

Seeing Double: Ironic Encounters between Art and Law

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Table of Contents

<i>Abstract</i>	6
<i>Sommaire</i>	7
<i>Acknowledgments</i>	8

Introduction: Irony, Affect and the Law

The Paradox of Censorship.....	11
Chapter Breakdown	18
Art as Encounter.....	22
Law's Repression of its Other.....	25
Crime, Obscenity and Transgression.....	31
Conclusion: Ironic Doubling	35

Chapter 1 - Repeating Law: Power, Performativity, and Psychoanalysis

Introduction: The Dangers of Repetition	37
I. Approaches to the Problem of Repetition	40
Proliferation: Foucault and the Productive Power of Discourse	40
Iterability: Derrida's Performativity	47
Subversion: Butler's Performativity	50
Critiques of Butler: Intention and the Body	54
Excess: Felman and the Speaking Body.....	57
II. Repetition and the Force of Law.....	60
Derrida: Performative Law	61
Butler: The Sovereign Conceit.....	62
Psychoanalysis: Before the Law	65
Law's Founding Violence.....	68
Exposing Law's Obscene Superego	72
III. Repetition as a Critical Doubling.....	76
Irony and Parody	77

Rogers' Mourning	80
Agamben's Mediality	83
Foucault's Reflection and Deleuze's Copy	86
Conclusion: Laughing at the New	91

Chapter 2 - Resignifying Words: Public Law, Private Judgment, and Obscene Repetition

Introduction: Judging Obscenity	94
I. Writing Law: The Problem of Citation	96
Circulation and Containment: The Origins of Anglo-American Obscenity Law.....	96
Obscenity's Primal Scene: <i>R v. Hicklin</i>	103
The United States: Public Display and Private Subversion.....	110
Corrupting the Law's Body	121
The Chastity of the Record Decided.....	128
II. Writing Pornography: The Power of Deferral	132
III. Writing Literature: Repetition as Purification.....	138
<i>Ulysses</i> and the Integrity of Dirty Words	140
Anglo-Saxon Words and the Trope of Authenticity	144
Purifying Sex and Language	147
Conclusion: Repeating Differently	150

Chapter 3 - Restaging Speech: Theatrical Cursing, Police Performance, and Obscene Repression

Introduction: Farce of Law.....	152
I. Onstage: The Collision of Two Scripts.....	159
II. Backstage: Unscripted Laughter	167
III. Audience: Obscene Racism Revealed	172
Conclusion: Unmasking Law	181

Chapter 4 - Reframing Images: Photographing Children and Desiring Law

Introduction: Framing Henson.....	184
I. The Aesthetic Gaze: Reframing Art and Pornography	193
Art as a Field of Cultural Production	195
Reappropriation Art	201
II. The Political Gaze: Children, Sex, and the Trouble with Innocence.....	205
The Empty Image of the Child	209
Critiques of Innocence	213
Instrumentalizing the Bodies of Girls	216
III. The Lascivious Gaze: The Expansion of Child Pornography Law	222
Fantasizing about Fantasy	223
Circulating Desires.....	227
IV. Re-Aestheticizing the Image: Desire and Disgust	230
Looking and the Collapse of Distance	231
Fantasizing the Fantasy of the Other	235
Conclusion: Inside the Frame.....	239

Chapter 5 - Repurposing Signs: Street Art, Public Space, and Legal Semiotics

Introduction: Outlaw Art	242
I. Performing Illegal Art.....	246
Art on the Street	247
Guilty Pleasures.....	253
II. Repurposing Legal Semiotics	259
Moving through the City	260
Public Address.....	264
Queering Semiotics	268
III. Public Space and City-zenship.....	272

Spatial Governance and Social Control	273
From Prosecution to Permission	281
IV. Regulating Aesthetics	286
Aesthetic Pluralism	291
Beyond Criminalization	296
Conclusion: Reclaiming Form	300

<i>Conclusion - Law Through the Looking Glass.....</i>	<i>301</i>

Bibliography

Books	309
Newspapers and Other News Sources.....	339
Cases.....	347
Legislation.....	349
Reports and Government Publications.....	349
Websites	351
Films.....	352
Archival Materials	352
Interviews	352

Abstract

This dissertation is about what happens when the law attempts to control and police the meaning, circulation, and effects of representations. In a series of case studies, I examine encounters between the criminal law and the works of art, literature, and theatre it seeks to regulate and contain, in order to probe what the notion of irony can tell us about the vulnerability of institutionalized power. Each chapter focuses on a particular crime of representation - publishing an obscene text; uttering offensive language in a public place, making and showing indecent or pornographic images; and marking graffiti. In each case, I read the law through the representations - publications, theatre, photographs, or street art - made subject to its juridical force. I explain the sense of irony that arises in each case as a function of how the law tries but fails to remain outside of the representations it regulates, and shows itself to be immersed in and subject to the representational dynamics it seeks to control. The necessity of law repeating itself through time leaves open the ever-present possibility of a *critical* doubling, one which shifts or changes the scene in which authority operates, disrupting law's fantasy of sovereign power, exposing the fault lines and the precariousness of its own pronouncements, performances, frames, and insignia. Irony becomes a means of analyzing the precariousness of law's sovereign performances: as text (canonized and not pornographic), as theatre (a display of authority and not a farce), as remaining outside the image (not implicated or desirous), as a sign (communicating, not questioning) in space (bounded and designated not 'free'). This dissertation builds upon and extends transdisciplinary inquiries into legal aesthetics - law and discourse, legal theatricality, law and the image, and legal spaces - by connecting the threat of literariness, the embarrassment of overt theatricality, the vulnerability of explicit censorship, and the threatening polysemy of images, to art's challenge to law *as* representation. This dissertation seeks to contribute to the cultural study of law by demonstrating that art and law are constituted in and through one another in infinite, contradictory, and potentially transformative ways.

Sommaire

Cette dissertation porte sur les conséquences des tentatives de la loi de contrôler et surveiller le sens, la circulation et les effets des représentations. Dans une série d'études de cas, j'examine les rencontres entre le droit criminel et les oeuvres d'art, la littérature et le théâtre dont la loi cherche à réguler et contenir, afin de sonder ce que la notion de l'ironie peut nous dire sur la vulnérabilité du pouvoir institutionnalisé. Chaque chapitre se concentre sur un crime particulier de représentation - publier un texte obscène; utiliser un langage offensant dans un lieu public; prendre et montrer des images indécentes ou pornographiques; et faire des graffitis. Dans chaque cas, j'interprète la loi à travers les représentations - publications, théâtre, photographies ou arts de la rue - soumise à sa force juridique. J'explique le sens de l'ironie qui apparaît dans chaque cas comme une fonction de comment la loi tente mais échoue de rester en dehors des représentations qu'elle régule et se démontre comme faisant partie et assujettie à la dynamique de représentation qu'elle cherche à contrôler. La nécessité de l'auto-répétition de la loi à travers le temps engendre la possibilité omniprésente du dédoublement critique, celui qui décale ou change la scène où l'autorité opère, perturbant la fantaisie de la loi sur le pouvoir souverain, exposant les lignes de failles et la précarité de ses propres prises de positions, de ses performances, de ses cadres et de ses insignes. L'ironie devient un moyen d'analyser la précarité des performances souveraines de la loi: comme un texte (canonisé et non pornographique), comme théâtre (un acte d'autorité et non une farce), comme étant hors plan (pas impliqué ou désireux), comme un signe (qui communique et non questionne) dans l'espace (délimité et désigné mais non "libre"). Cette dissertation s'appuie sur et prolonge des préoccupations transdisciplinaires dans l'esthétique juridique - le droit et discours, la théâtralité du droit, le droit et l'image et les espaces juridiques - en joignant la menace de la littérature, l'embarras de l'exagération théâtrale, la faiblesse de la censure évidente et la polysémie écrasante des images avec le défi de l'art contre la loi en tant que représentation. Cette étude cherche à contribuer aux études du droit dans la culture en démontrant que l'art et le droit se croisent de façon infinie, contradictoire et potentiellement révolutionnaire.

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Irony, Affect and the Law

Since irony precisely consists in dragging authority as such into a scene which it cannot master, of which it is *not aware* and which, for that very reason, is the scene of its own self-destruction, literature, by virtue of its ironic force, fundamentally deconstructs the fantasy of authority in the same way, and for the same reasons, that psychoanalysis deconstructs the authority of the fantasy.¹

‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’

‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master — that’s all.’²

This dissertation is about what happens when law seeks to control and police the meaning, dissemination, and effects of representations. Each of my case studies involves an encounter in which the force of criminal law is brought to bear on the meaning, effects and circulation of art works. Each chapter focuses on a crime of representation - publishing an obscene text, uttering offensive language in a public place, making and showing indecent or pornographic images, and marking graffiti. In each case, I read the law through the representations - published texts, theatrical plays, photographs, or street art - made subject to its force: condemnation, seizure, erasure, or prosecution. In the story produced by the encounter, we see how the law – in its representations and through its representatives - tries and *fails* to remain outside of the

¹ Shoshana Felman, “To Open the Question” (1977) 55-56 Yale French Studies 5 [“To Open the Question”]

² Lewis Carroll, *Through the Looking Glass, And What Alice Found There* (London: MacMillan & Co., 1917 [1871]) at 99.

representations it regulates, and shows itself to be immersed in and subject to the representational dynamics it seeks to control. The devices adopted by late nineteenth-century courts to avoid reproducing obscene words on the public record are mirrored in the elliptical devices employed by pornographic texts. Police prosecute actors in the theatre for uttering obscene words, but are forced to join the theatre instead, exposing their own intervention as obscene. The censors produce pornography in the course of denouncing it, and courts adopt a lascivious gaze in order to adjudicate the pornographic nature of photographs of children. A street artist initially prosecuted by city authorities for repurposing road signs, before public outcry forces the city to adopt the artist's own semiotics, pardoning and hiring him to promulgate his work. Each case is marked by a reversal, a doubling, as though we have fallen through the looking glass into a topsy-turvy world: judgment becomes a pornographic text, the police are obscene, the public law is pedophilic, and the city does graffiti.

In the passage from Shoshana Felman that began this introduction, she suggests that the irony consists in 'dragging authority as such into a scene which it cannot master, of which it is *not aware* and which, for that very reason, is the scene of its own self-destruction.'³ Irony – whether in literature, art and life – calls us to bear witness to a 'scene.' As a rhetorical situation, it necessarily imports 'the sense of an audience,'⁴

³ Felman, "To Open the Question," *supra* note 1 at 8.

⁴ As Ruth Smith explains, 'the stipulation of what is ironic – be it a kind of argumentation, a power relation, a joke, or a glance across the room – is a joint project in which ironists and the particular conventions of irony activity deployed in that moment are dependent on each other. Ironists, audiences, and practice are specifically connected in the relations of the rhetorical situation... The entire process assumes that speaker and audience, in their historical situatedness, share some degree of common discourse, without which irony could not be irony.' Smith, *supra* note 8 at 369. Linda Hutcheon argues that 'irony happens because what could be called 'discursive communities' already exist and provide the context for both the deployment and attribution of irony.' Linda Hutcheon, *Irony's Edge: The Theory and Politics of Irony* (London: Routledge, 1994) [*Irony's Edge*] at 18. Amber Day works through Michael Warner's definition of 'publics' to suggest that members of discursive communities *become* publics in choosing to interpret an ironist's statements ironically. Amber Day, "And Now...the News? Mimesis and the Real in The Daily Show" in Jonathan Grey, Jeffrey P. Jones & Ethan Thompson, eds., *Satire TV: Politics and Comedy in the Post-Network Era* (New York: New York University Press, 2009) 67. See Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002) at 67-74; Amber Day, "Are They for Real? Activism and Ironic Identities" 18 *Electronic Journal of Communications* <http://www.cios.org/www/ejc/v18n24toc.htm> So according to Hutcheon, irony shows the need for common and shared discourse, and according to Day's reversal of this formulation, we can look to irony as evidence of such a shared discourse.

addressing us as spectators and demanding that we interpret it.⁵ Irony arises between and by virtue of the layered and lived texts of our shared discourse, and marks the moments when our frames of reference collide and realign before us. The law is ‘*not aware*’ in these moments: irony exposes law’s unconscious, ‘the other dimension of law,’⁶ the repressions which constitute itself. For to see law ‘in *the scene* of its own self-destruction’ is to momentarily escape its thrall, to stand outside law’s authority and realize its contingent and precarious hold on that authority. Through irony’s ‘double vision’⁷ or ‘multiple vision,’⁸ we witness law’s authoritative self-instantiation and at the *same time* perceive it to be a fiction. Rebecca Clift draws on Erving Goffman’s idea of framing to suggest that irony depends upon ‘the simultaneous presence of two dimensions of meaning: ‘inside’ and ‘outside’ meanings, the one framing the other.’⁹ To perceive irony, then, is to be *a spectator to a moment of doubling*. This dissertation traces moments in which the law fails to master its scene, and is pulled into and framed by the art it seeks to regulate, a doubling reflected back to us as viewers.

The Paradox of Censorship

What’s at stake for law in these ironic moments? What is it about seeing law doubled in this way that ruins for us the illusion of its singular authority? The irony that

⁵ On ‘invitations to interpret’ see Wayne Booth, *A Rhetoric of Irony* (Chicago: University of Chicago Press, 1974) at 245. For accounts of irony as ‘that on which the critic’s eye falls,’ see Joseph A. Dane, *The Critical Mythology of Irony* (Athens, GA: University of Georgia Press, 2011) at 2.

⁶ Pierre Legendre, “The Other Dimension of Law” in David Carlson and Peter Goodrich eds. *Psychoanalysis and Jurisprudence: Essays in Law and the Postmodern Mind* (Ann Arbor: Michigan University Press, 1997).

⁷ ‘... irony happens, it comes about, in a space somewhere *between* the said and the unsaid. This borderland locus can produce surprising effects, at a minimum making visible the multiple meanings of an event. A matter of double vision, the ironic challenges an utterance or an image in its customary meaning. It undermines the authority of this privileged meaning by staging a confrontation with the spectral presence of other possible meanings.’ Claire Valier, “The Spaces of Irony” in Ronnie Lippens, ed. *Imaginary Boundaries of Justice: Social and Legal Justice Across Disciplines* (Hart Publishing, 2004) 97 at 98.

⁸ Ruth L. Smith argues that ‘the greater sightedness of irony’ – its ability to perceive more, means it has been accorded ‘a privileged status in critical discourse.’ Ironists see ‘with two or three’ eyes and are willing ‘to consider human activity disjunctive and ambiguous instead of harmoniousness and seamless.’ Ruth L. Smith, “Morals and their Ironies” (1998) 26:2 *Journal of Religious Ethics* 367 at 367.

⁹ Rebecca Clift, “Irony in Conversation” (1999) 28 *Language in Society* 523 at 533.

characterizes each of these crime stories is constitutive of censorship more generally. Legal institutions frequently attempt to contain 'alarming' representations, to place limits on their circulation, to modify their affective trajectories, to decide what they will mean and where they will travel, who can read, view or listen to them and under what circumstances. But as a strategy for containing representations, explicit censorship has a notorious tendency to backfire.¹⁰ Historian Donna L. Dennis notes that the most widely expressed objection to obscenity regulation in the United States during the nineteenth-century - far more than concerns about restrictions on freedom of speech or freedom of the press - stemmed from the realization that such prosecutions often served to publicize the practices they were intended to eradicate.¹¹ Geoffrey Robertson calls 'the abiding irony of all censorship' 'the *Spycatcher* effect: attempt to ban by law any form of artistic expression, and the publicity you bestow upon it will only serve to promote massive sales.'¹² The perverse effects so often associated with regulatory censorship demonstrate that animating context or authorial intention does not determine the meaning or force of law's instantiation, suggesting the unstable connection between means and ends, forms and effects.

The paradox of censorship is linked to the problem of repetition: censorship is doomed to make present what it seeks to make absent. Judith Butler observes that in order for the law to regulate a phenomenon, it must transform it into legal discourse, and thus –

¹⁰ An act of censorship can be said to have 'backfired' when 'it creates more attention to, and support for, the censored work and its creator than would have occurred without the intervention of censors.' Sue Curry Jansen & Brian Martin, "Exposing and Opposing Censorship: Backfire Dynamics in Freedom of Speech Struggles: (2004) 10:1 Pacific Journalism Review 29 at 29-30; Sue Curry Jansen & Brian Martin, "Making Censorship Backfire" (2003) 7:3 Counterpoise 5; Derek Dalton & Catherine Schubert, "When Classification Becomes Censorship: An Analysis of the Neutralisation and Resistance of Film Censorship in Contemporary Australia" (2011) 20:1 Griffith Law Review 31 at 32-33. For the model of backfire more generally, as it applies to events that give an impression of injustice, such as police brutality, unfair dismissals, and human-caused environmental catastrophes, etc. see Brian Martin, *Justice Ignited: The Dynamics of Backfire* (Lanham, MD: Rowman & Littlefield, 2007).

¹¹ Donna I. Dennis, "Obscenity Law and its Consequences in Mid-Nineteenth Century America" (2007) 16:1 Columbia Journal of Gender and Law 43 at 92.

¹² Geoffrey Robertson, *The Justice Game* (Vintage, London, 1999) at 47. See also Dalton & Schubert, *supra* note 10 at 32-33, observing that 'a central irony linked to film classification in the modern era is that effectively banning a film can fuel interest and inaugurate other viewing opportunities, such as pirate screenings, internet downloads and clandestine DVDs that circulate ungoverned by the OFLC.'

inadvertently - 'establish it as a site of contestation, that is, as the scene of public utterance that it sought to preempt.'¹³ She writes that 'the censor is compelled to repeat the speech that the censor would prohibit,'¹⁴ and 'language that is compelled to repeat what it seeks to constrain invariably reproduces and restages the very speech that it seeks to shut down.'¹⁵ But, she warns, general appeals to this irony have limited explanatory power:

they cannot tell us when and why certain kinds of censorship are, in fact, more complete than others, why some operations of censorship seem to capture the offensive speech, and others seem quite helpless to effect any capture at all. What accounts for the efficacy and vulnerability to failure that characterizes different operations of censorship? Never fully separable from that which it seeks to censor, censorship is implicated in its own repudiated material in ways that produce paradoxical consequences.¹⁶

In this dissertation, I pursue Butler's suggestion by asking how law's own 'fantasy of sovereign action'¹⁷ is called into question and transformed by its encounters and entanglements with its own repudiated texts: literature, theatre, photographs, and unauthorized street art. Rather than conceptualizing law as always-already externally imposed on art works as objects of criminalization or governance – a law which art can then 'subvert' – I pursue an account of law and art as 'co-implicated.'¹⁸ By focusing on the irony generated by the encounter between law and art, I aim to uncover exactly how law is drawn into, and made vulnerable to, the representations it would seek to distance itself from.

¹³ Judith Butler, *Excitable Speech: A Politics of the Performative* (London: Routledge, 1997) [*Excitable Speech*] at 130.

¹⁴ *Ibid.* at 37.

¹⁵ *Ibid.* at 129.

¹⁶ *Ibid.* at 130.

¹⁷ *Ibid.* at 12.

¹⁸ This approach is indebted to Alison Young's excellent work on law and the image, in Alison Young, *Judging the Image: Art, Value, Law* (London: Routledge, 2005) [*Judging the Image*]. She suggests that 'law and the image are enfolded within each other, their contours and substances passing through and around each other.' *Ibid.* at 10; and focuses on 'the embedded and enfolded relation of law and art.' *Ibid.* at 13.

Law's vulnerability arises from its necessary reliance on repetition: it must present and re-present itself through time.¹⁹ As Roland Barthes wrote, 'enratic language (the language produced and spread under the production of power) is statutorily a language of repetition; all official institutions of language are repeating machines.'²⁰ Law's authority is grounded in the sanctioned violence it has the power to enact.²¹ This authority is constituted by legal performances in which those speaking for law or exercising its force – judges, police, censors, legislators - engage in framing activities, declaring that which is outside the law, asserting legal interiority, animating a purposive discourse, and distinguishing between law and illegitimate violence. Jacques Derrida drew attention to the work of the frame, or *parergon*, in inscribing and maintaining the distance between the pure interiority of form and the exteriority of context and social history.²² The frame is 'the margin of certainty where the supposed interiority of such a system is set in place,' but it functions only at the price of disclosing that system's incompleteness to itself.²³ Peter Fitzpatrick suggests that modern law is constituted by, and gains its operative effect from, an oscillation between fixity and fluidity, openness and closure, determinacy and responsiveness.²⁴ On his account, law appears as a

¹⁹ Without the ability to represent what is not present, without the capacity therefore to project oneself or one's ideas into an absence, there can be no morality... And without a system of iterability by which we can reincarnate or *re-produce* those representations accurately and consistently across time and space, there can be no law, either.' Desmond Manderson, "From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature" (2003) 15:1 Law and Literature 87 at 62.

²⁰ Roland Barthes, *The Pleasure of the Text*, trans. by Richard Miller (New York: Noonday Press, 1975) [*The Pleasure of the Text*] at 40.

²¹ Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge: Harvard University Press, 2002) at 107. See Robert Cover, "Violence and the Word" in Martha Minow, Michael Ryan and Austin Sarat, *Narrative, Violence and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1995) 203.

²² Jacques Derrida, "Passe-Partout" and "Parergon" in *The Truth in Painting*, trans. by Geoff Bennington and Ian McLeod (Chicago: University of Chicago Press, 1987) 1-13 and 15-147 [*Truth in Painting*]. See further Jonathan Culler, *Framing the Sign: Criticism and its Institutions* (London: University of Oklahoma Press, 1988) at ix.

²³ John Tagg, *The Disciplinary Frame: Photographic Truths and the Capture of Meaning* (Minneapolis: University of Minnesota Press, 2009) at 249.

²⁴ Law is 'a putative settlement of the space in-between determinate position and what [is] beyond it.' Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) at 104. Law has 'to be apart from a quality of determinant fixity so that it could be ever responsive, but it [has] also to be apart from mere responsiveness otherwise it would simply deliquesce and not 'be' at all.' This

function of the perpetual *breaking* of the frame around its formal existence. While to speak of an entity called 'law' is to be in thrall, however momentarily, to 'the fiction of the unity of law,'²⁵ its smooth self-presentation as a unitary desiring subject, as Shaun McVeigh and Shannaugh Dorset caution, 'failure to pay attention to the difficulties of escaping from the metaphysics of law only ensures their repetition.'²⁶ So I retain the term 'law' throughout my analysis in order to explore how law is empowered by its singular image and claim to formal coherence.²⁷ I am interested in how law does what it does, and how it affects us, rather than its definition.

Sociolegal and critical legal scholars grapple with law as a site where power relations are negotiated, reproduced and contested, and explore law's role in framing the public sphere, public discourse, and public spaces. In its most instrumental mode, such writing imagines law as a machine designed to perform legal work, one which reflects dominant class interests, conceals the ideological foundation of authority, and denies the

apartness is what gives law 'some place, some palpability, some hold.' *Ibid.* While 'law can never be totally mastered by any external power' 'it must constantly give way to, and engage with, that which lies beyond its fixity for the time being' in order to remain in force: Ben Golder & Peter Fitzpatrick, eds., *Foucault and Law* (Abingdon: Ashgate, 2010) at xx. Law relies on both determinacy and responsiveness for its 'operative effect.' (xxi).

²⁵ Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967) at 128.

²⁶ Shaunnagh Dorsett & Shaun McVeigh, "Questions of Jurisdiction" in Shaun McVeigh, ed. *Jurisprudence of Jurisdiction* (Taylor & Francis, 2006) 3 at 4. Hans-Georg Gadamer, *Truth and Method* (London: Continuum, 1979) at 595; Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" trans. by Mary Quaintance (1990) 11 *Cardozo Law Review* 919 ["Force of Law"]. Instead of reifying 'law' through its singular invocation, Mariana Valverde proposes to examine: 'how people interact with, and help to maintain and transform, various *legal complexes*: ill-defined, un-coordinated, often decentralized sets of networks, institutions, rituals, texts and relations of power and of knowledge that develop in those societies in which it has become important for people and institutions to take a position vis-à-vis law. Unlike Law, which hovers beyond the reach of those who act in its name, legal complexes can be empirically investigated.' Marianne Valverde, *Law's Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003) at 10. Valverde echews the abstraction of the term 'law' by preferring to locate it, but then does so in limited institutions, deferring the interpretative problem. See further Emmanuel Melissaris, "Review: Law's Dream of a Common Knowledge" (2003) 13:9 *Law and Politics Book Review* <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Valverde903.htm>

²⁷ See Carol Smart, *Feminism and the Power of the Law* (Routledge, London, 1989) at 4. Lon L. Fuller considered argument about definitions of law to be unproductive: see Kenneth I. Wilson, "Three Models for the Study of Law," in Willem J. Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 51 at 69.

perspectives of marginalized groups.²⁸ But as legal pluralists have shown, law is more than an external force acting on hapless legal subjects: it is a process of active, normative, creative engagement with rules.²⁹ This means we must think law's formal existence simultaneously with its cultural and symbolic life. In Robert Gordon's words, law's power 'consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.'³⁰ As Sarat and Kearns have emphasized, law's force is both material and symbolic: law 'is a creature of both literal violence, and of imaginings and threats of force, disorder, and pain... in the absence of such imaginings and threats there is no law.'³¹ The cultural study of law recognizes that law is constituted by and through modes of representation that are grounded in institutional forms, social relationships and cultural practices.³²

Scholarship on legal aesthetics recognizes that social or political explanations of law's force are only of limited relevance in understanding '*the visual effects of the law, for...*

²⁸ For a critique of the assumptions behind the 'engaged' mode of legal scholarship, see Roderick Macdonald, "Still 'Law' and Still 'Learning' / Quel 'droit' et quel 'savoir'?" (2003) 18 Canadian Journal of Law and Society 5 at 11.

²⁹ This perspective has been eloquently elaborated in the work of Roderick Macdonald, who draws on Lon Fuller's idea that law's purposive enterprise is 'subjecting human conduct to the governance of rules,' advancing a critical pluralist hypothesis of law as 'the endeavour of *symbolizing* human interactions as governed by rules.' Roderick A Macdonald & David Sandomierski, "Against Nomopolies" (2006) 57:4 Northern Ireland Legal Quarterly 610 at fn 16. See further Roderick Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" in A Lajoie, R A Macdonald, R Janda & G Rocher, eds, *Théories et émergence du droit : pluralisme, surdétermination et effectivité* (Montreal: Éditions Thémis, 1998) 11; Roderick A. Macdonald, "Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Social Change" (2007) 67:4 Louisiana Law Review 1113; Roderick Macdonald, "Here, There ... and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in N Kasirer, ed., *Étudier et enseigner le droit: hier, aujourd'hui et demain - Études offertes à Jacques Vanderlinden* (Montreal: Éditions Yvon Blais, 2006) 381, especially 394-5.

³⁰ Robert W. Gordon, "Critical Legal Histories" (1984) 36 Stanford Law Review 57.

³¹ Austin Sarat & Thomas R. Kearns, "Introduction" in Austin Sarat & Thomas R. Kearns, eds., *Law's Violence* (Ann Arbor: University of Michigan Press, 1992) 1 at 1.

³² See further Austin Sarat and Thomas R. Kearns, "The Cultural Lives of Law," in Austin Sarat & Thomas R. Kearns eds., *Law in the Domains of Culture* (Ann Arbor: The University of Michigan Press, 1998) 1; Austin Sarat and Jonathan Simon, "Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship," in Austin Sarat and Jonathan Simon, eds., *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Durham: Duke University Press, 2003) 1; Naomi Mezey, "Law as Culture" (2001) 13 Yale Journal of Law and the Humanities 35 at 42.

its dogmatic ability to hit the tender spot... cannot be accounted for by the ordinary means of observation.’³³ As Douzinas and Nead write, ‘(l)aw’s force depends partly on the inscription on the soul of a regime of images.’³⁴ Psychoanalytic jurisprudence insists that our attachment to law is about more than logic or fear – it is the attachment of belief, the acting-out of purpose, the absorption of a narrative. ‘We have internalized law’s meanings and its representations of us so much that our own purposes and understandings can no longer be extricated from them.’³⁵ Therefore, we need an account of what makes law and art, as modes of representation, attach to and affect our bodies and life-worlds in this way: of how law ‘inscribes itself on everyday life.’³⁶ Law constitutes and re-constitutes itself through authoritative writing, embodied performances, policing images, and transmitting signs. To cite the law is always to cite certain specific inflections or displaced instantiations of the law, following the endless detour of its figures, bodies, images and signs.³⁷ The necessity of law’s repetition leaves open the ever-present possibility of an *ironic* doubling, one which shifts or changes the scene in which authority operates, disrupting law’s fantasy of sovereign power, exposing the fault lines and the precariousness of its own pronouncements, performances, frames, and insignia.

³³ Pierre Legendre, “The Dogmatic Value of Aesthetics” (2008) 14:4 Parallax 10 [“Dogmatic Value of Aesthetics”] at 10. Legendre defines aesthetics as ‘the sensory apprehension of thought,’ in which ‘the field of pure abstraction is left behind.’ *Ibid.* For Legendre’s translator Peter Goodrich, ‘the text circulates as an image and the power of its effect is largely resident in that aesthetic quality rather than its supposed rational content.’ Goodrich, “Specula Laws: Image, Aesthetic and Common Law” (1991) 2 Law and Critique 233 [“Specula Laws”] at 236.

³⁴ Costas Douzinas and Lynda Nead, “Introduction: Law and Aesthetics” in Costas Douzinas and Lynda Nead, eds., *Law and Image: The Authority of Art and the Aesthetics of Law* (Chicago and London: University of Chicago Press, 1999) [Law and Image] at 4.

³⁵ Austin Sarat & Thomas R. Kearns, “Editorial Introduction” in Austin Sarat & Thomas R. Kearns, eds., *The Rhetoric of Law* (Ann Arbor: The University of Michigan Press, 1994) at 12-13.

³⁶ Goodrich, “Specula Laws,” *supra* note 33 at 235.

