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positions in the history of the period. These centuries did witness the dramatic proliferation of new technologies of nonverbal representation,[44] some of which enabled (and required) new relationships between texts and readers and among readers.[45] But some diagrammatic devices used before the advent of linear perspective in the fourteenth century and movable type in the fifteenth persist, in largely unaltered form, in later periods, and the social and institutional forms within which modern legal and academic discourse is produced also began taking shape before these revolutions. This section illustrates these complexities by considering the use of nonverbal devices in the work of three influential figures from this period (including one, Ramon Lull, who worked before linear perspective), then reviewing the institutional forms that started to coalesce in the twelfth and thirteenth centuries.

The visual devices appearing in the works of the Spanish mystic and philosopher Ramon Lull (1232–1315) both recall Euclid and anticipate post-printing practices. Lull's life's work was an "art"[46] articulated in expository, allegorical, and diagrammatic form and encompassing all areas of inquiry, from cosmology to logic, medicine, and law. The purpose of the "art" was to provide certain knowledge and a tool for the persuasion of unbelievers. To this end, Lull's work brimmed with both verbal descriptions of figural illustrations[47] and literal figures.[48] Most striking were his representations of concepts in the form of abutting circles that could be rotated to generate different combinations of concepts. Offered as tools for logical argument and persuasion, these proto-computers directly inspired Gottfried Leibniz's and

[44] For accounts from the spheres of cartography, engineering, and banking, see, for example, Turnbull, supra note 38 (cartography); Brian S. Baigrie, Descartes's Scientific Illustrations and "la grande mecanique de la nature," in Picturing Knowledge: Historical and Philosophical Problems Concerning the Use of Art in Science 86 (Brian S. Baigrie ed., 1996) (engineering); Matthew J. Barrett, The SEC and Accounting, in Part Through the Eyes of Pacioli, 80 Notre Dame L. Rev. 837 (2005). Systematic visual education also dates from this period, culminating in Comenius's Orbis Sensualium Pictus (The Visible World in Pictures) (1658), an illustrated children's textbook based on principles that still animate educational theory. See James Andrew Laspina, The Visual Turn and the Transformation of the Textbook (1998).

[45] It is commonly noted that print made possible the exact reproduction of not only text but also illustrations. See, for example, Bruno Latour, Drawing Things Together, in Representation in Scientific Practice 19 (Michael Lynch & Steve Woolgar eds., 1988); Walter J. Ong, From Allegory to Diagram in the Renaissance Mind: A Study in the Significance of the Allegorical Tableau, 17 J. Aesthetics & Art Criticism 423 (1959). But this theoretical reproducibility of illustrations did not necessarily enable actual practices of precise reproduction; the expense of printing illustrations, as opposed to text, led to reuse of illustrations and sometimes "scrambled relations between text and images." Bert S. Hall, The Didactic and the Elegant: Some Thoughts on Scientific and Technical Illustrations in the Middle Ages and Renaissance, in Picturing Knowledge, supra note 44, at 3, 17.

[46] This is set out most generally in Lull's Ars Generalis Ultima or Ars Magna ("Ultimate General Art") (1305) but runs through all his works. See Frances A. Yates, The Art of Ramon Lull: An Approach to It Through Lull's Theory of the Elements, 17 J. of the Warburg & Courtauld Insts. 115 (1954).

[47] Yates, supra note 46, at 136 (describing conviction by circle drawn in sand).

[48] Id.

Leonhard Euler's proto-Venn diagrams in the seventeenth and eighteenth centuries[49] and may also have influenced Charles Peirce's "existential graphs."[50] In addition to influencing logical discourse, Lull was a legal glossator, directly participating in the European reception of Roman law that laid the foundation of modern Western understandings of law as a systematic practice.[51] With a directness unfamiliar (and perhaps unavailable) to us now, Lull sought to show the basic coherence of discourse on every topic conceivable and accorded visual devices an equal status with text in this enterprise.

A systematizing impulse similar in some ways to Lull's characterizes the work of the French educator and logician Peter Ramus (1515–1572), although Ramus channeled the impulse in more iconoclastic directions.[52] Ramus's "method," a systematic approach to learning any subject matter, swept the Western world during the sixteenth and seventeenth centuries.[53] Central to the highly visual Ramist method were horizontally oriented bracketed analytical trees of concepts. This approach blended text and nontextual space far more deeply than the Porphyrian tree, and its influence on the Anglo-American conceptualization of law is difficult to overstate. A method that is recognizably Ramist in spirit remains one of the dominant discursive models for law today.[54]

Still, it is common to regard not Ramus but Rene Descartes (1596–1650) as the key progenitor of modern Western thought, especially scholarly thought. In fact, Descartes's influence merely complements that of Ramus. Descartes's skeptical epistemology and metaphysics both enabled the notion that radical certainty was a meaningful goal for human efforts and posited a world theoretically devoid of but amenable to human agency.[55] Complementing these premises, Descartes's analytic geometry offered an abstract spatial template seemingly suited (like Ramist trees) to the analysis and solution of any problem.[56] Cartesian thinking would later be taken to have underwritten a new understanding of social organization and government, based on an expansion of the domain of individual certainty to an empirical social reality emptied of subjectivity.[57] Within a century or so of his work, discursive techniques specific

[49] Ian Spence, No Humble Pie: The Origins and Usage of a Statistical Chart, 30 J. Educ. & Behavioral Statistics 353, 358 (2005); Yates, supra note 46, at 167 [Lull]. See also Margaret E. Baron, A Note on the Historical Development of Logic Diagrams: Leibniz, Euler, and Venn, 53 Mathematical Gaz. 113 (1969).

[50] See Sun-Joo Shin, The Iconic Logic of Peirce's Graphs (2002).

[51] Cf. Berman, supra note 40.

[52] Ross, supra note 22, at 346; Yates, supra note 37 [Memory].

[53] Walter J. Ong, Ramus, Method, and the Decay of Dialogue: From the Art of Discourse to the Art of Reason (1958).

[54] Cf. Schlag, supra note 21; Kennedy, supra note 36.

[55] Rene Descartes, Discourse on Method (1632).

[56] See, for example, J.J. Gibson, The Ecological Approach to Visual Perception (1979).

[57] See, for example, Foucault, supra note 25; Charles Sanders Peirce, How to Make Our Ideas Clear, in Peirce on Signs: Writings on Semiotic by Charles Sanders Peirce 160, 161–62 (James Hoopes ed., 1991).

to this conceptualization began to take their modern form—that of graphic statistical representations, many built in a Cartesian coordinate framework.

During this period, as texts begin to take on characteristics more recognizable to us, so too did forms of interaction among people. Bruno Latour, among others, has argued that it is not just ideas and technologies but also encounters with them in social environments, and particularly the "recruitment" or persuasion of others that is enabled by the combination of technology and interpersonal contact, that make possible such features of the modern world as industry, finance, and science.[58] Environments facilitating this kind of "recruitment" include the university—whose origins lie in eleventh-century Europe[59]—and the law office and courtroom, which in England began to assume their modern form between the twelfth and sixteenth centuries.[60] Institutional developments of this sort in turn shaped the discourse used within these environments. Harold Berman has explained how the "legal science" that emerged in Europe during this period, the first conceptualization of law as subject to systematic overview (and proposals for reform) by commentators, necessarily developed contemporaneously with the university.[61] Systematic accounts of this kind, created within particular social settings, in turn made those social settings more complex, allowing them to become both more spatially dispersed and more tightly woven.[62] And these recursive effects eventually enabled the creation and discussion of new types of "facts."

30.3.3 Eighteenth and Nineteenth Centuries

Many visual forms familiar to us today, including graphs and charts, first appeared in the eighteenth century and first attained widespread use in the nineteenth. These developments coincided with an explosion in the number of social forms within which people used devices like this to "recruit" allies, as well as with increasingly elaborate systems for control of access to the spheres in which this recruitment occurred. The visual forms themselves presented new kinds of facts as a focus of professional, learned, and political attention; the communities in which they were generated and circulated were a market for these facts and were themselves instantiations of such facts. In this section, I first describe the proliferation of nonverbal forms of communication during this period and their role in generating new facts; then I explain how the multiplication of social forms enabled and exemplified these phenomena in a dynamic that continues to structure contemporary scholarship and legal practice.

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[58] Latour, supra note 45; for similar arguments, see, for example, Randall Collins, The Sociology of Philosophies: A Global Theory of Intellectual Change (1998); Ong, supra note 53 [Ramus].

[59] See, for example, Berman, supra note 40; William Clark, Academic Charisma and the Origins of the Research University (2006).

[60] J.H. Baker, The Legal Profession and the Common Law: Historical Essays 156–59 (1986).

[61] Berman, supra note 40, at 931–41.

[62] See Latour, supra note 45.

As they learn how to speak, children experience a "phase shift" in vocabulary acquisition: after a period of slowly learning to use a small number of words, they all at once attain the ability to use many, many more.[63] The vocabulary of visual commentary in the West experienced an analogous phase shift around the turn of the nineteenth century, when the tools for nonverbal representation of information diversified dramatically. Many historians give much of the credit to William Playfair (1759–1823), a Scottish polymath and entrepreneur.[64] His innovations appeared in two works, the Commercial and Political Atlas (1786) and the Statistical Breviary (1801), which, as their names suggest, compiled economic and demographic information about England and its trading partners. The Atlas included numerous line graphs and a bar graph; the Breviary added what is considered the first pie chart.[65] Although the concept of statistics was as much created by Playfair's work as operative in that work,[66] the importance of his graphics lies less in their innovation by one individual than in the historical overdetermination of his supposed breakthrough. In using graphic forms to communicate information about groups of humans and their activities, Playfair married the time-honored technique of geometrical demonstration[67] to contemporary obsessions with the abstract features of aggregated human populations.[68] Building on the eighteenth-century concern with political economy, Playfair showed how information about populations could be made both comprehensible and propositionally stable.

The link between these modern diagrammatic forms and biopolitics—probabilistic, deindividualized, instrumentalist thinking about human life—is confirmed by the work of pre-Playfair graphic pioneers. The earliest geometric display of quantity as a function of height and width appeared in a 1693 essay on actuarial science by Edmund Halley, who offered a Euclid-like quadrilateral to illustrate the chances for survival and death of two independent lives, as well as many tables of figures.[69] Joseph Priestley probably originated the use of graphic timelines, precursors of line graphs, in the mid-eighteenth century.[70] Curves illustrating the normal distribution also first appeared in the eighteenth and nineteenth centuries.[71] The proliferation of biopolitical diagramming

[63] Katherine Nelson & Lea Kessler Shaw, Developing a Socially Shared Symbolic System, in Language, Literacy, and Cognitive Development: The Development and Consequences of Symbolic Communication 27, 32 (Eric Amsel & James P. Byrnes eds., 2002).

[64] See, for example, Funkhouser, supra note 38, at 280–90; Thomas L. Hankins, Blood, Dirt, and Nomograms: A Particular History of Graphs, 90 Isis 50, 52 (1999); Spence, supra note 49, at 353–56.

[65] Cf. Michael Friendly, A Brief History of the Mosaic Display, 11 J. Computational & Graphical Statistics 90, 94 (2002) (asserting that all modern forms of statistical graphics were invented by the early 1800s).

[66] Funkhouser, supra note 38, at 280.

[67] Playfair called diagrams "the best and readiest method of conveying a distinct idea." Quoted in Spence, supra note 49, at 353.

[68] See, for example, Foucault, supra note 25.

[69] See Friendly, supra note 65, at 92 [Mosaic]; see also Funkhouser, supra note 38, at 278.

[70] Funkhouser, supra note 38, at 279–80.

[71] Pioneers of this form were Jean d'Alembert, Pierre Laplace, Augustus de Morgan, and Adolphe Quetelet. Funkhouser, supra note 38, at 296–99.

in the century after Playfair is so profuse that a concise summary is impossible. To take just a few examples, in the mid-nineteenth century, Florence Nightingale created elaborate geometric representations of the causes of soldiers' mortality to use in her campaign for public health reform.[72] In 1872, the US Secretary of the Interior first requested federal funding for diagrams to accompany the US census; illustrated census atlases were issued in 1874, 1890, and 1900.[73] The economic indifference curve, which would eventually reshape legal scholarship, was pioneered by Alfred Marshall in 1879[74] and the box diagram comparing indifference maps of two traders by Francis Edgeworth in 1881.[75] Among the most celebrated graphicists of the period was Charles Joseph Minard (1781–1870), a French civil engineer who devoted his later career to the graphic presentation of social and political data.[76]

All of these forms enabled the perception and management of depersonalized populations. As they became familiar, such forms became "transparent"; eventually, they would come to be regarded as more faithful representations of reality than pictorial images or text[77] and to function as modes of argument in their own right.[78] And toward the end of this period, diagrams become devices for communication to fellow specialists as much as to novices—tools for the management of discursive communities, not just populations.[79] One of the signal features of the intellectual history of this period is the increasing particularization of professional life and the increasing professionalization of intellectual and academic life.[80] The proliferation of increasingly specialized professional and scholarly societies

[72] See Florence Nightingale, Notes on Matters Affecting the Health, Efficiency, and Hospital Administration of the British Army (1858).

[73] See Funkhouser, supra note 38, at 338–42.

[74] See, for example, Joseph A. Schumpeter & Elizabeth B. Schumpeter, History of Economic Analysis 1031 n.10 (1994).

[75] See Humphrey, supra note 28, at 39, 40–49.

[76] Minard's "figurative map" (Carte figurative) of the 1812 march of Napoleon's army on Russia, which used line direction, width, and color to represent attributes of the march, is considered a high-water mark of information graphics. See especially Michael Friendly, Visions and Re-Visions of Charles Joseph Minard, 27 J. Educ. & Behav. Statistics 31 (2002); Funkhouser, supra note 38, at 305–10 (1937). In addition to diagrams of military and transportation information, Minard also created representations of cultural phenomena such as the spread of languages. See, for example, Friendly, supra, at 36 [Minard].

[77] See, for example, Anne Beaulieu, Images Are Not the (Only) Truth: Brain Mapping, Visual Knowledge, and Iconoclasm, 27 Sci., Tech., & Hum. Values 53 (2002); Jurgen Link, The Normalistic Subject and Its Curves: On the Symbolic Visualization of Orienteering Data, 57 Cultural Critique 47, 49 (2004) (Mirko M. Hall trans.); Michael Lynch, Discipline and the Material Form of Images: An Analysis of Scientific Visibility, 15 Soc. Studies of Sci. 37 (1985); Wolff Michael Roth & Gervase Michael Bowen, When Are Graphs Worth Ten Thousand Words? An Expert-Expert Study, 21 Cognition & Instruction 429 (2003).

[78] See Humphrey, supra note 28.

[79] Link, supra note 77.

