.

The question of the Court's ascendancy as one semiotic group over the Prosecution Service as another semiotic group remains unanswered. However, following Teubner's concept of law as an 'autopoietic system', it may be concluded that the degree of autonomy of a semiotic group correlates with the 'resistance' it offers against different images of another group as well as with its power to impose its own codes and meanings on other semiotic groups.

7.6 Final Remarks

The *Eric O*. case attracted a great deal of attention and was the subject of debates in politics, constitutional science, and in the media. While the case was pending, a period of several years, the lack of clarity about the legal status of peacekeeping missions that are characterized by warfare was central in discussions in the media and among constitutional lawyers. Since the case had a huge impact on the life of Eric O., a military man, doing his duties in Iraq in a warfare situation that was named 'peacekeeping', investigations were started, resulting in an immense research report[13] in which the legal status of the 'robust' peacekeeping missions was analysed and recommendations were given in order to avoid misunderstandings in the future. Moreover, it resulted in a change in governmental policy. Regular deliberations will take place in the future between the Minister of Defence, as part of the legislature, specialists in the field of war, and the Prosecution Service in order to harmonize the differences in viewpoints and to avoid a lack of legal certainty, which is one of the basic principles in the Dutch *Rechtsstaat*.

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[13] *Rapport Onderzoek NATO Response Force*, Den Haag: Sdu Uitgevers, 2006, Kamerstukken II [Parliamentary Documents] 2005–2006, 30 162, nos. 2–3, *Verslagen van gesprekken* [Reports of Discussions], nos. 4–5.

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Part II
Visualizing Legal Scholarship

Chapter 8
The First Amendment and the Second Commandment

Amy Adler

Abstract We live in an image culture, a world in which images are so ubiquitous as to be unremarkable. It is said that the image has surpassed the word as the dominant mode of communication. It seems preposterous to suggest that in this modern, digital, visual culture, we might still feel the ancient, bewitching pull of images, the instinct that images possess an uncanny power or danger. Surely, this view of images is archaic; it resembles the view that motivated both idolaters and iconoclasts in earlier, supposedly more primitive, cultures. Yet I believe this ancient view of images is alive and well (although we don't acknowledge it) in the modern and supposedly rationalistic world of contemporary First Amendment law. In my view, First Amendment law consistently and unthinkingly favors text over image, and it does so for reasons that bear a remarkable similarity to the reasons that motivated iconoclasts throughout the history of religious and secular struggles over images.

In this chapter, I explore a variety of free speech doctrines to establish that First Amendment offers greater protection for verbal as opposed to visual forms of representation. Curiously, this consistent preference for text over image is buried in the doctrine; assumed and almost never acknowledged, its real-world implications are dramatic. I then show that the First Amendment treatment of images echoes the approach to visual imagery that animated the biblical prohibition on graven images and the historical, religious impulse to destroy images. The view of images that

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motivated iconoclasts, the perception of images as invested with magic powers or indistinguishable from what they represent, persists unrecognized in contemporary First Amendment law and theory.

8.1 Introduction

> *Thou shall not make unto thee any graven image, or any likeness of anything that is in heaven above or that is in the earth beneath or that is in the water under the earth.*
>
> — Exodus 20:4–5

> *The ancient superstitions about images—that they take on lives of their own, that they make people do irrational things, that they are potentially destructive forces that seduce and lead us astray—are not quantifiably less powerful in our time.*
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> — W.J.T. Mitchell, *What Do Pictures Want?*

We live in an image culture, a world in which images are so ubiquitous as to be unremarkable. It is said that the image has surpassed the word as the dominant mode of communication. It seems preposterous to suggest that in this modern, digital, visual culture, we might still feel the ancient, bewitching pull of images, the instinct that images possess an uncanny power or danger. Surely, this view of images is archaic; it resembles the view that motivated both idolaters and iconoclasts in earlier, supposedly more primitive, cultures. Yet I believe this ancient view of images is alive and well (although we don't acknowledge it) in the modern and supposedly rationalistic world of contemporary First Amendment law. In my view, First Amendment law consistently and unthinkingly favors text over image, and it does so for reasons that bear a remarkable similarity to the reasons that motivated iconoclasts throughout the history of religious and secular struggles over images.