³⁷ Jacques Derrida, “Differance” in *Margins of Philosophy*, trans. by Alan Bass (Chicago: University of Chicago Press, 1982) at 154.

Chapter Breakdown

The methodology of pursuing four specific case studies, ranging across historical moments, normative sites, and representational modes, is driven by the terms of my inquiry. Irony is notoriously resistant to being pinned down or formalized in abstract structures. After all, how could we use words to systematize a phenomenon that depends precisely on the capacity of words to get away from us? As Paul de Man wrote, ‘any theory of irony is the undoing, the necessary undoing, of any theory of narrative... Words have a way of saying things which are not at all what you want them to say. There is a machine there, a text machine, an implacable determination and a total arbitrariness.’³⁸ The central preoccupations of this thesis – the capacity of discourse to produce a reversal of effects, the tendency of utterances to escape the speaker’s intent, the radically different affective trajectories inaugurated through changing the contexts of images, and the susceptibility of forms to appropriation – are precisely what militate against abstract or systematic formulations of irony. As Claire Valier suggests, irony ‘exists only in and through its demonstration. Irony, one might say, is the performative *par excellence*.’³⁹ This necessarily means that irony must look where and when irony strikes us, allowing the force of this irony to register as critique, as a glimpse into the institutional guise of law under pressure.

Chapter 1, Repeating Law, connects the vulnerability of law to the problem of representation, which it identifies as a problem of repetition. Representations are constituted by their *reproducibility*, by their capacity to be resignified, restaged or reframed in different contexts, and repurposed towards different ends. Repetition is a structural necessity of language and law. This chapter reviews approaches to the problem of repetition in scholarship dealing with the meaning, effects, and force of representations, before turning those insights onto law itself, understood as a repeating

³⁸ Paul de Man, “The Concept of Irony” in Andrzej Warminski, ed. *Aesthetic Ideology* (Minneapolis: University of Minnesota Press, 1996) 163 at 179 and 181.

³⁹ Valier, *supra* note 7 at 97.

machine, a discursive and performative self-instantiation through time. If performativity tells us about the authority and power of legal language - law's effectivity, its capacity to do things - psychoanalysis inquires into the subjectivity of legal practices: law's affectivity, its relationship to desire. If performativity explores repetition as convention, psychoanalysis explores repetition as repression: the law is bound to repeat its obscene founding repression, the political Real, the basis of its claim to authority. Performativity understands law's vulnerability as the possibility of an improper repetition or infelicitous performance, and psychoanalysis understands this vulnerability as a function of displaying or exposing law's obscene repression. This chapter draws these inquiries together to offer a way of understanding the phenomena of repeating *differently* – critically or subversively, through the ironic doubling of parody and farce, and what this means for our understanding of law's authority.

The remaining four chapters explore four different ways of understanding the dynamics of repetition with a critical difference: resignifying, restaging, reframing, and repurposing. Each chapter investigates a different representational form - writing, speaking, images and signs – within a range of different sites – the courtroom, the theatre, the media, and the street – to unravel the link between these representational dynamics and legal authority. By examining, in turn, the crimino-legal response to printed texts, theatrical plays, circulating images, and unauthorized signs, I am able to draw upon theoretical resources developed in scholarship on literature, theatre, visual studies and semiotics to understand how law can become vulnerable as a function of its status as representation. Scholars of legal discourse observe literature's threat to law's hegemonic control over language, performance scholars speak of law's theatrical unmasking, psychoanalysts speak of the revelation of law's ideological basis of authority, and semioticians point to an excess of signification which frustrates law's purposes. Each of these perspectives offers a distinct, but related, way of understanding what happens in these ironic encounters between law and art.

Chapter 2, *Resignifying Words*, examines key cases in the modern history of obscenity regulation in order to explore the implications and effects of repetition in the written texts of law. In the nineteenth-century, United States courts adjudicating charges of publishing an obscene text worried about their own necessary repetition of those texts in the course of rendering judgment. The formal requirements of criminal prosecutions required them to cite the text, but the law's emerging status as a written archive accessible to the public raised questions of circulation and access – the very questions of obscenity itself. The court's hierarchical solution, which exposed legal officials but not the general public to these texts, threatened to become undone at any moment. The court's capacity for judgment depended on it remaining distant from and resisting the obscene effects of that text. The texts of law must not be pornographic. Yet in writing about obscene texts, the courts are obliged to adopt key devices of pornographic writing: ellipsis, negation and deferral. In these key obscenity cases, we perceive the taint of a corporeal body behind law's textual abstractions – and clearly see that law is produced by judges who are embodied, affected, interested readers of texts.

Chapter 3, *Restaging Speech*, turns from the writings of judges and censors to the embodied actions and spoken utterances of police, and examines a historical occasion of theatre censorship in order to explore the theatricality of law. Drawing on the definition of theatricality as a viewing experience in which the mechanisms of power are revealed, I show how the attempts by Queensland police to censor the play *Norm and Ahmed* in 1969 demonstrate the tendency of spectacular or explicit censorial measures to undermine or compromise law's authority. In entering the stage to arrest the actor for the crime of uttering obscene words in a public place, the police shone the light on their own spectacle of policing, their own performance of power. The performances of law must not be farcical. Yet by entering the theatrical frame, the police shone a spotlight on their own imitative structure, the necessary repetition of their own legal authority, transforming performance into parody. The police were reacting to the play's exposure of obscenity, but their own reaction revealed the repressed violence at the foundation

of law. The law attempts to restage a play as obscene, but is in turn restaged, revealing law's own obscenity: an ideology rooted in social exclusion.

Chapter 4, *Reframing Images*, turns from the actions of the police to the crimino-legal complex, examining the controversy over nude photographs of children in order to show how public law is implicated in the images it seeks to impugn. Taking its departure from the controversy over the Henson case in 2008, this chapter explores law as a regime of control over images and as an agent of framing, bound up in the affect and desire of the representations it regulates. The processes of visual representation itself are caught up in broader legal, political, aesthetic, sexual discourses and pressures and languages, which are at once at odds and co-implicated. The law must remain outside the image and the affects it generates. Yet the public law's reaction of disgust points towards a deeper co-implication between law and the image. The expressions of public disgust elicited by such photographs reveal the public law's superego obscene supplement: its implications in the socially-constructed 'deviant' desires it seeks to interpellate and externalize. Law tries to frame the image, but is itself framed by the image, pulled inside its borders and revealed as thoroughly invested in the affects of representation.

Chapter 5, *Repurposing Signs*, explores the susceptibility of legal semiotics to repurposing by examining an instance where authorised signage is subverted and put to new use. Like the crimes of obscenity, the crime of marking graffiti is an utterance out of place, 'a heterogeneity within the field of representation.'⁴⁰ By virtue of its illegality, graffiti calls into question the distribution of signs and space. The work of Canadian street artist Roadsworth, in addition, called into question the very formal mechanisms by which law achieves this distribution. The law is meant to be directive and purposive, not open-ended and suggestive. But Roadsworth took the instrumental semiotics by which the law governs roads and urban spaces, and transformed them into non-instrumental art. The irony of the City's eventual adoption of Roadsworth's art demonstrates the shifting politics working through law's empty formalism. Turning from

⁴⁰ Rosalind Krauss, "Michel, Bataille et moi" (1994) 68 October 3 at 14.

the public sphere to the material sites of urban governance, this chapter shows that while law attempts to repurpose aesthetic interventions into the city as threats to public safety or as signs of crime, it is in turn repurposed by being made into art, and rendered not only a site of exclusion, control and instrumental meaning, but a language of possibility, of thinking otherwise.

These four case studies focus on how the dynamics of *encountering* texts, performances, images and signs illuminate the forms, affects and power of law in distinct ways. In each chapter, law doubles these alarming representations by resignifying, restaging, reframing and repurposing them, but always ends up reflected in and through them. Each encounter shows that the relationship between law and art is mirror-like: law is reflected in and through the art. Art is not law's double, rather their encounter is a *scene of doubling* that reverses, refracts and somehow shatters the closed logic of law. We see law resignifying but being resignified, restaging but being restaged, reframing but being reframed, repurposing but being repurposed. The relation between law and art is never purely mimetic, a straightforward reflection, or a unilateral reference from one aesthetic domain to another; art and law are constituted in and through one another in infinite, contradictory, and potentially transformative ways.

Art as Encounter

Theoretical approaches to art and law, in aesthetic history and legal theory, respectively, have evolved in parallel and intersecting ways. Post-Kantian aesthetic theory asserted that art was a transcendental phenomenon based on the contemplation of form, just as traditional approaches to law – whether natural law or positivist – located it on a formal plane separated from the vicissitudes of force and culture. The ideals of beauty and justice – two highly interrelated concepts – formed the *telos* of aesthetic and legal judgment alike. Since early twentieth-century art historians pursued an understanding of art as a product of its historical and social milieu, at the same time as realist legal critics forced understanding of law's imbrications in social and political power, scholars

of art and law have faced the theoretical challenge of establishing that their respective objects of study are more than just politics. A disappointed absolutism fuelled much late twentieth-century postmodernist art practice that sought to deny art's capacity for authority and originality: everything is recycled, value is contingent, anything can be an art object, and it's all a big swindle. Art, here, is a broken promise. A similar disillusionment underpinned Critical Legal Studies and 'vulgar' deconstructionism: law is force dressed up as form, a language-game with no necessary connection to social justice, a tool or instrument or mechanism of power, with means and ends that can be radically separated. Law, too, is a broken promise.⁴¹

Contemporary scholarship on art and culture has recognized that the force or political effectivity of art – how it does what it does - cannot be accounted for by reference to its semantic content, its transmission of a message.⁴² The meaning or significance of an artwork cannot be exhausted by a historical, sociological, political, anthropological or institutional account of its production or reception. 'The work of art is not communication'⁴³ – rather it 'harbors within it an excess, a rapture, a potential of associations that overflows all the determinations of its 'reception' and 'production.'⁴⁴

⁴¹ See further Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (Berkeley Calif: University of California Press, 2000); Desmond Manderson, "Apocryphal Jurisprudence" (2001) 23 *Studies in Law, Politics and Society* 81. On modernist aesthetics in law and the possibility of a pluralist aesthetic, see Roderick A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism" (1998) 15 *Arizona Journal of International and Comparative Law* 69.

⁴² This acknowledgment also drives much contemporary art practice. See Hal Foster, *The Return of the Real: The Avante-Garde at the End of the Century* (Cambridge, Mass.: MIT Press, 1996); Stephen Zepke & O'Sullivan, Simon, eds., *Deleuze and Contemporary Art* (Edinburgh: Edinburgh University Press, 2010); Martha Buskirk, *The Contingent Object of Contemporary Art* (Cambridge, Mass.: MIT Press, 2003); Nicholas Bourriaud, *Relational Aesthetics* (Dijon: Les Presses du réel, 2002); Claire Bishop, *Participation* (Cambridge, Mass.: MIT Press, 2006); Claire Bishop, *Installation Art* (New York: Routledge, 2005); Miwon Kwon, *One Place After Another: Site-Specific Art and Locational Identity* (Cambridge, Mass.: MIT Press, 2004).

⁴³ Gilles Deleuze, "What is the Creative Act?" in Sylvère Lotringer & Sande Cohen, *French Theory in America* (Routledge: New York, 2001) 99 at 106.

⁴⁴ Jean-Francois Lyotard, "Critical Reflections" (1991) trans. W.G.J. Niesluchawski 24:8 *Artforum* 92 at 93.

Scholars following Gilles Deleuze's idea that art is experienced as 'sensation'⁴⁵ have sought to account for its seemingly *immanent* power through recourse to the notion of affect: to the embodied *event* of viewing art. For Deleuze, the cinematic image, for instance, is not a representation or a sign, rather, it is expressive and affective: not an image of a body, but the body as image.⁴⁶ Drawing on Deleuze, Brian Massumi argues that 'approaches to the image in its relation to language are incomplete if they operate only on the semantic or semiotic level, however that level is defined (linguistically, logically, narratologically, ideologically, or all of these combinations, as a Symbolic). What they lose, precisely, is the *event* – in favour of structure.'⁴⁷

These Deleuzian scholars ask us to think about what art does (how we respond to it) rather than what it means (how we interpret it). Rather than attempting to read the art object for its (political) content, however socially-determined, a focus on art as sensation, event, and encounter proceeds by 'attending to the specificity of an art work and the specificity of the milieu in which the art object operates.'⁴⁸ A differential account of art – which echoes Heideggerian aesthetics - addresses a painting *as* painting, not reducing the artwork to brushstrokes, but recognizing its power of resonance *as sign*, as language itself.⁴⁹ Art's political effectivity is not a function of its substantive

⁴⁵ See further Gilles Deleuze, *Francis Bacon: The Logic of Sensation*, trans. by Daniel W. Smith (Minneapolis: University of Minnesota Press, 1981); and Gilles Deleuze & Félix Guattari, *What is Philosophy?* (New York: Verso, 1994).

⁴⁶ Gilles Deleuze, *Cinema 1: The Movement Image* (1983), trans. by Hugh Tomlinson and Barbara Habberjam (1989: University of Minnesota Press, Minnesota) at 58, cited in Ed Mussawir, "Cinematic Jurisprudence" (2005) 17:1 *Law and Literature* 131 at 134-5.

⁴⁷ Brian Massumi, "The Autonomy of Affect" in Paul Patton, ed., *Deleuze: A Critical Reader* (Oxford: Blackwell, 1996) at 220.

⁴⁸ Simon O'Sullivan, "The Aesthetics of Affect: Thinking Art Beyond Representation" (2001) 6:3 *Angelaki* 125 at 130.

⁴⁹ See Martin Heidegger, 'The Origin of the Work of Art' and 'Language' in *Poetry, Language, Thought*, trans. by Albert Hofstadter (New York: Harper & Row, 1971) 15 and 185. For Heidegger, art is not a logocentric attempt at the making present of something which exists or has existed elsewhere: rather, art enacts *the way in which such beings come to presence*, the 'happening of truth at work.' *Ibid.* at 36. See further Derrida, *Writing and Difference*, trans. by Alan Bass (Chicago: University of Chicago Press, 1978 [1967])[*Writing and Difference*].

message, but its capacity to generate an encounter that produces difference.⁵⁰ At stake in this kind of aesthetics is what Deleuze calls ‘a genuine encounter’ with an object of sense that *does* something to us, that short-circuits our cognitive and conceptual capacities.⁵¹ For Simon O’Sullivan, aesthetics names ‘the rupturing quality of art: its power to break our habitual ways of being and acting in the world (our reactive selves)’ and also for the ‘concomitant second moment: the production of something new.’⁵² I have adopted this understanding of art as neither pure artifact nor pure artifice but rather a creative force in itself generating thought. As performance scholar Peggy Phelan argues: ‘interaction between the art object and the spectator is essentially performative.’⁵³ That means we are always-already implicated in the performance, and that whatever we seek to bring to bear ‘on’ the object is already part of it. To overlook or elide this magical – and immanent – function is to remain unaffected by art.

Law’s Repression of its Other

Over the last decade, affect has become a key term in cultural, feminist, and criminological approaches to law.⁵⁴ As aesthetic criminologist Alison Young explains, the

⁵⁰ Simon O’Sullivan, “From Aesthetics to the Abstract Machine: Deleuze, Guattari and Contemporary Art Practice” in Simon O’Sullivan & Stephen Zepke, eds., *Deleuze and Contemporary Art* (Edinburgh: Edinburgh University Press, 2010) 189 at 194. [From Aesthetics to the Abstract Machine]

⁵¹ See Gilles Deleuze, *Difference and Repetition*, trans. by Paul Patton (London: Continuum, 2004) at 139. Following Deleuze, Bennett argues that an artwork is an ‘encountered sign’: a ‘sign that is felt, rather than recognized or perceived through cognition.’ J. Bennett, *Empathic Vision: Affect, Trauma and Contemporary Art* (Stanford: Stanford University Press, 2005) at 7.

⁵² O’Sullivan, “From Aesthetics to the Abstract Machine”, *supra* note 50 at 197. Langer explains that art is a ‘symbol of feeling,’ a device through which we can make an abstraction: Suzanne K. Langer, *Feeling and Form: A Theory of Art Developed from Philosophy in a New Key* (London: Routledge and Kegan Paul, 1953).

⁵³ Peggy Phelan, *Unmarked: The Politics of Performance* (London: Routledge, 1993) at 147.

⁵⁴ Alison Young, *The Scene of Violence: Cinema, Crime, Affect* (London: Routledge, 2010) [*The Scene of Violence*]; Ruth Buchanan & Rebecca Johnson, “Strange Encounters: Exploring Law and Film in the Affective Register” in Austin Sarat, ed. *Studies in Law, Politics and Society: A Special Symposium Issue on Law and Film*, Vol. 46 (Bradford: Emerald, 2009) 33; William De Haan, & and Ian Loader, “On the Emotions of Crime, Punishment and Social Control” (2002) 6:3 *Theoretical Criminology* 243; Anna Hickey-Moody and Peta Malins, eds., *Deleuzian Encounters: Studies in Contemporary Social Issues* (New York: Palgrave, 2008); Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh: University Press, 2004); Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham, NC: Duke University Press, 2003).

question of affect concerns the processes or structures of identification *with, in* and *as* law. It looks at what binds subjects to law: 'This is not so much a question of whether law arrives at its destination, but rather how and by what route law achieves its ends and gets under our skins.'⁵⁵ '(A)ffect has to do with intensity rather than identity.'⁵⁶ It relates to manner rather than essence: 'not what something is, but how it is – or, more precisely, *how* it affects, and how it is affected by, other things.'⁵⁷ Its focus is not on emotion but on the 'ways in which the body can connect with itself and with the world,'⁵⁸ 'the way the subject feels itself from the inside.'⁵⁹ A psychoanalytic inquiry into law proceeds by 'looking at the affective structures and appeals of law,' and 'addressing the juridical as a strange object of love, as an obscure yet persistent desire.'⁶⁰ The law must continually reform and resubstantiate itself in the social psyche, and it achieves this by embedding itself within and colonizing our cultural representations.

Interdisciplinary approaches to law often observe that modern law constitutes itself by denying its own status as representation – as literature, theatre, images, and art.⁶¹ Legal positivists who approach law as a body of determinate rules that guide officials

⁵⁵ Alison Young, "In the Eyes of the Law: The Look of Violence" (1997) 8 *Australian Feminist Law Journal* 9 at 9 ["In the Eyes of the Law"].

⁵⁶ Young, *The Scene of Violence*, *supra* note 54 at 9.

⁵⁷ Steven Shaviro, "Pulses of Emotion: Whitehead's 'Critique of Pure Feeling'" (2007) in *The Pinocchio Theory* <http://www.shaviro.com/> at 8 cited in Melissa Gregg and Gregory J. Seigworth, "An Inventory of Shimmers" in Melissa Gregg and Gregory J. Seigworth, eds., *The Affect Theory Reader* (Durham: Duke University Press, 2010) 1 at 14.

⁵⁸ Brian Massumi, *Parables for the Virtual: Movement, Affect, Sensation* (Durham, DC: Duke University Press, 2002) at 28.

⁵⁹ Patricia Pisters, *The Matrix of Visual Culture: Working with Deleuze in Film Theory* (Stanford: Stanford University Press, 2003) at 70.

⁶⁰ Peter Goodrich, "Screening Law" (2009) 21:1 *Law and Literature* 1 ["Screening Law"] at 3. Goodrich suggests that the interesting part of 'the literary effusions of law, in the fictions and figures of legal doctrine' is 'precisely what escapes the text, what gets under the skin, what is incorporated as law for us.' *Ibid.* See further Peter Goodrich, *Languages of Law* (London: Weidenfeld and Nicolson, 1990); Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press, 1995).

⁶¹ Douzinas & Nead, *supra* note 34 at 5.

necessarily insist on law's resistance to polysemy or multiple interpretations.⁶² 'Law pretends that it can close itself off from other discourses and practices, attain a condition of total self-presence and purity, and keep outside its domain the non-legal, the extraneous, the other – in particular the aesthetic, the beautiful and the image.'⁶³ Images are particularly suspicious for traditional legal thought which, as Peter Goodrich notes, likens images to 'a false truth, a woman, a strumpet, pollution, seduction, enigma, likeness or dissemblance, fraud or veil.'⁶⁴ The affective or performative power of images is seen to make them uniquely threatening to law. 'Images are sensual and fleshy; they address the labile elements of the self, they speak to the emotions, and they organize the unconscious. They have the power to short-circuit reason and enter the soul without the interpolation or intervention of language or interpretation.'⁶⁵ Their polysemy threatens law's claim to hegemonic control over meaning: 'The fear of images, displaced into judicial hermeneutics, becomes the fear of plural meanings and interpretations.'⁶⁶

Beginning her book *Crimes of Writing: Problems in the Containment of Representation* by identifying law as 'a particularly idealized and transcendent form of writing,'⁶⁷ Susan

⁶² 'If we are to communicate with each other at all . . . then the words we use . . . must have some standard instance in which no doubts are felt about its application.' H.L.A. Hart, *The Concept of Law*, rev. ed. by P.A. Bulloch & J. Raz, (Oxford: Clarendon Press, 1994) at 125; see Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Macmillan, 1987) at 56; Stanley Fish, "The Law Wishes to have a Formal Existence" in Alan Norrie, ed., *Closure or Critique: New Directions in Legal Theory* (Edinburgh: Edinburgh University Press, 1993).

⁶³ Douzinas & Nead, *supra* note 34 at 4.

⁶⁴ Goodrich, "Screening Law" *supra* note 60 at 19.

⁶⁵ Douzinas & Nead, *supra* note 34 at 7. 'The specular ordering of the world presides over the life of civilizations and this responsibility primarily falls upon aesthetics, without which, today, not science, technology nor any of the prodigious objects of industrial rationality could be conceived, for one could not inhabit them subjectively otherwise.' Legendre, "Dogmatic Value of Aesthetics", *supra* note 33 at 12; Pierre Legendre, *Dieu au miroir: Etude sur l'institution de images* (Paris: Fayard, 1994); Pierre Legendre, "Introduction to the Theory of the Image," (1997) 8:1 *Law and Critique* 3.

⁶⁶ Douzinas & Nead, *supra* note 34 at 8 citing C. Douzinas, P. Goodrich and Y. Hachamovitz, "The Legality of the Contingent," in C. Douzinas, P. Goodrich, and Y. Hachamovitz, eds., *Politics, Postmodernity, Critical Legal Studies* (London: Routledge, 1995) 1.

⁶⁷ See Susan Stewart, *Crimes of Writing: Problems in the Containment of Representation* (New York: Oxford University Press, 1991) [*Crimes of Writing*] at 3; Roderick A. Macdonald, "Custom Made: An

Stewart asks: 'How can the law maintain a distance from its status as writing at the same time that it proclaims and delimits a domain of writing?'⁶⁸ Legal writing cannot share the qualities of literary texts, 'for if it does, it loses its power to legislate as a metadiscourse. Of even more consequence, to share in these qualities would be to admit the literariness of the law.'⁶⁹ Put simply, if law is (just) words (or theatre, images, or signs) then it must be a qualitatively different 'kind' of words (or theatre, or images, or signs) in order to carry authority and exert legitimate force. Stewart identifies two ways in which the law typically tries to stand outside or deny its own status as writing (or representation). The first is to deny its materiality: law functions 'by eliding its historical and material conditions of production and reception,'⁷⁰ 'the law itself never addresses its own materiality; it is not subject to a historical account aside from a broadly evolutionary model in which the law becomes fuller, more elaborated, and more just.'⁷¹ The second is to deny its temporality or contingency: 'the law is not subject to a specific ontology,'⁷² but maintains its status 'as event.'⁷³ In its executive or sovereign mode, it is always already *there*. 'The fixity of the law... all the structural and structuring capabilities of the law must be assumed, must be *in place*'⁷⁴ before the law speaks. Before the law speaks, it is always already there, and this there is everywhere: 'the law in this sense is both metalinguistic and performative.'⁷⁵ In turn, Stewart makes the provocative suggestion that law criminalizes some forms of writing – forgery, pornography and graffiti – precisely *because* of the threat they pose law's own status as writing:

Argument for a Non-Chirographic Critical Legal Pluralism" (2011) 26:2 Canadian Journal of Law and Society / Revue canadienne droit et société 301.

⁶⁸ Stewart, *Crimes of Writing*, *supra* note 67 at 18.

⁶⁹ *Ibid.* at 21.

⁷⁰ *Ibid.* at 19.

⁷¹ *Ibid.* at 18.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.* at 19.

⁷⁵ *Ibid.* at 18.

... these 'crimes of writing' are delineated by law because they quite specifically undermine the status of law itself; they point to the irreducible fact that law is written and hence to the consequent fact that the law is subject to temporality or interpretation.⁷⁶

This dissertation builds on Stewart's reading of literary genres that point to and thereby undermine law's sense of itself, extending her insight from written work to speaking, images and signs. I retain Stewart's use of the term 'representation' because it retains an important connection to the materiality of representations as they are borne out of conditions of reproducibility: not only from the bodily capacity for voice and gesture, but out of machines, institutions and networks of transmission: the printer, the camera, the internet, etc.

An alternative approach might analyze writing, speaking and images as *signs*: forms with socially-constituted meanings. As Suzanne Langer insisted, meanings are 'embodied in forms' that have a distinctive kind of 'logic' and history, both 'ideal' and 'real,' and studying them does not take us away from 'real life,' but rather shows us how life is structured through semiotics.⁷⁷ In *Mythologies*, Barthes treats language, discourse and speech as co-extensive, and purports to study mythical speech as consisting in 'modes of writing or of representations; not only written discourse, but also photography, cinema, reporting, sport, shows, publicity...'⁷⁸ Invoking a wide range of different cultural forms is warranted for Barthes because all of them function as signs - 'the associative total of a concept and an image' - on the level of myth.⁷⁹ This allows him to pursue semiology, 'a science of forms, since it studies significations apart from their content.'⁸⁰ While acknowledging that images 'are more imperative than writing, they impose meaning at

⁷⁶ *Ibid.* at 3.

⁷⁷ Susanne Langer, *Philosophy in a New Key: A Study of the Symbolism of Reason, Rite and Art*, 3rd ed. (Cambridge: Harvard University Press, 1954) [*Philosophy in a New Key*].

⁷⁸ Roland Barthes, "Myth Today" in *Mythologies*, trans. by Annette Lavers (London: Paladin, 1972).

⁷⁹ 'the semiologist is entitled to treat in the same way writing and pictures: what he retains from them is the fact that they are both *signs*, that they both reach the threshold of myth endowed with the same signifying function, that they constitute, one just as much as the other, a language-object.' *Ibid.* at 115.

⁸⁰ *Ibid.* at 112.

one stroke, without analyzing or diluting it,' Barthes' semiological approach assumes that once there is meaning, pictures become a kind of writing,⁸¹ so 'a photograph will be a kind of speech for us in the same way as a newspaper article.'⁸²

Although I view words, performances, images, and signs each as modes of representation, I have proceeded by noticing, rather than assuming or eliding, the similarities and differences between reading a text, hearing spoken words, viewing a photograph, and encountering a sign. Words began as icons, and retain an imagistic link.⁸³ Word and images travel together in the visual, metaphorical and sensual act of engaging with a written text.⁸⁴ Hearing an obscene spoken word can be like seeing an image, with a similar immediacy and incantatory power.⁸⁵ Images can be understood as a kind of performative speech.⁸⁶ Wildstyle graffiti and iconographic street art frequently challenge the possibility of making a formal distinction between words, images, and signs.

A decade ago, Goodrich called grammatology, 'the study of writing systems,' of 'the structures of legal performance and communication, the material conditions of the

⁸¹ *Ibid.* at 110.

⁸² *Ibid.* at 111.

⁸³ See further Duncan Davies, Diana Bathurst & Robin Bathurst, *The Telling Image: The Changing Balance between Pictures and Words in a Technological Age* (Oxford: Clarendon Press, 1999).

⁸⁴ 'It is through its imagery, its visual tropes and figures, that the text attaches itself and binds its reader.' Goodrich, "Specula Laws", *supra* note 33 at 237. 'Word and image travel together'; the text 'is also an image and both uses and conjures images visible and unseen'; lawyers in their work need 'the affect and effect of images.' Goodrich, "Screening Law", *supra* note 60 at 11. 'Their effect is their affect and this is as true for the libidinal economy of juridical images as it is of the sensual apprehension of literary texts.' *Ibid.* at 18.

⁸⁵ 'Thanks to the automatic nature of speech perception, a taboo word kidnaps our attention and forces us to consider its unpleasant connotations. That makes all of us vulnerable to a mental assault whenever we are in earshot of other speakers, as if we were strapped to a chair and could be given a punch or shock at any time.' Steven Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (New York: Penguin, 2007) at 339.

⁸⁶ Liza Bakewell draws on J.L. Austin's theory of performative speech acts to argue that images, rather than re-presenting reality and therefore being largely descriptive, are more accurately categorized as acting. Liza Bakewell, "Image Acts" (1998) 100:1 *American Anthropologist* 22.

possibilities of law,’ ‘the coming project in the cultural study of law.’⁸⁷ Derrida’s grammatology analyses all forms of inscription, from gesture to plastic image.⁸⁸ Derrida uses ‘writing’ as an inclusive term: ‘we say ‘writing’ for all that gives rise to an inscription in general, whether it is literal or not and even if what it distributes in space is alien to the order of the voice: cinematography, choreography, of course, but also pictorial, musical, sculptural ‘writing.’⁸⁹ I have adopted this wide-angled approach to court judgments, police action, public legal discourse, and city signage, as *legal writing systems*. The appeal of the grammatological approach is that it allows us to attend ‘to the complexity of forms, not to what was intended but what was done.’⁹⁰ It allows us to bring disparate scholarly analyses of law’s textual, performative, affective and semiotic processes into dialogue with each other.