[80] See generally Andrew Abbott, The System of Professions: An Essay on the Division of Expert Labor 86–98 (1988).

during this period mirrors the proliferation of diagrammatic forms and accelerates in the same time frame.[81]

While the reasons for these developments are debated, some of the functions of these social groupings are evident; they operate largely by credentialing experts.[82] As Andrew Abbott has put it, professional groupings come to exist through meta-discourse on the "jurisdiction" belonging to the grouping, that is, identification of the types of questions its members are equipped to answer definitively.[83] The formation of such groupings also encourages the generation of commentary decipherable only by initiates, a powerful tool for ensuring that commentary on particular matters remains scarce and authoritative.[84] It is no coincidence that these developments in social and intellectual organization occurred during the period when biopolitical diagrammatic forms were proliferating. Thinking of people as populations makes it possible to think of them (and for them to think of themselves) as members of occupational and intellectual groups. And many of the earliest groups to associate defined their jurisdictions in biopolitical terms: engineering (devoted to augmenting the physical capacities of populations),[85] anthropology (devoted to the differentiation of cultures),[86] and statistics (devoted to the description of populations).[87] In statistics and engineering, the relation of all of these developments is especially evident: practitioners' use of visual forms spurred the development of conventions of visual grammar, which in turn became part of the education of new practitioners.[88]

This trend toward specialization and exclusivity has not been entirely uniform. The creation of professional jurisdictional boundaries restricts access to discourse communities but also makes it possible to cross those boundaries deliberately (e.g., through interdisciplinary work). Such boundary crossing enables new perspectives and new types of commentary. Examples include not only the work of Peirce, discussed below, but also the modern American law school, which emerged in the interstices between professional jurisdictional claims and those of academic

[81] For an overview of the development of learned societies, see the website of the Scholarly Societies Project at the University of Waterloo, which summarizes the number of such societies founded by decade. See Scholarly Societies Project Chronology, at http://www.scholarly-societies.org/chronology_soc.html.

[82] See Abbott, supra note 80; Harry Collins & Robert Evans, Rethinking Expertise (2007).

[83] "Jurisdiction" is Abbott's term for the functional focus of professional efforts. Abbott, supra note 80, at 59–85, 98–108.

[84] See Abbott, supra note 80, at 98–108; Andrew Abbott, Chaos of Disciplines (2001).

[85] The British Institution of Civil Engineers, established in 1818, was among the earliest professional societies.

[86] Anthropological societies were among the earliest specialized learned societies. Examples include the Royal Asiatic Society of Great Britain and Ireland (1824) and the Royal Anthropological Institute of Great Britain and Ireland (1843). See also Susan Gal & Judith T. Irvine, The Boundaries of Languages and Disciplines: How Ideologies Construct Difference, 62 Soc. Res. 967, 967–69 (1995).

[87] The Royal Statistical Society, originally the Statistical Society of London, was established in 1834 and the American Statistical Association in 1839.

[88] See especially Funkhouser, supra note 38, at 273.

disciplinarity in general[89]; the fields of psychology and economics, both of which developed as hybrids of nineteenth-century natural and human sciences[90]; and more recent interdisciplinary fields such as social network theory[91] and game theory,[92] both of which, notably, involve distinctive diagrammatic forms. Such boundary-crossing social forms and discourses are possible only in an ecology in which boundaries exist, and those boundaries are in part an effect of visual forms enabling their conceptualization.

30.3.4 Twentieth-Century Perspectives on Visual Commentary

By the beginning of the twentieth century, our diagrammatic vocabulary and institutional ecology had mostly assumed their present-day forms. Instead of discussing the development of visual and social practices, this section considers the light shed on practices of visual commentary by several perspectives developed within and between academic disciplines. Section 30.3.4.1 discusses semiotic perspectives, particularly those of Peirce; Sect. 30.3.4.2 historical-cultural perspectives, which informed the discussion above; and Sect. 30.3.4.3 psychological perspectives, which illuminate the relations between sign systems and social structures from a complementary vantage point.

30.3.4.1 Semiotic Perspectives

The interdisciplinary discourse of semiotics began to take shape in the late nineteenth century and has itself relied on visual commentary from the start.[93] But in addition to being an example of the developments described above, semiotics offers a vocabulary for discussing them: semioticians' work involves the generation of commentary on other practices of commentary, including visual commentary. In this section, after explaining some resources that the Peircean tradition offers for analyzing visual commentary, I suggest where the perspective requires supplementation.

Like the other founding father of semiotics, Ferdinand de Saussure, Charles Peirce (1839–1914) included diagrams in his work, but unlike Saussure, Peirce also began

[89] See, for example, Christopher Tomlins, Framing the Field of Law's Disciplinary Encounters: A Historical Narrative, 34 Law & Soc'y Rev. 911 (2000).

[90] See, for example, Humphrey, supra note 28.

[91] See especially Freeman, supra note 35, at 39, 70.

[92] John von Neumann & Oskar Morgenstern, Theory of Games and Economic Behavior (1944).

[93] See, for example, Ferdinand de Saussure, Course in General Linguistics 65, 67, 77–78, 84 (Charles Bally & Albert Sechehaye eds., 1916); Tomas Albert Sebeok, Semiotics in the United States (1991); see also supra note 30 [Greimas].

to work out a vocabulary for analyzing their function and significance.[94] One of Peirce's most influential semiotic proposals has been his trichotomy of sign functions: icon, index, and symbol.[95] Peirce acknowledges that a single sign may serve more than one function but notes that each type of function is suited to different communicative purposes.[96] Indexical signs, based on "direct physical connection" between sign and object,[97] like the connection between smoke and fire, are valuable when we want "positive assurance of the reality and the nearness of" signified objects.[98] Iconic signs "exhibit[] a similarity or analogy to the[ir] subject[s],"[99] as a stick-figure image of a person resembles an actual person and as a drawing of a triangle resembles the concept of a triangle. Peirce considered iconic signs "specially requisite for reasoning,"[100] since they offer "assurance" that "the Form of the Icon, which is also its object, . . . must be logically possible."[101] Symbolic signs arise when "the mind associates the sign with its object"[102]; they "afford the means of thinking about thoughts in ways in which we could not otherwise,"[103] but because they "rest … on habits already . . . formed," they do not "add to our knowledge."[104]

Peirce himself applied this taxonomy to nonverbal, nonrepresentational signs, which he took to be primarily iconic.[105] For Peirce, "diagrams" and "graphs" could convey the possibility of particular abstract relations more surely than symbolic signs could.[106] From a Peircean perspective, verbal descriptions of geometric

[94] See Michael Leja, Peirce, Visuality, and Art, 72 Representations 97, 97–98 (2000). Despite Saussure's use of diagrams and acknowledgment that linguistics is only one branch of semiology, see Saussure, supra note 93, at 15, the Saussurean tradition focuses mostly on linguistic signs, Peircean symbols that appear in text as blocks of continuous prose.

[95] See, for example, Charles Sanders Peirce, "Sign," 2 Dictionary of Philosophy and Psychology 527 (James Mark Baldwin ed., 1901–05), reprinted in Peirce on Signs, supra note 57, at 239, 239.

[96] Peirce gave the following illustration of how a sign might be both indexical and symbolic: "That footprint that Robinson Crusoe found in the sand . . . was an Index to him that some creature was on the island, and at the same time, as a Symbol, called up the idea of man." Charles Sanders Peirce, "Pragmatism" Defined (ca. 1904), in Peirce on Signs, supra note 57, at 246, 252.

[97] Charles Sanders Peirce, One, Two, Three: Fundamental Categories of Thought and Nature (1885), in Peirce on Signs, supra note 57, at 180, 183.

[98] Peirce, supra note 96, at 251 [Pragmatism].

[99] Peirce, supra note 97, at 181 [One, Two].

[100] Peirce, supra note 96, at 252 [Pragmatism].

[101] Id. [Pragmatism].

[102] Peirce, supra note 97, at 183 [One, Two].

[103] Peirce, supra note 96, at 251 [Pragmatism].

[104] Id. [Pragmatism].

[105] For example, he defined a "diagram" as "mainly an Icon . . . of intelligible relations." Id. at 252 [Pragmatism].

[106] See, for example, Shin, supra note 50, at 19, 27. On Peirce's never-completed plan to generate a graphic grammar for the representation of logical relations that would bridge the Euclidean tradition and that of probabilistic thinking, see Roberta Kevelson, The Law as a System of Signs 79–101 (1988) (discussing Peirce's planned "delta" graphs as form suited to the semiotic features of judicial decisions).

figures are functionally inferior to the figures themselves—but to the extent that the verbal descriptions are recipes for construction of nonverbal figures, they are also acknowledgements of the discrepancy. The main problem with Peirce's approach for understanding the practices addressed in this chapter is his refusal to confront the symbolic function of diagrams.[107] His analyses of visual phenomena tended to abstract them from convention, the domain of the symbolic sign. But all of the practices described above have symbolic as well as iconic dimensions. In legal commentary, for example, a reproduction of a legal document, such as a pleading, functions both iconically (formally resembling the original) and symbolically (depending on an understanding of the symbols present in the original and the reproduction). Tables of text and figures contain symbols but use the page's space iconically. And although line and bar graphs and economic box diagrams have iconic aspects, they are also symbols.[108]

Following Peirce, some scholars in semiotics and related fields have acknowledged the role of convention in processes of nonverbal signification.[109] But very little work has been done on the variability in the experience of convention among individuals, the differential distribution of the ability to act as what Peirce would call an interpretant of nonverbal signs.[110] Facility with some symbols, such as the letters of the Roman alphabet and treelike schematics, is acquired by most Western individuals through ordinary socialization.[111] But facility with others is less universally distributed, requiring opportunity and effort.[112] Semiotic perspectives have not developed a vocabulary for considering these differences critically.

30.3.4.2 Historical and Cultural Perspectives

The story presented above builds on work done from historical and cultural perspectives, which, unlike semiotics, do focus on the variable environments of convention within which signification operates. By tracing the contours of particular social environments at particular times, these perspectives allow us to draw conclusions (however speculative) about changes in signification over time or from environment to environment. But these approaches have shortcomings, too. To describe signification in context, they must simplify. And as humanistic disciplinary specialization has increased, the vocabularies available for this simplification have multiplied, and the

[107] See especially Leja, supra note 94, at 113–15.

[108] See Link, supra note 77; Lynch, supra note 77.

[109] See, for example, Nelson Goodman, Languages of Art: An Approach to a Theory of Symbols 58, 69, 88 (1968); Erwin Panofsky, Studies in Iconology: Humanistic Themes in the Art of the Renaissance (1939).

[110] See Shin, supra note 50, at 170–72.

[111] See Collins & Evans, supra note 82.

[112] See, for example, Jean-Francois Rouet, Monik Favart, M. Anne Britt, & Charles A. Perfetti, Studying and Using Multiple Documents in History: Effects of Discipline Expertise, 15 Cognition & Instruction 85 (1997).

simplification itself has assumed diverse, often incompatible forms. Thus, those studying the history of visuality have based their accounts on such dichotomies as those between aural and visual, or multimodal and single-modal, ways of apprehending the world[113]; between sensible and purely cognitive experience[114]; and between linearity and recursivity as cognitive and communicative modes.[115] The multiplicity of accounts that results precludes consensus on the significance of the changes in visual communication that have undeniably occurred in Western culture over the past few millennia. More problematically, the simplification necessitated by this perspective precludes attention to the ways individual encounters with signs vary based on individual experience. Historical-cultural accounts tend to rely on intuited generalizations about perceptual and cognitive processes and sometimes resort to a biopolitical vocabulary. Psychological perspectives, which focus on the details of individual encounters with signs, can offer a useful supplement to these approaches.

30.3.4.3 Psychological Perspectives

Two areas of recent psychological research are relevant to the subject of this chapter: work on the relations between visual perception and abstract thought, which helps to clarify the questions raised by the tradition of iconic "proof" from Euclid on, and work addressing the acquisition of specialized sign-handling expertise. This work offers a critical check on the intuitions on which many semiotic and historical approaches rely.[116]

Experiments addressing language acquisition and reasoning indicate that some kind of "intrinsic" schematic geometry—physical patterns of relations among cognitive states[117]—is necessary for abstract thought and that this geometry is affected by visual and other experience.[118] But there is little agreement on the specific relationship

[113] See Ong, supra note 23 [System].

[114] See, for example, Rudolf Arnheim, Visual Thinking (1969).

[115] See, for example, Ong, supra note 53 [Ramus]; Latour, supra note 45.

[116] See, for example, Mike Scaife & Yvonne Rogers, External Cognition: How Do Graphical Representations Work?, 45 Int'l J. Human-Computer Studies 185, 200 (1996) (noting reliance on intuition in previous studies of the relation between graphics and cognition).

[117] Julie Sarama, Douglas H. Clements, Sudha Swaminathan, Sue McMillen & Rosa M. Gonzalez Gomez, Development of Mathematical Concepts of Two-Dimensional Space in Grid Environments: An Exploratory Study, 21 Cognition & Instruction 285, 288, 322 (2003).

[118] Findings about language acquisition support the "schema" theory of cognition, which regards it as based on patterns of apprehension, rather than on manipulation of language-like propositions. See, for example, Joost A. Breuker, A Theoretical Framework for Spatial Learning Strategies, in Spatial Learning Strategies: Techniques, Application, and Related Issues 21, 30–31 (Charles D. Holley & Donald F. Dansereau eds., 1984); William A. Roberts, Spatial Representation and the Use of Spatial Codes in Animals, in Spatial Schemas and Abstract Thought 15, 39 (Merideth Gattis ed., 2001). Contrary to Piaget's theory, children seem to acquire vocabulary for abstractions as early as vocabulary for concrete objects, largely based on exposure to patterns of use of such terms, rather than on internalizing information about the terms' referential meaning. Nelson & Shaw, supra note 63, at 39, 41–43, 47–53.

between the perception of diagrams and images and abstract reasoning—the link assumed by Euclid and those following in his footsteps.[119] Studying this link is difficult because, as Peirce suggested, testing the assumption that diagrammatic presentation promotes a special kind of conviction requires investigation not only of processes of abstract cognition but also of the noncognitive state of conviction, as well as the relationship between the two.[120]

On the other hand, there is little dispute that the perception of diagrams involves cognition different from that involved in comprehending text.[121] There is also little dispute that the skills needed to understand nonmimetic visual forms are learned.[122] Schoolchildren must learn, for example, how to manipulate basic features of the Cartesian grid, such as infinite extensibility and two-dimensional location conventions.[123] Moreover, scientists are not general experts in diagram reading,[124] but make the same mistakes as children when reading and explaining unfamiliar graphs.[125] Like abstract reasoning, such graphic literacy skills involve schema acquisition, which is also the basis of those specialized capacities we identify as "expertise."[126] Indeed, it seems to be the rooting of expertise in pattern acquisition that allows experts to experience diagrammatic presentations as "transparent."[127] From this perspective, we can

[119] See, for example, Merideth Gattis, Space as a Basis for Abstract Thought, in Spatial Schemas and Abstract Thought, supra note 118, at 1, 2, 5 (noting variety of models for the relation between extrinsic and intrinsic form or visual percepts and schemas); Brendan McGonigle & Margaret Chalmers, Spatial Representation as Cause and Effect: Circular Causality Comes to Cognition, in Spatial Schemas and Abstract Thought, supra note 118, at 247, 250–75; Susan N. Friel, Frances R. Curcio, & George W. Bright, Making Sense of Graphs: Critical Factors Influencing Cognition and Instructional Implications, 32 J. for Res. in Math. Educ. 124, 125 (2001); Scaife & Rogers, supra note 116, at 186–87, 209.

[120] See, for example, Rotman, supra note 3, at 28, 41; and see generally Charles Sanders Peirce, The Fixation of Belief (1877), in Peirce on Signs, supra note 57, at 144–59.