I have two major goals in this chapter. The first is to establish that the First Amendment offers greater protection for verbal as opposed to visual forms of representation. The preference for text over image surfaces in a variety of places in First Amendment thinking. It is, however, a peculiar preference: it is often assumed and almost never acknowledged. Yet, the difference between text and image within the First Amendment has significant real-world implications. It is evident, for example, in the pattern of contemporary obscenity prosecutions, which have focused exclusively on pictorial rather than textual material. The preference for text also arises in child pornography law, which focuses exclusively on pictures. It also turns up as an assumption in a variety of scholarly thinking. For example, Catharine MacKinnon's antipornography writing argues that pictorial pornography, especially photography, is far more harmful to women than is textual pornography. The uncertain status of visual images, in my view, also influences the Court's jurisprudence about the USs flag.

My second goal in this chapter is to trace the ways in which the First Amendment treatment of images echoes the approach to visual imagery that animated the biblical prohibition on graven images and the historical, religious impulse to destroy

images. The view of images that motivated iconoclasts, the perception of images as invested with magic powers or indistinguishable from what they represent, persists unrecognized in contemporary First Amendment law and theory.

Part I offers a very brief introduction to the complex underpinnings of the biblical prohibition on graven images and historical outbreaks of iconoclasm by focusing on one theme that recurs in the literature—the fear that images might somehow merge with their prototypes. Part II then turns to the argument that there is a First Amendment hierarchy that values text over image. Here, I explore four areas of First Amendment law and theory in order to tease out the thematic concerns about images that underlie this unrecognized hierarchy. Ultimately, I argue that the First Amendment preference for verbal over visual representation rests on assumptions about visuality that have biblical roots.

8.2 Iconoclasm and the Fear of Images

In Exodus, Chapter twenty, verse four, the Hebrew Bible commands:

> Thou shall not make unto thee any graven image, or any likeness of anything that is in heaven above or that is in the earth beneath or that is in the water under the earth… (Exod. 20:4–5)

The biblical prohibition on graven images is an extraordinarily complex subject, and I could not begin to do it justice in the confines of this condensed account. In what follows, then, I focus on one central theme in the religious literature that I believe is particularly relevant to First Amendment law and theory: there was a fear that visual images were so powerful that they would provoke viewers to confuse the image with its prototype, leading to a dangerous merger of signifier and signified (Freedberg 1989; Halbertal and Margalit 1992). This theme informed not only the second commandment, it also resurfaced as a prominent justification in numerous outbreaks of iconoclasm.

David Freedberg argues that throughout the history of iconoclastic controversies, across culture and religions, run certain recurrent assumptions about the nature of images. Whether it be the great iconoclastic movements of Byzantium in the eighth or ninth century, of Reformation Europe, of the French Revolution or the Russian Revolution, or even modern day, seemingly isolated attacks on art, one of the most prominent fears expressed by iconoclasts has been that the image will somehow merge (or be seen by others to merge) with what it represents (Freedberg 1989, 378–428).[1] Of course, as the image tempts us to fuse it with what it represents, this becomes the basis of idolatry. One danger of making an image of God is that we might become so entranced with the image that we end up worshipping the thing itself, forgetting that it is only a representation. The image is so beguiling that we

[1] David Morgan has said that in debates on iconoclasm that "difference between representation and the person represented had… become unclear" (2005, 145).

lose all sense. The next step, of course, is iconoclasm. Thus, it is a premise of this piece that idolatry and iconoclasm are two sides of the same coin—both views depend on the attribution of extraordinary power to images.[2]

The Second Commandment's prohibition on graven images was handed down from Moses to the people on tablets in the midst of the "Golden Calf" episode of the Bible (Exod. 32:1–35). Moses went to receive the Word of God, and, in his absence, the Israelites became distracted. They built the Golden Calf, a glittering golden image, and began dancing around it as they lapsed into decadent sensuality and distraction. When Moses returned with the inscribed Word of God, he broke the tablets in anger at what he beheld. This idolatry was no small matter. Moses killed 3,000 men. He burnt the Golden Calf, strewing its dust into the water, and made the people drink it. Only then did Moses give God's commandments once again to the Israelites. This passage marks the elevation of the Word over the image in the Bible. It vividly illustrates the hazardous sensuality of visual representation. The voluptuousness and seductiveness of the image, its power beyond words, and its appeal to the senses and to passion rather than reason paved the way for both worship and condemnation.