Crime, Obscenity and Transgression

The force, effects, and affects of art, literature and other representations are rendered explicit by the obscene. Obscenity is *the* crime in both an aesthetic and legal sense, precisely because it is a violation of *form* – it is frequently linked to dirt, which Mary Douglas famously defined as ‘matter out of place,’⁹¹ and is connected to the uncanny, to ‘what is frightening – to what arouses dread and horror.’⁹² The obscene is outside its

⁸⁷ Peter Goodrich, “Europe in America: Grammatology, Legal Studies, and the Politics of Transmission” (2001) 101 *Columbia Law Review* 2033 [“Europe in America”] at 2037. ‘The history of writing systems was the history of modes of circulation or dissemination of power... the ontology of writing systems was that of iteration and reiteration, inscription and reinscription, and so it always returned to law, to the unraveling of an origin, to the tracing of a genealogy or complex history.’ *Ibid.* at 2043.

⁸⁸ *Ibid.* at 2034.

⁸⁹ Jacques Derrida, *Of Grammatology*, trans. by Gayatri Chakravorty Spivak (Baltimore: Johns Hopkins University Press, 1976) at 9. ‘For Derrida... a text, as we recall, whether ‘literary,’ ‘psychic,’ ‘anthropological,’ or otherwise, is a play of presence and absence, a place of the effaced trace.’ Gayatri Chakravorty Spivak, “Preface” in *Ibid.* at vii.

⁹⁰ Goodrich, “Europe in America” *supra* note 87 at 2038.

⁹¹ Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (London: Routledge, 1966) [*Purity and Danger*]; William Ian Miller, *The Anatomy of Disgust* (Cambridge, MA: Harvard University Press, 1998); Peter Stallybrass & Allon White *The Politics and Poetics of Transgression* (London: Methuen, 1986).

⁹² Sigmund Freud, “The ‘Uncanny’” in James Strachey, ed., *Sigmund Freud Vol. 14: Art and Literature* (London: Penguin, 1985) 339 [The ‘Uncanny’] at 339.

proper place, violating boundaries even as it calls them into being, and justifying their policing and regulation. The legal crime of obscenity, whether in the form of obscene libel, prosecutions for literary obscenity, classification systems, or public order laws against offensive language, has played a central regulatory and productive function in the classification, distribution and circulation of texts and images. The nineteenth-century vice reformer Anthony Comstock, whose eponymous law was one of the first modern state attempts to control the traffic of obscenities, frequently invoked the specter of ‘poison’ and ‘sewers’ in raging against the evils of pornography.⁹³ The same rhetoric of profanity, corruption, disease, contagion occurs in calls to regulate graffiti, which is itself often called obscene: it is ‘an utterance out of place.’⁹⁴ The metaphor of pollution is also central to regulatory debates over prostitution, cyberporn, refugees and undocumented migrants.⁹⁵ As Emma Haddad observes of the latter, ‘(t)hings that cross the border undermine the border’s authority and have the capacity to ‘pollute’ the inside that the border is trying to protect.’⁹⁶ Maintaining these borders sustains our systematic externalization of deviant desires by rendering them corporeal (the law is putatively opposed to pornographers in chapter 2, racists in chapter 3, pedophiles in chapter 4, vandals in chapter 5) and casting them as pollutants, corrupting influences, and threats to the nation.⁹⁷ Focusing on questions of how borders function (as frames),

⁹³ See, e.g., Anthony Comstock, *Frauds Exposed; or How the People are Deceived and Robbed, and Youth Corrupted* (Montclair, N.J.: Patterson Smith, 1969 [1880]) at 388–89 [*Frauds Exposed*]; Anthony Comstock, *Traps for the Young* (New York: Funk & Wagnall, 1883) at 174, 175, 179, 182, 206, 242 [*Traps for the Young*] cited in Matthew Benjamin, “Possessing Pollution” (2007) 31 *New York Review of Law and Social Change* 733 at 740.

⁹⁴ ‘... the public and the law often declaim the obscenity of graffiti, and we might conclude that in a general sense the obscenity here is... an utterance out of place. All display is a form of exposure; just as the spaces of reproduction in society are maintained through the regulation, by means of taboo and legitimation, of places and times for sexuality, so in this case do writing and figuration in the wrong place and time fall into the category of obscenity.’ Stewart, *Crimes of Writing*, *supra* note 67 at 219.

⁹⁵ See further Mona Lynch, “Pedophiles and Cyber Predators as Contaminating Forces; The Language of Disgust Pollution and Boundary Invasions in Federal Debates on Sex Offender Legislation” (2002) 27:3 *Law and Social Inquiry* 529 ; Benjamin, *supra* note 93.

⁹⁶ Emma Haddad, “Danger Happens at the Border” in Prem Kumar Rajaram & Carl Grundy-Warr, eds., *Borderscapes: Hidden Geographies and Politics at the Territory’s Edge* (Minneapolis: University of Minnesota Press, 2007) 119 at 119.

⁹⁷ In the post 9/11 context, the close affinities between policing child porn transmission offences and policing cyber crime and terrorism have enabled child pornographic material to be conceived of as a threat

and how they relate to disgust and desire, helps us understand how representations both provoke the turn to law and also display its limits.

The representations investigated in this thesis are constructed as criminal by what Alison Young calls the ‘crimino-legal complex’ – ‘the knowledges, discourses and practices that are deemed to fall under the rubric of criminology, criminal justice, and criminal law’⁹⁸ - comprising legal judgments, the actions and pronouncements of police and administrative officials, the discourse of policymakers, and media representations of and popular discourses about crime. The crimino-legal complex sublimates our deep social anxieties – our crises over the corruption of youth, deviant sexualities, child sexual abuse, and criminality in cities – onto those representations, and attempts to regulate social desires by containing the meaning, circulation and effects of aesthetic objects. But the legal outcome of each case is anti-climactic: the history of obscenity law is commonly seen as a process of ‘relaxing standards’ (for instance, no conviction for literary obscenity has ever been upheld on appeal to the United States Supreme Court); the charges against the theatre actors in Australia 1969 were either dismissed or reversed on appeal; the New South Wales police investigation of Bill Henson was quietly dropped after the Director of Public Prosecutions advised that there was no case to answer; and the charges against Roadsworth were dropped after pressure from the City of Montreal. In each case, there is a turn to law, a fantasy of enforcement, but the alarming representations outstrip the crimino-legal response they engender.

The crimes stories investigated in the final two chapters take place in contemporary neoliberal states in which criminalization has become an increasingly preferred response to social anxieties. Criminalization promises to contain social order, enhances the authority of the state, and reduces social spending – as Lise Gotell observes, criminalization is politically attractive because it ‘simplifies conflicts, stresses moral

to the nation. Anna Munster, “The Henson Photographs and the ‘Network Condition’” (2009) 23:1 *Continuum: Journal of Media & Cultural Studies* 3 at 6. For a discussion of the language used to describe pedophiles, see Lynch, *supra* note 95, at 529–562.

⁹⁸ Alison Young, *Imagining Crime: Textual Outlaws and Criminal Conversations* (London: Sage, 1996) [*Imagining Crime*] at 2.

outrage over reason, allocates blame, and offers concrete goals.’⁹⁹ Neoliberal criminal responses sublimate social fears and anxieties by channeling them onto particular subjects via the regulation of representations: fantasy-based or animated pornography comes to stand in for child sexual abuse (chapter 4), and unauthorized marking on city property signifies crime itself (chapter 5). Just as the figure of the artist and the body of the pedophile serve as sites of displacement of multiple anxieties over child sexual abuse and child welfare, the municipal and criminal responses to graffiti channel fear of crime into the project of policing spaces and city semiotics rather than bodies directly.¹⁰⁰ As Young observes, ‘the failure to distinguish semblance from substance’ ‘marks the experience of criminality in ultramodernity.’¹⁰¹

Works of criminal art can be understood as acts of deliberate transgression or resistance on the part of their producers, publishers or consumers, part of an attempt to push social, psychic or legal boundaries and to define the terrain on which political contestation occurs. This perspective is strongly suggested by the obscene representations in my case studies: the repeated publication of different editions of *A Confessional Unmasked*, the mid-twentieth century publication of magazines entitled *Obscene* and *Censor*,¹⁰² the continued performances of *Norm and Ahmed* (even after the actors were arrested), the edginess of Henson’s photography, and Roadsworth’s provocative stenciling. Artistic works like these have been instrumental in redefining the

⁹⁹ Lise Gotell, “Inverting Image and Reality: *R. v Sharpe* and the Moral Panic around Child Pornography” (2001-2002) 12:1 *Constitutional Forum* 9 [“Inverting Image and Reality”] at 11. Lise Gotell, “A Critical Look at State Discourse on Violence Against Women: Some Implications for Feminist Politics and Women’s Citizenship” in C. Andrew and M. Tremblay, eds. *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press, 1998) 39; Lise Gotell, “Policing Desire: Obscenity Law, Pornography Policy and Feminism” in Janine Brodie ed. *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 279. As Keane writes, neoliberalism works ‘to increase the effectiveness of state policies by downgrading the instrumental dimensions of the state (as provider of goods and services to civil society) in favour of its role as a powerful, prestigious and enduring guardian of the Nation... as a guarantor of domestic law and order [and] social stability.’ John Keane, *Democracy and Civil Society* (London: Verso, 1988) at 8.

¹⁰⁰ Leonie Sandercock, “Difference, Fear and Habitus: A Political Economy of Urban Fears” in Jean Hillier & Emma Rooksby, eds., *Habitus: A Sense of Place* (Aldershot: Ashgate, 2002) 219.

¹⁰¹ Young, *Imagining Crime*, *supra* note 98 at 22.

¹⁰² *Crowe v. Graham* (1967) 121 C.L.R. 375 at 397 [*Crowe v. Graham*].

boundaries of acceptable and legal representations throughout the modern history of state regulation. However, to analyze the outcome of these case studies as the triumph of free expression is to adopt a framework of ‘the authorial expression of self through art’;¹⁰³ likewise, to analyze the history of censorship as a gradual relaxing of standards is to eschew complexity in favour of ‘unidirectional narratives of supersession.’¹⁰⁴ Claiming that certain art objects are ‘transgressive’ can too often preclude the question of how law is bound up in and constituted by the borders it is supposed to be policing, and becomes caught in a circular totalizing logic.¹⁰⁵ Rather than assume an ‘intended’ act of resistance or subversive challenge to the legal order, I want to suspend the process by which we attribute intentionality, recognizing that the process of assigning authorship and installing purpose at the origin of meaning is part of how we look at law.

Conclusion: Ironic Doubling

As Felman reminds us, the ironic force of literature – and by extension of art - deconstructs the fantasy of authority by showing us that ‘authority is a *language effect*, the product or creation of its own rhetorical power; that authority is the *power of fiction*; that authority, therefore, is likewise a fiction.’¹⁰⁶ Irony is the scene of authority’s self-immolation, the compromise of the author/authority; this is its ‘wounding’ force.’¹⁰⁷ Irony then becomes a means of analyzing the precariousness of law’s sovereign

¹⁰³ Young, *Judging the Image*, *supra* note 18 at 16.

¹⁰⁴ Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990) at 46 [*Epistemology of the Closet*]. See Ladenson’s account of literary obscenity, which resists ‘address(ing) the subject from the point of view of a narrative recounting successive stages in a continuing march toward complete freedom of expression.’ Elisabeth Ladenson, *Dirt for Art’s Sake: Books on Trial from Madame Bovary to Lolita* (Ithaca: Cornell University Press, 2007) at xvii.

¹⁰⁵ As Young remarks, ‘claims about transgression in art have not yet engaged with the difficulties emphasized in cultural studies, feminist theory and criminology in discussing the outlaw, the transgressive and the borderline.’ Young, *Judging the Image*, *supra* note 18 at 21. On the notion of transgression in art, see Hal Foster, “Obscene, Abject, Traumatic” in Douzinas & Nead, *Law and Image*, *supra* note 34; C. Freeland, *But is it Art?* (Oxford, Oxford University Press, 2000); bell hooks, *Art on my Mind* (New York: New Press, 1995); Anthony Julius, *Transgressions: The Offences of Art* (London: Thames & Hudson, 2002); J. La Placa, “The Right to Offend” (2003) *Art Review*, December-January 48.

¹⁰⁶ Felman, “To Open the Question”, *supra* note 1 at 8.

¹⁰⁷ Valier, *supra* note 7 at 100.

performances: as text (canonized and not pornographic), as theatre (a display of authority and not a farce), as remaining outside the image (not implicated or desirous), as a sign (communicating, not questioning) in space (bounded and designated not 'free'). For Deleuze, irony is a crucial form 'through which we apprehend the law,'¹⁰⁸ and in modernity, where law can no longer be made to depend on an infinite superior Good, but is valid by virtue of its form alone, irony is directed at a subversion of the law, at 'turning the law upside down'¹⁰⁹ - the judgment as pornography text; the police as actors (and racists); the public law as lascivious; the city as outlaw (or vandal). The criminal representations I examine here each provoked a turn to law, but also challenge something of law's hold over us. In law's encounters with literature, theatre and art, the fiction of its authority becomes painfully apparent: we see law's shadowy double(s), through the looking glass, and can re-evaluate its hegemonic claims.

¹⁰⁸ Gilles Deleuze, "Coldness and Cruelty" in Gilles Deleuze & Leopold von Sacher-Masoch, *Masochism: Coldness and Cruelty, and Venus in Furs* (New York: Zone Books, 1989) 9 ["Coldness and Cruelty"] at 82.

¹⁰⁹ *Ibid.* at 86

Repeating Law: Power, Performativity, and Psychoanalysis

What is so perilous, then, in the fact that people speak, and that their speech proliferates? Where is the danger in that?¹¹⁰

Introduction: The Dangers of Repetition

For many philosophers, both ancient and modern, humans are *homo symbolicum*, the creature who creates and manipulates signs, and is thus possessed of language, art and culture.¹¹¹ For Pierre Legendre, the ability to engage in practices of representation – to draw images, make gestures or speak words – is conditioned on the ability to experience a distance between body and self, this ‘imaginal breach that elicits aesthetic writing.’¹¹² This distance, gap, or empty space, gives rise to aesthetic action, to the exercise of a kind of sovereign power, conjuring something out of nothing.¹¹³ But since the beginning of language – which is also the beginning of philosophy – this human capacity for making representations has been persistently beset by questions and doubts about what happens – what is lost or gained – in the process. In mimetic theories, representation is

¹¹⁰ Michel Foucault, “The Discourse on Language” in *Archaeology of Knowledge*, trans. by A.M. Sheridan-Smith (New York: Pantheon Books, 1972) 215 [“The Discourse on Language”] at 216.

¹¹¹ Langer identified the power of understanding symbols, ‘regarding everything about a sense-datum as irrelevant except for a certain form that it embodies,’ as ‘the most characteristic mental trait of mankind.’ Suzanne Langer, *Philosophy in a New Key*, *supra* note at 58. The narrator in *Notes from the Underground* remarks: ‘man alone can utter curses (it is his privilege and the thing that chiefly distinguishes him from the other animals).’ Fyodor Dostoyevsky, *Notes from Underground / The Double*, trans. by Jessie Coulson (London: Penguin, 1972 [1864]) at 38.

¹¹² Legendre, “Dogmatic Value of Aesthetics”, *supra* note 33 at 11. ‘Aesthetic action resolves into poietics,’ it ‘causes to be’ (ie. it is performative and productive) and ‘tames the void, creates a stage out of that empty space.’ To be human is to see the world as a living image, as ‘some representation held on to that stage I am separated from but which belongs to me nonetheless. Dwelling in the world means living in an image in which I recognize myself.’ *Ibid.* See also Werner Herzog, *Cave of Forgotten Dreams*.

¹¹³ Legendre, “Dogmatic Value of Aesthetics,” *supra* note 33 at 11.

seen to work as a substitution, copy, or imitation, something that stands in for and takes the place of something else.¹¹⁴ Michael Davis defines mimesis as ‘a framing of reality that announces that what is contained within the frame is not simply real.’¹¹⁵ Plato’s famous anxiety over mimesis, which imagined drama, fiction and representational painting as a sinister doublings derogating from the real, moral or good, culminated in his exclusion of poets and playwrights from his ideal republic.¹¹⁶ Luce Irigaray also argues that Western philosophy has privileged, and worried about, a view of representation as ‘already caught up in a process of *imitation, specularization, adequation and reproduction,*’ while repressing the idea of ‘mimesis as production.’¹¹⁷

¹¹⁴ This reflects the definition of representation given in W. Mitchell, “Representation” in Frank Lentricchia & Thomas McLaughlin, eds. *Critical Terms for Literary Study*, 2nd ed. (Chicago: University of Chicago Press, 1995). Plato suggested that visual art was a mirrored copy of the real, when he wrote that Socrates likened the painter to an artist or craftsman (*technites*) who ‘takes a mirror and carries it about everywhere.’ Plato, *Republic*, 596d-e, cited in Gary Shapiro, *Archaeologies of Vision: Foucault and Nietzsche on Seeing and Saying* (Chicago: University of Chicago Press, 2003) at 315.

¹¹⁵ ‘At first glance, mimesis seems to be a stylizing of reality in which the ordinary features of our world are brought into focus by a certain exaggeration, the relationship of the imitation to the object it imitates being something like the relationship of dancing to walking. Imitation always involves selecting something from the continuum of experience, thus giving boundaries to what really has no beginning or end. Mimesis involves a framing of reality that announces that what is contained within the frame is not simply real. Thus the more “real” the imitation the more fraudulent it becomes.’ Michael Davis, *Aristotle’s Poetics: The Poetry of Philosophy* (Lanham, MD: Rowman & Littlefield, 1992) at 3. Performance scholar Tracy C. Davis describes theatrical mimesis as ‘transformation and estrangement through framing.’ Tracy C. Davis, “Theatricality and Civil Society” in Tracy C. Davis & Thomas Postlewait, eds. *Theatricality* (Cambridge: Cambridge University Press, 2004) 127 [“Theatricality and Civil Society”] at 131. Elsewhere she remarks that ‘a mimetic act refers to an ideal ‘real’ which can never quite be successfully invoked: theatre is doomed (or blessed) by this failure.’ Tracy C. Davis, *Stages of Emergency: Cold War Nuclear Civil Defense* (Durham: Duke University Press, 2007) at 85-86. Stephen Halliwell’s history of mimesis contrasts the Platonic ‘world-reflecting’ view of representation, which ties representation to a real or something that it seeks to re-present, with the ‘world-creating’ view in which representation is ‘not to be judged primarily or directly by comparison with reality.’ Stephen Halliwell, *The Aesthetics of Mimesis: Ancient Texts and Modern Problems* (Princeton: Princeton University Press, 2002). See further Gunter Gebauer & Christopher Wulf, *Mimesis: Culture, Art, Society* (Berkeley: University of California Press, 1995).

¹¹⁶ Plato writes that the mimetic artist ‘wakens and encourages and strengthens the lower elements in the mind to the detriment of reason.’ Plato, *The Republic*, trans. by Desmond Lee (London: Penguin Books, 1987) Book 10 Ch. 2 at 373. Plato specifically links the corruption of performance and dramatic poetry with femininity; poetry draws you in through displays of sentiment and emotion, but when released from its clutches ‘we regard the behaviour we admired on stage as womanish...Is it reasonable to feel enjoyment and admiration rather than disgust?’ Some artists would be admitted to the ideal state, on the condition that they kept impulses to imitate subordinated to logos and made work that promoted the ‘higher’ ideals of the state. As Deleuze notes in his reading of Plato, the good copy (or image or icon) is ‘endowed with resemblance’, the bad copy (or semblance, phantasm, simulacrum) abandons truth and dissembles. Gilles Deleuze, “Plato and the Simulacrum” trans. by Rosalind Krauss (1983) 27 October 45 at 48.

¹¹⁷ Luce Irigaray, *This Sex Which is Not One* (New York: Cornell University Press, 1985) at 131.

The making of representations – even imitative ones - is creative and generative, marked not just by loss but also by excess: Stewart recognizes the role of representation ‘in ‘both maintaining and cutting off its referent,’ implying ‘a type of substitution that undermines its own status as a purportedly transcendental gesture, figuring a referent that always exceeds and escapes the very aim of representation’s function – a sufficient signification.’¹¹⁸ The problem of re-presentation is the problem of *repetition*: the reproducibility of signs accounts for representation’s power as well as its risks.

This chapter maps out different approaches to the problem of repetition and connects these to central questions about law’s meaning and force. Part 1, ‘Approaches to the Problem of Repetition,’ traces the problem of repetition through Michel Foucault’s account of the productive power of discourse (repetition as structural), Derrida’s response to J.L. Austin’s performative speech (repetition as iterability), Butler’s analysis of performativity (repetition as subversive), and Felman’s account of the speaking body (repetition as desire). Part 2, ‘Repetition and Law,’ analyzes how the problem of repetition has figured in accounts of law’s force and effectivity, translating the performative question of intention into the psychoanalytic question of desire. Goodrich, Legendre, and Slavoj Žižek demonstrate that law is constituted through the repetition of its founding repression, and thus offer a way of conceiving of the vulnerability that inheres in law’s necessary ties to repetition. Part 3, ‘Repetition as Critical Difference,’ connects the problem of repetition to the force of irony. Irony arises when the law is doubled in and through the representations it encounters. Accounts of the subversive power of doubling - in relation to irony, parody, protest speech, reflections, and copies – give us some insight into how the scene of law’s repetition can function as the scene of its immanent dissolution. Scholarly inquiries into power, performativity and psychoanalysis are interwoven, interconnected and brought into dialogue with each other over the three parts of this chapter, providing the theoretical groundwork for the following chapters, each of which picks up and exemplifies specific manifestations of the

¹¹⁸ Stewart, *Crimes of Writing*, *supra* note 67 at 5-6.

problem of repetition in legal contexts – resignifying words, restaging speech, reframing images, and repurposing signs.

I. Approaches to the Problem of Repetition

This section traces the structural necessity, yet uncertain effects, of repetition as they are outlined and analyzed in different accounts of language's power, intention and agency, or explanations of the capacity of words to have meaning, force and effects. For Foucault, repetition is an essential mode by which discourse operates: discourse is productive and intensifying, repressing through proliferation. For Derrida, repetition is structural necessity of language, which is constituted by deferral and absence. For Butler, repetition holds out the possibility of political subversion, although her account of linguistic agency has significant limitations. For Felman, repetition is the ungovernable excess of desire which cannot be deliberately wielded but which offers us a connection between performative accounts of speech and psychoanalytic accounts of law. These various approaches to the problem of repetition provide us with a means of analyzing the powerful yet precarious operations of language, and by extension, of law *as* language.

Proliferation: Foucault and the Productive Power of Discourse

In the quotation opening this chapter, Foucault suggests that it is in the nature of speech or discourse to repeat and proliferate. Foucault defined discourses as generative and productive, as 'practices that systematically form the objects of which they speak,'¹¹⁹ inseparable from the action and generation of power effects.¹²⁰ He wrote, 'it is in

¹¹⁹ Michel Foucault, *The Archaeology of Knowledge*, trans. by A.M. Sheridan-Smith (New York: Pantheon Books, 1972) at 79.

¹²⁰ 'in every society the production of discourse is at once controlled, selected, organized and redistributed according to a certain number of procedures.' Foucault identifies three interrelating and reinforcing types of prohibition, 'covering objects, ritual with its surrounding circumstances, the privileged or exclusive right to speak of a particular subject.' Foucault, "The Discourse on Language" in *supra* note 110 at 216.

discourse that power and knowledge are joined together:¹²¹ power produces knowledge and 'the individual as the effect and object of power... [and] of knowledge.'¹²² The discourses of psychology, psychiatry, and criminology developed in the context of disciplinary power, Foucault suggests, 'where the modern play of coercion over bodies, gestures and behavior has its beginnings.'¹²³ In turn, those discourses remain deeply enmeshed in institutional and social structures,¹²⁴ producing 'truths' useful in the exercise of power: 'truth isn't outside power, or lacking in power... Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power.'¹²⁵

In *History of Sexuality*, Foucault is concerned with how repression actually repeats, perpetuates or intensifies that which it seeks to efface. He observes that during the seventeenth century, sexuality began being regulated at the level of representation:

Calling sex by its name thereafter became more difficult and more costly. As if in order to gain mastery over it in reality, it had first been necessary to subjugate it at the level of language, control its free circulation in speech, expunge it from the things that were said, and extinguish the words that rendered it too visibly present.¹²⁶

¹²¹ Foucault, *History of Sexuality Vol. 1: An Introduction*, trans. by Robert Hurley (New York: Vintage Books, 1990) at 100. [*History of Sexuality*] 'Perhaps, too, we should abandon a whole tradition that allows us to imagine that knowledge can exist only where the power relations are suspended and that knowledge can develop only outside its injunctions, its demands and its interests.... We should admit rather that power produces knowledge...; that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.' Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York: Vintage Books, 1995) at 27.

¹²² *Ibid.* at 192.

¹²³ *Ibid.* at 191

¹²⁴ Michel Foucault, "Truth and Power" in Colin Gordon, ed. *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (New York: Pantheon, 1980) 109.

¹²⁵ *Ibid.* at 131.

¹²⁶ Foucault, *History of Sexuality*, *supra* note 121 at 17, see also 3.

But he argues that this repression, precisely *insofar* as it purported to repress sexuality, occasioned a ‘discursive explosion’¹²⁷ around sex, a proliferation of discourses as sex was taken up and turned into a specialized area of scientific, religious, and sociological knowledge.¹²⁸ The practice of confession, as ‘a ritual of discourse where the subject who speaks corresponds with the subject of the statement’¹²⁹ serves as a key example of this ‘incitement to discourse.’¹³⁰ In the eighteenth-century, when the influence of the Church was waning and confessional subjectivity might have diminished with it, the technique of compelling confessions and inculcating a need for them was taken up by other domains, as a result of the will to know about, and thus to produce truth about, human sexuality.¹³¹

This is the essential thing: that Western man has been drawn for three centuries to the task of telling everything concerning his sex... and that this carefully analytical discourse was meant to yield multiple effects of displacement, intensification, reorientation and modification of desire itself.¹³²

This ‘transforming of sex into discourse’¹³³ means that power is sexualized and knowledge is always sexual knowledge, because ‘it is in discourse that power and knowledge are joined together.’¹³⁴ Eve Kosofsky Sedgwick observes that for Foucault, the history of the nineteenth century is ‘the transformation of knowledge into sexual knowledge, and sexual knowledge into secrecy.’¹³⁵ As we shall see in the following

¹²⁷ *Ibid.* at 38.

¹²⁸ *Ibid.* at 78. ‘the West has managed... to annex sex to a field of rationality.’ *Ibid.*

¹²⁹ *Ibid.* at 61.

¹³⁰ *Ibid.* at 34.

¹³¹ ‘This technique [confession] might have remained tied to the destiny of Christian spirituality if it had not been supported and relayed by other mechanisms. In the first place, by a ‘public interest.’ Not a collective curiosity or sensibility; not a new mentality; but power mechanisms that functioned in such a way that discourse on sex... became essential.’ *Ibid.* at 23.

¹³² *Ibid.* at 23.

¹³³ *Ibid.* at 269.

¹³⁴ *Ibid.* at 100.

¹³⁵ Sedgwick argues that modern Western culture has placed what it calls sexuality in ‘a more and more distinctively privileged relation to our most prized constructs of individual identity, truth and knowledge.’ Sedgwick, *Epistemology of the Closet*, *supra* note 104 at 3. Foucault’s *History of Sexuality* suggests that

chapter, the nineteenth-century was also the time in which the regulation of representations – the circulation and distribution of cultural texts – became the focus of modern state power. As historians have argued in relation to the regulation of prostitution, criminal law in modernity has witnessed a shift away from policing bodies directly, towards policing their conditions of possibility, the spaces that constitute and constrain them, and importantly, the representations which they make and see. Just as sexual identities come to stand in for sexual acts, representations come to serve as sites for or ways of regulating those sexual identities, and particularly minority expressions of sexuality. The nineteenth-century accumulated a new socio-legal category for this kind of knowledge: the obscene, perhaps best thought of as the uncanny, that which ‘ought to have remained secret and hidden but has come to light.’¹³⁶ At the same time, the unknowing innocent child was installed at the basis of our sexual economy, and childhood became constituted primarily by an ignorance of sex.¹³⁷ Childhood and obscenity are thus installed at opposing ends of the (always-sexual) knowledge spectrum.

Foucault’s account radically undermines the idea of censorship as a unilateral exercise of repression. ‘Rather than a massive censorship, beginning with the verbal proprieties imposed by the Age of Reason, what was involved was a regulated and polymorphous incitement to discourse,’¹³⁸ and ‘what we now perceive as the chronicle of censorship and the difficult struggle to remove it will be seen rather as the centuries-long rise of a complex deployment for compelling sex to speak, for fastening our attention and

knowledge and sex became conceptually inseparable from one another after the late nineteenth-century – in Sedgwick’s words, ‘so that knowledge means in the first place sexual knowledge; ignorance, sexual ignorance; and epistemological pressure of any sort seems a force increasingly saturated with sexual impulsion.’ By the end of the nineteenth-century it had become widely acknowledged that ‘knowledge meant sexual knowledge, and secrets sexual secrets, there had in fact developed one particular sexuality that was distinctively constituted *as* secrecy: the perfect object for the by now insatiably exacerbated epistemological/sexual anxiety of the turn-of-the-century subject.’ *Ibid.* at 73.

¹³⁶ Freud, “The ‘Uncanny’”, *supra* note 92 at 345.

¹³⁷ As Sedgwick points out, ignorance is ignorance of *a* knowledge: there are ‘a plethora of ignorances, and we may begin to ask questions about the labor, erotics and economics of their human production and distribution.’ Sedgwick, *Epistemology of the Closet*, *supra* note 104 at 8.