[121] Sarah Guri-Rosenblit. Effects of a Tree Diagram on Students' Comprehension of Main Ideas in an Expository Text with Multiple Themes, 23 Reading Res. Q. 236, 243–44 (1989) (finding that the use of tree diagrams assists recall of complex information in a text). For similar conclusions, see Ernest T. Goetz, The Role of Spatial Strategies in Processing and Remembering Text: A Cognitive-Information Processing Analysis, in Spatial Learning Strategies, supra note 118, at 47, 56.

[122] This work refutes the contentions of, for example, Stephen Pinker, A Theory of Graph Comprehension, in Artificial Intelligence and the Future of Seeing 73 (R. Freedle ed., 1990) (arguing that the salient elements of any graph will be evident to experts).

[123] Sarama et al., supra note 117, at 299–316.

[124] Roth & Bowen, supra note 77, at 430, 441–45, 466, 470 [Expert-Expert].

[125] Wolff Michael Roth & G. Michael Bowen, Professionals Read Graphs: A Semiotic Analysis, 32 J. for Res. in Mathematics Educ. 159, 160, 165, 168–69, 185 (2001).

[126] Gary L. Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. Legal Educ. 313, 318, 335, 342–44 (1995); Rouet et al., supra note 112, at 86, 102 (distinguishing between domain (content) expertise and discipline (method, problem-solving) expertise and noting that both involve the use of schemas but that the latter form of expertise extends to the treatment of texts); see also Beaulieu, supra note 77, at 56, 74–75 (2002) (discussing complex relationship of fMRI researchers to visual aspects of fMRI images as tokens of expertise); Lynch, supra note 77; Scaife & Rogers, supra note 116, at 199, 201, 206.

[127] Richard Lehrer & Leona Schauble, Symbolic Communication in Mathematics and Science: Co-Constituting Inscription and Thought, in Language, Literacy, and Cognitive Development, supra note 63, at 189.

understand discipline-specific diagrammatic forms, like the economic box diagram, as material records of the cognitive schemas common to experts in that domain.

Findings like these can help us to understand how the institutional developments described in previous sections took hold. Experiments involving small groups of schoolchildren have shown how the recruitment of allies prompts both increased abstraction (a basis for commentary) and a new relationship to visual forms. In one study, children developed increasingly "mathematized" graphs as they were pushed to defend to peers their claims about concrete information like the relative rates of growth of plants in the classroom.[128] This dynamic explains the contemporaneous emergence of specialized expert discourses and the proliferation of conventions for presenting biopolitical facts. Considered alongside historical-cultural accounts, psychological perspectives can thus confirm the relationships among otherwise obscurely linked phenomena.

30.4 Implications of the Contemporary Forms of Visual Legal Commentary

Without aspiring to exhaustiveness, this section considers the implications of the accounts presented above for understanding the practices described in Sect. 30.2. Leaving aside pictorial representation, which has been the subject of significant commentary,[129] the practices in question fall into four main categories: document reproductions, tables, conventional forms borrowed from other disciplines (such as the economic box diagram), and "ad hoc" diagrams, which are geometric but non-conventional. Space constraints prevent me from considering the first of these forms in detail[130]; instead, I focus on the latter three.

30.4.1 Tables

The presentation of information in table form has been a consistent component of legal commentary since that commentary assumed its modern form a little over a century ago. Many of the earliest examples used tables to compare text,[131] but from

[128] Lehrer & Schauble, supra note 127, at 168.

[129] See, for example, sources cited supra notes 5 & 20 [Dellinger et al.].

[130] Document reproductions include reproductions of letters, invoices, advertisements, contracts, and pleadings, typeset along with text or reproduced in facsimile form. This is perhaps the most widespread and long-lived visual practice in legal commentary. A good example is Warren, supra note 6, at 87 (1923) (including photostat of manuscript of 1789 Judiciary Act). There has been very little work on this practice, and I plan to address it in a separate project.

[131] See, for example, F.W. Maitland, The History of the Register of Original Writs, 3 Harv. L. Rev. 212, 221–23 (1889).

the start, tables have also been used to present figures,[132] often but by no means always in balance-sheet form.[133]

Whether they contain text, figures, or a combination of the two, tables involve the presentation of symbolic signs. But tables also have an important iconic dimension. Hovering within every table (as well as within the related form of combinatorial and game-theory matrices) is a grid, a culturally specific example of the type of visible geometric "proof" exploited since Euclid.[134] Presentation of textual or numerical material in table format demonstrates, in Peirce's sense, that the material presented is amenable to regularization. This iconic function is also key to the symbolic dimension of tabular formats, which, at least since Halley's actuarial tables, have assumed a biopolitical perspective on the world. In legal commentary, tables provide assurance that a link exists between the commenting text (together with the network of other verbal legal texts to which it refers) and the "real world" beyond this textual network, and that "real world" is often presented biopolitically, through an array of symbols referring to preexisting social facts. Even the most modest table injects into legal commentary a visual semantics that is neither textual nor imagistic, but purely biopolitical—a matter of generalizations about and abstractions from the physical details of human existence.[135]

The link to a biopolitically conceived "real world" that tables offer serves an important function. As Elizabeth Mertz has explained in her study of the linguistic socialization of US law students, legal discourse relentlessly marginalizes issues of social fact.[136] Students are trained to purge from their analysis all references to facts not expressible in legal vocabulary but also taught that they may permissibly generalize about social facts without heed to the conventions used in other disciplines, like the social sciences, to validate such generalizations.[137] The use of tables in legal commentary confirms this analysis and indicates the strength of the "linguistic ideology" that Mertz describes in legal scholarship as well as legal education as her focus.[138] Tables seem to make social facts empirically verifiable and accessible to legal professionals, but tables visually distinguish those facts from the legal text. Moreover, while critiques of both prose and mimetic illustration as susceptible to manipulation are familiar themes in Western culture, there is no comparable tradition

[132] See, for example, Notes from Professor Langdell's Report on the Law School, 2 Harv. L. Rev. 333, 333 (1888).

[133] See, for example, Samuel B. Clarke, Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice, 1 Harv. L. Rev. 265, 283 n. (1888).

[134] See discussion supra notes 26–28 and accompanying text.

[135] For example, in an article on constitutional law, a footnote including a table illustrating the average tenure of Supreme Court justices during recent presidencies makes visible the equivalency of individuals' occupation of institutional roles, turning their mortality into a political epiphenomenon. See Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633, 707 n.163 (2000).

[136] See Mertz, supra note 1, at 76–82.

[137] Id.

[138] Id. at 45–46.

of critiques of tabular representation.[139] Including biopolitical tables as support for claims made in textual legal commentary seems, then, primarily to be a device for immunizing the commentary from the valid charge that it is unconnected to lived experience.

30.4.2 Imported Conventions

Since the 1970s, legal commentary has increasingly included diagrammatic conventions imported from other disciplines, such as line and bar graphs and economic box diagrams. If tables suggest the ambivalent relationship of legal discourse to social facts, these conventions bespeak the disciplinary insecurity of legal commentary, as opposed to legal discourse.

By the time practices of this kind became widespread in legal materials, they had been used in other contexts for nearly a century. Diagrammatic conventions from other disciplines appear only sporadically in pre-1970s legal commentary.[140] Successive scholarly efforts to move legal scholarship closer to the discourse of the social sciences (by the legal realists in the 1930s and the Law and Society movement in the 1960s) may explain why most of these conventions are borrowed from social science disciplines.[141] But the use of such devices within the social sciences—and within legal commentary—is more than a matter of scholarly style. As Latour puts it, these devices function to recruit allies. Their communicative potential derives not just from their efficiency or their iconic, proof-like power but also from the fact that these devices, regardless of content, are associated with expertise.

These devices connote expertise because understanding them requires training. The devices that most strongly communicate expertise in this way, however, are comprehensible only to a subset of the audience for legal commentary.[142] Unlike in their disciplines of origin, in legal commentary these devices are not "transparent" windows onto reality, but merely a promise that a complex reality has been respected. Despite their apparently greater complexity and density, then, these devices function

[139] See, for example, Dellinger, supra note 20.

[140] The earliest equation in the Harvard Law Review appeared in an 1898 article on joinder of claims, G. Rowland Alston, Joinder of Claims Under Alternate Ambiguities, 12 Harv. L. Rev. 45, 46 (1898), and the earliest graphic diagrams in the periodical that were neither document reproductions, tables, nor Ramist trees but geographic diagrams in a 1902 article on mining law, John Maxcy Zane, A Problem in Mining Law: Walrath v. Champion Mining Company, 16 Harv. L. Rev. 94, 97, 108 (1902). The first line graph did not appear until 1963, Hans Zeisel & Thomas Callahan, Split Trials and Time Saving: A Statistical Analysis, 76 Harv. L. Rev. 1606, 1615 (1963); the first box diagram did not appear until 1971, Tribe, supra note 9, at 1387–88 [Trial].

[141] See Tomlins, supra note 89.

[142] See the parody of these forms in Kenneth Lassen, Commentary, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 Harv. L. Rev. 926, 938 n.60 (1990) (including box diagram demonstrating relationships between determinants of scholarship and tenure).

similarly to tables, linking legal commentary to reality; at the same time, and unlike most tables, many borrowed diagrammatic forms mediate that link through the "black box" of a technical discourse. Of course, many borrowed conventions, such as line graphs and game-theory matrices, borrow the authority of other disciplines without this exclusionary effect. But from any perspective, the use of graphs and specialized forms like box diagrams and regression plots suggests a felt need to increase the recruiting potential—the persuasive power and authority—of legal commentary. In addition to being symbols of expertise, these borrowed conventions seem to be indices of a disciplinary crisis of confidence. In this respect, they serve a function different from that served by the ad hoc diagrams discussed next, which bespeak not disciplinary insecurity but discursive confidence.

30.4.3 Ad Hoc Diagrams

Ad hoc diagrams present conceptual relations nonverbally but conform to no convention associated with a profession or academic discipline.[143] Examples include arrows designating property succession,[144] Venn-diagram-like schematics,[145] Ramus-derived trees,[146] and above all simple geometric representations of conceptual relationships.[147] Approaching Peirce's iconic ideal of the graph, these forms still have symbolic functions.

Ad hoc diagrams sometimes have an explicitly pedagogical function. In addition to communicating the author's expertise, they create expertise, initiating the reader into a more sophisticated fluency regarding the relationships among abstract legal concepts—much as the visual conventions of other disciplines record the cognitive schemas that underlie those forms of expertise. But in contrast to other disciplines, in law the display of this expertise, once attained, rarely involves the recreation of these visual schemas. Legal expertise involves skillful use of a specialized, highly abstract

[143] Some diagrams are difficult to classify as either purely conventional or ad hoc, particularly such basic forms as Venn diagrams and square-of-opposition quadrilaterals.

[144] See, for example, John E. Cribbett, Principles of the Law of Property 28, 115 (2d ed., 1975); Sandra H. Johnson, Timothy S. Jost, Peter W. Salsich, Jr., & Thomas L. Shaffer, Property Law: Cases, Materials, and Problems 701–02 (1992).

[145] See, for example, John Henry Wigmore, Select Cases on the Law of Torts 865 (1912).

[146] See, for example, George P. Costigan, The Classification of Trusts as Express, Resulting, and Constructive, 27 Harv. L. Rev. 437, 437, 461, 462 (1913); Roscoe Pound, Classification of Law I, 37 Harv. L. Rev. 933, 957–59, 962–67 (1924) (omitting brackets); Lea Brilmayer, Colloquy, Related Contacts and Personal Jurisdiction, 101 Harv. L. Rev. 1444, 1454 (1988); Note, The Price of Everything, the Value of Nothing: Reframing the Commodification Debate, 117 Harv. L. Rev. 689, 689 (2003).

[147] See, for example, Tribe, supra note 19, at 959 [Triangulating]; Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1921 (1994); Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621, 632, 671 (1998).

verbal language, not of particular visual communicative forms. Thus, these ad hoc forms promote the very discursive ideology analyzed by Mertz.[148] They bespeak neither disciplinary insecurity nor an impulse to link the verbal abstractions of legal discourse to extra-discursive facts. Rather, they promote legal discourse as a unique means of making sense of the world, one incompatible with other discourses, reinforcing law's claims to exclusive professional and academic jurisdiction. The implicit denial, in these forms, of any need to develop a visual grammar specific to law contributes to an ideology of accessibility that is at odds with the reality of legal expertise, a contradiction that ad hoc forms betray in spite of themselves.

30.5 Conclusion

The role of legal commentary in enculturating lawyers and legal scholars has been one of the main themes of this chapter. It is not novel to argue that the visible nature of this commentary plays a role in legal enculturation. The significant contribution of visual commentary to the process is, however, little appreciated.

Most discussions of the pedagogical use of visual commentary characterize it as increasing accessibility: nontextual materials are thought to engage at least some pupils more readily and to bypass the need for specialized vocabulary.[149] The discussion above suggests that the visual forms used in legal commentary have other effects as well. They reinforce a biopolitical point of view, deter detailed analysis of the relations between legal discourse and the "real world," and underline the need to recruit allies by any available means—including means that conflict with the claims to discursive autonomy made by law and protected by legal education and credentialing.

The implications of this discussion for legal academics are troubling. For a little over a century, the American legal academy has occupied an uneasy position between the professions and the university. Other forms of professional training bridged similar structural gaps by developing jurisdiction-specific visual grammars. Law has not. Instead, it has expanded its borrowing from other "jurisdictions." This borrowing indicates increased academic insecurity about the hold of legal discourse on those problems traditionally identified as legal, decreased consensus about the cognitive schemas appropriate to legal expertise, and, ultimately, weaker claims to professional jurisdiction. This insecurity also finds voice in other academic worries—about the moral and social justification of legal imperatives[150] and

[148] See Mertz, supra note 1, at 45–83.

[149] See, for example, J.R. Kirby, P.J. Moore, & N.J. Schofield, Visual and Verbal Learning Styles, 13 Contemp. Educ. Psych. 169 (1988); Laspina, supra note 44, at 58–65; Michael A. Toth, Figures of Thought: The Use of Diagrams in Teaching Sociology, 7 Teaching Sociology 409, 410–11 (1980).

[150] The flowering of scholarship debating the merits of "exclusive" and "inclusive" legal positivism in the late twentieth century is a dramatic example of how concerns with professional jurisdiction and institutional legitimacy can affect not just the form but also the content of academic debate. See, for example, Wilfrid J. Waluchow, Inclusive Legal Positivism (1994); The Autonomy of Law (R.G. George ed., 1996).

about control over the meaning and use of legal texts.[151] All of these verbal debates, like the use of visual commentary, suggest the increasing difficulty of reconciling law's claim to disciplinary and discursive autonomy with its undeniably social functions.

[151] Text-focused understandings of legal interpretation reproduce the tension discussed in connection with ad hoc diagrams: the emphasis on text is said to promote both populism (or access) and judicial restraint (or standardization), when in fact it does neither. See, for example, Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989).

Chapter 31
The Invisible Court: The Foreign Intelligence Surveillance Court and Its Depiction on Government Websites

Pamela Hobbs

Abstract The Foreign Intelligence Surveillance Court is a federal court of nationwide jurisdiction that was created by statute in 1978. Its function and purpose is to review applications for "warrants" for domestic surveillance of persons suspected of having connections with foreign governments and/or terrorist organizations. The court is highly unusual in that its location is secret, its proceedings are ex parte, and virtually all of its orders and opinions are classified, and may not be published or otherwise disclosed. The government justifies this secrecy on the basis of national security. Nevertheless, certain limited information about the court is available on government websites, including information that is designed to inform the public about the court and its functions. This chapter examines the content of these websites in which the government depicts an otherwise invisible court. I argue that the information provided on these government websites constructs the court as legitimate by minimizing or omitting problematic aspects of the court's operation, while framing it as a duly constituted Article III court. Through this publicly available information posted on its websites, the government thus advances a particular vision of a court whose operations and decisions remain invisible.