Why do images but not words invite such a response? Why does the biblical prohibition apply only to pictorial representation? Indeed, verbal representations of God are not only permitted but encouraged. As Halbertal and Margalit argue, the potential confusion between representation and prototype is unique to pictorial representation.[3] They write: "This blurring of the distinction between symbol and the thing symbolized, which is so common in idolatry, does not occur in language" (1992, 52). The tendency to equate images with what they represent and to invest them with magical powers recurs across a number of contexts—not only in the long-standing worship of images as religious icons or the belief that certain pictures have talismanic properties but also in the widespread fear among native peoples that a picture captures your soul (Frazer 1996, 223–24), or the use of voodoo dolls, or the burning of enemies in effigy. All of these various uses of images depend on a fusion between representation and its subject or its effects.

This interest in the power of images that informs the religious literature also characterizes a great deal of contemporary, secular criticism in the field of visual studies. In recent years, in fact, some say that the field of visual studies has taken an "iconic turn," marking a newfound fascination with the autonomous power of images, their ability to determine their own reception (Moxey 2008; Belting 1994). The use of the term "iconic" in this literature deliberately conjures up the concept of divine presence immanent in religious icons. Of course, there are still many critics

[2] The idolater perceives the image as having power over himself. The iconoclast fears that others perceive the picture as having power over them. The image's power is to be celebrated in the former case and destroyed in the latter. But as David Freedberg puts it, "the love and fear of images… are indeed two sides of one coin" (1989, 405).

[3] Although they do acknowledge a qualification to this rule, citing the potential fetishization of the Torah or occasionally of names (1992, 52).

who resist this turn, and some who resist, in fact, the very assumption that there is a marked distinction between text and image, as did Nelson Goodman and to a lesser extent E.H. Gombrich in an earlier wave of criticism. Nonetheless, for purposes of this chapter, I will assume some difference between pictorial and linguistic representation, at least at the very important level with which I am concerned: the level of cultural and, as I will now explore, legal reception.

What are the First Amendment implications of this tendency I have described to attribute life to images, to imagine them as fusing signifier and signified? I believe it leads to two seemingly paradoxical results: on the one hand, it may lead us to view images as trivial or unimportant in the First Amendment hierarchy. As signifier merges with signified, and the image becomes a thing, we may forget that we are in the presence of representation, of speech, at all. In this view, the First Amendment would not even apply to images. On the other hand, this same merger between signifier and signified can lead to the view that images are anything but trivial. Instead, they possess a magical, uncontrollable autonomy that requires us to restrain them. In this view, images would count as "speech" for First Amendment purposes, but they are such peculiarly dangerous type of speech that the typical First Amendment rules should not apply to them.[4] Below, I will explore how both views of images play themselves out in free speech law and theory.

8.3 The Preference for Text Over Image in First Amendment Law and Theory

Drawing on this analysis, in this part, I explore four areas of First Amendment law and theory in order to trace the ways in which I believe age-old assumptions about visuality assert themselves in the modern First Amendment context.

8.3.1 Obscenity Law

[W]hatever images are, ideas are something else.

— W.J.T. Mitchell (1994), *Iconology: Image, Text, Ideology*

In the 1973 case of *Kaplan v. California*, the Supreme Court offered in dicta its only overt acknowledgement of the preferred status of text over image in First Amendment law. *Kaplan* involved the obscenity prosecution of an adult bookstore owner for selling an "unillustrated" book to an undercover officer (116–17). The Court described the book as "made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous" (116–17).

[4] Perhaps this double vision of images as both trivial and dangerous bears something in common with what W.J.T. Mitchell suggested when he wrote: "We need to account not just for the power of images but their powerlessness, their impotence, their abjection" (2004, 10).