¹³⁸ Foucault, *History of Sexuality*, *supra* note 121 at 34.

concern upon sex.¹³⁹ 'All these negative elements – defenses, censorships, denials - ... are doubtless only component parts that have a local and tactical role to play in a transformation into discourse, a technology of power, and a will to knowledge.'¹⁴⁰ But the 'tactical polyvalence of discourses'¹⁴¹ means that the operations of this power are never a *fait accompli*:

We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.¹⁴²

Scholars have drawn on Foucault's account of power to explore the ways in which ostensible instruments of repression and prohibition have instead publicized sex, promoted sexual discourse, and created the conditions for new forms of desire.¹⁴³ For example, Foucault points out that even as medical discourse made 'the homosexual' a category and object of regulation, it 'also made possible the formation of a 'reverse' discourse: homosexuality began to speak in its own behalf, to demand that its legitimacy or 'naturalness' be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.'¹⁴⁴ In Butler's words, 'the very terms by which sexuality is said to be negated become, inadvertently but inexorably, the site and instrument of a new sexualization.'¹⁴⁵ Analyzing the United States congressional statute which placed into law the 'don't ask, don't tell' policy on homosexual self-declaration in the military, Butler argues that 'the effort to constrain the term

¹³⁹ *Ibid.* at 158.

¹⁴⁰ *Ibid.* at 12.

¹⁴¹ *Ibid.* at 100.

¹⁴² *Ibid.* at 101.

¹⁴³ 'Censorship functions not simply to erase but also to produce visual representation; it generates limits but also reactions to those limits; it imposes silence but also provokes new forms of responding to that silence.' Richard Meyer, "The Jesse Helms Theory of Art" (2003) 104 *October* 131 at 140.

¹⁴⁴ Foucault, *History of Sexuality*, *supra* note 121 at 101.

¹⁴⁵ Butler, *Excitable Speech*, *supra* note 13 at 94.

[‘homosexual’] culminates in its very proliferation – an unintended rhetorical effect of legal discourse.’¹⁴⁶ In her analysis of legislative restrictions on obscenity, Butler notes how ‘certain kinds of efforts to restrict practices of representation in the hopes of reigning in the imaginary, controlling the phantasmatic, end up reproducing and proliferating the phantasmatic in inadvertent ways, indeed, in ways that contradict the intended purposes of the restriction itself.’¹⁴⁷

This returns us to the abiding irony of censorship that we noted in the introduction – its propensity to repeat what it seeks to erase. Traditional accounts of censorship tend to posit a unilateral top-down exercise of power wielded by the censor on the censored, where each is understood as external to the power of censorship itself.¹⁴⁸ But Foucault’s productive account of power emphasized that practices of censorship make the object which they constrain.¹⁴⁹ So both the censor and the censored are subjects ‘constituted in part by a restrictive and productive power.’¹⁵⁰ Censorship is no longer necessarily an external, repressive force but a positive exercise of power that constitutes practice as it defines their boundaries.¹⁵¹ Bourdieu wrote about ‘censorship constituted by the very

¹⁴⁶ *Ibid.* at 131

¹⁴⁷ ‘The effort to limit representations of homoeroticism within the federally funded art world – an effort to censor the phantasmatic – always and only leads to its production; and the effort to produce and regulate it in politically sanctioned forms ends up effecting certain forms of exclusion that return, like insistent ghosts, to undermine those very efforts.’ Judith Butler, “The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess” (1990) 2:2 *Differences: A Journal of Feminist Cultural Studies* 105 [“Force of Fantasy”] at 108.

¹⁴⁸ “The conventional view of censorship ‘commits us to understanding power as that which is wielded by the one who censors on the one who is censored, where each of these “ones” is understood as external to, or accidentally related to, the power of censorship itself.’ Judith Butler, “Ruled Out: Vocabularies of the Censor” in Robert C. Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles: Getty Research Institute, 1998) 247 [“Ruled Out”] at 247.

¹⁴⁹ ‘If power is understood in juridical terms, it limits and constraints the object on which it operates; if power is, however, also productive, then it contributes to making the object that it also constrains.’ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Richard Burt, “Introduction: The ‘New’ Censorship,” in Richard Burt, ed. *The Administration of Aesthetics: Censorship, Political Criticism and the Public Sphere* (Minneapolis, University of Minnesota Press, 1994). ‘... censorship is what permits speech by enforcing the very distinction between permissible and impermissible speech. Understood as foreclosure, censorship produces discursive regimes through the production of the unspeakable.’ Butler, *Excitable Speech*, *supra* note 13 at 139; Butler, “Ruled Out”, *supra* note 148 at 251.

structure of the field in which the discourse is produced and circulates;’ the ‘structure of the field itself’ governs expression by controlling ‘both access to expression and the form of expression.’¹⁵² Butler writes that censorship ‘is not merely restrictive and privative, that is, active in depriving subjects of the freedom to express themselves in certain ways, but also formative of subjects and the legitimate boundaries of speech.’¹⁵³

Scholars re-imagining censorship outside the context of explicit legal censorship, within a field of power that is dispersed, circulating, and spinning out from the enactment of discursive and disciplinary practices, run into a problem. Once censorship is the norm rather than the exception – it materializes everywhere – its critical force as a concept or pejorative rallying cry diminishes. We can no longer be ‘for or against’ censorship, it simply *is*,¹⁵⁴ and we can no longer distinguish between different kinds.¹⁵⁵ This is untenable for those scholars who want to distinguish pre-publication state censorship or criminal prohibition from other forms of speech regulation in democracies.¹⁵⁶ Butler manages to retain a critical perspective by distinguishing between implicit censorship or ‘foreclosure,’ the discursive narrowing of the field, and explicit censorship, backed by political authority. I have adopted her distinction here, and am focusing on the explicit crimino-legal regulation and containment of representations. But rather than assuming, as many analyses of censorship do, law’s straightforward right to ‘judge’ art, I am

¹⁵² Pierre Bourdieu, “Censorship and the Imposition of Form” in John B. Thompson, ed., *Language and Symbolic Power*, trans. by Gino Raymond and Mathew Adamson (Oxford: Polity Press, 1991), 137-138. See also Robert C. Post, “Censorship and Silencing” in Robert C. Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles: Getty Research Institute, 1998) 247 [“Censorship and Silencing”] at 1.

¹⁵³ Butler, *Excitable Speech*, *supra* note 13 at 132.

¹⁵⁴ Michael Holquist, “Corrupt Originals: The Paradox of Censorship” (1994) 109 PMLA 14 at 16-17.

¹⁵⁵ “The result seems to flatten distinctions among kinds of power, implicitly equating suppression of speech caused by legal state action with that caused by the market, or by the dominance of a particular discourse, or by the institution of criticism itself. It tends also to flatten variations among kinds of struggles, de-emphasizing the different between, say, the agonism of poets and that of legal aid clients.” The scholarship thus veers between ‘the concrete mechanisms of silencing and the abstraction of struggle.’ Post, “Censorship and Silencing”, in *supra* note 152 at 4.

¹⁵⁶ See further Nicole Moore and Christina Spittel, “Bobbin Up in the Leseland: Australian Literature in the German Democratic Republic” in Peter Kirkpatrick & Robert Dixon, eds., *Reading Communities* (Sydney: University of Sydney Press, [forthcoming]).

pursuing a more nuanced reading of law's investment in art and the art's involvement with structures of law.

Iterability: Derrida's Performativity

In his foundational text *How to Do Things with Words*,¹⁵⁷ J.L. Austin chose to investigate the context in which speech acquires, over and above its meaning, a 'certain force of utterance'¹⁵⁸ by focusing on moments when 'something *goes wrong* and the act – marrying, betting, bequeathing, christening, or what not – is therefore at least to some extent a failure.'¹⁵⁹ While Austin wants to account for the meaning of performative utterances by reference to social convention rather than to interior states of mind – it would be wrong, he argues, to think of the utterance as '(merely) the outward and visible sign... of an inward or spiritual act'¹⁶⁰ – he can justify limiting the scope of his study only by appealing to an idea of language used 'non-seriously.'

Surely the words must be spoken 'seriously' and so as to be taken 'seriously'? This is, though vague, true enough in general – it is an important commonplace in discussing the purport of any utterance whatsoever. I must not be joking, for example, nor writing a poem.¹⁶¹

¹⁵⁷ J. L. Austin, *How to Do Things with Words* 2nd ed. by J.O.Urmson & Marina Sbisa, (Oxford: Oxford University Press, 1975 [1955]).

¹⁵⁸ *Ibid.* at 14. Austin initially distinguishes between *constative* utterances, which describe a state of affairs and are either true or false, and *performative* utterances, which are not true or false and which actually perform the action to which they refer (ie. saying "I marry you" or "I promise to do x" accomplishes the act of marrying or promising). As Austin presses further into his description of the distinctive features of the performative, however, he discovers that what holds for performative utterances equally holds for constative utterances: the constative statement 'the cat is on the mat' necessarily encompasses the statement 'I hereby affirm the cat is on the mat,' which accomplishes the act of affirming to which it refers, and is thus performative. Austin thus reframes his inquiry as an attempt to investigate the context in which speech acquires, over and above its meaning, a certain force of utterance. He presents a ternary distinction: the *locutionary* act is 'saying something meaningful' – 'roughly equivalent to uttering a certain sentence with a certain sense and reference' (*Ibid.* at 103), the *illocutionary act* is what we perform 'in saying something' (at 99) and the *perlocutionary act* is the production of certain effects on the interlocutor: 'what we bring about or achieve *by* saying something' (at 108) or 'the achieving of certain effects by saying something' (at 121) (by arguing I may *persuade* you, by proclaiming something I may *bring you to know* it.)

¹⁵⁹ *Ibid.* at 14. He defines these as infelicitous performatives.

¹⁶⁰ *Ibid.* at 9.

¹⁶¹ *Ibid.* at 9.

In this awkward passage, the word ‘seriously’ appears in quotation marks, as though indicating it is not to be taken seriously.¹⁶² Derrida famously responded by insisting that the possibility of ‘mis’-citation is not something incidental to the serious performative, but allows for its very possibility.¹⁶³ The meaning or force of language relies on the capacity for a word or sign to be unmoored from its origin and repeated in a different setting. Therefore ‘a general citationality - or rather a general iterability’ is ‘a structural characteristic of every mark.’¹⁶⁴

Every sign, linguistic or nonlinguistic, spoken or written (in the current sense of this opposition), in a small or large unit, can be *cited*, put between quotation marks; in so doing it can break with every given context, engendering an infinity of new contexts in a manner which is absolutely illimitable.¹⁶⁵

Because the unity of any signifying form is given *only* by its iterability (which implies the possibility of being repeated in the *absence* of both its signified and its referent), meaning itself, endlessly deferred, is perceived as always already a transcription, leading

¹⁶² A similar sentiment is expressed in the passage ‘a performative utterance will, for example, be *in a peculiar way* hollow or void if said by an actor on a stage, or if introduced in a poem, or spoken in soliloquy. This applies in a similar manner to any and every utterance – a sea-change in special circumstances. Language in such circumstances is in special ways – intelligibly – used not seriously, but in ways *parasitic* upon its normal use – ways which fall under the doctrine of the *etiolations* of language. All this we are *excluding* from consideration. Our performative utterances, felicitous or not, are to be understood as issued in ordinary circumstances.’ *Ibid.* at 22, emphases in original. Erving Goffman expresses this idea in similar terms to Austin: ‘When a speaker employs conventional brackets to warn us that what he is saying is meant to be taken in jest, or as mere repeating of words by someone else, then it is clear that he means to stand in a relation of reduced personal responsibility for what he is saying. He splits himself off from the content of the words by expressing that their speaker is not he himself or not he himself in a serious way.’ Goffman, *Frame Analysis: An Essay on the Organization of Experience* (New Hampshire: Northeastern University. Press, 1986 [1974]) [*Frame Analysis*] at 512.

¹⁶³ ‘... is not what Austin excludes as anomalous, exceptional, ‘non-serious’, that is *citations* (in the stage, in a poem or in a soliloquy) the determined modification of a general citationality - or rather a general iterability - without which there would not even be a ‘successful’ performative?’ Jacques Derrida, “Signature, Event, Context” in *Limited Inc* trans. Samuel Weber (Evanston, Ill.: Northwestern University Press, 1988 [1972]) 1 [“Signature, Event, Context”] at 17. As Jonathan Culler explains, ‘Something can be a signifying sequence only if it is iterable, only if it can be repeated in various serious and non-serious contexts, cited and parodied. Imitation is not an accident that befalls an original but its condition of possibility.’ Jonathan Culler, *On Deconstruction: Theory and Criticism After Structuralism* (Ithaca, N.Y.: Cornell University Press, 1982) at 22.

¹⁶⁴ Derrida, “Signature, Event, Context,” *supra* note 163 at 18.

¹⁶⁵ *Ibid.* at 12.

Derrida to call iterability ‘the graphematic structure of every communication.’¹⁶⁶ For Derrida, Austin’s quest to identify the conventions governing a successful performative is misguided, because it consists of:

the search for an exhaustively definable context, of a free consciousness present to the totality of the operation, and of absolutely meaningful speech [*vouloir-dire*] master of itself: the teleological jurisdiction of an entire field whose organizing center remains *intention*.¹⁶⁷

But iterability ensures that the intention animating a given utterance will not govern its meaning because it ‘will never be through and through present to itself and to its content,’ but an ‘essential absence’ or ‘structural unconsciousness’ which ‘prohibits any saturation of the context.’¹⁶⁸ Derrida defines *différance* precisely as ‘the irreducible absence of intention or attendance to the performative utterance.’¹⁶⁹ Representation is possible only because of the separation of a sign – or word or image – from the context of its originating utterance, and its reproduction in a new context – and this distance accounts for the aleatoric rupture of representation, its tendency to escape intention, its susceptibility to chance and circumstances.¹⁷⁰

¹⁶⁶ *Ibid.* at 19.

¹⁶⁷ *Ibid.* at 15.

¹⁶⁸ *Ibid.* at 17.

¹⁶⁹ *Ibid.* at 18-19.

¹⁷⁰ Jacques Derrida, ‘Telepathy’, trans. Nicholas Royle, (1988) 10 *The Oxford Literary Review* 3. This theme received an iconic elaboration in *The Post-Card*, according to which representation is structured like a postal network; that is, the relationship between signifier and signified is structured according to channels that might link transmission to reception. Jacques Derrida, *The Post Card; From Socrates to Freud and Beyond*, trans. Alan Bass (Chicago: University of Chicago Press, 1987). And like postal systems, like any transmission from sender to receiver, the destination of meaning is prone to ambush, delays and chance occurrences. ‘Not that the letter never arrives at its destination, but that it belongs to the structure of the letter to be capable, always, of not arriving.’ Jacques Derrida, ‘The Purveyor of Truth,’ trans. by Alan Bass, in John P. Muller and William J. Richardson, eds., *The Purloined Poe: Lacan, Derrida and Psychoanalytic Reading* (Baltimore: The Johns Hopkins University Press, 1988) at 187. As ‘artifacts surviving their makers,’ representations pose the problem of what Stewart calls ‘distanciated intention,’ or ‘absent intention.’ Stewart, *Crimes of Writing*, *supra* note 67 at viii.

Subversion: Butler's Performativity

Butler builds on Derrida's account of iterability, placing repetition at the centre of her political theory of the subject. She drew her inspiration for gender performativity from Derrida's reading of 'Before the Law,' which made her wonder whether gender functions, like law, 'as an interior essence that might be disclosure, an expectation that ends up producing the very phenomenon that it anticipates.'¹⁷¹ Butler defines performativity 'not as the act by which a subject brings into being what she/he names, but, rather, as that reiterative power of discourse to produce the phenomena that it regulates and constrains.'¹⁷² She argues that the putatively natural and inevitable facts of sex, gender and sexuality are constituted through discursively constrained performative acts which must be repeated through time.¹⁷³ Gender must be presented and *re-presented*: 'performativity must be understood not as a singular or deliberate 'act,' but, rather, as the reiterative and citational practice by which discourse produces the effects that it names.'¹⁷⁴ The necessity of repeating these practices provides the political possibility for subversion:

If the ground of gender identity is the stylized repetition of acts through time, and not seemingly seamless identity, then the possibilities of gender transformation are to be found in the arbitrary relation between such acts, in the

¹⁷¹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999) at xiv [*Gender Trouble*]. She revealed this in the foreword to the tenth anniversary edition. On Butler's reading, 'The one who waits for the law, sits before the door of the law, attributes a certain force to the law for which one waits. The anticipation of an authoritative disclosure of meaning is the means by which that authority is attributed and installed: the anticipation conjured its object.' *Ibid.* For Butler, the performativity of gender revolves around what she calls 'this metalepsis; the way in which the anticipation of a gendered essence produces that which it posits as outside itself.' *Ibid.* at xv

¹⁷² Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993) [*Bodies that Matter*] at 2.

¹⁷³ 'It is not a singular 'act' for it is always a reiteration of a norm or set of norms, and to the extent that it acquires an act-like status in the present, it conceals or dissimulates the conventions of which it is a repetition.' *Ibid.* at 12.

¹⁷⁴ *Ibid.* at 2.

possibility of a different sort of repeating, in the breaking or subversive repetition of that style.¹⁷⁵

The inevitability of repetition, for Butler, is thus transformed into a political imperative: 'The task is not whether to repeat, but how to repeat, or indeed, to repeat and, through a radical proliferation of gender, to *displace* the very gender norms that enable the repetition itself.'¹⁷⁶

In *Gender Trouble*, Butler puts forward drag performance as an example of repetition which 'fully subverts the distinction between inner and outer psychic space and effectively mocks both the expressive model of gender and the notion of a true gender identity... *In imitating gender, drag implicitly reveals the imitative structure of gender itself – as well as its contingency.*'¹⁷⁷ Through parodic performance which avows the distinction between the anatomical sex of the performer and the gender performed, drag dramatises and destabilises the fabricated unity of sex and gender as it is constructed within the heterosexual hegemony. Butler suggests that whether a particular drag performance will be subversive will depend on its degree of theatricality: 'This kind of citation [ie. drag] will emerge as theatrical to the extent that it mimes and renders hyperbolic the discursive convention that it also reverses.'¹⁷⁸ She indicates here that subversive repetition must do more than simply double – it must mime but also render exaggerated. In her later work, *Bodies that Matter*, Butler acknowledges the ambivalence of drag performance, observing that 'drag is not unproblematically subversive,'¹⁷⁹ and may itself may be used 'in the service of' the 'reidealisation of

¹⁷⁵ Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory," (1988) 40:4 Theatre Journal 519 at 520. She defines acts as "both that which constitutes meaning and that through which meaning is performed or enacted" (*Ibid.* at 521). See further Gill Jagger, *Judith Butler: Sexual Politics, Social Change, and the Power of the Performative* (London: Routledge, 2008).

¹⁷⁶ Butler, *Gender Trouble*, supra note 171 at 148.

¹⁷⁷ *Ibid.* at 137, emphasis in original.

¹⁷⁸ *Ibid.* at 232.

¹⁷⁹ Butler, *Bodies that Matter*, supra note 172 at 231.

hyperbolic heterosexual gender norms.¹⁸⁰ In referring to ‘the politicization of theatricality’ and ‘hyperbolic displays’ of protest practices like for ‘die-ins,’ Butler acknowledges the importance of staged political performances for particular audiences.¹⁸¹ In a 1993 interview, she states:

It is important to understand performativity - which is distinct from performance - through the more limited notion of resignification. I'm still thinking about subversive repetition, which is a category in *Gender Trouble*, but in the place of something like parody I would now emphasise the complex ways in which resignification works in political discourse.¹⁸²

In 1997's *Excitable Speech: A Politics of the Performative*, she notes how often offensive words are subject to what she calls ‘resignification,’¹⁸³ or repetition in contexts which transforms their meaning: for example, the use of racist language in rap music, political parody and satire, as well as in the social and legal contexts in which such hate speech is denounced or critiqued.¹⁸⁴ For Butler, repetitive talk-back is a potentially powerful political tool in the hands of marginalized groups: ‘the revaluation of terms such as ‘queer’ suggests ‘that speech can be ‘returned’ to its speaker in a different form, that it can be cited against its originary purposes, and perform a reversal of effects.’¹⁸⁵ In her view, hate speech injures because it takes advantage of our prior vulnerability to language, its interpellation of our subjectivity.¹⁸⁶ Her politics of the performative thus attempts to account for how we can acquire, despite this vulnerability, the power to change linguistic contexts and thereby deflect the injurious forces of speech, by staging

¹⁸⁰ *Ibid.* at 125.

¹⁸¹ Judith Butler, “Critically Queer” (1993) in Julian Wolfreys, ed., *Literary Theories: A Reader and Guide* (New York: New York University Press, 1999) 570 at 578.

¹⁸² Judith Butler, “Gender as Performance: An Interview with Judith Butler” (1993) in Peter Osborne, ed. *A Critical Sense: Interviews with Intellectuals* (London: Routledge, 1996) 109 at 111.

¹⁸³ Butler, *Excitable Speech*, *supra* note 13 at 14.

¹⁸⁴ The critical and legal discourse on hate speech is itself a restaging of the performance of hate speech.’ *Ibid.*

¹⁸⁵ Butler, *Excitable Speech*, *supra* note 13 at 14.

¹⁸⁶ This is her ‘Althusserian model’: the self is constituted through the address of the other which inaugurates the possibility of agency and at the same time ‘forecloses the possibility of radical autonomy.’ *Ibid.* at 26

a 'counter-appropriation or restaging of offensive speech'¹⁸⁷ in which the word is disjoined from its injurious power and 'recontextualized in more affirmative modes.'¹⁸⁸ This is repetition with a purposive, appropriative distance: 'The political possibility of reworking the force of the speech act against the force of injury consists in misappropriating the force of speech from those prior contexts. The language that counters the injuries of speech, however, must repeat those injuries without precisely reenacting them.'¹⁸⁹

When critical race theorist Richard Delgado argues for the intrinsic offensiveness of certain words ('words such as "nigger" and "spick" are badges of degradation even when used between friends: these words have no other connotation'¹⁹⁰) Butler responds by noting that in Delgado's very statement, the words are being used differently. The repetition of hateful words in courtroom testimony, media reports, or public debates re-enters them as objects of another discourse:

As acts, these words become phenomenal, they become a kind of linguistic display that does not overcome their degrading meanings, but that reproduces them as public text and that, in being reproduced, displays them as reproducible and resignifiable terms. The possibility of decontextualising and recontextualising such terms through radical acts of public misappropriation constitutes the basis of an ironic hopefulness that the conventional relation between word and wound might become tenuous and even broken over time.¹⁹¹

The hopefulness is ironic because the repetition that ensures that words continue to wound is also the precondition for ameliorating the effects of the injury. The condition is the cure.

¹⁸⁷ *Ibid.* at 14.

¹⁸⁸ *Ibid.* at 15. 'Is there a repetition that might disjoin the speech act from its supporting conventions such that its repetition confounds rather than consolidates its injurious efficacy?' *Ibid.* at 20.

¹⁸⁹ *Ibid.* at 40-41.

¹⁹⁰ Richard Delgado, *Words that Wound*, cited in *Ibid.* at 100.

¹⁹¹ *Ibid.* at 100.

Butler has thus attempted to carve out a circumscribed space for political linguistic agency that would allow subordinate groups to take advantage of the capacity of discourse to be redirected, to wreak havoc, to suffer a reversal of purposes. Many scholars have expressed uneasiness with her account of agency, bemoaning the lack of criteria with which to distinguish between subversive and non-subversive repetition, and accusing her of perpetuating a liberal humanist conception of a voluntarist self who freely chooses his or her identity.¹⁹² Butler has persistently responded to such criticisms by emphasizing her distance from a voluntarist concept of appropriation. She writes that

when words engage actions or constitute themselves a kind of action, they do this not because they reflect the power of an individual's will or intention, but because they draw upon and reengage conventions which have gained their power precisely through *a sedimented iterability*. The category of 'intention,' indeed, the notion of 'the doer' will have its place, but this place will no longer be 'behind' the deed as its enabling source.¹⁹³

Critiques of Butler: Intention and the Body

Butler explains that 'the idea of a fully intentional speech act is perpetually subverted by that in speech which subverts intentionality.'¹⁹⁴ But what it is in speech that subverts intention? To clarify this, she turns to Felman's reading of J.L. Austin in *The Scandal of the Speaking Body*, and quotes the following passage:

If the problem of the human act consists in the relation between language and the body, it is because the act is conceived – by performative analysis as well as by psychoanalysis – as that which problematizes at one and the same time the separation and opposition between the two. The act, an enigmatic and

¹⁹² See Seyla Benhabib, et al. *Feminist Contentions: A Philosophical Exchange* (New York: Routledge, 1995); Elisa Glick, "Sex Positive: Feminism, Queer Theory, and the Politics of Transgression" (2000) 64 *Feminist Review* 19; Saba Mahmoud, "Feminist Theory, Embodiment and the Docile Agent: Some Reflections on the Egyptian Islamic Revival" (2001) 16 *Cultural Anthropology* 202; Chris Brickell, "Masculinities, Performativity and Subversion: A Sociological Reappraisal" (2005) 8 *Men and Masculinities* 24; Geoff Boucher, "The Politics of Performativity: A Critique of Judith Butler" (2006) 1 *Parrhesia* 112; Moya Lloyd, *Judith Butler* (Cambridge: Polity Press, 2007) especially at 66-68.

¹⁹³ Judith Butler, 'For a Careful Reading' in Benhabib, et al *supra* note 192 at 134.

¹⁹⁴ Butler, *Excitable Speech*, *supra* note 13 at 10.

problematic production of the *speaking body*, destroys from its inception the metaphysical dichotomy between the domain of the 'mental' and the domain of the 'physical,' breaks down the opposition between body and spirit, between matter and language.¹⁹⁵

Recognising that 'speaking is itself a bodily act,'¹⁹⁶ Butler emphasizes the 'instrument' of the body as that which undermines the speech act: 'there is what is said, and then there is a kind of saying that the bodily 'instrument' of the utterance performs.'¹⁹⁷ She uses the example of a threat that is not convincing because of the body's failure to perform in a threatening way: 'the threat emerges as the apparent effect of a performative act only to be rendered harmless through the bodily demeanor of the act (any theory of acting knows this.)'¹⁹⁸ In this example, the meaning of the speech act, the threat, is found not through verbal articulations but through bodily significations. The body is described as being capable of its own sovereign speech, 'confounding the performative power of the threat.'¹⁹⁹ Butler thus reinstates sovereign agency and intentionality at the level of the body, which does not *exceed* the speaker's intentions but transparently *expresses* them:

As an 'instrument' of a violent rhetoricity, the body of the speaker exceeds the words that are spoken, exposing the addressed body as no longer (and not ever fully) in its own control.²⁰⁰

¹⁹⁵ Shoshana Felman, *The Scandal of the Speaking Body: Don Juan with J.L. Austin, or Seduction in Two Languages* (Stanford: Stanford University Press, 1983) [*Scandal*] at 65, cited in Butler, *Excitable Speech*, *supra* note 13 at 10-11.

¹⁹⁶ Butler, *Excitable Speech*, *supra* note 13 at 10.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.* at 11.

¹⁹⁹ *Ibid.* at 12.

²⁰⁰ *Ibid.* at 13. Returning to Felman at the end of *Excitable Speech*, Butler claims to find in Felman her warrant for the notion that the body provides the true gauge of the meaning of the speech act: '... the bearing of the body as rhetorical instrument of expression ... makes plain the incongruous interrelatedness of body and speech to which Felman refers, the excess in speech that must be read along with, and often against, the propositional content of what is said.' Butler, *Excitable Speech*, *supra* note 13 at 152, my emphasis. Here, again, the body ceases to stand for the exceeding or disrupting of intentionalized meaning, as Felman theorizes, and comes to serve instead as the vehicle and guarantor of intentionality. The impossibility of securely recovering intentions turns into a demand – 'must be read along with, and often against' – that assumes their transparency. See further Molly Anne Rothenberg & Joseph Valente, "Performative Chic: The Fantasy of a Performative Politics" (1997) 24:1 *College Literature* 295; Lisa H.

Butler thus criticizes the fantasy of the always-successful illocutionary act of hate speech only by extending its sovereign force to marginalized and resistant speakers whose performing bodies are somehow capable of subversive reappropriation.²⁰¹ Butler locates the force of the performative in the chiasmatic relationship between speech and body: 'Speech is body, but the body exceeds the speech it occasions; and speech remains irreducible to the bodily means of its enunciation.'²⁰²

Given her emphasis on the body, it is ironic that Butler relies on linguistic rather than bodily explanations of performativity: 'she does not clearly articulate how actions as well as language signify.'²⁰³ Carrie Noland observes that Butler shifts constantly between an analysis of discursive acts and an analysis of physical acts (what Butler calls 'acts, gestures and behaviors'), without attending to and distinguishing the differences between them.²⁰⁴ For Noland, the corporeal is more than just discursive;²⁰⁵ she focuses on 'the doing-body,' or gesture, and locates the possibility of political agency between the cultural meaning of a gesture and the subject's own embodiment of that meaning.²⁰⁶

Schwartzman, "Hate Speech, Illocution and Social Context: A Critique of Judith Butler" (2002) 33:3 *Journal of Social Philosophy* 421.

²⁰¹ Butler thus goes further in overestimating the efficacy of illocutionary acts than Austin, for whom even illocutionary acts involved context and contingency and the constitutive role of the audience: 'a certain effect is achieved, the illocutionary act will not have been happily, successfully performed . . . the performance of an illocutionary act involves the securing of *uptake*.' Austin, *supra* note 157 at 116 -117

²⁰² Butler, *Excitable Speech*, *supra* note 13 at 155-6.

²⁰³ Amy Hollywood, "Performativity, Citationality, Ritualization" (2002) 42:2 *History of Religions* 93 at 95.

²⁰⁴ Carrie Noland argues that Butler wants to refer to 'bodily gestures' and 'discursive acts' in one breath, without having to account for the difference between a 'corporeal sign,' a sign that *is* a moving body, and a verbal sign produced by that body. Noland argues that Butler conflates corporeal signs and discourse when she argues that behaviors, gestures and speech acts are all '*performative* in the sense that the essence or identity that they otherwise purport to express are *fabrications* manufactured and sustained through corporeal signs and other discursive means' *Gender Trouble*, *supra* note 171 at 136. Noland calls this 'the weakness of her theory and its most suggestive element.' Carrie Noland, *Agency and Embodiment: Performing Gestures/Producing Culture* (Cambridge, Mass.: Harvard University Press, 2009) at 175.