31.1 The Foreign Intelligence Surveillance Court

The Foreign Intelligence Surveillance Court is a federal court of nationwide jurisdiction that was created by statute in 1978. Its function and purpose is to review applications for "warrants" for domestic surveillance (by wiretapping, other forms of electronic eavesdropping, and physical searches) of persons within the United

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States who are suspected of having connections with foreign governments and/or terrorist organizations. The court itself is highly unusual. Unlike all other American courts, it has no published address, and all of its proceedings are closed. Hearings take place in secret in a locked, windowless room, with only the government's lawyers appearing before the court (Breglio 2003, 179; Sloan 2001, 1496; Bamford 1982, 369); the persons against whom surveillance orders are sought have no right to be informed of the proceedings and are thus precluded from retaining counsel to dispute the government's submissions (Sloan 2001, 1496). Moreover, virtually all of the orders and opinions of the court are classified as "national security information" that may not be published or otherwise disclosed (Ruger 2007, 245; Breglio 2003, 190), resulting in an unprecedented body of secret law (Feingold 2008). The government justifies this secrecy on the basis of national security.

Nevertheless, certain limited information about the court is available on government websites, including information that is designed to inform the public about the court and its functions. Using Huckin's (2002) model of manipulative silence, this chapter examines the content of these websites in which the government depicts an otherwise invisible court. I argue that the information provided on these government websites constructs the court as legitimate by minimizing or omitting problematic aspects of the court's operation, while framing it as a duly constituted Article III court. Through this publicly available information posted on its websites, the government thus advances a particular vision of a court whose operations and decisions remain invisible.

The Foreign Intelligence Surveillance Court was created by Congress in the Foreign Intelligence Surveillance Act of 1978 ("FISA"),[1] in order to provide judicial oversight of the government's use of electronic surveillance in the name of national security (Breglio 2003, 187).

Although the Fourth Amendment ordinarily requires the government to obtain a warrant in order to search private property, prior to FISA's enactment, the Executive Branch had historically taken the position that the warrant requirement was inapplicable to foreign intelligence surveillance, because the President's inherent constitutional authority empowered him to authorize such searches (Sloan 2001, 1492, 1494–1495). As a result, warrantless wiretapping by the Executive Branch was common as early as World War I (Cinquegrana 1989, 795) and was subsequently authorized by presidents including Franklin Roosevelt, Harry Truman, and Lyndon Johnson (Breglio 2003, 182). During this approximately 60-year period, the Supreme Court did not directly address the issue. However, in 1967, in *United States v. Katz*,[2] a criminal case involving the transmission of wagering information by telephone across state lines, the court held that the admission of warrantless electronic surveillance evidence violated the defendant's Fourth Amendment rights. Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which established standards for obtaining a warrant for the

[1] 50 U.S.C. §§ 1801–1811.

[2] 389 U.S. 347 (1967).

placement of a wiretap in criminal investigations; the act specifically stated that "[n]othing contained in this chapter… shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."

Nevertheless, in 1972, in *United States v. United States District Court*,[3] in which the defendant, an American citizen, was charged with bombing a CIA office in Michigan, the court held that, notwithstanding the language of Title III, a warrant was required for the placement of a wiretap in domestic security investigations. The court emphasized that the case did not decide the scope of the President's powers in the area of foreign intelligence surveillance, thus continuing to leave open this particular question, while making it increasingly apparent how it would eventually rule. Accordingly, when the Senate committee convened to investigate allegations published by the New York Times in December 1974 (Hersh 1974), that the Nixon administration had engaged in massive, illegal domestic intelligence operations uncovered wide-ranging infringements of the privacy interests of American citizens by both electronic surveillance and physical searches (McAdams 2007, 2; Johnson 2004, 6; Cinquegrana 1989, 806–807), the committee's recommendation that Congress enact legislation to curb such abuses presented a convenient opportunity to impose regulations in this area. This resulted in the enactment of FISA, which created a special court to review the government's applications for electronic surveillance for foreign intelligence purposes.

The Foreign Intelligence Surveillance Court ("the FISA Court") is composed of 11 judges appointed by the Chief Justice of the US Supreme Court and drawn from the pool of existing federal district court judges (Ruger 2007, 244; Cinquegrana 1989, 812). They serve nonrenewable terms of a maximum of 7 years (Ruger 2007, 244; Breglio 2003, 191), during which time they retain their full district court caseloads, but travel to Washington periodically to preside over FISA hearings (Ruger 2007, 244). The court conducts no trials and virtually no adversary proceedings; its sole purpose is to hear and decide applications for foreign intelligence surveillance, according to the standards imposed by FISA. Under these standards, the judge must grant the application if she/he finds, on the basis of the facts submitted, that there is probable cause to believe that "the target of the surveillance is a foreign power or agent of a foreign power," and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power,"[4] and that the government's application otherwise complies with the statutory requirements.

These procedures bear a strong superficial resemblance to those required for the issuance of a search warrant in a criminal investigation. However, while the Fourth

[3] 407 U.S. 297 (1972).

[4] 50 U.S.C. §1805(a)(3).

Amendment standard requires a finding of probable cause to believe that a crime has been committed and that evidence of that crime will be found in the place to be searched, FISA requires no analogous finding that the target has engaged in foreign intelligence activities or poses a danger to national security. It is thus "dramatically less stringent" than the Fourth Amendment standard (Ruger 2007, 243–244). Nevertheless, FISA permits the disclosure of information obtained by FISA orders for law enforcement purposes, that is, for use in criminal investigations and trials, if authorized by the Attorney General.[5]

Although originally limited to electronic surveillance, the court's jurisdiction was gradually expanded over the years to include physical searches and the installation and use of pen registers and trap and trace devices (see McAdams 2007, 3–4). These expansions excited no controversy, and, during the first 24 years of its existence, the court, shrouded in secrecy, was virtually unknown. However, in the aftermath of 9/11, it was catapulted into prominence when the government announced in May 2002 that a provision of the hastily enacted USA PATRIOT Act, which for the first time permitted the Department of Justice to use FISA orders specifically to obtain evidence for use in criminal prosecutions, had resulted in arrests in two high-profile criminal cases, one charging the director of an Islamic charity with perjury and the other charging a New York lawyer with providing material aid to terrorists (see Lewis 2002).

Soon afterward, the amendment brought additional attention to the court when its implementation resulted in the first-ever decision of the Foreign Intelligence Surveillance Court of Review, which had been created by FISA in 1978 to review denials of the government's applications but, until then, had never had occasion to do so. The government had presented the FISA Court with a request to void existing procedures which partitioned intelligence gathering from criminal investigations and to give criminal prosecutors broad access to information developed in FISA investigations and allow them to "consult extensively and provide advice and recommendations to intelligence officials" (Breglio 2003, 197). However, in a strongly worded opinion that was later made public, the normally acquiescent court, noting that the type of information sharing proposed had resulted in gross abuses in the past, ordered that the proposed procedures be modified to prohibit prosecutors from making recommendations to intelligence officials regarding FISA searches or surveillances or from directing or controlling the use of FISA procedures to enhance criminal prosecutions.[6] The government appealed, and the Court of Review reversed the decision, holding that the PATRIOT Act amendment "supports the government's position, and that the restrictions imposed by the FISA court are not required by FISA or the Constitution."[7]

[5] 50 U.S.C. § 1808.

[6] *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp.2d 611 (Foreign Intelligence Surveillance Ct. 2002).

[7] *In re Sealed Case*, 310 F.3d 717, 719–720 (Foreign Intelligence Surveillance Ct. Review 2002).

Yet despite the tensions evidenced by this case, both the government and the court have remained largely silent on the subject of its operations, and the court is usually described by the media as "secret" or "secretive" (see, e.g., Wilber 2009; Associated Press 2009; Ryan 2006; Lewis 2002; Shenon 2002a, b). Perhaps to counter this perception, the government provides certain limited information, designed to inform the public about the court and its functions, on government websites. This chapter will examine information from two of these websites, using Huckin's (2002) model of manipulative silence.

31.2 Manipulative Silence

Manipulation has been a key concept in the teaching of public speaking since the days of the Greek Sophists (Huckin 2002, 367), a fact that is not surprising, given that the goal of rhetoric is to persuade. Nevertheless, scholars draw a distinction between legitimate and illegitimate persuasion. While legitimate persuasion seeks to achieve its goals by presenting the speaker's position in its strongest light, leaving recipients free to accept or reject its persuasive message (Van Dijk 2006, 361), illegitimate persuasion—that is, manipulation—intentionally misleads or deceives the recipient, to the speaker's advantage (Huckin 2002, 354). Manipulation occurs when recipients lack resources to detect the inaccuracy of the speaker's assertions and accordingly are deceived (Van Dijk 2006, 375).

Van Dijk defines manipulation as a communicative practice by which the manipulator exercises control over others, usually against their will or contrary to their interests (2006, 360). He focuses upon manipulation at the level of the group rather than the individual, as a form of power abuse that requires preferential access to media and public discourse, through which dominant groups reproduce their power (2006, 362–364). Thus defined, manipulation is a pervasive feature of contemporary public discourse, much of which is ideologically shaped (Huckin 2002, 354). For example, the opposing factions of the abortion debate label their positions as "pro-choice" and "pro-life," reflecting radically differing conceptualizations of the issues involved. To the extent that adherents of these positions, in their efforts to influence public policy, emphasize the interests that support their viewpoint while ignoring those that support the opposing perspective, their discourse is potentially manipulative in attempting to suggest that abortion involves *only* the woman's privacy and personal autonomy, or *only* the fetus' human status. Huckin (2002) refers to such omissions as "manipulative silences."

31.3 Methodology

Huckin's model of manipulative silence is based on the three criteria of *deception*, *intentionality*, and *interest*: He argues that manipulative silences deceive or mislead recipients by concealing relevant information that is known to the speaker, that the

concealment and resulting deception are intentional, and that it is in the speaker's interest to deceive the recipient (2002, 354–356). In order to identify manipulative silences, he proposes a four-stage analysis which focuses on compiling evidence of these criteria. According to Huckin's methodology, the analyst should:

- Determine the basis of the speaker's knowledge of the topic by collecting a corpus of texts that is representative of the larger body of discourse from which that knowledge is derived.
- Apply a qualitative content analysis to this corpus in order to compile a list of subtopics which represent the public discourse on that topic.
- Examine the original text to determine which subtopics are included and which are excluded. The latter constitute textual silences which may or may not be manipulative silences; the next step will determine this issue.
- Using a sociopolitical form of discourse analysis, raise questions relating to, e.g., the standard features of the genre and its conventions, the (likely) author of the text and his or her knowledge about the subject, and the sociopolitical pressure that he or she may have been under, in order to provide evidence of deception, intentionality and advantage. (Huckin 2002, 356–357)

Here the relevant public discourse is the ongoing discussion of the court in legal circles, a discussion which centers upon issues raised in cases challenging FISA's use. These cases, filed in the federal trial and appellate courts, involve the use of FISA evidence in the criminal context, and the reported (published) opinions that decide these cases constitute the existing body of federal law on the subject. As such, they are referred to collectively as "case law" and individually as "cases," terms that will be used here.

I developed a corpus of these cases that is drawn from two sources: (1) the cases listed in the United States Code Service, Lawyers Edition (USCS), which contains the official text of all federal statutes, together with annotations that list and summarize the cases interpreting each statutory section, and (2) the cases discussed in the annotation of FISA that appears in American Law Reports, Federal (ALR Fed), a widely used multivolume digest that summarizes and analyzes federal case law on specific individual topics.

The corpus includes all of the cases listed in the "Interpretive Notes and Decisions" following the text of each section of FISA in the USCS, as updated through April 2008, that raise issues relating to the constitutionality of the FISA Court and/or its decision-making process. It also includes all cases analyzed in 190 ALR Fed 385 (Dvorske 2005), as updated by the 2008–2009 Supplement issued September 2008, that raise either of the foregoing classes of issues. The combined total of 29 cases consists of 28 reported decisions of federal district or appellate courts plus the FISA Court of Review's 2002 published decision.

Having compiled this corpus, I performed a qualitative analysis of each case in order to identify the issues raised. I was guided in this process by the scholarly literature on the subject (e.g., Breglio 2003; Sloan 2001; Cinquegrana 1989), as well as news articles and commentary and my own legal background and experience as a litigator and appellate specialist. My close reading of these cases revealed distinct

patterns of topics and subtopics extending across the corpus and reflecting the concerns about the constitutional legitimacy of the court, its operations, and the legal framework enacted by FISA that represent the relevant public discourse on the subject.

Most of the cases raised multiple issues; the 29 cases yielded 95 issues, an average of 3.276 issues per case. I identified six categories of topics which, broadly stated, relate to the manner in which the court is constituted, the nature of its proceedings, whether FISA can be reconciled with the Fourth Amendment, the constitutionality of the PATRIOT Act amendment regarding the purpose of FISA orders, whether FISA violates the First Amendment, and whether FISA violates the Equal Protection Clause of the Fifth Amendment. These categories and their subcategories may be described as follows.

The first category of issues relates to how the court is constituted, and specifically, whether it meets the definition of a federal court stated in Article III of the US Constitution. Article III, Section 1, provides for lifetime tenure for federal judges with no decrease in compensation, whereas FISA appointments are for one nonrenewable 7-year term, during which they continue to serve as district court judges while receiving no additional compensation for essentially performing two jobs. In addition, Article III, Section 2, defines the jurisdiction of the federal courts as extending to "cases" or "controversies" (both of which are more extensively defined); however, FISA's jurisdiction is limited to issuing surveillance orders, and its proceedings are ex parte, involving only the government's representatives and not the target of the surveillance. This raises two related issues: whether the court decides "cases" or "controversies" and whether the nature of FISA proceedings results in a delegation of judicial power to the Executive Branch. Finally, the structure and jurisdiction of the court raise issues as to whether it violates the political question doctrine, which prohibits the courts from deciding political questions, or the Separation of Powers doctrine, which prohibits one branch of the federal government from exercising powers that are constitutionally vested in another branch.

The second category of issues relates to the exclusively ex parte (non-adversarial) and in camera ("in chambers," i.e., not in open court) nature of FISA proceedings and the impact of these procedures on the rights of criminal defendants when evidence obtained by use of a FISA order is introduced in a criminal trial. Specifically, the Fifth Amendment's Due Process Clause provides for notice of, and an opportunity to defend against, charges or evidence to be used in a criminal prosecution, and the Sixth Amendment provides criminal defendants with rights to counsel, the confrontation of witnesses (i.e., the right to examine and cross-examine) and a public trial; however, FISA's secret proceedings eliminate these rights.

The third category of issues relates to whether FISA can be squared with the Fourth Amendment, which ordinarily requires a warrant for searches of private property and which prohibits "unreasonable" searches. The numerous subtopics generated by this issue include the following: Is the warrant requirement applicable to foreign intelligence surveillance cases? Is a FISA order a warrant? Do FISA's standards meet the Fourth Amendment's probable cause requirement? Do FISA's standards meet the Fourth Amendment's particularity requirement? Do FISA's

standards meet the Fourth Amendment's reasonableness requirement? Is a FISA judge a "neutral magistrate" for Fourth Amendment purposes? Do FISA's standards preclude sufficient judicial scrutiny of the government's applications? Do physical searches (as opposed to electronic surveillance) under FISA violate the Fourth Amendment?

The fourth category of issues relates to the PATRIOT Act amendment to FISA, which broadened the language of the government's required certification in FISA applications from "*the purpose* of the surveillance is to obtain foreign intelligence information" to "*a significant purpose* of the surveillance is to obtain foreign intelligence information" (emphasis added), thus authorizing the use of FISA orders to obtain non-intelligence evidence for use in criminal investigations (see Breglio 2003, 196). The subtopics generated include whether this amendment violates the Fourth Amendment's probable cause requirement, and whether it violates the Fifth Amendment's Due Process Clause.

The fifth category of issues relates to whether FISA violates the First Amendment by infringing freedom of speech, and the sixth category of issues relates to whether FISA violates the Equal Protection Clause of the Fifth Amendment by its differing treatment of citizens and noncitizens. These two categories of topics are less frequently raised, and less extensively discussed and analyzed, than the previous four. My analysis will thus focus upon the first four categories.

31.4 Analysis

31.4.1 Understanding Intelligence Surveillance: A FISA Primer (www.uscourts.gov)

The first texts to be examined are among the materials posted on the federal government website of US Courts, www.uscourts.gov. The site contains detailed comprehensive information about the US federal court system and invites visitors to sign up to receive email updates on topics that are of interest to them and/or to subscribe to RSS feeds. A notice at the bottom of the site's home page states:

> **This page is maintained by the Administrative Office of the U.S. Courts on behalf of the U.S. Courts.**
>
> The purpose of this site is to function as a clearinghouse for information from and about the Judicial Branch of the U.S. Government.

The page includes a link labeled "Go to Court Map," which takes the visitor to a page displaying a map of the United States that shows the state names, boundaries and intrastate federal districts, and the geographic areas of the multistate federal circuits, beneath which is a list of links to the various federal courts and associated agencies. The FISA Court and FISA Court of Review are not included on either the map or the list, and there is no evidence of their existence on this page or the links thereto.

The site's home page also includes a link to the site's Educational Outreach page, which contains links to topics including "Understanding the Federal Courts." This link displays a page which describes the federal court system in some detail and lists the federal courts as including the US Supreme Court, the US Courts of Appeals, the US District Courts, the US Bankruptcy Court, the US Court of International Trade, the US Court of Federal Claims, the Military Courts, the Court of Veterans Appeals, and the US Tax Court. The FISA Court and FISA Court of Review are not included in this list or in the description of the federal courts.

Thus it is only by following a circuitous route through the Educational Outreach page's list of "Contemporary Topics" that the visitor, by clicking on a link that bears the nonspecific label "All Topics," is led to a page entitled "Contemporary Topic – Understanding Intelligence Surveillance: A FISA Primer," with additional links to pages describing the FISA Court and FISA Court of Review. Clicking on the first of these links, "What is FISA?" brings up a page entitled "A FISA Primer," which is examined below. Paragraph numbers have been added for convenient reference.

A FISA Primer

General Introduction

[1] One of the reasons that Congress enacted The Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C.A. §§ 1801 et seq., was to put in place checks and balances among the three branches of government in regard to domestic warrantless surveillance in the name of national security, a practice which had given rise to governmental abuse in the past.

[2] FISA created the Foreign Intelligence Surveillance Court (FISC), or the FISA Court, as it is popularly called. It is composed of 11 (previously seven) federal judges, selected by the Chief Justice to a non-renewable seven-year term. Its job is to review applications for governmental surveillance of persons within the United States whom the government suspects of having connections to foreign governments and/or terrorist organizations. A Foreign Intelligence Surveillance Court of Review also was established to review applications denied by the FISA Court.

[3] The primary purpose of FISA is to assist the government, specifically the Executive Branch, with gathering foreign intelligence, as opposed to evidence of criminal activity. Although intelligence operations often result in the discovery of evidence of crimes, this must be a secondary objective. Indeed, the FISA Court is instructed not to permit surveillance activities if the government's sole motivation is to use the surveillance for criminal investigative purposes.

[omitted material describing situations to which FISA is inapplicable]

Warrantless Wiretaps

[4] In 2005, news agencies reported that, in the wake of the September 11, 2001 terrorist attacks on the United States, President Bush authorized the warrantless surveillance of individuals within the United States whom the government had reason to believe were affiliated with foreign terrorists. Although he received criticism that this action violated both the Fourth Amendment (which prohibits unreasonable searches and seizures) and FISA, President Bush argued that he

has the inherent authority as Commander-in-Chief of the armed forces to authorize this action to protect U.S. citizens. As a result, a public discussion is underway in legal circles concerning the following questions:

What is the proper balance between preserving civil liberties and protecting national security in times of war and crisis; and

What is the proper role of each branch of government in authorizing warrantless surveillance during wartime?

Text 1: US Courts (www.uscourts.gov)

Here the text's opening paragraph states that Congress' purpose in enacting FISA was to "put in place checks and balances among the three branches of government in regard to domestic warrantless surveillance in the name of national security, a practice which had given rise to governmental abuse in the past." However, although the declared purpose of the text is educational, it does not define what is meant by "governmental abuse" and thus fails to mention the widespread infringements of the privacy interests of members of "dissident" groups, including civil rights activists and Vietnam War protesters (see Johnson 2004, 6–10; McAdams 2007, 2). Moreover, without this information, the paragraph is actually misleading, since the "abuse" referred to is the fact that the surveillance was aimed at persons whom the government had no reason to suspect (and in fact did not suspect) of being involved in foreign intelligence activities (Cinquegrana 1989, 806–807).

This paragraph also has the effect of suggesting that FISA *actually* acts as a check on the executive branch; however, this suggestion is refuted in the fourth paragraph, headed "Warrantless Wiretaps," which notes that media reports in 2005 revealed that, following September 11, 2001 (i.e., long after FISA was enacted), President Bush authorized domestic warrantless surveillance in the name of national security. Nevertheless, the potential conflict between the information contained in these two paragraphs is not discussed, and, instead, the description of Bush's actions is elaborated in a way that suggests that (1) his actions did not constitute "governmental abuse" and (2) were not inconsistent with FISA. Specifically, the use of the modifying phrase "in the wake of the September 11, 2001 terrorist attacks on the United States" acts to suggest that exigent circumstances called upon the President to take emergency action, providing a powerful justification for the argument attributed to him in the following sentence ("that he has the inherent authority as Commander-in-Chief … to authorize this action to protect U.S. citizens"), while preemptively invalidating the opposing position ("that this action violated both the Fourth Amendment … and FISA"). It thus presents a one-sided view (Huckin 2002, 354), and although the paragraph ends by noting that "a public discussion is underway in legal circles" regarding the appropriate balancing of civil liberties and national security and the role of each branch of government in authorizing warrantless surveillance, it does not provide any information about the issues which inform this discussion that would allow the reader to formulate an opposing view.

The second paragraph states that the court is composed of 11 (originally seven) federal judges appointed by the Chief Justice to serve a single 7-year term. It does not mention that judges appointed to the court continue to serve as district court

judges during their term on the FISA Court, and that they receive no additional compensation for presiding over FISA hearings, and thus fails to provide information that would point to a deviation from the Article III tenure-and-compensation provisions relative to federal judges.

The second and third paragraphs then state that the FISA Court's "job is to review applications for governmental surveillance," and that "[t]he primary purpose of FISA is to assist the government, specifically the Executive Branch, with gathering foreign intelligence…." Again, this (re)statement of the court's purpose implicitly negates the checks-and-balances function propounded in the first paragraph; however, the information necessary to reach this conclusion is not accessible to the uninformed reader, who will accordingly conclude that the statements are not contradictory. In addition, the "primary purpose" language of the third paragraph and the accompanying explanation—that obtaining evidence of criminal activity can be only "a secondary objective" of FISA surveillance—omit any discussion of the PATRIOT Act amendment and the massive controversy that ensued, leading to the government's first-ever appeal from a FISA Court ruling.

Readers interested in continuing after reading this page can click on the second link displayed at the top, "Foreign Intelligence Surveillance Court and The Court of Review," bringing up the following page, which provides additional information about the court's operations. Paragraph numbering has been added.

The Foreign Intelligence Surveillance Court and The Court of Review

[1] Another reason that Congress passed the Foreign Intelligence Surveillance Act of 1978 was to balance liberties and safety and enhance the ability of government to protect the citizenry from national security dangers while respecting privacy rights.

[2] This Act put an end to the practice of warrantless domestic wiretapping for national security reasons. It mandates that domestic "national security" wiretaps cannot be authorized without the approval of a specialized court created for this purpose, the Foreign Intelligence Surveillance Court (FISC).

[3] The FISC originally was composed of seven federal judges, selected by the Chief Justice of the United States to serve a seven-year, non-renewable term. The PATRIOT ACT expanded this number to 11 judges. At least three judges must reside within 20 miles of Washington, D.C. The Chief Justice designates one of these judges to serve as the Chief Judge of the Court.

[4] The purpose of the Court is to review applications for domestic surveillance of individuals the government believes pose a threat to national security. Requests for surveillance are made from various governmental intelligence agencies. They go to the National Security Agency (NSA), then to the Office of Intelligence Policy Review in the Department of Justice.

[5] The Department of Justice makes a recommendation to the Attorney General. If the Attorney General approves the request, the government asks the FISC to issue a warrant permitting surveillance activities to take place. These include both wiretapping (and other forms of electronic eavesdropping) and physical searches.

[6] The FISC meets in a room to review requests in the Justice Department and follows specific procedures. Only lawyers for the Department of Justice are allowed to appear before the Court. Person(s) under surveillance are not informed of the proceedings nor are they allowed to appear or be represented in the Court by a lawyer. When a legal proceeding involves only one party to a dispute, as in the FISC, it is called an ex parte (Latin: "from one party") proceeding.
[7] If the government's request for a warrant is declined, the government may appeal to the three-judge Foreign Intelligence Surveillance Court of Review. These are federal district and appellate court judges who, like the FISC judges, are appointed by the Chief Justice to a non-renewable, seven-year term. If this Court also declines the government's request for a warrant, an appeal may be taken to the U.S. Supreme Court.
[8] Although the Foreign Intelligence Review Court was established with the FISC in 1978, it rendered its first decision in 2002, in a case called *In Re Sealed Cases* (2002). With the exception of this one case, decisions of both the FISC and the Foreign Intelligence Court of Review have not been made public. To date, no FISA-related matter has been appealed to the U.S. Supreme Court.

Text 2: US Courts (www.uscourts.gov)

The first paragraph of this text references the opening paragraph of the previous page to expand on Congress' purpose in enacting FISA, stating that "[a]nother reason" that the statute was enacted was "to balance liberties and safety and enhance the ability of government to protect… national security… while respecting privacy rights." As was the case with the opening paragraph of Text 1, the phrasing of this paragraph suggests that FISA *effectively* balances civil liberties with public safety but omits any discussion of the privacy rights involved that would permit the reader to understand what is at stake or to evaluate the claim that the appropriate "balancing" has been achieved. The second paragraph then reiterates the claim that FISA "put an end to the practice of warrantless domestic wiretapping for national security reasons," a claim likely to confuse the reader who has just learned in paragraph 4 of Text 1 that warrantless domestic wiretapping for national security reasons was in fact authorized by President Bush.

The third paragraph repeats the information contained in Text 1 relating to the court's composition without further elaboration which would alert the reader to the Article III issues raised. The fourth paragraph repeats the description of the function of the court first stated in paragraph 2 of Text 1 and then states that "[r]equests for surveillance are made from various governmental intelligence agencies" without naming them or describing the circumstances that occasion such requests. Paragraph 5 then outlines the process that the government follows in applying for a surveillance order, which the text refers to as a "warrant" despite the controversy generated by the question of whether a FISA order actually constitutes a "warrant." The use of this term is, accordingly, deceptive, because it acts to conceal the considerable doubt over whether this label can constitutionally be applied.

The sixth paragraph describes the (unusual) nature of FISA Court proceedings and begins by stating that the court "meets in a room to review requests in the

Justice Department and follows specific procedures." This oddly worded sentence refers to the fact that, historically, FISA hearings were held in a room in the Justice Department, rather than in either a federal courtroom or the judge's chambers (office), the latter being the place where hearings that are closed to the public ordinarily are held. Because the Justice Department is a division of the Executive Branch, this location was not only unusual but problematic. However, the text omits any information that would alert readers to this fact, and its syntax suggests that the phrase "in the Justice Department" modifies "requests" rather than "room." Interestingly, although the court has recently moved to the District of Columbia's federal courthouse, due precisely to concerns that its location communicated a message of bias (Wilber 2009), this paragraph has not been updated to reflect the new location.

This same paragraph next describes the court's "specific procedures," stating that only the government's lawyers are present at hearings, and that targets of surveillance "are not informed of the proceedings nor are they allowed to appear or be represented in the Court by a lawyer." It then provides the following explanation: "When a legal proceeding involves only one party to a dispute… it is called an *ex parte* (Latin: 'from one party') proceeding." However, although the fact that this explanation is being offered hints at the unusual nature of these exclusively one-sided proceedings, the text provides no information that would alert the reader to the constitutional issues raised.

The seventh paragraph explains that the government may appeal denials of its applications to the Court of Review and describes how judges are appointed to that court; here again the text refers to the orders as "warrants" and also omits any information that would suggest the Article III tenure-and-compensation issues that are raised by the appointment process. The final paragraph begins, "Although the Foreign Intelligence Review Court was established with the FISC in 1978, it rendered its first decision in 2002, in a case called *In re Sealed Cases* (2002)." Considering that the source of this text is the Administrative Office of the US Courts, the sentence is remarkable for its misstatement of the name of the Foreign Intelligence Court of Review and of the case title, which is *In re Sealed Case* (not *Cases*). This paragraph omits any commentary on the highly unusual nature of the message conveyed, that is, that the court did not decide a single case in the first 23 years of its existence. It also states, again incorrectly, that no other decisions of the FISA Court or the Court of Review have been made public. In fact, the FISA Court's decision which was reversed by *In re Sealed Case* has also been made public,[8] as have two other decisions, one of the FISA Court and one of the Court of Review.

In these two texts, the government provides a simplified overview of the court that describes, in summary form, its purpose, composition and proceedings, and the steps that the government takes in preparing a FISA application. The descriptions are spare, almost totally lacking in detail, and thus largely omit any mention of the

[8] *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp.2d 611 (Foreign Intelligence Surveillance Ct. 2002).

problematic aspects of the court's operations and functions. Moreover, even when they are mentioned, no explanatory information is provided that would permit an uninformed reader to identify, let alone evaluate, the relevant issues. The texts thus promote a favorable view of the court that presents it as an effective check on (past) Executive Branch abuse, whose function is to "balance liberties and safety." In so doing, they fail to mention the recurrent constitutional questions that have been raised in a host of reported criminal cases in which FISA evidence has been used, even where the information that is provided directly implicates these issues. Thus, Text 1 states that the "primary purpose" of FISA is to review requests for foreign intelligence surveillance, and that "the discovery of evidence of crimes… must be a secondary objective" of a FISA order, but fails to note that this is no longer true, because the PATRIOT Act amendment to FISA replaced the required government certification that "the purpose" of the surveillance was to obtain foreign intelligence information with a certification that this was "a significant purpose" and describes the court's appointment process without referring to the Article III issues that the process raises. Similarly, Text 2 refers to the surveillance orders as "warrants" without mentioning that even the FISA Court of Review has questioned whether a FISA order is in fact a "warrant" for Fourth Amendment purposes[9] and, in reference to the court's proceedings, provides a definition of "ex parte," without commenting upon or explaining the constitutional issues that these one-sided proceedings raise.