²⁰⁵ *Ibid.* at 189.

²⁰⁶ Noland argues, with an emphasis on the something other than language that is *agentic*, arising from proprio-perception, 'it is the doing-body, not the speaking body, that senses most urgently the dissonance, the lack of adequation, between a cultural meaning and the embodiment of that meaning, between what the subject is supposed to be signifying and how she feels.' *Ibid.* at 195 'It is through gesturing that bodies become inscribed with meanings in cultural environments, but it is also by gesturing that these inscribed meanings achieve embodiment and inflection.' *Ibid.* at 207

Many scholars have noted that the body's role in meaning-making is obscured by the 'tendency to interpret embodied experience in terms of cognitive and linguistic models of meaning.'²⁰⁷ Michael Jackson emphasized that 'thinking and communicating through the body precede and to a great extent always remain beyond speech.'²⁰⁸ He gives as examples our earliest, sensory non-verbal memories, and the idea of *being betrayed by one's gestures*. Following Merleau-Ponty and others in their view that 'meaning should not be reduced to a sign which, as it were, lies on a separate plane outside the immediate domain of an act,'²⁰⁹ he cites metaphors of falling or disturbance which, in expressing both a bodily and intellectual loss of balance, demonstrate 'the integral connexion of the psychic and the physical.'²¹⁰ The body, he emphasizes, is not a medium of communication, but actively shapes that communication; human experience is grounded in bodily movement within a social and material environment.

Excess: Felman and the Speaking Body

Felman's insight was more significant than Butler's reading suggests. For Felman, all speech exceeds the speaker's intentions not by virtue of the body, but by virtue of the *unconscious excess of signification*. As she notes, Austin himself was unable to distinguish performatives from constatives because he found that every (constative) statement includes an unspoken reference to its enunciative conditions.²¹¹ For instance, 'I am sad' includes 'I am saying that I am sad,' which in turn includes a reference to its own enunciation – 'I am saying that I am saying that I am sad' – and so on without end. If 'I am sad' exceeds itself, adding 'I am saying that' does not destroy but rather revitalizes and perpetuates this excess. Every statement always exceeds itself in virtue of being stated. An indefinite, but constant, surplus attends every utterance. This

²⁰⁷ Michael Jackson, "Knowledge of the Body" (1983) 18:2 *Man* 327 at 328.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.* at 329.

²¹¹ Austin, *supra* note 157 at 53-66.

means that every signification (whether in articulated speech, written text or bodily gesture) produces and leans on an excess inherent to signification itself.

Psychoanalysis reads this ungovernable excess as the desire that cannot be pinned down in language.²¹² Whereas Derrida's *difference* suggests language's play of differences as a system of present absences or absent presences, in Lacanian psychoanalysis, one sign follows another in semiosis, generating a Symbolic Law organized around and sustained by a fundamental lack. 'Desire is a relation of being to a lack.... Of no object can desire ever say, 'that's it.'"²¹³ This desire is not a question of material sexuality but of the social structures and strictures that dictate our entry into the symbolic order (with its laws, conventions, and images for perfection). Through the force of *coupere*, the cut of language – and law as language – which dispatches the Real (that which resists symbolization) and installs in its stead the 'lack' of the Symbolic signifier, the human subject is effectively dissociated from bodily drives and initiated into the collective unconscious of fantasy.²¹⁴ It is that lack at the heart of desire that ensures we continue to desire. To come too close to our object of desire threatens to uncover the lack that is, in fact, necessary for our desire to persist, so that, ultimately, desire is most interested

²¹² Stanley Cavell turns to Austin's underdeveloped theory of perlocutionary effects in order 'to question a theory of language that pictures speech as at heart a matter of action and only incidentally as a matter of articulating and hence expressing desire.' Stanley Cavell, "Performative and Passionate Utterance" in *Philosophy the Day After Tomorrow* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005) 155 at 159. Austin attempted to rule out the perlocutionary act as an instance of performative utterance: 'the perlocutionary sense of 'doing an action' must somehow be ruled out as irrelevant to the sense in which an utterance, if the issue of it is the 'doing of an action,' is a performative.' Austin, *supra* note 157 at 110, Cavell at 172 and 186. Cavell calls this 'a surprising and unnecessary limitation' (at 172) and argues that in Austin's work the distinction between illocutionary and perlocutionary effects 'fails to be given its due.' (at 157) For Cavell, illocutionary utterances do not *usually* require interpretation, whereas perlocutionary utterances do, and in the case of performative (illocutionary) utterances, failures are reparable, but in case of passionate (perlocutionary) utterances, the failures are more radical: with predictable, conventional illocutionary utterances 'interpretations or decisions are sometimes to be made as to whether an instance is happy... with perlocutions, interpretation is characteristically in order, part of the passionate exchange.' at 184. 'A performative utterance is an offer of participation in the order of law.... A passionate utterance is an invitation to improvisation in the disorders of desire.' at 185. Cavell pursues an 'idea of speech... as designed to work on the feelings, thoughts and actions of others coevally with its design in revealing our desires to others and to ourselves.' at 186.

²¹³ Shoshana Felman, *Jacques Lacan and the Adventure of Insight: Psychoanalysis in Contemporary Culture* (Harvard: Harvard University Press, 1987) at 144.

²¹⁴ Jacques Lacan, "The Subversion of the Subject and the Dialectic of Desire in the Freudian Unconscious" in, *Écrits: A Selection* trans. by Bruce Fink (New York: W.W. Norton, 2006) 671 [Écrits].

not in fully attaining the object of desire but in keeping our distance. 'Full Symbolic closure would foreclose identic reinvention under the Law, stabilizing subjectivity into a mortified fixity. Such stasis would bring the Law grinding to a halt.'²¹⁵

Felman thus connects the scandal of performative to psychoanalysis' understanding of language's *necessary* generation of unwanted – undesired – meaning:

... if the theory of the performance of the speaking body – of speech acts proper – lies in the realm of the performative, the theory of the scandal of this performance falls in the domain of psychoanalysis. The scandal consists in the fact that the act cannot *know what it is doing*, that the act (of language) subverts both consciousness and knowledge (of language). The 'unconscious' is the discovery, not only of the radical divorce or breach between act and knowledge, between constative and performative, but also (and in this lies the scandal of Austin's ultimate discovery) of their undecidability and their constant interference.²¹⁶

Through Felman's reading of Austin's foundational text of performativity, we can see that the irony in which law is pulled unaware into the scene of its own self-destruction is connected to the *scandal* of law's unconscious, its unpredictability, precisely its *lack* of awareness – the law that does not, and cannot, know what it is doing: it must keep its distance from its own tragic desire to be more than it is.

This section has examined the major theorists of repetition as the problem of representation, in order to lay the groundwork for our inquiry into law. For Foucault, words are bound up in relations and regimes of power, but those discourses are inherently susceptible to being reversed, frustrated. For Derrida, Austin's attempt to formalize the conditions and conventions under which certain types of speech will have effects ('do things') is a doomed enterprise. Representation is aleatoric, intention is an effect of discourse, and meaning is dependent on the workings of framing and context. For Butler, the repetition of representation – the gap between the intentions animating

²¹⁵ William P. MacNeil, "'You Slay Me!': Buffy as Jurisprude of Desire" (2003) 24:6 Cardozo Law Review 2421 at 2439.

²¹⁶ Felman, *Scandal*, *supra* note 195 at 67.

an utterance and the effects it produces - holds out the possibility of reversing the injurious effect of words or performances.²¹⁷ Butler's notion of politically subversive repetition resonates with our inquiry into critical doubling, but ultimately rests on a problematic 'embodied' account of intention, and also ignores the institutional dimension of law. For Felman, the problem of repetition is linked to the excess of desire. Felman thus gives us a way of connecting performative accounts of speech with psychoanalytic understandings of law's force and affect, to which we now turn.

II. Repetition and the Force of Law

Section 10 of the Canadian *Interpretation Act* reads:

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

This legal provision neatly joins the problem of repetition ('always') to questions of meaning (how the law 'shall be' interpreted) and power (it is the law, not other voices, that speaks). The law speaks, but this speaking creates itself - there is no law before it speaks. The performative force of the assertion constitutes 'the law' as a speaking subject, a singular unity, capturing the univocal posture of state law. And the law is *always* speaking: it constitutes a continuous, repeated assertion of authority over time. Law is not ossified in a historical moment, but eternal, illimitable; it is never *not* having the last word. Of course, if the law is always speaking, then the law is speaking *this* phrase, 'the law shall be considered as always speaking,' and so on *ad infinitum*. Analysing this performative statement thus easily leads into a vortex of endless meta-juridicality.²¹⁸ As Felman's analysis suggests, we can read this unconscious excess of

²¹⁷ 'The possibility for a speech act to resignify a prior context depends, in part, upon the gap between the originating context or intention by which an utterance is animated and the effects it produces.' Butler, *Excitable Speech*, *supra* note 13 at 14.

²¹⁸ See further Karen Crawley, "Limited Ink: Interpreting and Misinterpreting Godel's Incompleteness Theorem in Legal Theory" (2006) McGill University LLM Thesis [unpublished.]

signification as law's desire. This part builds on Felman's articulation of the link between performativity and psychoanalysis to consider the law's own practices of repetition, connecting Derrida's and Butler's work on performativity to psychoanalytic understandings of law as a desiring subject engaged in the repeated repression of its own political foundation of authority.

Derrida: Performative Law

The idea that law is performative is a mainstay of contemporary critical legal thinking. Pierre Bourdieu described law as 'the quintessential form of 'active' discourse, able by its own operation to produce effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which firsts creates the law.'²¹⁹ Douzinas and Nead write that 'throughout history law has been the performative language *par excellence*, a language whose success is measured by its consequences, its ability to act on the world.'²²⁰ The law performatively creates a fictional entity called the state.²²¹ Derrida's performativity understands law as a kind of subject-formation in itself, ostensibly authorizing itself by 'the sovereign conceit,'²²² but actually called into being in the act of calling others to account. He argues that 'the intentional structure'²²³ by which the *Declaration of Independence* purported to declare independence is nothing more than a performative effect:

One cannot decide – and that's the interesting thing, the force and the *coup de force* of such a declarative act – whether independence is stated or produced by

²¹⁹ Pierre Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field" (1987) 38 Hastings Law Journal 814 at 839.

²²⁰ Douzinas & Nead, *supra* note 34 at 10.

²²¹ Richard Mohr argues that 'each manifestation of the state 'signifies so much that its specific denotations could never exhaust the possibilities: there will always be some remainder, some possible meaning which is not enacted.'... 'the successful constitution of the state as a legal fiction involves establishing it as a floating signifier, a sign with excess meanings that cannot all be spoken so that they overwhelm everyday semiosis with mysterious possibilities.' Richard Mohr, "Living Legal Fictions: Constituting the State or Submerging the Signifier?" (2006) 19 International Journal for the Semiotics of Law 237 at 240.

²²² Butler, *Excitable Speech*, *supra* note 13 at 16.

²²³ Jacques Derrida, "Declarations of Independence" (1986) 7:1 New Political Science 7 at 8.

this utterance.... This obscurity, this undecidability between, let's say, a performative structure and a constative structure, is *required* in order to produce the sought-after effect.²²⁴

If Derrida's account of repetition – iterability – is an account of meaning, his account of law's repeated performativity is a theory of force. In 'Force of Law' Derrida argued that the founding violence of law must be repeated and consolidated, in that it repeats itself in every decision, every 'reinstating act of interpretation.'²²⁵ The absence of intention, the excess of the 'structural unconsciousness,' is figured in the legal context as the need for interpretation which cannot itself be contained by a prophylactic rule about interpretation: 'the undecidable is not limited to a founding moment but 'remains caught, lodged, at least as a ghost – but an essential ghost – in every decision, in every event of decision.'²²⁶ Just as Derrida's critique of Austin emphasized that the possibility of failure is a structural possibility internal to performative speech, Derrida emphasizes here that the performative force of law is not something that is leveraged by an exterior agent, but is internal to law itself and a necessary part of its functioning.

Butler: The Sovereign Conceit

Butler observes that resignification seems to work differently when it comes to law. When the law resignifies offensive terms in the course of critiquing or responding to them - in explicit legal regulations, court judgments or parliamentary discussion - it seems caught in 'a performative contradiction:' 'an act of speech that in its very acting

²²⁴ *Ibid.* at 9. 'The very emergence of justice and law, the founding and justifying moment that institutes law always implies a performative force, which is always an interpretative force: this time not in the sense of law in the service of force, its docile instrument, servile and thus exterior to the dominant power but rather in the sense of law that would maintain a more internal, more complex relation with what one calls force, power or violence... Its very moment of foundation or institution (which in any case is never a moment inscribed in the homogenous tissue of a history, since it is ripped apart with one decision), the operation that consists of founding, inaugurating, justifying law (*droit*), making law, would consist of a *coup de force*, of a performative and therefore interpretative violence... 'Derrida, "Force of Law", *supra* note 26 at 941.

²²⁵ *Ibid.* at 961.

²²⁶ *Ibid.* at 965.

produces a meaning that undercuts the one it purports to make.’²²⁷ And she expresses this contradiction in terms of a thwarted *desire*:

The regulation that *states what it does not want stated* thwarts its own desire, conducting a performative contradiction that throws into question that regulation's capacity to mean and do what it says, that is, its *sovereign pretension*.²²⁸

Butler, however, is not so interested in law, and immediately turns her gaze elsewhere, to and marshalling performativity as a kind of argument against state power, defining the political task of how ‘subjects in subjection’ can employ performativity as resistance to an always efficacious sovereign. When she argues that proponents of hate-speech prosecution and anti-porn censorship attribute to hate speech a ‘fantasy of sovereign action... an illocutionary performative, in Austin’s view, one that immediately does what it says,’²²⁹ she does not go far enough: this fantasy of sovereign action is a fantasy even where the sovereign is concerned. As several critics have noted, even while undermining hate speech’s ‘sovereign conceit’²³⁰ Butler tends ‘to over-state the efficacy of the state in achieving its regulatory goals,’²³¹ equating the legal regulation of speech with the repression of language by sovereign intent, ‘as if the life of language is truly arrested because the state *does* contain the sovereign capacity to ‘mean what it says.’²³² Her account of performativity as an interpellative process of subject formation is agonistic with regard to the ‘state’ and particularly the criminal law (as that which *subjugates*),

²²⁷ Butler, *Excitable Speech*, *supra* note 13 at 84.

²²⁸ *Ibid.* at 130.

²²⁹ *Ibid.* at 12.

²³⁰ *Ibid.* at 16.

²³¹ Moya Lloyd, “Butler, Antigone and the State” (2005) 4 Contemporary Political Theory 451 [“Butler, Antigone and the State”] at 452 and 464.

²³² Vicki Kirby, *Judith Butler: Live Theory* (London: Continuum, 2006) at 103. This emphasis is reflected in her assumption that any appeal to the state for legitimation, regardless of its historical specificity, fortifies and extends state power. Judith Butler, “Is Kinship Always Already Heterosexual?” (2002) 13:1 differences: A Journal of Feminist Cultural Studies 14 [“Kinship”]. But as Mona Lloyd notes, ‘if state speech is more potent than other speech, as [Butler] implies, this appears to strengthen the case for seeking state backing of counter-hegemonic discourse, rather than weaken it.’ Moya Lloyd, “Butler, Antigone and the State” *supra* note 231 at 464.

and conceives of the state narrowly in legal or judicial terms, collapsing state institutions (like police) and legal discourse and practice into one.²³³ Butler's theory of performativity corrodes the institutional too quickly, even suggesting that law may arrive disembodied, 'without a speaker' and 'without a subject.'²³⁴ If Butler's 'presumption is that speech is always in some ways out of control,'²³⁵ we can extend that presumption to the speech of the law, as it works through institutional guises, performances by authorized subjects, and encounters between embodied and desiring subjects.

By connecting the iterability of discourse to the political struggle for power, Butler offers us an account of how repetition can be subversive. 'It seems that repetition is inevitable, and that the strategic question remains, what best use is to be made of repetition?'²³⁶ She critiques the juridication of politics, arguing that instead of turning to law to resolve our issues around injurious speech – like hate speech and pornography – we should seek the proliferation of discourse, multiply the sites of discursive production.

If prohibitions invariably *produce and proliferate* the representations that they seek to control, then the political task is to promote a proliferation of representations, sites of discursive production, which might then contest the authoritative production produced by the prohibitive law.²³⁷

²³³ See further Paul Passavant and Jodi Dean, "Laws and Societies" (2001) 8:3 *Constellations* 378 at 381-382. Elsewhere, Butler acknowledges that the state 'is not reducible to law;' and gives an account in which the state 'is not a simple Unity, and its parts and operation are not always coordinated with one another;' it does not work with a single set of interests and is not unilaterally successful; and it can be worked, exploited and challenged, as different parts (eg. the courts and law) clash. Butler, "Kinship", *supra* note 232 at 27. But even here, Moya Lloyd writes, Butler 'gives priority to the state's judicial function,' linking 'rights, normalization, regulation and recognition in a reactionary legalistic chain that figures the state as uniformly enhancing its interests above all others.' 'The effect of this is to consistently underplay the extent to which different state institutions may conflict in their operations and interests, and how this conflict may provide an entry-point for democratic demands.' Lloyd, "Butler, Antigone and the State" *supra* note 231 at 461.

²³⁴ Butler, *Excitable Speech*, *supra* note 13 at 34.

²³⁵ *Ibid.* at 15.

²³⁶ *Ibid.* at 37.

²³⁷ Butler, "Force of Fantasy" *supra* note 147 at 119. 'Feminist theory and politics cannot regulate the representation of "women" without producing that very "representation"; and if that is in some sense a

Butler responds to the inevitability of repetition by advocating the promotion of proliferating representations. But of course, identifying proliferation as a 'good' does not support the derjuridification of politics, because if legal intervention inevitably becomes one more site for repeating, restaging and proliferating representations, and that is what we want, then why not have more legal intervention? We need a way of conceiving of the subversive effects of law's repetition which does not overdetermine its effects or harness them to a teleological field of intentionality, but rather traces them to law's very self-constitution.

Psychoanalysis: Before the Law

The way in which law constitutes itself through endless deferral to a higher or further authority or justification emerges through Derrida's reading of Franz Kafka's parable *Before the Law*, in which there is a gate, and in front of it, a man from the country who desires admission to the law, but is detained by the gatekeeper. The gate refers to a law that resides behind it. Behind the first gate there is a further gate, and then another. But the man never accesses the law. Derrida explains: 'the law is prohibition/prohibited... it is itself prohibited, a prohibited place,'²³⁸ but this prohibition is not 'an imperative constraint; it is a *différance*.'²³⁹

What is deferred forever till death is entry into the law itself, which is nothing other than that which dictates the delay. The law prohibits by interfering with and deferring the "ference" [*"férance"*], the reference, the rapport, the relation. What *must not* and cannot be approached is the origin of *différance*, it must not be presented or represented and above all not penetrated. That is the law of the law, the process of a law of whose subject we can never say "There it is," it is here or there.... It is always cryptic; that is, it is a secret which a caste – for example, the nobility of which Kafka speaks in *Zur Frage der Gesetze* – pretends to possess by delegation. The secret is nothing – and this is the secret that has to

discursive inevitability of representational politics, then the task must be to safeguard the open productivity of those categories, whatever the risk.' *Ibid.* at 120.

²³⁸ Jacques Derrida, "Before the Law" in Derek Attridge, ed., *Acts of Literature* (NY: Routledge, 1992) at 203.

²³⁹ *Ibid.*

be kept well, nothing either present or presentable, but this nothing must be well kept.²⁴⁰

For Derrida, 'the play of framing and the paradoxical logic of boundaries' in Kafka's text reveals 'an essential structure of referentiality,' 'an obscure revelation of referentiality which does not make reference, which does not refer, any more than the eventness of an event is itself an event.'²⁴¹ There is nothing behind the law's manifestations of itself, and this is the 'secret' that buttresses the ruling ideology. As Derrida suggests elsewhere, perhaps law, 'neither presentable nor representable,' 'manages to do no more than transgress the figure of all possible representation.'²⁴² The man's desire to enter through the gate, the fantasy that there is something behind the bounded entity, actually creates the law: '*Where one believed there was the law, there is in fact desire and desire alone.*'²⁴³ As Deleuze explains,

In Lacan's words, the law is the same as repressed desire. The law cannot specify its object without self-contradiction, nor can it define itself with reference to a content without removing the repression on which it rests. The object of the law and the object of desire are one and the same, and remain equally concealed.²⁴⁴

Psychoanalytic accounts of law emphasize that '(t)he analysis of inscriptions, instruments and other signs is never fully constrained to the conscious, intended, or projected meaning of the author or source of law.'²⁴⁵ Read psychoanalytically, law's own speech acts are spoken to say something different from what is being said,²⁴⁶ 'in

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.* at 213.

²⁴² Jacques Derrida, "Sending: On Representation" (1982) 49:2 Social Research 294 at 325-326

²⁴³ Gilles Deleuze and Felix Guattari, *Kafka, Toward a Minor Literature*, trans. by Dana Polan (Minneapolis: University of Minnesota Press, 1975) at 49, emphasis in original.

²⁴⁴ Gilles Deleuze, "Coldness and Cruelty", *supra* note 108 at 85.

²⁴⁵ Goodrich, "Europe in America" *supra* note 87 at 2037.

²⁴⁶ In Lacan's words, we speak 'to signify something altogether different from what [the signifier] says.' Lacan, *Ecrits*, *supra* note 214 at 421 cited in Juliet Rogers & Peter D. Rush, "The Remains of Authority and the Trial of Saddam Hussein (2009) 31 Australian Feminist Law Journal 121 at 126.

the hope that the speaker will be recognized in its desired image.’²⁴⁷ The speaking body of the law desires recognition as a legitimate speaker. The content of the speech act merely betrays by whom and in what way the speaker desires recognition. For instance, Juliet Rogers and Peter Rush read the speech act of the Iraqi High Tribunal asserting the basis of its authority to try Saddam Hussein as evidence of the ‘desire’ of the court to be recognized; the speaker’s desire. ‘Speech, understood as an instance of self-presence – or a diction, as dictation from the one who ‘knows’ – is a corporeal moment.’²⁴⁸ The court’s declaration is necessary ‘both to secure the self image and to announce the parameters of an operational sovereignty that meets up with the expectations of the international community.’²⁴⁹

Jurisdiction ‘engages with the fact that there is law, and with the power and authority to speak in the name of the law.’²⁵⁰ Jurisdiction, then, is how law speaks or performs what it does: declaring, judging, policing, and regulating. The rhetorical tradition reminds us that each speaker speaks from a situated place or office, and is buttressed by institutional constructs. If performativity is what one does as a speaker, the conditionality of that speaker’s performance relates to the institutional forms within which one speaks. Understood as the power of enunciating law, the essentially oral and

²⁴⁷ Rogers and Rush suggest that ‘(a)n elaboration of the image desired by the speaker can be read as an amalgam of Lacan’s discussion of the ‘mirror stage’ in Jacques Lacan, “The Mirror stage as formative of the function of the I as revealed in psychoanalytic experience (seminar delivered 17 July 1949), and ‘the gaze’ in Jacques Lacan, *The Four Fundamental Concepts of Psychoanalysis*, trans. Alan Sheridan (New York: W.W. Norton, 1978) [*Four Fundamental Concepts*] cited in in Rogers & Rush, *supra* note 246 at 126 fn 15.

²⁴⁸ An exchange in the trial of Saddam Hussein in which the judge tries to get Saddam Hussein to state his name for the court, and Hussein refuses to acknowledge the court’s authority, shows ‘the need for the body to identify itself,’ and ‘speech is imagined to perform a direct relation between symbol and object, word and thing.’ *Ibid.* at 131.

²⁴⁹ *Ibid.* at 126.

²⁵⁰ ‘It encompasses the authorisation and ordering of law as such as well as determinations of authority within a legal regime. Emile Benveniste has drawn out the inaugural character of the etymology of jurisdiction. The Latin *juris-dictio* links the Latin noun *ius* with the verb *dictio*. *Ius* is usually translated as ‘law’, and refers to the adjectival situation of conforming to law (*iustus*). Linked to the verb *dicere* – the saying or speech of law – *ius* becomes performative (and adverbial) (1973:391). Within the institutional domain of the Roman courts, *ius* and *dicere* are linked to the office of the *iu-dex*, he who states the law, and *juris-dictio*, the saying or speaking of the law (*Digest* 2.1.1) (Benveniste, 1973:392). In jurisdiction, then, might be found questions of the inauguration of law – its value and validity – and its articulation.’ Dorsett & McVeigh, *supra* note 26 at 3.

dramatic pronouncements of legal power, jurisdiction refers to ‘the grounding of legality in a visible legitimacy, its symbolic validation and present authority as defined through its staging and enactment.’²⁵¹ Questions of jurisdiction thus connect intimately to questions of the censor, who licenses public speech and creates public space. As Dorsett and McVeigh argue in *Jurisprudence of Jurisdiction*, we need ‘a form of investigation that pays attention to the ways in which the authorisation of law is linked to its purposes or desire’.²⁵² Psychoanalysis is what gives us ‘a reading of the institution of law ‘as if’ it were a subject and so driven to reproduce itself,’²⁵³ of law ‘as a social subject ceaselessly laboring to create subjects.’²⁵⁴ For Goodrich, the aesthetic study of law reflects the insight that ‘to capture the subject for the institution involves a delicate and complicated play of attraction and threat, and needs to be understood in the psychoanalytic terms of desire.’²⁵⁵

Law’s Founding Violence

In psychoanalytic theory, prohibition curiously preserves rather than obliterates the desire it represses. ‘The prohibition does not seek the obliteration of the prohibited desire; on the contrary, prohibition pursues the reproduction of prohibited desire and becomes itself intensified through the renunciations it effects... the prohibition not only sustains, but is *sustained by*, the desire that it forces into renunciation.’²⁵⁶ In fact the pleasure of repeating and observing a prohibition may come to replace the satisfaction

²⁵¹ ‘Law has to be differentiated and separated from other social discourses, and jurisdiction is the discourse of that separation and authorization. Argument as to jurisdiction create spaces of law, protected and authorized sites of enunciation of legal speech, stages for the performance of law that need their own distinctive and solemnized props, their own juridically formulated scenery uncluttered by or ferociously free of the accoutrements of other genres of stage and play.’ Goodrich, “Screening Law”, *supra* note 60 at 7.

²⁵² Dorsett & McVeigh, *supra* note 26 at 4.

²⁵³ Peter Goodrich, “The Unconscious is a Jurist: Psychoanalysis and Law in the Work of Pierre Legendre” (1996) 20:2 Legal Studies Forum 195 [“The Unconscious is a Jurist”] at 199.

²⁵⁴ *Ibid.* at 199.

²⁵⁵ Peter Goodrich, trans, and ed. *Law and the Unconscious, a Legendre Reader* (London: Macmillan, 1997) [*Law and the Unconscious*] at 17.

²⁵⁶ Butler, *Excitable Speech*, *supra* note 13 at 117.

of violating it. In this way prohibition and desire depend on each other.²⁵⁷ A taboo is inherently able to arouse temptation, because taboo is a 'prohibition forcibly imposed (by some authority) from outside, and directed against the most powerful longings to which human beings are subject,'²⁵⁸ and 'where there is a prohibition there must be an underlying desire.'²⁵⁹

Žižek writes prohibition, desire and the fantasmatic into the Derrida's account of performative law legitimating itself retroactively at its foundational moment.²⁶⁰ In Freud's account of the birth of law, Freud describes pre-societal humans as a primal horde ruled by a violent, jealous father who kept all the females for himself. Hating the father because he 'presented such a formidable obstacle to their craving for power and their sexual desires,' the brothers join together and kill him.²⁶¹ From the standpoint of the old law, the violent establishing of something new is crime, and the law is thereby disobeyed, overthrown, transgressed, usurped. From the standpoint of the new law, this crime is self-negating - it vanishes (or is concealed) as a crime once the new order is constituted. For law to function as law, the Real of violence must be concealed. As Jodi Dean writes, 'To be law, a given legal order must cover over the crime that founds it.

²⁵⁷ For Bataille a transgression 'suspends a taboo without suppressing it.' George Bataille, *Erotism: Death and Sensuality* (San Francisco: City Lights Books, 1986 [1957]) [*Erotism*] at 36. 'Transgression does not deny the taboo but transcends and completes it.' at 63. See Freud's discussion of the dynamic relationship between conscience and renunciation in Sigmund Freud, [*Discontents*] (New York: W. W. Norton, 1961) at 84.

²⁵⁸ Sigmund Freud, *Totem and Taboo: Some Points of Agreement between the Mental Lives of Savages and Neurotics* trans. and ed. by James Strachey (New York: W.W. Norton & Co, 1950 [1912]) at 44 [*Totem and Taboo*].

²⁵⁹ *Ibid.* at 88.

²⁶⁰ "At the beginning' of the law, there is a certain 'outlaw,' a certain Real of violence which coincides with the act itself of the establishment of the reign of law: the ultimate truth about the reign of law is that of a usurpation, and all classical politico-philosophical thought rests on the disavowal of this violent act of foundation . . . this illegitimate violence by which law sustains itself must be concealed at any price because this concealment is the positive condition of the functioning of law: it functions insofar as its subjects are deceived, insofar as they experience the authority of law as authentic and eternal.' Slavoj Žižek, *For They Know Not What They Do* (London: Verso, 1991) at 204.

²⁶¹ Sigmund Freud, *Totem and Taboo*, *supra* note 258 at 177.