Indeed, the only place in which any of these issues are raised is in paragraph 4 of Text 1, headed "Warrantless Wiretaps," which states that President Bush "received criticism" for authorizing warrantless domestic surveillance after 9/11, but argued that he had "the inherent authority as Commander-in-Chief… to authorize this action to protect U.S. citizens." The text then notes:

> As a result, a public discussion is underway in legal circles concerning the following questions:
>
> What is the proper balance between preserving civil liberties and protecting national security in times of war and crisis; and
>
> What is the proper role of each branch of government in authorizing warrantless surveillance during wartime? (Text 1, para. 4.)

However, these questions are too general to permit the uninformed reader to infer the specific issues to which they relate. These texts thus present a highly selective view of the court and its functions, raising the question of whether the author(s) intended to mislead or deceive visitors to the website, to the government's advantage. In considering this question, relevant factors include both the genre of the texts and the author's knowledge of the topic (Huckin 2002, 362).

The information that appears on the US Courts website is provided by the Administrative Office of the US Courts, which may be presumed to have extensive knowledge of, as well as access to, information about the federal courts, including the FISA Court and the Court of Review. Indeed, the site provides comprehensive

[9] *In re Sealed Case*, 310 F.3d at 741.

information about the federal courts, including an interactive map with links to individual courts, a list of links to various federal courts and agencies, and an overview entitled "About US Federal Courts," with a link to a page entitled "Understanding Federal and State Courts," which includes a more detailed description of the federal court system and the individual federal courts. However, none of these pages contains any reference to the FISA Court or the Court of Review—a fact that is itself deceptive and misleading. Thus, it is *only* by following the "All Topics" link on the site's "Educational Outreach" page that a visitor to US Courts will encounter *any* information about FISA or the FISA Court and Court of Review.

If the information in Texts 1 and 2 had been included in the court descriptions provided in "Understanding Federal and State Courts," it might be possible to argue that, in that particular context—that is, a summary overview of each of the federal courts—a description that presents the "received version" of the courts' function and operations is all that would be expected and is not intentionally deceptive. However, where the only information about the Court appears in the "Educational Outreach" section of the site, the declared purpose of which is to inform and educate the public, and where some of the controversies surrounding FISA and its implementation are hinted at (although not in a way that would allow the uninformed reader to understanding what was being conveyed), the government's silence on the topic must be seen as intentionally deceptive and manipulative.

31.4.2 Foreign Intelligence Surveillance Court (www.fjc.gov)

The third text to be examined appears on the website of the Federal Judicial Center, www.fjc.gov. The site's home page provides the following brief description of the center and the site's informational content:

> The Federal Judicial Center is the education and research agency for the federal courts. Congress created the FJC in 1967 to promote improvements in judicial administration in the courts of the United States. This site contains the results of Center research on federal court operations and procedures and court history, as well as selected educational materials produced for judges and court employees.

To the left of this paragraph are a number of links, the first of which is labeled "General Information about the FJC." Clicking on this link takes the visitor to a page headed "The Federal Judicial Center," which provides a more detailed description of the agency's functions and which summarizes its duties in the following bullet list:

- Conducting and promoting orientation and continuing education and training for federal judges, court employees, and others
- Developing recommendations about the operation and study of the federal courts
- Conducting and promoting research on federal judicial procedures, court operations, and history
- (www.fjc.gov)

However, the most prominent feature of the page is a second list of links which is centered on the page and is printed in larger type; the links include "Publications & videos," "International judicial relations," "Federal judicial history," and "Educational programs & materials." Clicking on "Federal judicial history" brings up a page containing a list of the "Courts of the Federal Judiciary." Those listed include the US Supreme Court, the US Courts of Appeals, the US District Courts, the US Circuit Courts (now abolished), and 13 individually listed "Courts of Special Jurisdiction," the twelfth of which is the Foreign Intelligence Surveillance Court. Clicking on the link to "Foreign Intelligence Surveillance Court" brings up the following text. Paragraph numbers have been added.

Foreign Intelligence Surveillance Court

[1] Congress in 1978 established the Foreign Intelligence Surveillance Court as a special court and authorized the Chief Justice of the United States to designate seven federal district court judges to review applications for warrants related to national security investigations. Judges serve for staggered, non-renewable terms of no more than seven years, and must be from different judicial circuits. The provisions for the court were part of the Foreign Intelligence Surveillance Act (92 Stat. 1783), which required the government, before it commenced certain kinds of intelligence gathering operations within the United States, to obtain a judicial warrant similar to that required in criminal investigations. The legislation was a response to a report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee"), which detailed allegations of executive branch abuses of its authority to conduct domestic electronic surveillance in the interest of national security. Congress was also responding to the Supreme Court's suggestion in a 1972 case that under the Fourth Amendment some kind of judicial warrant might be required to conduct national security related investigations.

[2] Warrant applications under the Foreign Intelligence Surveillance Act are drafted by attorneys in the General Counsel's Office at the National Security Agency at the request of an officer of one of the federal intelligence agencies. Each application must contain the Attorney General's certification that the target of the proposed surveillance is either a "foreign power" or "the agent of a foreign power" and, in the case of a U.S. citizen or resident alien, that the target may be involved in the commission of a crime.

[3] The judges of the Foreign Intelligence Surveillance Court travel to Washington, D.C., to hear warrant applications on a rotating basis. To ensure that the court can convene on short notice, at least one of the judges is required to be a member of the U.S. District Court for the District of Columbia. The act of 1978 also established a Foreign Intelligence Surveillance Court of Review, presided over by three district or appeals court judges designated by the Chief Justice, to review, at the government's request, the decisions the [sic] Foreign Intelligence Surveillance Court. Because of the almost perfect record of the Department of Justice in obtaining the surveillance warrants and other powers it requested from the Foreign Intelligence Surveillance Court, the review court had no occasion

to meet until 2002. The USA Patriot Act of 2001 (115 Stat. 272) expanded the time periods for which the Foreign Intelligence Surveillance Court can authorize surveillance and increased the number of judges serving the court from seven to eleven.

Text 3: Federal Judicial Center (www.fjc.gov)

This text includes much of the same information about the court and its operations that appeared in Texts 1 and 2 and displays similar patterns of omission. Thus, paragraph 1 explains that FISA judges "serve for staggered, non-renewable terms of no more than seven years" without reference to the Article III tenure-and-compensation issues raised by this limited appointment, and describes FISA's enactment as coming in response to "allegations of executive branch abuses" which remain completely unspecified. Similarly, paragraph 3 notes that prior to 2002, the FISA Court of Review had never met, a fact which the text attributes to the "almost perfect record" of the Justice Department in obtaining the surveillance orders that it requests, while failing to mention that, due to the ex parte nature of the proceedings, the government's applications are *unopposed*. However, inasmuch as the issues raised by these omissions have been discussed in detail in the previous section, the present analysis will focus on one particular feature of this text: its use of the word "warrants" to refer to the FISA Court's orders. In the following analysis, uses of the word in the text will be boldfaced.

The word "warrant[s]" appears six times in the 432-word text and is the key concept discussed in each of its three paragraphs. Indeed, it appears that the whole purpose of the text's description of the court is to establish that FISA orders are judicial warrants. Paragraph 1 begins by stating that the FISA Court was created by Congress "as a special court. . .to review **applications for warrants** related to national security investigations." The text explains that the court was established by FISA, "which required the government, before it commenced certain kinds of intelligence gathering operations within the United States, to obtain **a judicial warrant** similar to that required in criminal investigations," and adds that, in so doing, Congress was responding to the Supreme Court's "suggestion," in *United States v. United States District Court*, "that under the Fourth Amendment **some kind of judicial warrant** might be required to conduct national security related investigations." The text then continues to refer to FISA orders as "warrants," explaining that "**[w]arrant applications**… are drafted by attorneys in the General Counsel's Office at the National Security Agency" (paragraph 2), and that FISA Court judges travel to Washington on a rotating basis "to hear **warrant applications**" (paragraph 3) and notes that, due to the unparalleled success of the Justice Department in obtaining "**surveillance warrants,**" prior to 2002 (i.e., when it decided *In re Sealed Case*, which is not mentioned by name), the Court of Review had never convened.

Taken together, these statements have the effect of declaring that FISA orders are judicial warrants, while implying that FISA's procedures, as those devised by Congress at the Supreme Court's behest, are in fact constitutionally sufficient to meet that definition, thus illustrating "the annunciative and constitutive capacity" of

political discourse (Dunmire 2005, 483). Moreover, they do so without discussing the continuing controversy that surrounds this issue and thus conceal the questionable nature of the impression that they convey. In particular, the text includes only an elliptical reference to *In re Sealed Case* and accordingly fails to mention that, in that case, the Court of Review conceded that "a FISA order may not be a 'warrant' contemplated by the Fourth Amendment."[10] This raises the question of whether the text's use of the word "warrant" without disclosing this information is manipulative and intentionally deceptive. Once again, factors relevant to this question include the genre of the texts and the author's (presumed) knowledge of the topic (Huckin 2002, 362).

As was the case of the US Courts website, the Federal Judicial Center website is maintained by the agency itself. As the agency responsible for the continuing education and training of federal judges and court employees, whose duties include conducting research on federal judicial procedures, court operations, and history, it is officially constituted as a repository of knowledge on those topics. Yet although the educational mission of the agency is primarily focused on a specialist audience, the information that is publicly available on this site is designed for public use, rather than for use specifically by judges and court personnel. This being the case, it might be argued that the use of the word "warrant" to describe FISA orders is intended to facilitate the understanding of lay visitors to the site by analogy to criminal warrants and is not intentionally deceptive. However, given *In re Sealed Case*, this argument must fail: Where no lesser an authority than the FISA Court of Review has expressed doubt about the appropriateness of labeling FISA orders "warrants," the text's use of this word while omitting mention of any of the relevant information that would allow a reader to understand and evaluate the issues that it raises is intentionally deceptive and manipulative.

31.5 Discussion

Political discourse has a persuasive function; accordingly, its formal structure is primarily argumentative (Van der Valk 2003, 318). However, arguments are structured both by what is said and by what is left unsaid. Thus omitting certain subjects can be an effective way of influencing public opinion about an issue (Huckin 2002, 347). Selective omissions may be used to give added prominence to the information provided (Huckin 2002, 354) or to create distortions where recipients would receive a different impression if the omitted information were revealed. In either case, they serve as persuasive strategies that are designed to manipulate processes of comprehension so that "preferred models" will be built by the recipients themselves (Van Dijk 1993, 264).

Textual omissions, which are by definition *absent* from the text, are difficult to identify (Huckin 2002, 353), and it is even more difficult to establish their omission

[10] 310 F.3d at 741.

as intentional. This chapter has applied Huckin's model of manipulative silence to the government's descriptions of the FISA Court on two federal government websites, in order to identify the relevant omissions from these texts. In the foregoing analysis, I demonstrate that the texts provide an intentionally partial and one-sided description of the court that (1) omits specific relevant information known to the authors, (2) mentions but does not explain other relevant information, and (3) uses inaccurate terms while omitting information that would serve to clarify their meanings.

This description is manipulative in presenting an inaccurate version of the court that is constructed as authoritative by virtue of its source: the agencies responsible for providing information about the federal courts (cf. Van Leeuwen 2007, 94–95). Thus, visitors who have little or no prior knowledge of the FISA Court, and who access these sites in order to obtain "official" information about the court and its operations, are primed to accept such information as accurate and complete. As a result, by their omission from these texts, problematic aspects of the court's structure and operations—such as the tenure-and-compensation issues raised by the judges' limited terms, the PATRIOT Act amendment and its expansion of FISA's scope, the nature of the agencies that submit surveillance applications to the court (e.g., the National Security Agency[11]), and the highly unusual nature of its location and proceedings—are effectively concealed (Huckin 2002, 366).[12]

Similarly, the failure to explain other relevant information both avoids difficult questions (Huckin 2002, 366) and permits the authors to exploit the resulting vagueness to manipulate recipients' interpretations (cf. Hobbs 2008, 50). The opening of Text 1 announces that the purpose of the court was to remedy "governmental abuse," a term that is not defined. However, the word "abuse" carries a highly negative connotation. Accordingly, the vagueness of the term acts to shift the focus of the text from the (undefined) abuse to the government's (specified) remedial action, while the negative connotation casts the government in a positive light (cf. Van Dijk 1993, 264), for surely a government that admits abuse will not repeat it. This impression is bolstered by the text's incorporation of President Bush's justification of the use of warrantless surveillance following September 11, 2001. By implicitly endorsing the President's claim that "he has the inherent authority as Commander-in-Chief of the armed forces to authorize this action to protect U.S. citizens," the text

[11] The National Security Agency was established by President Truman in 1952 to serve as the primary agency responsible for intercepting and reviewing global "communications intelligence," including signals and information transmitted via telephone, facsimile, high-frequency and microwave radios, communications satellites, undersea cables, and the Internet (Sloan 2001, 1470–1474). A secretive agency whose very existence is unknown to most Americans, it is often referred to by insiders as "No Such Agency," the nickname derived from its acronym, NSA.

[12] The effect of the omitted information may be illustrated by the reaction of a law professor who, presented with the information that FISA Court judges are appointed for a nonrenewable 7-year term, immediately asked how it could be an Article III court where its judges are denied life tenure (S. Pager, personal communication 2009).

constructs his action as both legal and a moral necessity (cf. Van Leeuwen 2007, 96–97), thus demonstrating "the utility of interpretations" in resolving doctrinal disputes (Chomsky 1999, 146; see also Allot 2005, 148).

The same strategies may be seen in the opening of Text 2, which explains that Congress' purpose in enacting FISA "was to balance liberties and safety and enhance the ability of government to protect the citizenry from national security dangers while respecting privacy rights," but does not define or discuss the "privacy rights" to which it refers. It thus avoids the necessity of enumerating the privacy interests that are likely to be infringed in the course of this "balancing" (Huckin 2002, 366), while invoking the discourse of moral value to present the government as the benevolent protector of the rights and safety of American citizens (Van Leeuwen 2007, 97).

The third strategy—the use of inaccurate terms while failing to provide information that would serve to clarify their meanings—is most clearly illustrated by Text 3, the description of the FISA Court posted on the Federal Judicial Center's website. The text opens with the statement that the court was established by Congress "to review applications for warrants related to national security investigations." It then offers the apparently explanatory information that the court was established by FISA, which required the government "to obtain a judicial warrant similar to that required in criminal investigations" prior to conducting foreign intelligence surveillance; and that Congress was acting upon the suggestion of the Supreme Court "that under the Fourth Amendment some kind of judicial warrant might be required to conduct national security related investigations." The word "warrant" is then used to refer to FISA orders in the remainder of the text, conferring legitimacy by implying that FISA orders are indistinguishable from the warrants that are issued in criminal investigations (cf. Van Leeuwen 2007, 104).