But, the crime is itself a fantasy-construction that functions to conceal the antagonism fissuring the legal order.²⁶²

Law's validity requires that we remain within the law, rather than going outside the law and emphasizing its contingent, historical founding. Because if we do go outside the law, we cannot even see the order as law; its claim to authority becomes just another contingency or act of violence. Law involves more than the violent, arbitrary control of people. People need to believe in it. They cannot accept the fact that law has no authority outside itself, and repress the violent origins of law by positing a Truth behind law to which they transfer their faith or confidence. Žižek describes this through the mechanism of transference: 'transference is this supposition of a Truth, of a meaning behind the stupid, traumatic, inconsistent fact of the Law. In other words, 'transference' names the vicious circle of belief: the reasons why we should believe are persuasive only to those who already believe.'²⁶³ The kernel of irrational violence that inheres in law is the necessary condition for the belief that attaches subjects to law. As a non-integrated surplus, violence is what gives law the form of an injunction, what renders law as that which is to be obeyed. So the Real of violence is a source of our attachment to and investment in law.

For Goodrich, the work of Legendre shows us that 'questions of law are always also questions of subjective attachment to an institution.'²⁶⁴ 'Law in the sense of the foundational social principle of authority is intrinsic to the symbolic dimension of social

²⁶² Jodi Dean, "Žižek on Law" (2004)15:1 Law and Critique 1 at 3. As Žižek explains, 'The loop is therefore perfect: the Structure can function only through the occultation of the violence of its founding Event, yet the very narrative of this Event is ultimately nothing but a fantasy destined to resolve the debilitating antagonism/inconsistency of the structuring/synchronous Order.' Žižek, *The Fragile Absolute* (London: Verso, 2000) at 93.

²⁶³ Žižek, *The Sublime Object of Ideology* (London: Verso, 1989) at 38.

²⁶⁴ Goodrich, "The Unconscious is a Jurist", *supra* note 253 at 198. Legendre explains that psychoanalysis 'requires one to take note of the mythical side of the subjective order and carefully to consider the fact that structural constructions of normativity, which are concerned with the human subject who is endowed with an unconscious, necessarily deal with unconscious representations.' Goodrich, Peter & Warrington, Ronnie. "The Lost Temporality of Law: An Interview with Pierre Legendre", trans. by Alain Pottage, (1990) 1:1 Law and Critique, 3 at 18

relations, and forms the context or 'mirror' within which identity is constructed in the institution.²⁶⁵ Legendre reinscribes law in our understanding of the subject, elaborating a theory of the subject's erotic attachment to power, and a corresponding aesthetics of submission to law.²⁶⁶ The workings of law necessarily mobilize an express ritualized theatre: a display designed to capture, hold and fascinate the desiring subject.²⁶⁷ Law is an essential medium for the communication of the founding mythological principle which justifies but is beyond justification, and 'no subject can function properly until or unless this principle (the Reference) has been symbolically imprinted on the flesh.'²⁶⁸ Recognising that law in modernity is arranged according to, and draws its authority from, an absolute reference devoid of any content,²⁶⁹ Legendre saw that 'rien d'autre que l'état de la Référence, plus exactement du rapport a la Référence [nothing other than the state of Reference, more exactly the relationship to Reference].'²⁷⁰ His account

²⁶⁵ Goodrich, "The Unconscious is a Jurist", *supra* note 253 at 200.

²⁶⁶ For selections of Legendre's work in English, see Peter Goodrich, *Law and the Unconscious*, *supra* note 255. See further Goodrich, "Law's Emotional Body: Pierre Legendre," *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990) and "Translating Legendre, or, the Poetical Sermon of a Contemporary Jurist," 16 *Cardozo Law Review* 963-978 (1995); Anton Schiitz, "Sons of Writ, Sons of Wrath: Pierre Legendre's Critique of Rational Law-Giving," (1995) 16 *Cardozo Law Review* 979; and Alain Pottage, "The Paternity of Law," in Costas Douzinas, Peter Goodrich, & Yifat Hachamovitch, eds., *Politics, Postmodernity and Critical Legal Studies: the Legality of the Contingent* (London: Routledge, 1994) 147-186.

²⁶⁷ Stephanie Lysyk offers the Basoche theatre as a concrete historical manifestation of this kind of display, and of specifically what Legendre terms *l'amour du censeur*: that is, 'the subject's love of the censor, which is also the vicarious enjoyment of the censor's power, and the submission which becomes a desire for submission, upon which the individual's relation to the law is necessarily premised.' Stephanie Lysyk, "Love of the Censor: Legendre, Censorship, and the Theater of the Basoche" (1999) 11 *Cardozo Studies in Law and Literature* 113 at 114. Legendre connected the censorship that takes place in between individuals in terms of their behavior and thought, with the state-employed censor of texts and information, 'by reflecting on the role played by dogma and ritual not only in securing the individual's subjection to the mechanisms of power... but also [in securing] the subject's adoration of and possession by the censor as incarnated in emblematicized figures of the law.' *Ibid.* at 116-117. See Pierre Legendre, *L'amour du censeur: essai sur l'ordre dogmatique* (Paris: Seuil, 1974) at 5.

²⁶⁸ Alain Pottage, "Crime and Culture: The Relevance of the Psychoanalytical" (1992) 3:55 *Modern Law Review* 421 at 422.

²⁶⁹ Pierre Legendre, *L'empire de la verite : Introduction aux espaces dogmatiques industriels* at 107.

²⁷⁰ Pierre Legendre, *Le Desir Politique de Dieu: Etude sur les montages de l'état et du droit* (Paris, Fayard 1988) at 323, cited in Cornelia Vissman, *Files: Law and Mediatechnology*, trans. by Geoffrey Winthrop Young (Stanford, Ca: Stanford University Press, 2008) at 16.

thus captures ‘the essentially mythic nature of the legal institution.’²⁷¹ The authority of law is theatrical: ‘a truth that is sanctioned by its staging: the mirror’s truth or the emblem’s... honoured as such, the exact opposite of a scientific demonstration.’²⁷²

Exposing Law’s Obscene Superego

Žižek’s account of law is directed towards understanding how law can become vulnerable by way of certain kind of staging or public exposure of what he calls its obscene superego. Žižek draws upon Jacques Lacan’s account of the tripartite division of the subject into the ideal ego (the idealized self-image of the subject, “the way I would like to be and have others see me”), the Ego-Ideal (the agency whose gaze I try to impress with my ego image), and the superego (the same agency in its revengeful, sadistic, punishing aspect.)²⁷³ Žižek explains:

The underlying structuring principle of these three terms is clearly Lacan's triad Imaginary-Symbolic-Real: ideal ego is imaginary, what Lacan calls the "small other," the idealized double-image of my ego; Ego-Ideal is symbolic, the point of my symbolic identification, the point in the big Other from which I observe (and judge) myself; superego is real, the cruel and insatiable agency which bombards me with impossible demands and which mocks my failed attempts to meet them, the agency in the eyes of which I am all the more guilty, the more I try to suppress my "sinful" strivings and meet its demands.²⁷⁴

For Lacan, the Ego-Ideal which leads us to moral growth and maturity also forces us to betray the ‘law of desire’ by way of adopting the ‘reasonable’ demands of the ‘socio-symbolic order that regulates social life.’²⁷⁵ The superego, with its excessive feeling of

²⁷¹ Adam Gearey, “Pierre Legendre and the Possibility for Critique” (1999) 11:2 *Cardozo Studies in Law and Literature* 135 at 135

²⁷² Legendre, “Dogmatic Value of Aesthetics”, *supra* note 33 at 10.

²⁷³ See further Jacques Lacan, “Kant avec Sade,” in Lacan, *Écrits*, *supra* note 214. See further Dean, *supra* note 262 at 2.

²⁷⁴ Slavoj Žižek, “How to read Lacan” <http://www.lacan.com/zizraphael.htm> [“How to read Lacan”]

²⁷⁵ Slavoj Žižek, “Ideology between Fiction and Fantasy” (1995) 16 *Cardozo Law Review* 1511 [“Ideology”] at 1512. (ie. The level of Ego-Ideal, the network of social-symbolic norms and ideals that the subject internalizes in the course of his or her education). He explains that ‘when the subject is endowed with symbolic authority,’ ‘it is the big Other who acts through him.’ *Ibid.* at 1523.

guilt, is merely the necessary obverse of the Ego-Ideal: it exerts its unbearable pressure upon us on behalf of our betrayal of the 'law of desire.' Since for Lacan, 'the only thing of which one can be guilty is of having given ground relative to one's desire,'²⁷⁶ the superego pressure demonstrates that we are in fact effectively guilty of betraying our desire. 'The superego is characterized by a vicious cycle: the more we submit ourselves to the superego imperative, the greater its pressure, the more we are guilty.'²⁷⁷ 'Superego is like an extortioner slowly bleeding us to death: the more it gets, the stronger its hold on us.'²⁷⁸ Superego is 'the price we pay for the guilt we contract by betraying our desire in the name of the good,' and is thus 'the necessary inverse and underside of the ego-ideal – of the ethical norms founded upon the good of the community.'²⁷⁹

Behind law's visible public power lie the obscene underpinnings that redouble the 'public' law. As Žižek explains, 'this other, hidden Law acts as part of the 'Other of the Other' in the Lacanian sense, the part of the metaguarantee of the consistency of the big Other (the symbolic order that regulates social life).'²⁸⁰ A community is not held together by identification with the normal public law that regulates its everyday functioning. Cohesion or attachment requires a superego supplement - specifically, an 'identification with a specific form of transgression of the law – of the law's suspension

²⁷⁶ Lacan writes: 'the only thing of which one can be guilty is of having given ground relative to one's desire.' Jacques Lacan, *The Ethics in Psychoanalysis*, at 314 cited in Slavoj Žižek, "How to read Lacan", *supra* note 274.

²⁷⁷ This guilt, for Lacan, is 'not a self-deception to be dispelled in the course of the psychoanalytic cure – we truly are guilty.' See Slavoj Žižek, "Superego by Default" (1995) 16 *Cardozo Law Review* 925 at 932 ["Superego by Default"]. The guilt we experience under the superego pressure is not illusory but actual - and the superego pressure demonstrates that we effectively are guilty of betraying our desire.' Slavoj Žižek, "How to read Lacan", *supra* note 274 "the more virtuous a man is, the more severe and distrustful is its [superego's] behavior, so that ultimately it is precisely those people who have carried saintliness furthest who reproach themselves with the worst sinfulness.' Freud, *Discontents*, *supra* note 257257 at 72-3.

²⁷⁸ Žižek, "Superego by Default," *supra* note 277 at 932-3. 'Therein consists the vicious circle: once we give way to our desire, we cannot easily return, as the more we endeavour to exculpate ourselves by way of sacrificing the pathological object which induced us to betray our desire, the greater becomes our guilt.' At 933.

²⁷⁹ *Ibid.* at 934-5.

²⁸⁰ Slavoj Žižek, "Ideology", *supra* note 275 at 1512.

(in psychoanalytic terms, with a specific form of enjoyment.)²⁸¹ ‘Superego emerges where the Law—the public Law, the Law articulated in public discourse—fails; at this point of failure, the public Law is compelled to search for support in an *illegal* enjoyment.’²⁸² The superego is the dialectical contrary of the public law; it is what Žižek calls its obscene ‘nightly’ law. ‘Explicit, public rules do not suffice; they must be supplemented by a clandestine ‘unwritten’ code aimed at those who, although they violate no public rules, maintain a kind of inner distance and do not truly identify with the ‘spirit of the community.’²⁸³

As an example of how the superego functions in the operations of censorship laws, Žižek turns to the notorious *Motion Picture Production Code* (the Hays Code) which governed the production of most studio pictures from 1930 to 1968. Movies made under this code functioned according to a deliberate doubling whereby the film could be constructed by the spectator as obeying moral codes, but simultaneously offer clues for an alternative sexualized reading. The famous 3.5 seconds gap in *Casablanca*,²⁸⁴ after Ilsa and Rick embrace, gives rise to a ‘double reading:’ for the big Other, the order of public appearance, the level of the Ego-Ideal, there was no sex; but on another level, the film bombards the spectator with the superego injunction ‘Enjoy!’ (ie. give way to your dirty imagination). The Hays Code functioned not as a prohibition but as a positive (productive, in Foucault’s terms) codification and regulation that ‘generated the very excess whose direct depiction it hindered.’²⁸⁵ Žižek notes the ‘obvious reproach’ that such an argument would seemingly elevate the Hays Code into ‘a subversive machine more threatening to the system of domination than direct tolerance: are we not claiming that the more severe is direct censorship, the more subversive are the unintended by-

²⁸¹ Žižek, “Superego by Default,” *supra* note 277 at 926.

²⁸² *Ibid.* at 925.

²⁸³ *Ibid.* at 926.

²⁸⁴ (Warner Bros. 1942) dir. Michael Curtiz.

²⁸⁵ Slavoj Žižek, “How to read Lacan”, *supra* note 274.

products generated by it?’²⁸⁶ He responds by reminding us that ‘these unintended perverse by-products, far from effectively threatening the system of symbolic domination, are its inherent transgression, its unacknowledged obscene support.’

This double reading is not simply a compromise on the part of the symbolic law, in the sense that the law is interested only in keeping up appearances, and leaves you free your exercise of dirty imagination on condition that it does not encroach upon the public domain. The law itself needs its obscene supplement, it is sustained by it.²⁸⁷

Žižek insists that law’s power is contingent on the *concealment* of its obscene ideological underpinnings: ‘the obscene superego qua basis and support of the public law is operative only insofar as it remains unacknowledged, hidden to the public eye.’²⁸⁸ Revealing that superego, then, suspends the system’s efficiency.

The political question then becomes: how best to reveal or expose the superego? Instead of trying to maintain distance from, and mount arguments against, for instance, ‘racism’s fantamatic kernel,’ Žižek suggests the counter-intuitive strategy of publicly identifying with the obscene superego, citing as an example the postpunk group Laibach, who, during the disintegration of socialism in Slovenia, ‘staged an aggressive inconsistent mixture of Stalinism, Nazism and *Blut und Boden* ideology.’²⁸⁹ Leftist critics, buoyed by ‘the assumption that ironic distance is automatically a subversive attitude,’²⁹⁰ immediately diagnosed Laibach’s performances as an ironic imitation of totalitarian rituals, and proceeded to worry about whether Laibach was actually seriously identifying with these rituals, and whether the public was savvy enough to understand the joke. But Žižek argues that the ironic distance towards public values ascribed to Laibach by critics could not be subversive when it conformed precisely to the demands of the contemporary dominant ‘post-ideology.’ By distancing itself from its ironic imitation,

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.* ‘We can neither escape law’s traumatic kernel, nor do without it.’ Dean, *supra* note 262 at 4.

²⁸⁸ Žižek, “Superego by Default,” *supra* note 277 at 936.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

Laibach merely *frustrates* the ruling ideology, but overidentifying with the obscene fantasmatic kernel of its ideological structure through the public staging of its superego underside works to *suspend* that structure's normal functioning and symbolic efficiency.²⁹¹ To clarify this subversive effect of exposing the superego, Žižek appeals to what happens when a private ritual, phrase or gesture, used only with intimate friends, is made public: 'the effect is necessarily one of extreme embarrassment and shame.'²⁹²

III. Repetition as a Critical Doubling

As these accounts by Butler and Žižek, in particular, indicate, the central political question for critical theory is *how to repeat differently*. How do we change the status quo and challenge hegemonic power networks? How do we break out of established patterns and usher in the new? The fact that doubling which repeats *without* difference merely consolidates existing power structures has led to a critical anxiety about the effectiveness of certain forms of parody, protest, satire, or other subversive aesthetic interventions. In particular, the need for parody to have a referential structure – the idea that it must mimic or parrot its object – has often been viewed as a political limitation, because its reliance on that object means it cannot offer an alternative vision. Such discussions often take place in overtly instrumental registers that assume that the critical difference of repetition is a function of its actualization of a substantially alternative political vision.

By contrast, this section explores alternative ways of understanding the critical doubling of repetition by connecting it with the differential power of art, drawing on accounts examining the effectiveness of parodying official legal symbols, protest speech which manages to escape the symbolic network of the sovereign, and doubles or copies which are not limited by the relationship of reference. At stake here is a way of to conceive of art's 'challenge' to law in a way that doesn't rely on a theory of deliberate, intentional

²⁹¹ *Ibid.*

²⁹² *Ibid.* at 936-7, see esp. footnote 32.

'subversion' or which doesn't presuppose that the state always has its act together to *be* subverted. What we need is an account of repetition that locates its power not in the intentionality of subversion but in the immanence of repetition; an account that restores the mediality of representation – words, texts, images, signs – and connects art to the genuinely *new*.

Irony and Parody

The introduction defined irony as being a spectator to a doubling. This idea of duplication or repetition is reflected in accounts of irony in its literary, dramaturgical and situational forms. As Clift writes, '(t)he double perspective brought into existence by framing is ultimately what lies at the heart of all irony, and provides the one characteristic common to all its forms.'²⁹³ Linda Hutcheon draws on classical theories of irony to define irony as the simultaneity of both a said and unsaid meaning, 'each of which takes on meaning only in relation to the other.'²⁹⁴ Irony creates humor or laughter through incongruity that forces the audience to readjust or backtrack, to look *again*.²⁹⁵ Importantly, irony cannot be understood as 'a mere reversal of terms or the simple decoding of a single inverted message, but a semantically complex process of relating, differentiating, and combining said and unsaid messages... with an evaluative edge.'²⁹⁶ Clift and Hutcheon agree that evaluation is implicit in the framing that

²⁹³ Clift, *supra* note 9 at 535.

²⁹⁴ Linda Hutcheon, *Irony's Edge*, *supra* note 4 at 59. See Samuel Johnson's classic definition of irony as 'a mode of speech in which the meaning is contrary to the words.' (1755). Many accounts build on Wayne Booth's vision of the normative function of irony, in which it acts as a trope to express an idea other than the literally expressed one. Booth, *supra* note 5. See for instance Gary J. Handewerk, *Irony and Ethics in Narrative* (New Haven: Yale University Press 1985) and Clift, *supra* note **Error! Bookmark not defined.** at 524-5. Peter Goodrich connects the history of images to this idea when he reminds us that 'in rhetoric, *illusio* stands for irony, the figure of "things that are not."' Goodrich, "Screening Law", *supra* note 60 at 15.

²⁹⁵ Tony Veale, "Incongruity in Humor: Root Cause or Epiphenomenon?" (2004) 17 *Humor: International Journal of Humor Research* 419 at 424 describes the process of mental backtracking in response to an incongruity at 420 and 421. At 420, when analyzing a joke: 'The listener, who is unaware of the ambiguity at first, is thus forced to backtrack and recreate an alternative mapping between the surface and deep levels of the narrative.' Also Michael Billig, *Laughter and Ridicule: Towards a Social Critique of Humour* (2005) at 65 explains an incongruity as 'requiring the listener to make an abrupt cognitive reorganization.'

²⁹⁶ Hutcheon, *Irony's Edge*, *supra* note 4 at 89.

characterizes irony, because the framing serves as an invitation for the audience to adopt the ironist's perspective²⁹⁷ or 'attitude.'²⁹⁸ Like Bakhtin's mode of 'double-voiced discourse,'²⁹⁹ irony is frequently subversive or disruptive:

Irony can introduce trouble, something unfixed that breaks the linear flow of action and doubles things back on themselves and multiples their meanings so that they are displaced, reinforced or repositioned.³⁰⁰

Parody and irony share 'a close formal and hermeneutic relationship, 'a dual superimposing structure' constituted by 'a repetition with critical difference.'³⁰¹ Russian formalists argued that parodic imitation works by turning an organic moment into something mechanical, and so reveals the mechanization underlying the original communicative act.³⁰² Communications scholar Robert Hariman recounts the effect of when his young daughter parroted his gestures and facial expressions: 'all it takes to make one self-conscious is to duplicate some part of the communicative act.'³⁰³ 'The parody replicates some prior form and thereby makes that form an object of one's attention rather than a transparent vehicle for some other message.'³⁰⁴ In parody, 'the public formalization of language beside itself puts social conventions on display for

²⁹⁷ Clift, *supra* note **Error! Bookmark not defined.**

²⁹⁸ Hutcheon, *Irony's Edge*, *supra* note 4 at 11.

²⁹⁹ Mikhail Bakhtin, *The Dialogic Imagination: Four Essays*, Michael Holquist, ed., trans. by Caryl Emerson and Michael Holquist (Austin: University of Texas Press, 1981) [*Dialogic Imagination*]; Mikhail Bakhtin, "Discourse Typology in Prose" in Ladislav Matejka and Krystyna Pomorska, *Readings in Russian Poetics: Formalist and Structuralist Views* (Cambridge: MIT Press, 1971).

³⁰⁰ Smith, *supra* note 8 at 369.

³⁰¹ Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (New York: Routledge, 1985) at 64. Parody has been seen as a species of irony, an 'intertextual irony,' or the ironic interpretation of the relationship between two texts. Lars Elleström, *Divine Madness: On Interpreting Literature, Music and the Visual Arts Ironically* (London: Associated University Presses, 2002) at 99.

³⁰² See Margaret A. Rose, *Parody: Ancient, Modern, and Post-modern* (New York: Cambridge University Press, 1993) at 119, cited in Robert Hariman, "Political Parody and Public Culture" (2008) 94:3 *Quarterly Journal of Speech* 247 at 250.

³⁰³ Robert Hariman, "Political Parody and Public Culture" (2008) 94:3 *Quarterly Journal of Speech* 247 at 249.

³⁰⁴ *Ibid.* at 253.

collective reflection.’³⁰⁵ Hariman’s explanation of the ambivalent nature of doubling in parody is worth quoting at length:

The full significance of the parodic function is evident when placing a parody and its target discourse side by side. Before being parodied, any discourse could potentially become all-encompassing (such is the dream of totalitarianism). Once set beside itself, not only that discourse but the entire system is destabilized. As the act of replication replicates, everything is potentially both where it is and beside itself. Now there are two possible responses to any discourse: that which it intends and the laughter of those who see it through the lens of its parodic double. Everything is left as it was, because the original discourse is not itself subject to any change and the comic recasting is patently ritualized; this is the conservative fact of parodic transformation. And yet everything is changed, for what was capable of becoming an all encompassing worldview has been cut down to size, corrected against the “backdrop of a contradictory reality,” positioned to be set aside or otherwise not obeyed, and challenged to adapt toward the critique in order to continue to hold an audience; this is the radical fact of parodic transformation.³⁰⁶

When responding to law through the lens of its parodic double, we observe law’s intended effect, its wishful self-instantiation, alongside and in relation to, the representative practices it tries to keep at bay. Although parody, like irony, cannot be claimed in advance for a particular political agenda, it is inherently radical because it decentres authority, placing it within a scene larger than or outside itself. Irony and parody are not propositional, but expositional – opening and suspending a space for the possibility that things are only a ‘way,’ and might be otherwise.³⁰⁷

³⁰⁵ *Ibid.* at 251.

³⁰⁶ *Ibid.* at 254, citing in part Bakhtin, *Dialogic Imagination*, *supra* note 299 at 56.

³⁰⁷ In a similar vein, Leslie Moran and Derek McGhee describe the multivalency or ambivalence of Bakhtin’s carnival for law: ‘On the one hand it draws attention to the inevitability of law as order and hierarchy and simultaneously on the other hand it points to the capacity of law to be a site of creativity, of change and of renewal. The idea of another law and another order is immanent from the very operation of the law. Law within the parameters of carnival draws attention to law as a medium not of fixity but of change.’ Leslie J. Moran & Derek McGhee, “Perverting London: The Cartographic Practices of Law” in Carl F. Stychin & Did Herman, eds., *Law and Sexuality: The Global Arena* (University of Minnesota Press, 2000) 100 at 109

Rogers' Mourning

In her reflection on the capacity for protest speech to genuinely subvert the law, Juliet Rogers offers a distinction between doubling as (merely) copying and doubling as creating, in terms of a distinction between melancholia and mourning. She begins her psychoanalytic account by noting that is difficult to 'speak beyond the language of the sovereign.'³⁰⁸ The Lacanian subject of language may participate in the world only by accepting language and the symbolic order, which belong to the Other, so the subject must therefore begin from a compromise, in the acceptance of the Law as the prohibition of its own desire. As Rogers notes, it is thus difficult to 'exit the symbolic network scripted for us by the sovereign,' to deviate from the script that permeates our language and affect, our significances invested in land, property, freedom and rights as particular modes of speech.³⁰⁹ In this way, 'language begins along with law.'³¹⁰ She observes that proponents and critics of anti-terrorist laws both use similar language, appealing to the ideals of 'freedom' (either from terror or from invasions of civil liberties) and 'individual rights' (including 'the right' to be free from terror). Likewise, demonstrators at the G20 in Melbourne in 2006 who yelled: 'Whose streets? Our streets!' parroted 'the exclusion and ownership thematics of a conservative Australian government.'³¹¹ To Rogers' examples we could add the so-called 'Occupy' movement's repetition of the act of appropriation with its colonialist discourses of the 'management of' and the 'right to' space. These protestors are 'acting out'³¹² - a psychoanalytic relation in which 'the subject who acts still remains in the Scene.'³¹³ To the extent that

³⁰⁸ Juliet Rogers, "Beyond the Script of Law: Dildos, Tranny Cops and Protesting Anti-Terrorism" (2009) 18 Griffith Law Review 269 at 272.

³⁰⁹ *Ibid.* at 281.

³¹⁰ Lacan, *Ecrits*, *supra* note 214 at 225.

³¹¹ Rogers, *supra* note 308 at 274.

³¹² Žižek defines acting out as the symbiotic relation between left-wing critics and the state: Žižek, "Law and Critique Plenary" paper presented to Critical Legal Conference: Walls Birkbeck London 15 September 2007 cited in Rogers, *supra* note 308 at 274.

³¹³ Dylan Evans, *An Introductory Dictionary of Lacanian Psychoanalysis* (Brunner, Routledge 1996) at 128 cited in Rogers, *supra* note 308. Butler defends the Occupy movement against the charge that it has no

such acts of protest speech reflect the sovereign, they can actually serve to reify and reinforce the dominant structures of power. ‘This kind of parroting, or mirroring the gestures and language of the sovereign, ensures that the language of the sovereign and that of the critique are the same.’³¹⁴ Similarly, Žižek points out the ‘deeply ambiguous’ character of carnivalesque rituals that stage a reversal of institutions and roles of power: ‘they are a satire on the legal institutions, an inversion of public Power, yet they are a transgression that consolidates what it transgresses.’³¹⁵

Claiming that ‘[w]hat is at stake here is the capacity to initiate speech acts, as gestures of protest, which perform critique beyond the determined presence of the sovereign’s rhetoric,’³¹⁶ Rogers distinguishes between melancholia (where ‘the language of the critic... mirrored the language of the sovereign’³¹⁷) and mourning. Melancholia is a longing for the lost objects that the sovereign can return to us – freedom of speech, liberty of expression, etc. – but it restricts itself to precisely the objects the sovereign has to give, thus ‘ensuring a closed circle and perpetuating the illusion of a political subjectivity who “has it all”: rights, land, freedom and a stake in the decisions of the *polis*.’³¹⁸ Mourning, however, requires us to recognize that the objects offered in exchange with the sovereign are understood to be on his or her terms, to understand that the terms and desires of the sovereign and subject may not align. Rogers seeks the possibility of an act *not in relation* to the sovereign as a form of protest, and finds one in a consideration of the Australian ‘street theatrical protest group’ called the Tranny Cops:

coherent demands by pointing out that ‘articulating demands that can be satisfied depends fundamentally on the attribution of legitimacy to those who have the power to satisfy the demands. And when one ceases to direct demands to those authorities, as happens in the general strike, then it is the illegitimacy of those authorities that is exposed.’ Judith Butler, “For and Against Precarity” (December 2011) 1 Tidal: Occupy Theory, Occupy Strategy 12 available at: occupytheory.org

³¹⁴ Rogers, *supra* note 308 at 270.

³¹⁵ Slavoj Žižek, “Fiction and Fantasy”, *supra* note 280 at 1515.

³¹⁶ Rogers, *supra* note 308 at 271.

³¹⁷ *Ibid.* at 270.

³¹⁸ *Ibid.* at 271.

The Tranny Cops ... initially began their theatrical activist work dressing and performing as Transport Police in Sydney ... they have now transitioned to performing as riot police. In this role, the Tranny Cops are replete with blue overalls and anarchist badges—which have been described as resembling police badges—and they brandish drawn moustaches, sideburns and (possibly) hefty dildos. They march in rows, they dance and direct traffic—indeed, in 2007 two of them were arrested for impersonating police officers in performing this function. By way of describing their parodying capacity, a police witness testifying in the case stated that one of them “had her thumbs in her belt and rocked back and forth on her toes.” At the G20 in Melbourne ... [t]hey marched through the crowds towards police barricades and when they arrived they performed a kind of “line dance” in time with their own acoustic accompaniment...³¹⁹

Prosecutors claimed that the insignia on their uniforms was similar to Victorian police’s insignia, to which the magistrate responded ‘I presume the Victorian police’s insignia doesn’t have an anarchist sign in the middle.’ A senior police officer in APEC admitted he could tell their moustaches, sideburns and goatees were ink from five metres away.³²⁰ Magistrate David Hailpern, the same magistrate who decided the word ‘fuck’ was no longer obscene, dismissed the charges on the basis that it was clearly an impersonation for the purposes of satire and that no one could seriously have mistaken them for police.³²¹ The Tranny Cops had not really committed a crime, like breaching public order or threatening the peace. Their ‘obscenity’ was to turn ‘a uniform of the State into a piece of carnivalesque drag.’³²²

For Rogers, the Tranny Cops succeed in doing more than mirroring the language of the sovereign. They have a dual aspect: they are parodying ‘the imagined (im)potency of the state’ (in which their dress ‘indicates that the state has no significance for the subject without the artificial appendages to its authority’), but also ‘the current

³¹⁹ *Ibid.* at 276.

³²⁰ David Marr, “Street theatre or threat?” *Sydney Morning Herald* (22 July 2007).

³²¹ *Crimes Act 1900* (N.S.W.) s 546D, as amended in 2006, reads: ‘(4) In this section: “impersonation” does not include conduct engaged in solely for satirical purposes.’