However, the word "warrant" does not appear in the Foreign Intelligence Surveillance Act, which refers exclusively to the FISA Court's "orders." Yet, because Congress was obviously free to make use of the term adopted by the Supreme Court in suggesting that judicial oversight should be required, its failure to do so implies that it found the word inappropriate to procedures enacted in FISA. Moreover, any remaining doubts about this issue were conclusively resolved when, in its inaugural opinion in *In re Sealed Case*, the FISA Court of Review conceded that a FISA order may not meet the definition of a warrant. Considering the fact that *In re Sealed Case* was an unqualified endorsement of procedures that even the FISA Court had labeled unconstitutional, the Court of Review's failure to endorse this term is striking. And because the Court of Review was created for the purpose of resolving legal issues relating to the application of FISA, its interpretation stands as the official and authoritative statement of the law on this particular issue.

It is therefore clear that its use of the word "warrant" to describe FISA orders is inaccurate and incorrect, and that the text's use of the word without providing an explanation that discloses the Court of Review's ruling on the issue is intentionally manipulative and deceptive, an example of what Allot, citing Chomsky, refers to as the misuse of concepts in the manufacture of consent (Allot 2005, 147–148). Allot presents a pragmatic account of misused concepts in political discourse and

discusses a number of models used to analyze such discursive strategies, one of which, the code-word model, is particularly applicable here. This model proposes that the meaning of a well-known word is broadened by politicians (or by other elites, including the media) to incorporate situations or concepts that ordinarily would be excluded from its definition, resulting in "slippage" between the normal and "expert" uses of the word (Allot 2005, 153), which permits it to be used as a euphemism to disguise aspects of a situation that might be deemed objectionable if more clearly stated. Orwell famously argued that such abuse deliberately creates meaningless words which can be used with the intent to deceive: "That is, the person who uses them has his own private definition, but allows his hearer to think that he means something quite different" (Orwell 1961, 343). In some cases, including this one, such words have the additional advantage of announcing themselves as technical terms which are exempt from lay interpretations that differ from their "official" meanings (Hobbs 2008, 38).

Nevertheless, as Dunmire notes, even seemingly monologic texts contain traces of "alternative realities" that challenge the privileged version of the text (2005, 487). For example, in this case, the explanatory information included in the text's first paragraph is significant for the qualifying language used in connection with the word "warrant": "a judicial warrant **similar** to that required in criminal investigations"; "**some kind of** judicial warrant might be required." To the informed reader, these formulations may be interpreted as hedges that acknowledge the Court of Review's admission (cf. Hobbs 2003, 460–461); however, these cues are available only to legal professionals who are familiar with FISA and with the Court of Review's decision.

31.6 Conclusion

The FISA Court has been described as "the strangest creation in the history of the federal Judiciary," a court that is "like no other" (Bamford 1982, 368, 370; see also Breglio 2003, 188), and, indeed, many of the ways in which it differs from other courts would be readily apparent to those with no legal training or expertise. Thus, given their stark divergence from the basic courtroom procedures that are familiar to all Americans by virtue of the media, it is likely that many people would find these differences problematic—that is, if they were generally known. The fact that they are not is due to the secrecy that surrounds the court and shields it from public scrutiny.

Nevertheless, the court is occasionally the subject of media reports, and, perhaps in response, the government in recent years has provided information about the court on government websites, including those examined here. Although these websites contain some factual inaccuracies, the deceptive impressions that they convey are largely communicated by the omission of information about the problematic aspects of the court and its operations. These sites thus present the court as an otherwise unremarkable federal court that is distinguished only by the subject

matter of its cases. By encouraging discussion of the court while limiting the scope of the discussion to permissible topics (cf. Chomsky 1999, 147), these texts promote a sanitized view of the FISA Court and its operations that conceals the serious and recurrent questions that continue to be raised about the constitutionality of its proceedings.

References

Allot, Nicholas. 2005. The role of misused concepts in manufacturing consent. In *Manipulation and ideologies in the twentieth century: Discourse, language, mind*, ed. Louis de Saussure and Peter Schultz, 147–168. Amsterdam/Philadelphia: John Benjamins Publishing Company.

Associated Press. 2009. Official: NSA did not wiretap Harman. *Los Angeles Times*, April 28, 2009.

Bamford, James. 1982. *The puzzle palace*. Boston: Houghton Mifflin Company.

Breglio, Nola K. 2003. Leaving FISA behind: The need to return to warrantless foreign intelligence surveillance. *The Yale Law Journal* 113: 179–217.

Chomsky, Noam. 1999. *Necessary illusions: Thought control in democratic societies*. London: Pluto Press.

Cinquegrana, Americo R. 1989. The walls (and wires) have ears: The background and first ten years of the Foreign Intelligence Surveillance Act of 1978. *University of Pennsylvania Law Review* 137: 793–828.

Dunmire, Patricia. 2005. Preempting the future: Rhetoric and ideology of the future in political discourse. *Discourse & Society* 16: 481–513.

Dvorske, John J. 2005. Validity, construction, and application of Foreign Intelligence Surveillance Act of 1978 (50.U.S.C.A. §§ 1801 et seq.) authorizing electronic surveillance of foreign powers and their agents. 190 ALR Fed 385.

Feingold, Russ. 2008. Government in secret: The Yoo memo is just one example of Bush's hidden laws. *Los Angeles Times*, May 8, 2008. Posted at: http://articles.latimes.com/2008/may/08/opinion/oe-feingold8. Last accessed 1 Nov 2009.

Hersh, Seymour M. 1974. Huge C.I.A. operation reported in U.S. against antiwar forces, other dissents in Nixon years. *The New York Times*, December 22, 1974.

Hobbs, Pamela. 2003. The use of evidentiality in physicians' progress notes. *Discourse Studies* 5(4): 451–478.

Hobbs, Pamela. 2008. Surging ahead to a new way forward: The metaphorical foreshadowing of a policy shift. *Discourse & Communication* 2(1): 29–56.

Huckin, Thomas. 2002. Textual silence and the discourse of homelessness. *Discourse & Society* 13: 347–372.

Johnson, Loch K. 2004. Congressional supervision of America's secret agencies: The experience and legacy of the church committee. *Public Administration Review* 64(1): 3–14.

Lewis, Neil A. 2002. After September 11, a little-known court has a greater role. *New York Times*, May 3, 2002.

McAdams, James G. III. 2007. Foreign Intelligence Surveillance Act (FISA): An overview. Posted at: http://www.flect.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/foreign-intelligence-surveillance-act.html. Last accessed 1 Nov 2009.

Orwell, George. 1946/1961. Politics and the English language. In *Collected Essays*, ed. George Orwell, 337–351. London: Secker & Warburg.

Ruger, Theodore W. 2007. Chief Justice Rehnquist's appointments to the FISA Court: An empirical perspective. *Northwestern University Law Review* 101(1): 239–258.

Ryan, Jason. 2006. Going around the FISA court: Government officials cite need for speed. *ABC News Internet Ventures*, January 24, 2006. Posted at: http://abcnews.go.com/print?id=1537691. Last accessed 4 May 2009.

Shenon, Philip. 2002a. Traces of terror: Counterintelligence; 'Paper Court' comes to life over secret tribunal's ruling on post-9/11 police powers. *New York Times*, August 27, 2002.
Shenon, Philip. 2002b. Threats and responses: The Judiciary; Congress criticizes F.B.I. and Justice Department over actions before secret wiretap court. *New York Times*, September 11, 2002.
Sloan, Lawrence D. 2001. ECHELON and the legal restraints on signals intelligence: A need for reevaluation. *Duke Law Journal* 50: 1467–1510.
Van der Valk, Ineke. 2003. Right-wing parliamentary discourse on immigration in France. *Discourse & Society* 14: 309–348.
Van Dijk, Teun A. 1993. Principles of critical discourse analysis. *Discourse & Society* 4: 249–283.
Van Dijk, Teun A. 2006. Discourse and manipulation. *Discourse & Society* 17: 359–383.
Van Leeuwen, Theo. 2007. Legitimation in discourse and communication. *Discourse & Communication* 1: 91–121.
Wilber, Del Quentin. 2009. Surveillance court quietly moving: Some say previous location, in Justice Dept., gave an impression of bias. *The Washington Post*, March 2, 2009.

Links to Internet Pages Cited

U.S. Courts home page: http://www.uscourts.gov/
U.S. Courts, About U.S. Federal Courts: http://www.uscourts.gov/about.html. Last accessed 28 May 2009.
U.S. Courts, Court Links: http://www.uscourts.gov/courtlinks. Last accessed 28 May 2009.
U.S. Courts, Understanding Federal and State Courts: http://www.uscourts.gov/outreach/resources/fedstate_lessonplan.htm. Last accessed 28 May 2009.
U.S. Courts, Understanding the Federal Courts – Structure of the Federal Courts: http://www.uscourts.gov/understand03/content.3.0.html. Last accessed 28 May 2009.

Part VII
Law and Popular Visual Media: "Case Studies"

Chapter 32
Seeking Truth and Telling Stories in Cinema and the Courtroom: *Reversal of Fortune's* Reflexive Critique

Cynthia Lucia

Abstract Based on attorney Alan Dershowitz's *Reversal of Fortune*, Barbet Schroeder's 1991 film centers on the attorney's successful attempt to win an appeal for Claus von Bülow, who was convicted of twice attempting to murder his wife Sunny by insulin injection. Among the first to be televised, the 1982 trial drew extensive media coverage—much of it sensational, given the von Bülows' social position and enormous wealth. The film's interest lies in posing sometimes unanswerable questions about character, motive, and the law. Giving voice to the comatose Sunny through flashbacks and voice-over narration, and creating a complex interplay of differing versions of events, the film reflexively questions the very nature and processes of understanding truth. The film is, in effect, two movies in one: a relationship narrative, centered on Sunny and Claus, that departs from conventional form, and a legal process narrative, centered on Dershowitz, that strictly adheres to classical storytelling conventions while also offering a critique of those conventions. This structural interplay further allegorizes the adversarial configuration of Western law that, the film implies, closes out dimensions of truth that lie in between, a notion the film foregrounds by calling attention to Sunny's body and her mind as objects of legal dispute that resist unambiguous interpretation. Through the intersecting lines of narrative and legal theories, this essay analyzes *Reversal of Fortune's* critique of storytelling conventions as a means of accounting for, "containing," or accessing truth—whether in the movie theater, the interrogation room, or the courtroom.

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32.1 Storytelling, Reflexivity, and the Law

The dark irony of her death in December 2008 may or may not have registered somewhere within Sunny von Bülow as she drew her last breath, but it would not have escaped her comatose counterpart in the 1990 film *Reversal of Fortune*. A film about the trials of her husband Claus, accused of twice attempting to murder her, and the tribulations of Sunny herself, weighed down by her wealth and her uncertain sense of identity apart from it, *Reversal of Fortune* delights in the sly humor that only the idle rich can provide as we try to imagine their daily lives. To understand Sunny's coma, the character Claus proclaims, "You have to understand that Sunny loved Christmas." Master of the non sequitur, Claus may have been onto something after all, considering that Sunny's death on December 6, 2008, occurred so close to Christmas—"27 years, 11 months and 15 days after she was found unconscious on the floor of her bathroom in her mansion in Newport, R.I.," *The New York Times* obituary helpfully explains (Nemy 2008). The fact that she would fall into a decades-long coma and eventually expire during her favorite season of the year lends a certain symmetry and resonance, perhaps to her real life and death, but most certainly to the film that reimagined her life and the circumstances leading to her unhappy and gradual demise—whether as a victim of Claus, suicide, an inexplicable medical condition, or perhaps a combination of all three.

Based on the Alan Dershowitz book by the same title, Barbet Schroeder's film centers on Dershowitz's successful attempt to win an appeal for von Bülow, who, in 1982, was convicted of twice attempting to murder his wife by insulin injection. Although evidence was circumstantial, the Newport, RI, jury was convinced by the prosecution's case that established compelling motives—an ultimatum delivered by von Bülow's mistress that she would end their affair unless he divorced Sunny and the 14 million dollar inheritance he would stand to lose upon a divorce. In December 1979, Sunny's daughter and son by a former marriage became suspicious of Claus, who was slow to summon doctors when their mother fell into a coma from which she recovered the following day. In December 1980, Sunny fell into a second irreversible coma, remaining "persistent vegetative," as Nicholas Kazan's screenplay defines the state in which she was to live for so many years to follow. The Rhode Island Supreme Court overturned von Bülow's conviction in 1984, on the grounds that evidence had been improperly gathered and admitted and that the prosecution had withheld exculpatory material. In the 1985 retrial, a Providence, RI, jury acquitted von Bülow, finding reasonable doubt in, among other details, Sunny's possible suicide attempt by aspirin overdose several weeks before her second coma.

Among the first to be televised, the 1982 trial drew extensive media coverage—much of it sensational given the gripping details of passion, jealousy, family bickering, possible murder, or suicide, not to mention the von Bülows' social position and enormous wealth. At the time of the film's 1990 release, most viewers would therefore have been familiar with the people and events represented. Many very likely walked into the movie theater with firm opinions about von Bülow's guilt or

innocence, opinions that the film—starring Glenn Close as Sunny, Jeremy Irons as Claus, and Ron Silver as Dershowitz—sought to challenge.

Focusing on the few months when Dershowitz and his team of attorneys and law students construct their appeal, the film poses largely unanswerable questions about character, motive, and the law. Through giving life and voice to the comatose Sunny in the form of flashbacks and, most poignantly, voice-over narration, and through its structure creating a complex interplay of versions of events, the film self-reflexively questions the very nature of truth and access to the truth—both its own and the law's. The film is, in effect, two movies in one: a film about Sunny and Claus presented in unconventional form—with multiple narrators and flashbacks nested within flashbacks—and a film about Dershowitz and the legal process, adhering strictly to classical narrative film conventions. These parallel but very differently structured narratives form a consciously reflexive commentary on storytelling—a staple of both the legal process and mainstream film—as a means of accessing truth. Playing the unconventional structure of the von Bülow relationship-centered narrative against the conventional structure of the Dershowitz law-centered narrative, *Reversal of Fortune* exposes the limitations of storytelling conventions, suggesting that, like traditional Hollywood narrative, legal storytelling is invested in reconstructing desire or motive, in building neatly interlinking chains of cause and effect that, in linear fashion, lead to an unambiguous resolution in the form of a verdict that aligns with the truth. *Reversal of Fortune* suggests that conventional storytelling—whether in the movie theater, the interrogation room, or the courtroom—are inadequate as a means of accounting for or "containing" the complexities and contradictions that form the truth.

This structural interplay, moreover, allegorizes the adversarial structure of Western law which, the film implies, closes out dimensions of truth that lie in between—a construct given greater resonance through the voice of the comatose Sunny whose existence hangs somewhere in between life and death, reality and dream. Foregrounding this notion of the "in between," the film assigns its first spoken words to Sunny. "This was my body," we hear in voice-over, as she lies inert on a hospital bed. A blue lens filter, the hypnotic rhythm of her respirator, and the floating Steadicam infuse the scene with an eerie feeling of detachment, of the "in between." We see the body but it reveals nothing; we hear the voice but it does not exist. The past-tense verb applied to the present-tense image and the words themselves hint at the complications of accessing a truth that lies in between. By calling attention to Sunny's body (and her mind) as an object of legal dispute—one that resists all attempts by the law to use it as a source of unambiguous truth—the film also draws reflexive attention to the relationship between the law, with its reliance on the visible as evidence, and film, among the most intensively visual of the arts. Revolving on a complex interplay of perceptions of presence and knowledge of absence, the film image takes on multiple meanings that accrue over time. Like Sunny's body, the visible, the physical, and their representation as image tend to complicate more than they clarify in a search for truth.