³²² ‘The armour of authority became an artifice of authority and power slid deliciously into performance.’ Alecia Simmonds, “The Humourless State” *Arena Magazine* (August-September 2007).

impotency of a liberal democratic subject before the sovereign.³²³ Their costume, which both imitated and emphasized distance from its referent, ‘parodies the impossible symbol – a sovereign subject – which steps beyond the symbolising structure of law, the law that makes of the subject a subject.’³²⁴ As an imitation of the phallus *and* an indicator of a lack of a phallus, the dildoesque wear of the Tranny Cops ‘becomes the very symbol of what cannot be symbolized before the law.’³²⁵ In her Lacanian reading, in making themselves an ‘impossible object,’ and at the same time both sovereign police and subjects themselves, the Tranny Cops perform a sovereignty that is not sovereign, a relation that cannot be consummated, and an ‘impossible symbol;’ thus presenting the possibility of an act that is a non-relation.³²⁶

Agamben’s Mediality

For Giorgio Agamben, parody is not just a specific literary genre but constitutes the broader problem of language in relation to its object.³²⁷ As Connal Parsley explains, ‘parody exposes the textuality of its object, thus also exposing its ‘way’ (or, the very fact of its *having* a way; its having *this* manner, rather than another.) Parody, that is, opens a space for things to be other than the way they are.’³²⁸ The way which parody achieves this is paradoxical because it is only through precisely mimicking its object that parody can *be* parody, and yet its reliance on the thing it parodies means that it does not offer an *alternative*, but rather opens up an empty space. In Parsley’s reading of Agamben, parody’s object is not only what is represented but ‘the very structure of the linguistic

³²³ Rogers, *supra* note 308 at 276-277. This is a subject who, in Butler’s terms, has a psychotic relation to his or her own autonomy and forecloses on the repressive, sometimes arbitrary and increasingly prohibitive force of the state. Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997).

³²⁴ Rogers, *supra* note 308 at 278.

³²⁵ *Ibid.*

³²⁶ *Ibid.* at 227-228.

³²⁷ Giorgio Agamben, *Profanations* (New York: Zone Books, 2007) [*Profanations*] at 46.

³²⁸ Connal Parsley, “Para-protest: Reading a Parody of Police Gesture as Political Protest with Giorgio Agamben” in Matthew Stone, Illan Wall, Costas Douzinas, eds. *New Legal Critical Thinking: Law and the Political* [forthcoming in 2012, paper on file with author].

medium' itself, which is a kind of indistinction of life from its representedness, or the *fact* of life's representation; its 'mediality.'³²⁹ In a youtube video showing Tranny Cops at the G20 parading past a line-up of dour police, the police's own gestures, their braced stances and stern demeanour, suddenly seem ridiculous as a result of the 'mystical interval'³³⁰ introduced into the scene.³³¹ It is not simply that the police gestures suddenly seem as 'fictional' or 'artificial' as the Tranny Cops' own. Rather, their reality is heightened even as the linguistic texture of the gestures and 'ways' of policing are exposed. Agamben explains this by contrasting fiction and parody:

Parody not only does not coincide with fiction, but constitutes its polar opposite. This is because, unlike fiction, parody does not call into question the reality of its object; indeed, this object is so intolerably real for parody that it becomes necessary to keep it at a distance. To fiction's 'as if,' parody opposes its drastic 'this is too much.'³³²

Parody's different relation to its object - not representative but 'mysterious'³³³ - opens up an aporetic space, wherein the gestures of the police are not simply 'true' but 'too true,' and thus seem at once contingent and inescapable.³³⁴ As Parsley argues, the Tranny Cop's parody seems to be 'offering a lament about police and political life: a dolorious 'this is not it,' but also, since 'this is all there is,' reaffirming 'the too-true' nature of the police's gestures.'³³⁵ Parody's utter paratism on the forms that it calls into question reaffirms the forceful materiality of those forms, gestures, and symbols with which we are in power relations. So unlike those writers on parody who baulk at parody's reiterative function and its repetition or entrenchment of power relations and therefore doubt its 'effectiveness' as a strategy for protest, Agamben's account 'dwells

³²⁹ See further Giorgio Agamben, "Notes on Gesture" in *Means without End: Notes on Politics*, trans. by Vincenzo Binetti and Cesare Casarino (Minneapolis: University of Minnesota Press, 2000) 49 ["Notes on Gesture"].

³³⁰ Parsley, *supra* note 328.

³³¹ "More Cop it Sweet: Tranny Cops at the G20" <http://www.youtube.com/watch?v=xplxcVtxC58>

³³² Agamben, *Profanations*, *supra* note 327 at 48.

³³³ *Ibid.* at 41-2.

³³⁴ *Ibid.* at 49-50.

³³⁵ Parsley, *supra* note 328.

entirely in that function as one half of parody's paradox, without which it would not have the specific 'effect' that it does.³³⁶

Since parody is constitutively ambivalent, it makes no sense to worry about whether parody can be effective for this or that political end. Parody does not worry that it might take place 'within the terms of the law,'³³⁷ because it begins from doubling law's terms and not from an attempt to simply escape them (which would continue a sovereign conceit). Nor does parody worry about the reincorporation of parodied gestures into the vocabulary of power, because the gestures or power are less important than the exposure of its mediality. The paradox of parody is that it radically opens a distance between means and object only by attaining an unbearable promixity to that object, by being parasitic. In demonstrating 'language's inability to reach the thing and the impossibility of the thing finding its own name,' parody attests to 'what seems to be the only possible truth of language,'³³⁸ which is its mediality: '*The gesture is the exhibition of a mediality: it is the process of making a means visible as such.*'³³⁹ Robert Hariman defines modern laughter precisely as 'a reaction to the experience of mediation,' 'the shock of dislocation and delight that occurs when seeing that something is mediated rather than a thing in itself.'³⁴⁰

In the short essay "Notes on Gesture," Agamben suggests that Eadweard J. Muybridge's famous nineteenth-century photographs and filmic experiments such as *Man Walking at Normal Speed* and *Walking Woman Picking up a Jug* had a political significance because

³³⁶ *Ibid.*

³³⁷ *Gender Trouble*, *supra* note 171 at 119.

³³⁸ Agamben, *Profanations*, *supra* note 327 at 50.

³³⁹ Agamben, "Notes on Gesture," *supra* note 329 at 58. Parody exposes the mediality of human gesture, which according to Agamben is the originary human *ethos* and originary human capacity for politics (the sphere of 'pure means.') *Ibid.* at 60. Whereas 'doing is a means in sight of an end and praxis is an end without means, gesture breaks the false alternative between means and ends,' in "Notes on Gesture" at 154; thus gesture 'opens the sphere of *ethos* as the proper sphere of the human.' At 57.

³⁴⁰ Hariman, *supra* note 303 at 261-262.

they concerned themselves with the 'pure mediality' of our actions.³⁴¹ In taking recognized gestures and, through the technical capacity of film, removing them from the motor networks and purposes in which they are usually embedded, early film and photography revealed the sheer taking place, or the 'means' of human embodiment. An arm swinging removed from the technical purposive activity of working, frozen in time, is simply a gesture. The alienating effect of gesture 'allows the emergence of the being-in-a-medium-of human beings and thus it opens the ethical dimension for them.'³⁴² Like Deleuze, Agamben does not define cinema by the image and the dialectic of reality/representation, but by its ability to display the 'pure mediality' of our actions. As Stephen Crocker explains in his reading of Agamben,

Gesture gives us something that cannot be reduced to the Aristotelian distinction of *poesis* and *praxis*. Nothing is made and nothing is represented. It is a communication that works not so much to convey content as to display its communicability, its mediality. The medium is not a vehicle for achieving a goal but is compelling in and of itself.³⁴³

Foucault's Reflection and Deleuze's Copy

The attempt to move beyond an account of parody as the means of actualizing a particular political end, and towards an understanding of the *non-relation* of parody's unbearable proximity and exposure of mediality, finds a parallel in Foucault's description

³⁴¹ 'Agamben's analysis of these mechanical media might be best understood as a "remediation" of Walter Benjamin's efforts to find a common ground of aesthetics and politics. Benjamin thought that the movies could help us develop a new sensory apparatus that would allow us to orient ourselves among the continuous shock effect of modernity. As mechanical reproduction destroys the aura of aesthetics objects and breaks down the division between information, commodity and image, it releases aesthetics from the narrow confines of "art for art sake." Fascism and capitalism take advantage of this to enlist the aesthetic for the instrumental purpose of mythico-juridical rule and the production of value. The destruction of the aura, however, promises a more politicized sense of the aesthetic which would no longer be the vehicle for some pre-existing message, but rather the opening up of the human sensorium, or what Agamben calls "human being in a medium." Aesthetics, in this sense, points us toward mediality as the basic cell of all political thought and gesture.' Stephen Crocker, "Noises and Exceptions: Pure Mediality in Serres and Agamben" (2007) cththeory.net <http://www.ctheory.net/articles.aspx?id=574#bio>

³⁴² Agamben, "Notes on Gesture", *supra* note 329 at 58.

³⁴³ Crocker, *supra* note 341.

of the space of a mirror. In a 1967 lecture entitled 'Des espaces autres,'³⁴⁴ Foucault investigated particular emplacements 'that have the curious property of being in relation with all the other sites, but in such a way as to suspend, neutralize, or invert the set of relations designated, mirrored, or reflected by them.'³⁴⁵ These spaces are either utopias (emplacements 'with no place,' 'directed or inverted' analogies of real space, 'society turned upside down,' and 'fundamentally unreal') or heterotopias ('effective places,' 'actually localizable,' 'written into the institution of society itself,' 'counter-emplacements,' 'absolutely other than all the emplacements that they reflect.')³⁴⁶ Heterotopias are 'effectively real utopias in which the real emplacements are simultaneously represented, contested and inverted.'³⁴⁷ Foucault describes the *being in relation* of heterotopias to all other sites, the 'sort of mixed, in-between experience,' through the space of a mirror:

The mirror is, after all, a utopia, since it is a place without place. In the mirror, I see myself there where I am not, in an unreal space that virtually opens up behind the surface; I am... a sort of shadow that gives me my own visibility, that enables me to see myself there where I am absent.... But it is also a heterotopia in so far as the mirror does really exist, and as it exerts on the place I occupy a sort of return effect; it is starting from the mirror that I discover my absence in the place where I am, since I see myself over there. Starting from this gaze that is, as it were, cast upon me, from the depth of this virtual space that is on the other side of the looking glass, I come back towards myself and I begin again to direct my eyes toward myself and to reconstitute myself there where I am. The mirror functions as a heterotopia in the respect that it renders this place that I occupy at the moment when I look at myself in the looking glass at once absolutely real, connected with all the space that surrounds it, and absolutely

³⁴⁴ Michel Foucault, "Of Other Spaces" (1967) trans. by Lieven de Cauter & Michiel Dehaene, in Michiel Dehaene & Lieven De Cauter, eds., *Heterotopia and the City: Public Space in a Postcivil Society* (London: Routledge, 2008) 13 at 15-16.

³⁴⁵ *Ibid.* at 16-17.

³⁴⁶ *Ibid.* at 17. Foucault gives many further examples in his lecture: the school, military service, the honeymoon, old people's homes, psychiatric institutions, prisons, cemeteries, theatres and cinemas, libraries and museums, fairs and carnivals, holiday camps, hamams, saunas, motels, brothels, the Jesuit colonies and the ship. See further Michiel Dehaene & Lieven De Cauter, "Heterotopia in a Postcivil Society" in Michiel Dehaene & Lieven De Cauter, eds., *Heterotopia and the City: Public Space in a Postcivil Society* (London: Routledge, 2008) 3.

³⁴⁷ *Ibid.* at 17. Among Foucault's examples of heterotopias, he lists the theatre, which brings onto the stage 'a whole set of places that are alien to one another.' *Ibid.* at 19.

unreal, since, in order to be perceived, it has to pass through this virtual point, which is over there.³⁴⁸

The mirror shows a placeless place, but the mirror really exists and its reflection displaces the person looking into it. The mirror is a utopia in the sense that it provides a straightforward copy, a reflection of a model, but a heterotopia in the sense that it places into movement, and thus calls into question, the entire referential relationship between model and copy. To look into a mirror is to register the simultaneous impossibility and actuality of 'being over there,' and thus to experience a radical or impossible *non-relation*: I am here, but I am over there. The mirror is both a way of having and a way of losing oneself.³⁴⁹ Derrida makes a similar observation when he notes that mimicry does not mechanically reproduce a prior referent, but exposes and constitutes the original as phantasmatic: 'in this speculum with no reality, in this mirror of a mirror, this difference or dyad does exist, since there are mimes and phantoms. But it is a difference without reference, or reference without a referent, without any first or last unity, the ghost that is the phantom of no flesh.'³⁵⁰

Arguing that representation is characterized by a relation of recognition, requiring 'a conceived identity, a judged analogy, an imagined opposition or a perceived similitude' ('young' is 'not-old,' 'woman is 'not man' etc³⁵¹), Deleuze also sought to give an account of a relation of difference and repetition that is not subordinated to concepts of identity or resemblance.³⁵² He opposed the theatre of representation (which operates with

³⁴⁸ *Ibid.* at 17.

³⁴⁹ Gary Shapiro suggests that Foucault's mirror 'is perhaps more ambiguous than the Lacanian mirror which stabilizes an otherwise volatile identity in a specular image.' Shapiro, *supra* note 114 at 319.

³⁵⁰ Jacques Derrida, "The Double Session" in *Dissemination*, trans. Barbara Johnson (Chicago: University of Chicago Press, 1981) at 206.

³⁵¹ See Deleuze, *Difference and Repetition*, *supra* note 51 at 138.

³⁵² Deleuze likens this revolution in thought to one that has occurred in the history of art: 'the theory of thought is like painting: it needs that revolution which took art from representation to abstraction. This is the aim of a theory of thought without image.' *Ibid.* at 276. As Mussawir explains, '(i)t is not identity which returns in repetition, it is repetition or return which constitutes the only identity of all that which differs fundamentally. Expression, according to Deleuze, belongs to this relation of immanence in repetition.' Edward Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law* (Abingdon: Routledge-Cavendish, 2011) at 82-83.

words, faces and characters in order to create the image of a stable world) to the theatre of repetition (which deploys language, gestures, masks, phantoms, and specters in order to act directly on its audience, to force it into motion rather than producing only the image of motion.)³⁵³ On his account, repetition is transformed from the 'dreary succession of the identical' to the manifestation of a 'displaced difference.'³⁵⁴ He focuses on the multiplicity in repetition, rather than focusing on the original or object of that which is repeated.³⁵⁵

Deleuze and Foucault both explore the notion of a copying unmoored from the relationship of reference by reflecting on the work of artist Gérard Fromanger. For Deleuze, Fromanger's technique of projecting photographs onto a canvas and then painting them revealed 'an eternal truth of painting:'

that the painter has never painted on the white surface of the canvas to reproduce an object that acts as a model, but has always painted on an image, a simulacrum, a show of the object, to produce a canvas whose very operation reverses the relationship of model and copy, and which means that there is no longer a copy, *nor is there a model*. To push the copy, the copy of the copy, to the point at which it reverses itself and produces the model: Pop Art, or painting that produces a "heightened reality."³⁵⁶

For Deleuze, once the techniques of copying are multiplied – from photo to slide to projection to painting – there comes a point at which we cannot sustain the notion of

³⁵³ See Shapiro, *supra* note 114 at 363.

³⁵⁴ Michel Foucault, *Language, Counter-Memory and Practice*, trans. and ed. by Donald F Bouchard (Cornell University Press, 1980) at 182.

³⁵⁵ Foucault made a similar distinction in *This is Not a Pipe* between resemblance and similitude, using resemblance to designate a relationship of copying, in which a picture resembles its original by referring to it and looking like it: 'Resemblance has a model, an original element that orders and hierarchizes the increasingly less faithful copies that can be struck from it. Resemblance presupposes a primary reference that prescribes and classifies.' Similitude, on the other hand, is a relation among images without any reference to an external model or primary origin. 'The similar develops in series that have neither beginning nor end, that can be followed in one direction as easily as in another, that obey no hierarchy, but propagate themselves from small differences, among small differences.' Foucault, *This is Not a Pipe*, trans. and ed. by James Harkness (Berkeley: University of California Press, 1983) at 44. See further Shapiro, *supra* note 114 at 342.

³⁵⁶ Gilles Deleuze, "Cold and Heat" in Sarah Wilson, ed. *Gilles Deleuze, Michel Foucault: Gérard Fromanger, La Peinture Photogénique* (London: Black Dog, 1999) 63 at 65

‘model and copy:’ relations are subverted, reversed. Like parody, and its exposure of mediality, the result is not estrangement from reality or an attenuated relation to the ‘real,’ but a *heightened reality*. For Foucault, Pop artists and hyperrealists rediscovered the love of images, not by a ‘return to figuration’ or by cleaving to ‘the object and its real density,’ but by ‘plugging us in to the endless circulation of images.’³⁵⁷ Painters like Fromanger do not ‘incorporate images through their painting technique,’ rather they ‘extend technique itself into the great sea of images, where their painting acts as a relay in this endless circulation.’³⁵⁸ They ‘are not looking behind the image for what it represents... they capture an image, not anything else,’³⁵⁹ ‘an image caught in its trajectory from photograph to painting’³⁶⁰ - what Foucault calls ‘the autonomous transhumance of the image,’³⁶¹ or what he elsewhere called ‘representation in its pure form.’³⁶²

The political limitations of representation are bound up in viewing representation in a hierarchical relation to something that is *not* representation (reality-simulation, object-copy, model-imitation, referent-representation). In these varied accounts of ironic doubling, parody’s exposure of mediality, mournful protest speech which escapes the symbolic network of the sovereign, and copying unmoored from reference, we can perceive a common striving for a different account of repetition, one of radical *non*-relation. A mirror doesn’t create a copy so much as put into place a destabilizing refraction, an oscillating regard. Likewise, art does not merely reflect law but sets in motion a complex and affective process of entanglement and co-implication. Art’s

³⁵⁷ Michel Foucault, “Photogenic Painting” in Sarah Wilson, ed. *Gilles Deleuze, Michel Foucault: Gérard Fromanger, La Peinture Photogénique* (London: Black Dog, 1999) 83 [“Photogenic Painting”] at 90.

³⁵⁸ *Ibid.* at 91.

³⁵⁹ *Ibid.* Pop Art wants to ‘desymbolize the object,’ to release the image from deep meaning (metaphoric association or metonymic connection) into simulacral surface. Roland Barthes, “That Old Thing, Art” (1980) in ed. Paul Taylor, *Post-Pop Art* (Cambridge: MIT Press, 1989) 21 at 25.

³⁶⁰ Foucault, “Photogenic Painting” *supra* note 357 at 91.

³⁶¹ *Ibid.* at 102.

³⁶² Foucault, *Order of Things: An Archaeology of the Human Sciences* (New York: Vintage Books, 1973) at 18 [*Order of Things*].

challenge to law does not lie in its presentation of an 'alternative vision.' The significance of such acts of doubling lies not in the faithfulness or deviation from an original object, but in the explosion of immanence in its movement and gesture. Irony 'undermines the authority of this privileged meaning by staging a confrontation with the spectral presence of other possible meanings.'³⁶³ Modern humour, Hariman writes, consists in 'the refraction of mediation back onto itself,' and the 'parodic intention is completed by laughter – nothing else is needed.'³⁶⁴ The eruption of laughter captures the glimmering facet of 'the new' (the alternate, the other than, the something else, and therefore the hopeful) even in the face of apparent or actual totality.

Conclusion: Laughing at the New

This chapter has drawn on accounts of the political power of repetition in order to understand how the differential event of art can form the occasion of a misstep in law's own repetition, its performative self-instantiation and constitutive re-repression. Understanding the vulnerability of law that arises in its ironic encounters with art depends on understanding how the law is doubled in and through the representations it encounters. The remaining chapters of this dissertation explore particular instances of doubling which take place through law's encounters with art (works of literature, theatre, photographs, and street art). This doubling is precisely not mimetic – it does not depend, in Barthes' words, on 'the supposed exteriority of the signified to the signifier.'³⁶⁵ It does not consist in a hierarchical relationship between 'the representation' and what it is 're-presenting,' or in art's rendering of law or law's rendering of art, but their complex and refracted relationship. I do not begin from the

³⁶³ '... irony happens, it comes about, in a space somewhere *between* the said and the unsaid. This borderland locus can produce surprising effects, at a minimum making visible the multiple meanings of an event. A matter of double vision, the ironic challenges an utterance or an image in its customary meaning. It undermines the authority of this privileged meaning by staging a confrontation with the spectral presence of other possible meanings.' Valier, *supra* note 7 at 98.

³⁶⁴ Hariman, *supra* note 303 at 262.

³⁶⁵ Roland Barthes, "The Last Word on Robbe-Grillet" in Roland Barthes, *Critical Essays*, trans. by Richard Howard (Evanston: Northwestern University Press, 1972) 197 at 198.

position that art is powerful because it is referential (ie. 'it tells it like it really is') but by assuming and respecting its alterity. This alterity is always political, and for this reason art speaks – in rich and varied ways - to the ideological presuppositions of law, its claims to rule.



Figure 1 Photos of Student Protests in Colombia, November 2011.³⁶⁶

The best time to demystify ideology is when it enters into crisis: when its taken for granted, natural, invisible premises come to the surface and can be denaturalized and understood as tendentious and motivated constructs. When thousands of students took to the streets in Colombia in November 2011 to protest proposals to privatize the remaining public universities, and the government sent in the riot police, the students took photographs of themselves hugging and exchanging flowers with the police,

³⁶⁶ Sources: Top Left: cache.daylife.com Top Right: Fredy Builes, Reuters. Bottom: Guillermo Legaria, Getty Images. Compiled on this page: <http://www.buzzfeed.com/mjs538/photos-of-colombian-students-protesting-against-ri> (Last accessed Jan 26, 2012).

painting their shields, offering the police flowers, posing with them in costume or with funny props such as giant pencils. These scenes were created in order to be photographed and disseminated – we see cameras everywhere. The reason these photographs are so strikingly effective is because unlike the imagery usually associated with protests, they do not show a confrontation between state force and an alienated constituency, between police enforcers and legal ‘subjects’. These photographs brought the force of the state, embodied by the police officers, *into* the scene of play, in a parodic kind of doubling: the police are props in a funny drama, their riot shields become canvases for art. The students’ playfulness in the face of a display of state-sanctioned force powerfully suggests that in order to be effective, authority must be taken *seriously*. And the tacit cooperation of the riot police in the production of these photographs reminds us that law is created by those who act in its name, and it can be *re-created*. Art pulls law into its scene, and invites us to consider law otherwise.

Resignifying Words: Public Law, Private Judgment, and Obscene Repetition

Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records.³⁶⁷

Introduction: Judging Obscenity

The last chapter examined different perspectives on the problem of repetition, and its relationship to law's authority. This chapter focuses on how law has conceived of and dealt with its own predicament as a necessary agent of repetition, by examining the historical, literary, and material dimensions of its own resignification of obscene words. It begins at the origins of the modern state policing of representations in the United Kingdom and the United States, when the rise of mass literacy, photography and the modern postal system brought about rapid changing practices of reproduction and dissemination and inspired the law's first widespread endeavors to regulate obscene texts and images. It ends with the key obscenity law decisions of the early twentieth-century, the heyday of prosecutions for literary obscenity, before obscenity law moved almost exclusively into the realm of the pictorial. Within these historical parameters, this chapter investigates how the repetition of obscene words is understood in three different genres of writing: legal judgments, pornographic texts, and modernist literary works. For judges seeking to limit the scene and trace of judgment to the cultural elite, repetition is understood as *corruption*, overpowering, and damaging to vulnerable minds. For the censors and vice reformers concerned about the repeated exposure of

³⁶⁷ *Commonwealth v. Sharpless*, (1815) 2 Serg. & R. 91 [*Sharpless*] at 102, cited in *United States v. Rosen* (1886) 161 U.S. 29 [*Rosen*] at 36.

young people to salacious material, repetition leads to *addiction* – the growth of appetite, the excitement rather than the satiation of desire, and the increasing use of pornography. But for modernist writers, unconsciously echoing the approach of early modern French pornographic texts, the repetition of obscene words could lead to the *purification* of representation and referent, language and sex.

Part 1, Writing Law, reads obscenity judgments in the nineteenth-century as instances in which law attempts to maintain its status outside representation or discourse. In these early judgments, particularly in the United States, courts were obliged to discuss openly the question of whether the law can wield or reproduce obscene words without being held hostage to their obscene effects, and by implication, whether it is possible to intervene in the traffic of representations without the form of that intervention itself becoming compromised. The examination reveals that as obscenity law shifted throughout the nineteenth-century from being concerned with public display of images towards the private consumption of written texts, the law's own textual practices came under threat. When excluding obscene texts from the public records of the court, the law acknowledged its own status as *public* writing: as a literal corpus or archive of decisions which could be accessed and read by a new public: the very public to which obscenity laws were responding.³⁶⁸ This account shows how nineteenth-century courts and vice reformers opted for containment and private judgment. Simultaneously avowing obscenity's non-contextual immediacy, and adopting the view that the repetition of pornography corrupts, courts addressed the problem of citation by repeating without repeating, designating without describing, and erring dramatically on the side of exclusion. These earliest cases show the politics of citation most strongly,

³⁶⁸ In *Archive Fever*, Derrida notes that the meaning of the word 'archive' derives from the Greek *arkheion*, 'initially a house, a domicile, an address, the residence of the superior magistrates,' and that 'it is at their home, in that *place* which is their house (private house, family house, or employee's house), that official documents are filed.' Jaques Derrida, *Archive Fever: A Freudian Impression* (Chicago: University of Chicago Press, 1998) at 2. Derrida is interested not so much in the law as 'discursive domain' as he is in an actual *place* where the law is instituted ('*there* where men and gods *command*')—a place where discernible acts of interpretation occur: the *archons* ('men and gods') are the site of the law as vested authority, hermeneutic power. 'Derrida's archive is a juridical concept, an attempt at a general theory of how the law becomes institutionalized *as law*.' Sandhya Shetty & Elizabeth Jane Bellamy, "Postcolonialism's Archive Fever" (2000) 30:1 *diacritics* 25 at 27.

exposing its farcical beginnings, before law as a process of iteration, precedence, and bootstrapping, concealed our exposure to the underlying problem of repetition.

Part 2, *Writing Pornography*, demonstrates the mutual implication of legal and obscene written texts. As cultural historians have shown, law produces pornographic texts and resides within them, as the prohibition of eroticization becomes the eroticization of prohibition. Here I examine the striking convergence between the techniques of elision, deferral, and negation employed by the court, and the identical stylistic techniques of nineteenth-century pornographic texts. Just as the court judgment wishes to defer the obscene sexuality it confronts, pornographic texts too rely on the deferral towards sex, as a desire that cannot be captured in language. Legal discourse too is constituted by a withholding or deferral that creates desire – a desire for the law.

Part 3, *Writing Literature*, turns to modernism's challenge to the scene of reading figured as a scene of corruption. Modernist literature, which is marked by a tendency to foreground its own status as representation, sought through the repetition of obscene words to *purify* language, and thus sexuality. I examine the key literary prosecutions of obscenity in the twentieth-century, James Joyce's *Ulysses* and D.H. Lawrence's *Lady Chatterley's Lover*, reading the court's processes and judgments through those texts. This history reveals obscenity as an ideological and political category which transforms according to the changing dynamics of power. Examining how these texts operate, and how their words signify and have effectivity, forces recognition of law as an affective, textual enterprise.

I. Writing Law: The Problem of Citation

Circulation and Containment: The Origins of Anglo-American Obscenity Law

Historians of obscenity law have emphasized it as a creature of modernity, brought into being in the form we now recognize by the technologies of reproduction in the

nineteenth century.³⁶⁹ Prior to the democratic revolutions of the late eighteenth-century, obscenity tended to be grouped with blasphemy and sedition as crimes of libel against the church and state. Only after the revolutions did obscene libel take on its modern significance as a non-political crime concerned with offenses against public morality and decency.³⁷⁰ As a legal category, obscenity is a name given to describe the *effects* of particularly powerful representations. Annette Kuhn points out that the legal categories of obscenity and indecency 'are premised on terms whose reference is not specified representations, but the effects that representations may be thought, in certain circumstances, to produce.'³⁷¹ Michel Gamer has shown that eighteenth-century obscene libel was 'a category of reader response – a legal interpretation of the social effects of a certain kind of reading'³⁷² which created 'a legal space that came to be inhabited after 1820 exclusively by pornography.'³⁷³ Obscene representations were afforded great power, fetishized or endowed with agentic properties.³⁷⁴ As early as 1817, an account from a member of the Society for the Suppression of Vice in England

³⁶⁹ Lynn Hunt, "Introduction: Obscenity and The Origins of Modernity, 1500-1800" in Lynn Hunt, ed., *The Invention of Pornography: Obscenity and the Origins of Modernity, 1500-1800* (New York: Zone Books, 1993) ["Introduction"] 1 at 15; Peter Michelson argues that the introduction of the printing press brought with it the exclusively modern category of pornography. '... if we take the commercial printing press as a demarcation of modernity, pornography is coextensive with modern life and its vexations.' Peter Michelson, *Speaking the Unspeakable: A Poetics of Obscenity* (New York: State University of New York Press, 1993) at 1; "That modern pornography developed along with the commercial press, a professional as distinct from a patronized literati, increasing general literacy, and popular forms of prose fiction indicates its general human appeal. That suppression accompanied its development indicates how problematic its appeal is.' *Ibid.* at 3. Beverley Brown, "Troubled Vision: Legal Understandings of Obscenity" (1993) 10 new formations 29; See further Walter Kendrick, *The Secret Museum: Pornography in Modern Culture* (Berkeley: University of California Press, 1996).

³⁷⁰ James C. N. Paul and Murray L. Schwartz, *Federal Censorship: Obscenity in the Mails* (New York: Free Press, 1961) at 11. See also de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (New York: Random House, 1992) and Edward de Grazia, *Censorship Landmarks* (New York: Bowker, 1969).