With his roots as a filmmaker in Europe before directing a number of US features including *Barfly* (1987), *Single White Female* (1992), and *Desperate Measures* (1998), Barbet Schroeder juxtaposes the Dershowitz and von Bülow narratives—one in tune

with Hollywood convention and the other unconventionally European.[1] The film creates multiple layers of reflexive commentary overtly aimed at the legal process while implicitly directed toward conventional Hollywood narrative structure, foregrounding the requirements and, indeed, the limitations imposed on narrative by both the legal institution and the Hollywood industry. Undermining the invisible, seamless structure of conventional storytelling through the less conventional von Bülow narrative, while simultaneously offering and drawing attention to conventional forms through the Dershowitz narrative, the film exposes the generally hidden template that structures stories for mass consumption as one that, more often than not, forecloses ambiguity, multiple meanings, and open-ended conclusions. Whether the public "audience" is defined as movie viewers, a jury of peers, or perhaps even a panel of judges, the requirements remain rigidly and hegemonically in place: a character-centered story must establish clear motivation (or motive, in the legal sense); obstacles in the path of character desire build conflict; neatly linking chains of cause and effect formulate and trace the journey toward a goal, with conflict functioning both to intensify and distract, forcing excursions afield that formulate secondary stories meant initially to complicate or corroborate but ultimately to reinforce and "loop" back into the primary narrative. Most importantly, structuring (or reconstruction) of cause-effect relations provides a logical framework for defining motivation or motive—how it can be compromised or thwarted and how particular actions and reformulated motivations can arise from and contribute to frustrated or sharpened desire. Chronological ordering presents (or represents) events as they most plausibly would or did occur, allowing for further clarity in determining motive, identifying obstacle, and elucidating cause/effect actions and reactions, all leading to an unambiguous conclusion—in Hollywood known as the hopeful, if not entirely happy ending; in law known as the verdict that, at its best, is commensurate with *the* truth.[2]

The similarity between Hollywood and legal process story construction is strikingly clear when Bennett and Feldman, in *Reconstructing Reality on the Courtroom*, point out that "stories 'develop' the relations between acts, actors, and situations from some point at which the action and the situation might have had multiple definitional possibilities to a point at which a dominant central action clearly establishes a significance for the situation and vice versa. This is what is often called the 'point' of the story (47)." In juxtaposing the Dershowitz "point"-driven legal narrative with the Sunny-and-Claus emotion-driven relational narrative—with its departure from conventional Hollywood structure and therefore its multilayered "definitional possibilities" that resist reduction to a "point"—*Reversal of Fortune* draws explicit attention to the similarities shared by the Hollywood and legal process

[1] Barbet Schroeder was born in Tehran in 1941, lived in Colombia as a child, and in France as a teenager, where he later started a production company and worked with well-known filmmakers of the French New Wave (Sklar 1991, 4). He has made films produced in France, Germany, and the USA.

[2] Bordwell-Thompson (2010) provides a concise outline of classical Hollywood structure upon which I draw and slightly modify (see *Film Art: An Introduction* 102–104).

approaches to narrative construction. Implicitly, the film also suggests the underlying hegemonic processes served by this dominant form of storytelling that overrules alternative possibilities in favor of a singular mass emotion or conclusion designed to confirm viewer/public faith in a system—whether in Hollywood's capacity to deliver generally pleasing, and even at times edifying forms of entertainment, or the law's capacity to deliver generally satisfying, and sometimes illuminating, forms of justice. Identifying the "master purpose" of the film industry as profit-driven and of the legal institution as power-driven—centered on "keep[ing] existing power structures in place… [to] postpone the final stages of social chaos"—David A. Black (1999) in *Law in Film* explains that only when hidden beneath an "ostensible function" can the "master purpose" be effectively achieved; in film, that ostensible function is to entertain whereas in law, that function is to dispense justice (48). By reflexively drawing attention to the storytelling process, *Reversal of Fortune* exposes the ostensible function of both film and law as just that and thus, to some extent, also exposes the respective master purpose buried beneath. Films about law are by their very nature reflexive since "the (real) courtroom was *already* an arena or theater of narrative construction and consumption and so was the movie theater," as Black claims; therefore, "the representation of court proceedings… brought about a doubling up, or thickening, of narrative space and functionality" (2). With that in mind, *Reversal of Fortune's* foregrounding the process of narrative construction offers an especially interesting commentary on legal storytelling, as Black points out:

> As it [the legal institution] turns to its ostensible function to provide a decoy from its master purpose, its committedness to the production of narratives must go unconfessed, because that committedness cannot easily be reconciled with the claim that the effect of legal process is the administration of justice. But whereas the generation of narrative is compatible with the ostensible function of cinema, it is not compatible with the ostensible function of the law. (48–49)

Through his deft reliance on non sequitur and equivocation, screenwriter Nicholas Kazan (son of American filmmaker Elia Kazan) illuminates a rigid legalistic narrative framework and its *inability* to contain Claus's story. The seemingly honest contradictions and ambiguity within Claus's narrative rapidly erode chains of cause and effect and defy neat patterns of logic. Kazan draws many of the defense-team questions and Claus's responses faithfully from Dershowitz's nonfiction book and often quotes Claus verbatim from media interviews. Placed in slightly reformulated contexts, enhanced by Schroeder's visual choices, and heightened by Jeremy Irons' Academy Award-winning performance that delights in drollery, the words now are peppered with subtle, dark humor. Playing the shadowy, witty Claus against an all-too-earnest Dershowitz—prompting Robert Sklar gleefully to entitle his article on the film *Saint Alan and the Prince of Perversion* (5)—*Reversal of Fortune* effectively opens gaps between truth and legal justice and between justice and law. (Dershowitz as near-deity in part may be a function of his son Elon's role as coproducer of the film but also appears to grow from Kazan's perception of Dershowitz as "basically such a good guy" that as screenwriter he had to invent character flaws, like a sometimes explosive temper, to make Alan dramatically appealing to audiences [Kazan 2000, DVD Commentary].) Through the voice-over narration of

Sunny von Bülow (and the unhurried, deliberate enunciation of Glenn Close, lending the performance an ethereal air) and the distinctive visual treatment setting Sunny's narration apart, Schroeder and Kazan indirectly articulate the generally hidden master purpose behind both the law and the cinema.

32.2 The Saint and the Prince

Although the Dershowitz book provides a detailed discussion of the first trial convicting Claus of twice attempting to murder Sunny by insulin injection and the second trial acquitting Claus on both charges, as well as the period between the trials when Claus hired Dershowitz to discover and argue grounds for an appeal, the main narrative action of the film concentrates on the period between the two trials as Dershowitz assembles a defense team composed of several of his Harvard law students, former students now practicing law, and Rhode Island attorney Peter MacIntosh (a character based on the former Rhode Island public defender John "Terry" MacFayden who worked with Dershowitz on the case). Dershowitz's first-person narrative voice in the book is crisp and informal ("… like most criminal lawyers, I had my opinions… two things seemed clear: first, that von Bülow was guilty; and second, that he would get off. The reason for my second conclusion had nothing to do with either the evidence or the brilliance of his defense. It was based on my assessment of the response to von Bülow as a person by the Newport townies [48–49]."). He admits to having had little detailed knowledge of the case initially and thus takes the reader along through every step of the process as he searches for motives, examines evidence, and gathers witnesses—in other words, as he structures the legal narrative and then restructures it when he comes to believe in Claus's innocence. With a New York Jewish background similar to that of Dershowitz, actor Ron Silver skillfully captures the Dershowitz voice of confident strategist who is both amused and intrigued by the chasm that separates him from the European aristocrat he's defending ("I noticed immediately one striking difference between von Bülow's home and mine: the Fifth Avenue apartment had no aromas of home cooking, no smells, no odors. There was no sense that his home was lived in, loved in, eaten in, slept in." [50]). The shrewd casting of Silver as Dershowitz playing against Jeremy Irons as Claus effectively replicates this chasm through the performers' divergent backgrounds and approaches to acting: Silver was trained at New York's HB Studio where, when she taught there, Uta Hagen (cast as Sunny's maid Maria in *Reversal of Fortune*) and other instructors adapted aspects of the "internalizing" method; the British-born Irons was trained in more formalized "external" approaches to acting at the highly competitive Bristol Old Vic Theatre School founded by Sir Laurence Olivier.

The law-centered narrative with Alan Dershowitz as its protagonist forms the frame and major through-line of the film but is itself framed by a prologue and epilogue filtered through the perspective and voice of the comatose Sunny, whose narration, sometimes accompanied by shifting time and place, interrupts the Dershowitz narrative at key points throughout, arresting the goal-driven, linear

movement of Alan as good-guy hero in dogged pursuit of a goal shaped and defined by the parameters of the law. Although first-person narration in the book belongs to Dershowitz alone, narrative privilege in the film is reserved most powerfully for Sunny, whose "in-between" state implies a level of omniscience no other character can attain—neither Claus, when recounting past events, nor Dershowitz, when briefly theorizing, near the end, what *may* have led to Sunny's final coma. Embedded within the Dershowitz narrative are additional disruptions to linearity arising as Claus narrates past events when prompted by questions Alan or his assistants pose. Expressive of his enigmatic character, Claus's narration is accompanied by flashbacks, sometimes nested within additional flashbacks that freely move back and forth in time.

The Dershowitz narrative is punctuated by references to time—drawing reflexive attention to its linearity and its bound and grounded nature—and, unlike the narratives provided by Sunny or Claus, it can neither escape time nor can it access knowledge beyond that which physical, visible evidence supplies. This entrapment by time, space, and imperfect knowledge, a state the viewer shares in real life, is ironically articulated by the comatose and presumably untethered Sunny who, in the film's final narration, addresses the viewer: "This is all you can know, all you can be told. When you get where I am, you know the rest." Sharply in contrast is the countdown to the appeal deadline that Dershowitz and his team must meet; the characters often refer to the time remaining to complete the 100 pages required: 45 days, 38 days, 7 days, 4 days, and finally 2 hours, during which Peter MacIntosh must drive the brief to Providence, RI, from the Dershowitz home in Cambridge, MA—a home that also serves as an impromptu 24/7 law office with various assistants in residence during the time available. To further establish Alan's real-world, regular-guy credentials, in dramatic distinction from Sunny's limbo-like existence, the film cuts abruptly from her ethereal opening narration—shot with a deathly cold, blue lens filter and ghostly steady cam hovering above her hospital bed (the visual tropes always reserved for Sunny)—to jittery hand-held close-ups of a dribbling basketball pounding the pavement of a driveway, our first introduction to Alan, whose face we don't see for a few seconds. The staccato slapping of the ball and random competitive shouts establish the rapid-fire pace of his reality in contrast to the rhythmic shush of Sunny's respirator and the dispassionate, measured cadence of her narration.

Further establishing the hear-and-now world of Alan are the editing patterns which, as Barbet Schroeder (1991) points out, imply that Alan is playing against someone, yet that person, once we are given a wider shot, turns out to be himself (Schroeder 2000, DVD commentary). This strategy in many ways establishes his dual, oppositional function in the law-driven narrative—both as a lawyer concerned with winning his client's case and an investigator who wants to discover the truth. In regard to Alan's investigative, truth-seeking function, screenwriter Kazan points out that the truth "is what we all want, and what we, as movie goers, want" (Kazan 2000, DVD commentary), thus acknowledging the need to align viewers with Alan and acknowledging viewer (and public) desire for some sense of closure that aligns law with truth and truth with justice. This desire, foregrounded in the Dershowitz narrative, is rooted in the idealized vision of law held by the general public and perpetuated, for the most part, by the mainstream media, including conventional Hollywood films, which tend

to view law as a source of truth and justice, with exceptions, in reality and in film, cast as aberrant rather than typical of the system, as critical legal theorist David Kairys points out (Kairys 1990, 2). Kazan and Schroeder realize and comply with the public desire for a vision of law as defined by its ostensible function, but they do so only to a point, presenting us ultimately with characters, composition, and mise-en-scene that resist both linguistic and visual penetration or interpretation, thus suggesting that "there is no truth" (Kazan 2000, DVD commentary) accessible in the von Bülow case and that, with its real-world temporal and spatial limitations, neither the actual or the fictional Dershowitz, nor the real or the represented law can have privileged access. Dershowitz reinforces this point in his book: "The truth may lie… in some mundane series of coincidences that reflect the muted grey of indifference rather than the clear white of total innocence or the deep black of unmitigated guilt. The blunt instrument of the law is rarely refined enough to discern shades of intent, motivation or character" (1986, 252). He further draws an analogy with film itself in saying that "under our system, the legal story is almost never the whole story. Some of the juiciest parts end up on the cutting-room floor … the result is a film edited and cut drastically from the vast footage of real life" (1986, 245).

In spite of the shared need with law to pare real life down to its most relevant essentials, cinema, in its less conventional forms, can transcend time and space to speculate and imagine, to give voice to and resuscitate the comatose Sunny—and Schroeder does so in purposeful terms. He refers to the "documentary style" of the real-world narrative and to the "fictional style" of flashbacks and narrated sequences, citing the "Hollywood-like depth of field" he employs in the flashbacks and further citing the influential melodramas of Vincente Minnelli and Douglas Sirk. Schroeder also points out his use of non-diegetic music to mark these as "fictional" sequences. In the Dershowitz narrative, on the other hand, Schroeder limits sound to the diegetic, or sound that is part of the "real-world" space of the story, in keeping with the documentary effect of the law-driven narrative (Schroeder 2000, DVD commentary). Most prominently and powerfully Schroeder employs the dissolve in those sequences narrated by Claus or Sunny, an editing technique that seemingly defies spatial-temporal coordinates—instantly transforming locations that exist in the present to their past state, inhabited by characters as they existed in the past. When Claus, in response to questions about Sunny's first coma, explains that "Sunny loved Christmas," for instance, the camera slowly tracks forward and cranes downward to reveal the elegant, if somewhat stark, foyer of the Newport mansion, as a dissolve magically places a lighted Christmas tree in that same space, along with poinsettias, a bright red settee, and lighted chandeliers (Figs. 32.1–32.3).

A piano and the voices of the 20-year-old Alex von Auersperg and the 12-year-old Cosima von Bülow fade in as they sing a Christmas carol. Although Schroeder speaks of the consciously employed "fictional" devices in these scenes, such scenes, nevertheless, bring us closer to *the truth about the truth*—reflexively suggesting that fiction may provide greater access than nonfiction to the *idea* of truth, with its multifaceted, multivalent nature.

Linguistically, Claus's responses to Alan's questions, beyond their sly understated humor, provide a glimpse into language, itself, as a multivalent source of psychological

Fig. 32.1 The dissolve in REVERSAL OF FORTUNE defies temporal reality, moving from the stark present to the more animated past

Fig. 32.2 The dissolve in REVERSAL OF FORTUNE defies temporal reality, moving from the stark present to the more animated past

and emotional expression, therefore pointing out the limitations of its more narrow uses in the law. In film, of course, spoken language is clarified, contradicted, or rendered ambiguous by the images and other sound elements that accompany it, while in the legal context, language is clarified, contradicted, or rendered ambiguous by verbal accounts, by visible physical evidence or by recorded evidence whether visual or auditory. The automatic reflexivity present in films about law, and in