³⁷¹ Annette Kuhn, "Public versus Private : The Case of Indecency and Obscenity" (1984) 3 Leisure Studies 53 at 54.

³⁷² Michael Gamer, Genres for the Prosecution: Pornography and the Gothic (October 1999) 114 PMLA 1043 at 1046.

³⁷³ *Ibid.*

³⁷⁴ The defendant in the first United States obscenity case *Sharpless* argued (unsuccessfully) that the terms with which the indictment referred to the painting (ie. 'lewd, wicked, scandalous, infamous and obscene') were 'descriptive of desires and qualities belonging to animated beings, and are incorrectly applied to an inanimate object.' *Sharpless*, *supra* note 367 at 96.

describing how they secured obscene books and prints gathered for upcoming trials reveals an already-pervasive idea of obscenity as ‘a distinct and extremely volatile cultural form, in desperate need of containment:’

These specimens are kept in a tin box secured by three different locks; one of the keys of which is kept by the treasurer, one by a member of the Committee, and one by the secretary; so that box can at no time be opened, but with the concurrence of these three persons.³⁷⁵

Early nineteenth-century regulations of obscene representations rested on perceived notions of their unruly circulation in metropolitan urban culture.³⁷⁶ But as the primary means of distributing pornography shifted over that century from fairs to markets to bookstores and then to mail order subscription, legal reform began to reflect the fear of a new anonymous literate public, one brought into being by the circulation of texts. The law moved from concern with obscene acts in public to the distribution of obscene representations, from political dissent and public exhibition to circulation, distribution, and trafficking. ‘The focus was increasingly on the volume and number of publications and the velocity and scale of penetration.’³⁷⁷ As Colette Colligan writes,

The fear that obscenity is crossing borders, circumventing media laws and aesthetics, infiltrating communities and homes, and becoming increasingly

³⁷⁵ Cited in Colette Colligan, *The Traffic in Obscenity from Byron to Beardsley: Sexuality and Exoticism in Nineteenth-Century Print Culture* (Palgrave Macmillan, Basingstoke, Hampshire, 2006) at 13.

³⁷⁶ The *Vagrancy Act* of 1824 (5 Geo.4, c.83) attempted to stop the viewing of obscene materials in the streets, making it a summary offence willfully to expose ‘to view, in any street, road, highway or public place, any obscene print, picture or other indecent exhibition.’ The 1838 amendment to the *Vagrancy Act* widened the purview of the law to displays in shop windows (1 & 2 Vict. c. 38), and the *Metropolitan Police Act* of 1847 extended the rights of metropolitan police to regulate the public sale and distribution of obscenity, concentrating again on the street distribution as it targeted ‘every person who publicly offers for sale or distribution, or exhibits to public view, any profane, indecent, or obscene book, paper, print, drawing, painting, or representation, or sings any profane or obscene song or ballad’. 10 & 11 Vict., c.89. As Colette Colligan emphasizes, early nineteenth-century legislation against obscenity thus attempted to break up the congestion of obscenity and reintroduce the right kinds of flows of people and commodities through the city. *Ibid.*

³⁷⁷ *Ibid.* at 11.

uncontainable is the legacy of the nineteenth-century global information economy and the emergent print traffic in obscenity.³⁷⁸

By mid-nineteenth-century, the postal system, the advent of literacy, an explosion in printing, and the invention of photography had led to a dramatic increase in what could be seen, read, and circulated: from mail order catalogues to private letters, to pornographic photographs and reproductions of artworks.³⁷⁹ A robust mail order system, greater population concentration and increased literacy made books more broadly accessible,³⁸⁰ creating an ‘anonymous, amorphous public, in which distinctions of sex and class could no longer be relied upon to determine who could read what.’³⁸¹ Modern obscenity law emerged precisely at this historical juncture ‘as an ideological reaction to industrial production processes that enabled wide and inexpensive circulation of texts and images for the first time.’³⁸² The earliest national legislative attempts to control the circulation of obscene images or texts, the United Kingdom’s *Obscene Publications Act 1857*³⁸³ (also known as Lord Campbell’s Act) and the United States’ *Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use 1873*³⁸⁴ (known as the Comstock Act) were each crafted by the political elite in response to the fear of the uncontrollable impulses of the newly literate working class, an increasingly broad audience among which texts could circulate.

³⁷⁸ *Ibid.* citing John Ashcroft, Remarks, Federal Prosecutors’ Symposium on Obscenity, National Advocacy Center, Columbia, SC (6 June 2002); *Report from the Joint Select Committee on Lotteries and Indecent Advertisements* (London: Vacher & Sons, 1908)

³⁷⁹ On these developments, see Cathy Davidson, *Revolution and the Word: The Rise of the Novel in America* (New York: Oxford University Press, 1986); Daniel Czitrom, *Media and the American Mind from Morse to McLuhan* (Chapel Hill: University of North Carolina Press, 1982); and Michael Denning, *Mechanic Accents: Dime Novels and Working-Class Culture in America* (New York: Verso, 1987).

³⁸⁰ Kendrick, *supra* note 369 at 84.

³⁸¹ *Ibid.* at 177.

³⁸² Sonya Sceats, “The Legal Concept of Obscenity: A Genealogy” (2002) 16 Australian Feminist Law Journal 133 at 133.

³⁸³ *Obscene Publications Act 1857*, 20 & 21 Vict., c.83.

³⁸⁴ *Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use 1873*, 17 Stat. 598 which amended the *Post Office Act* (1872) 17 Stat. 283.

In the United Kingdom, the *Obscene Publications Act 1857* gave statutory authority to existing common law against libel and authorized the police to search suspect premises and to seize material they believed to be obscene and to get permission for the destruction of these materials from magistrates. Lord Campbell introduced and justified the Bill in Parliament as a necessary response to the increased circulation of pornographic materials at affordable prices: 'It was not alone indecent books of a high price, which was a sort of check, that were sold, but periodical papers of the most licentious and disgusting description were coming out week by week, and sold to any person who asked for them, and in any numbers.'³⁸⁵ He reassured the Parliament that the Bill was directed neither towards a gentleman's private erotica collection nor 'the masterpieces of Correggio,'³⁸⁶ stating that 'the keeping, or the reading, or the delighting in such things, must be left to taste, and was not a subject for legal interference.'³⁸⁷ Rather the Bill was directed to 'people who designedly and industriously manufactured books and prints with the intention of corrupting the public morals.'³⁸⁸ As Lisa Z. Sigel has shown, despite increased literacy and greater circulation in Britain, distribution patterns for pornographic texts continued to favour the upper classes throughout the nineteenth-century.³⁸⁹

³⁸⁵ *Hansard's Parliamentary Papers* 144-8 (1857), 145.103 cited in Colligan, *supra* note 375 at 11.

³⁸⁶ *Hansard Parliamentary Debates* 3rd Series Vol 146 25 June 1857 col 329: '[t]he pictures in such collections were not intended for sale and were kept for the owner's contemplation. ... It was not against the masterpieces of Correggio that the Bill was leveled but against the mass of impure publications, which was poured forth on London, to the great injury of the youth of the country... The keeping, or the reading, or the delighting in such things, must be left to taste, and was not a subject for legal interference; but when there were people who designedly and industriously manufactured books and prints with the intention of corrupting the public morals, and when they succeeded in their infamous purpose, he thought it was necessary for the Legislature to interpose and to save the public from the contamination to which they would otherwise be exposed.' *Hansard's Parliamentary Debates: Third Series, Commencing with the Accession of William IV Vol. CXLVI, Second Volume of Session 1857 (b)* (London: Published by Cornelius Buck, 1857) July 3, 1857; 865.

³⁸⁷ *Ibid.* ...

³⁸⁸ *Hansard Parliamentary Debates*, 3rd series, vol 146 (25 June 1857), col 329 quoted in Lynda Nead, *The Female Nude: Art, Obscenity and Sexuality* (London: Routledge, 1992) [*The Female Nude*] at 89.

³⁸⁹ 'For most of the nineteenth century, access to pornography remained restricted to wealthy, white men... High prices, low literacy rates, class-specific production and distribution patterns, and unequal patterns of state repression, kept pornography out of the hands of the working classes for most of the nineteenth

The legal definition of obscenity which appeared a decade later in *R v. Hicklin* (1868)³⁹⁰ confirmed that the focus of obscenity law was to protect a vulnerable new public, as well as the ineffable power of a male, heterosexual, procreative sexuality. Justice Alexander Cockburn defined obscene works as those having the tendency 'to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall.'³⁹¹ Obscenity was only a problem insofar as it might fall into the hands of women, children and working-class men who were seen as irrational by nature and unable to resist the corrosive influence of sexual materials. Florence Dore calls attention to the gendered trope of feminine readers as sexually corrupted by reading, where that obscenity is figured as an outside 'influence,' an intrusion of 'immorality' into an 'open mind,' thus conjuring 'an idea of vulnerable bodily openness.'³⁹² Jurisprudence after *Hicklin* quickly established that otherwise obscene material could be distributed among professionals and respectable individuals who endeavored to shield it from more vulnerable elements of society.³⁹³ Obscenity turned on questions of access: a work has the potential to corrupt to the extent that it was available to a large number of potentially corruptible people.³⁹⁴ As Nead explains:

...obscenity legislation in the modern period is not simply a question of the regulation of moral behaviour, but has far more to do with the regulation of cultural consumption. The outlawing of obscenity in this period is an attempt to shore up official culture and to redraw the boundaries between the permissible and the forbidden. The new, cheap forms of mass street culture are legally

century. Even the emergence of a working-class pornography in the late 1880s did not democratize literary pornography. Instead, the working classes consumed a pornography that remained largely pictorial... postcards, stereoscopes and mutoscopes.' Lisa Z. Sigel, "Name Your Pleasure: The Transformation of Sexual Language in Nineteenth-Century British Pornography" (2000) 9:4 *Journal of the History of Sexuality* 395 at 413-415.

³⁹⁰ *Regina v. Hicklin*, (1868) 3 L.R.Q. B. 360 [*Hicklin*].

³⁹¹ *Ibid.* at 371

³⁹² Florence Dore, *The Novel and the Obscene: Sexual Subjects in American Modernism* (Stanford, Ca.: Stanford University Press, 2005) at 25.

³⁹³ *R v Clayton & Halsey* [1963] 1 QB 163 at 168; *R v. Barker* [1962] 1 All ER 748. Australian customs policies during the 1940s permitted importation of expensive hardback versions of James Joyce's *Ulysses* and Boccaccio's *Decameron* while banning cheap editions. Geoffrey Dutton, 'Lady Chatterley Revisited' (1996) 31:8 *Australian Lawyer* 18.

³⁹⁴ See Ladenson, *supra* note 104 at 80.

isolated through the new specialist category of obscenity. But whereas the law judges between art and obscenity in relation to mass culture, the judgment of obscenity in high culture is a matter of taste.³⁹⁵

The *Hicklin* test dominated Anglo-American common law for the next century. Its emphasis on the *effects* of representation has not changed to date, although the ideological and political landscape has shifted the law's interest in *who* is affected by obscene representations. In the twentieth-century, the judicial definition of obscenity was, ostensibly at least, democratized, or conceived in more inclusive terms, even as it maintained a gendered, classed and racialized supporting structure.³⁹⁶ Judge John Woolsey, in his famous ruling freeing *Ulysses* in 1933, did not change the *Hicklin* test's essential emphasis on effects, defining obscenity as 'tending to stir the sex impulses or to lead to sexually impure and lustful thoughts,'³⁹⁷ but he did stipulate that this was to be judged not by reference to a vulnerable class, but according to a 'person of average sex instincts.'³⁹⁸ By the time of the trial of *Lady Chatterley's Lover* in 1960, the United States Supreme Court had begun reworking the *Hicklin* test into a community standards test, beginning in *Roth v United States* (1957), where the court asked 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest.'³⁹⁹ Then in *Miller v California* (1973) the court set out the test of obscenity that still applies: '(a) whether 'the average person, applying contemporary community standards' would find that the

³⁹⁵ Lynda Nead, "Bodies of Judgment: Art, Obscenity, and the Connoisseur" in Douzinas & Nead, eds., *Law and Image*, *supra* note 34 at 212. ["Bodies of Judgment"]

³⁹⁶ A strain of later decisions in the turn-of-the-century cases shows that gendering is a crucial aspect of *Hicklin*'s construal of corruption. In 1887, a New Jersey court upheld an indictment against a doctor for violating a statute preventing the communication of 'insulting, indecent, lascivious, disgusting, offensive, annoying or obscene' speech to 'any female.' *Larison v. The State* 710. For other statutes prohibiting obscene speech in the presence of women, see also *Henderson v The State*, *Yancy v The State*, and *Bragg v The State*. In the 1910 case *Redd. v The State*, the court argued that any 'act may be done under some circumstances without the imputation of indecency, when a similar act done in the presence of women or children would be highly obscene.' *Redd* at 711. That which makes an act indecent or obscene is whether or not it occurs in 'public,' and in *Redd* public means 'mixed company,' in front of women and children.

³⁹⁷ *United States v. One Book Called "Ulysses"*, (1933) 5 F. Supp. 182 (Dist. Court, S.D.N.Y.) [*Ulysses One*.]

³⁹⁸ *Ibid.* at 184.

³⁹⁹ Justice William Brennan, *Roth v. United States*, (1957) 354 U.S. 476

work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴⁰⁰ Similarly, in Australia, the *Hicklin* test was adopted and adapted by the High Court in *Crowe v Graham* (1968) as the community standards test.⁴⁰¹ Offensiveness rather than obscenity now became the key term, to be understood contextually, having regard to audience – ‘the persons, classes of persons, and age groups to whom or amongst whom the matter was published’⁴⁰² – and judged according to how the material ‘would affect the average man, considering his proper modesty in sexual matters.’⁴⁰³ Anglo-American obscenity law thus reflects a shift away from the direct harm that indecency might present to those most vulnerable (women, children, and the working class), to a measure related to the impact of the work on the modesty of the average person. The official protection argument has become more abstract, generalized and intense, as now all of society shares in the vulnerability to indecency.

Obscenity’s Primal Scene: *R v. Hicklin*

In *Hicklin* we find the earliest articulation of the dilemma that would continue to confront courts judging obscenity: the problem of citation. The defendant Henry Scott had been distributing a pamphlet called *The Confessional Unmasked; shewing the depravity of the Roman priesthood, the iniquity of the Confessional, and the questions put to females in confession*, produced in the tradition of protestant critique of the

⁴⁰⁰ *Miller v California*, (1973) 413 U.S. 15 at 24.

⁴⁰¹ Windeyer J observed that the *Hicklin* test ‘has only survived really because, although constantly mentioned, it and its implications have been ignored. Courts have not in fact asked first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is properly called obscene. If so its evil tendency and intent is taken to be apparent.’ *Crowe v. Graham*, *supra* note 102 at 392.

⁴⁰² *Ibid.* at 396.

⁴⁰³ *Ibid.* at 380.

confessional's tendency to fill the minds of its listeners with filth.⁴⁰⁴ This pamphlet consisted of extracts taken from the writings of various Catholic theologians on the practice of confession, containing descriptions of sexual concerns women confessed to priests. They were reproduced in Latin on one side of the page, and translated into English on the opposite page. A copy of the pamphlet was attached to Scott's indictment.⁴⁰⁵ Scott was convicted under the *Obscene Publications Act* 1857, but the recorder at Quarter Sessions reversed the decision on appeal on the basis that Scott's intention had been innocent: he had purchased and distributed the pamphlet in order to expose 'what he deems to be errors of the Church of Rome, and particularly the immorality of the Confessional'⁴⁰⁶ rather than to corrupt the public mind. In rejecting this argument at the Court of Queen's Bench, Lord Chief Justice Cockburn affirmed that intention was immaterial to a finding of obscenity.⁴⁰⁷ The legal issue is the likely effect of the text: its tendency to deprave and corrupt.

⁴⁰⁴ *Hicklin*, *supra* note 390 at 362. The defendant had distributed the pamphlet as part of the Protestant Electoral Union's campaign to keep Catholics out of Parliament.

⁴⁰⁵ *Ibid.* Stephen Gillers cites the following section of writing of theologian Alphonso De Liguori as being 'set out in the margin of the *Hicklin* judgment', but I have been unable to verify this. He reports that the pamphlet specifies that Liguori "was canonized at Rome on the 26th of May, 1839."

It is asked, 1st, does a man sin mortally by commencing the act of copulation in the hinder vessel, that he may afterwards finish it in the proper vessel? This is denied by Navarr. &c., provided there be no danger of pollution; because, otherwise, as they say, all touches, even venereal, are not grievously illicit among married persons. But it is commonly and more truly affirmed by Sanchez, &c. The reason is, because the very act of copulation after this manner (even without spending) is real sodomy, although not consummated, just as copulation itself in the natural vessel of a strange woman is real fornication, though there may be no spending. But is it a mortal sin for a man to rub his ___ against the hinder vessel of the wife? This is denied by Sanchez, &c., because to touch the mouth of the hinder vessel is not ordained for sodomical copulation. But it is more truly affirmed by Pontius, &c., and also by Tambur. (who testifies that the opinion of Sanchez has been expunged from some books. Nay, Moyas asserts that Sanchez himself had retracted, in the Antwerp edition, anno 1614.) The reason is, that such touch cannot morally take place without affecting sodomy.'

Alphonso De Liguori, *The Confessional Unmasked* (1867) at 58 cited in Stephen Gillers, "A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from *Hicklin* to *Ulysses II*" (2007) 85:2 Washington University Law Review 215 at 230.

⁴⁰⁶ *Hicklin*, *supra* note 390 at 363.

⁴⁰⁷ 'I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior motive in view (which is the immediate and primary object of the parties) of a different and of an honest character.' *Ibid.* at 370. The role of intention was directly in issue in the Australian High Court decision which incorporated *Hicklin*, *Crowe v. Graham*, *supra* note 102, decided just before the censors targeted *Norm and Ahmed*. The

The defendant Scott was trying to show that the practice of confession does harm – that in pressing confessants for details, priests further inflame their passions and give them wicked ideas, ‘suggesting thoughts and desires which otherwise would not have occurred to their minds.’⁴⁰⁸ Scott was thus citing non-obscene literature in order to show that it was obscene. But in order to successfully defend his pamphlet against the obscenity charge, he was obliged to argue that his citation has fundamentally changed the text, that his framing has rendered it *not* obscene. The court did not accept this argument. Justice Cockburn pronounced some of the passages in the pamphlet ‘the most filthy and disgusting and unnatural description[s] it is possible to imagine.’⁴⁰⁹ The pamphlet circulated on street corners, where, he observed, ‘of course it falls into the hands of persons of all classes, young and old, and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains.’⁴¹⁰ He wrote,

The very reason why this work is put forward to expose the practices of the Roman Catholic confessional is the tendency of questions, involving practices and propensities of a certain description, to do mischief to the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds. If that be the case as between the priest and the person confessing, it manifestly must equally be so

case concerned indecent material in the form of two magazines, called *Censor* and *Obscenity* (at 397) – titles indicating that the creator of the magazine, a member of the Council for Civil Liberties, was deliberately provoking a legal response. Despite ‘crediting the authors with a genuine desire to lampoon the procedures and results of censorship and not treating the issue as a whole as a mere cloak for the purveying of indecent matter,’ at 380, Barwick CJ chose not to overturn the finding of indecency, observing ‘sexual matters were referred to in the issues of the magazines in a way which might pass muster in a tap room or smoke concert but which, displayed in print to the reader of the magazine, could, in my opinion, be held to offend the modesty of the ordinary man.’ at 379. Justice Windeyer noted that the publication which contained excerpts from *Fanny Hill* (still outlawed in Australia at this time), a column described as ‘Playboy’s Party Jokes’ and illustrations of naked women, was ‘assembled professedly in the name of law reform, as protests against literary censorship, and in support of freedom of expression and of individual liberty,’ but suggested that its ‘avowal of a lofty moral purpose could well, when the whole is read, be seen as only a specious justification for seeking profit from pruriency.’ at 397. For Barwick CJ, the creator’s intention was morally, if not legally, exculpatory, whereas for Windeyer J, it was probably subterfuge – but as both judges acknowledged, their musings about intention were irrelevant to the finding of indecency: at 380 (Barwick CJ) and 397 (Windeyer J).

⁴⁰⁸ *Hicklin*, *supra* note 390 at 371.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.* at 372.

when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them of the most filthy and disgusting and unnatural description it is possible to imagine. I take it therefore, that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication...'⁴¹¹

In order for the pamphleteer to demonstrate the obscenity of the practice of confession, he had to reproduce this obscenity, as captured in the writing of the theologians. He framed the extracts by explicitly declaring that his intention was to critique rather than produce the obscenity.⁴¹² But this argument didn't work, because of the view of obscenity that the judgment has already endorsed: obscenity as transcendent and objective. Justice Cockburn applied Scott's arguments about the corrupting nature of the confessional to the corrupting nature of his pamphlet, which could not avoid provoking the same effect in its readers. Like the 'girl' in the confessional, subject to the questions of the 'depraved' priest, the reader's 'mind' is 'open to immoral influences.' The compiler of the pamphlet cannot redeem obscenity by framing it as critique, just as the confession to the priest cannot redeem obscenity by framing it as penitence.

To this mirrored citation at obscenity law's primal scene - between the priest and the confessor, and the pamphlet and its reader - we can add a third, between the court record and its future readers. The predicament of the pamphleteer parallels the predicament facing the law court in obscenity prosecutions. In order to denounce material as obscene, it has to describe, or at least designate, if not reproduce, that material in the court records - at least in the indictment, if not the judgment. Ironically, Justice Cockburn is oblivious to the prospect that his own judgment might be read as obscene, because just as the priest thinks the confessional is outside of obscenity, and the pamphleteer thinks that his compilation under the guise of opprobrium escapes

⁴¹¹ *Ibid.* at 371, emphasis mine.

⁴¹² The court reports the words of the pamphleteer: 'In the latter part of the pamphlet I have given a few extracts without abridgment, to shew into what minute and disgusting details these *holy men* have entered. This alone has been my object, and not the filling of the work with obscenity.' *The Confessional Unmasked*. Cited in *Ibid.* at 362.

obscurity's corrosive effects, the law thinks it is outside of discourse and does not partake of its signifying dynamics.

Another iteration of the problem of citation quickly followed *Hicklin*. The Protestant Electoral Union were unwilling to let go of such an effective piece of anti-Catholic criticism, and promptly issued a new edition of *The Confessional Unmasked*, 'with certain alterations, certain omissions, and certain additions'⁴¹³ calculated to ensure that it would not fall foul of *Hicklin*. George Mackey was tried in 1870 for selling this new edition, but the jury was unable to reach a verdict. There followed another publication, the *Report of the Trial of George Mackey*, a substantially correct report of Mackey's trial, but with one exception – although *The Confessional Unmasked* 'was not read aloud in open court,' it was reproduced in its entirety in the middle of the trial transcript. This was sold for 1 shilling, sometimes in a cover naming it as a trial transcript, and sometimes in a cover simply stating *The Confessional Unmasked*. When the *Report* was seized by police and ordered destroyed by a magistrate, the appellant bookseller appealed on the basis that the *Report*, being a fair report of proceedings in a court of competent jurisdiction, was privileged, and therefore could not be seized or destroyed.

At the Court of Common Pleas, in the decision of *Steele v Brannan*, Chief Justice Bovill said 'in general the publication of fair reports of proceedings in courts of justice, like free discussion of matters of public importance, being considered for the public benefit, is privileged; but it is equally clear that discussions offensive to public decency and of a depraving tendency are not privileged.'⁴¹⁴ He decided that even the newly expurgated edition of *The Confessional Unmasked*, which after all 'only professes to omit some of the most filthy and abominable passages in the first edition,'⁴¹⁵ still fell under the decision in *Hicklin*. The new edition attempted to cover itself with the cloak of privilege – of legitimacy – and directly posed the question of obscene content smuggling itself

⁴¹³ *Steele v Brannan* (1871-2) L.R. 7 C.P. 261 at 263 [*Steele*].

⁴¹⁴ *Ibid.* at 268 per Bovill C.J.

⁴¹⁵ *Ibid.* at 267 per Bovill C.J.

through to the public via the legitimate forms of the law. He noted the dissembling function of the book cover:

The book now before us publishes in offensive detail passages which were not read aloud at the trial. The outer cover of some of the copies does not even allude to the trial, while it does call attention to the offensive matters contained within. It appears to me pretty clear that the book, as a whole, was not intended to be merely a fair report of a trial, but a means of reproducing the offensive publication under the guise of a report of the prosecution of Mackey for such publication.⁴¹⁶

Ironiically, the way the court decided that something was obscene and not privileged, as opposed to legitimate and privileged, was by reference to intention: the very element that the *Hicklin* court had rejected as a relevant factor in deciding obscenity.

The appellant's lawyer in *Steele* raised again the central problematic of *Hicklin*: 'What effective remedy is there in the hands of persons wishing to suppress a system which they conceive to be pernicious, except to expose the tendency of such a system by reference to the writings in which it is expounded?'⁴¹⁷ Justice Keating rejected the idea that it is impossible to discuss the pernicious effects of writing without recourse to extracts of that writing: 'It would be strange indeed that in order to prevent the pollution of the public morals that law should allow pollution to be circulated... the law would be self-contradictory if it made the publication of an indecent work an indictable offence and yet sanctioned the republication of such a work under cover of its being part of the proceedings in a court of justice.'⁴¹⁸ The law cannot be brought into self-contradiction or made an agent of the public dissemination of obscenity:

the result would be that the person publishing an obscene work would only have to be brought before a court of justice for such publication, in order to entitle him to republish the same matter with perfect impunity. His trial would frustrate the very purpose which it had in view, viz. the putting a stop to the publication of

⁴¹⁶ *Ibid.* at 269 per Bovill C.J.

⁴¹⁷ *Ibid.* at 265, per Kydd, for the appellant.

⁴¹⁸ *Ibid.* at 270 per Keating J.

such matter. This consideration appears to me to reduce the appellant's contention to an absurdity.⁴¹⁹

Justice Keating's anxiety over the court's own function as an agent of repetition - his fear that, like the book cover, the court records may be used as a dissembling, legitimating cloak for promulgating obscenity to a reading public - is combated by appealing to the court as a private enterprise. He opines that the appellant's Protestant complaints about having no remedy to impugn such 'obscene' Catholic works are invalid because while they may not have a political remedy of republishing publicly, they have a 'simple' private legal remedy of *preventing publication*. This remedy keeps matters contained and enclosed in the safe confines of a hierarchical legal regime: 'the question whether the publication of such works is admissible may be made the subject of a prosecution... upon [which] the matter would be discussed only before the Court and the jury.'⁴²⁰

Neither *Hicklin* nor *Steele* were dealing with obscene texts 'directly', but rather with obscene texts which had already been resignified - reproduced or extracted - within a framework of opprobrium (the anti-confessional pamphlet in *Hicklin*, the trial transcript in *Steele*). In these legal judgments, the law writes condemning writing condemning writing. Its own textual status means that it cannot escape or remain outside of these layered scenes of reading. After all, the formulation of the 'tendency to deprave and corrupt' test invests the obscenity at the centre of these layered with a power - a 'tendency' - which transcends context and survives disavowal or framing as critique. And having just asserted the transcendent power of the obscenity, there is no basis for excluding the court or legal record from its corrosive operations. The very notion of a transcendent obscenity described by the courts equally applies to the written records of the court. These early English cases thus reflect, in perfectly doubled form, the central irony of censorship: its doomed repetition, its making present what it seeks to make absent.

⁴¹⁹ *Ibid.* at 271 per Keating J.

⁴²⁰ *Ibid.* at 271-272 per Keating J.

The problem of citation is bound up in the court's uneasiness with the ideology of law as a public, democratic and accountable institution. The law's justifications for regulating obscenity – protecting a vulnerable new public brought into being by the increasing circulation of representations – are a smokescreen for the political elite's fear of a new literate working class. As soon as the judges assert that obscenity does not depend on intention but likely effect, moving the focus of obscenity law away from production towards reception, from qualities of the text to qualities of the likely readers, they confront their judgment's own status as a written text subject to the possible attentions of precisely that receptive readership. The court records are accessible by the very public which obscenity law seeks to protect. The United Kingdom courts here seem quietly confident that the law is outside of the discourse it seeks to regulate, that the law does not substantially replicate obscenity's risk, because while court proceedings are ostensibly public, they are essentially a hierarchical and closed operation. This tension between the ideology of a court as a public institution, and the hierarchical anti-populist rationale for obscenity law, was far more pronounced in American courts, who would become increasingly worried about the problem of citation over the course of the century.

The United States: Public Display and Private Subversion

The earliest obscenity case in the United States, *Commonwealth v Sharpless* (1815)⁴²¹ dealt directly with the dilemma of the court's admittance of obscene material. The indictment alleged that Jesse Sharpless and his co-defendants

unlawfully, wickedly and scandalously *did exhibit, and show for money, ... a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman, to the manifest corruption and subversion of youth, and other citizens of this*

⁴²¹ *Sharpless*, *supra* note 367.

commonwealth, to the evil example of all others in like cases offending, and against the peace and dignity of the commonwealth of *Pennsylvania*.⁴²²

As this was the first American case, and predated *Hicklin* by half a century, Justice Tilghman was forced to draw an uneasy precedent from the earliest common law obscenity trial on record, the English case of *The King v Sir Charles Sedley* (1663).⁴²³ In that case, Sir Charles Sedley and Lord Buckhurst, insiders at the court of King Charles II and friends of the infamous Lord Rochester, had appeared naked and 'inflam'd with strong liquors' on the balcony of a Covent Garden tavern in London. They lowered their breeches and 'excrementiz'd' on the crowd below, followed by a shower of urine-filled bottles and blasphemous speech. They were convicted under a novel use of England's obscene-libel laws, which were based on the right to punish or prohibit any act contrary to the public interest, and fined and imprisoned for one week. Drawing an analogy between Sedley's crime, the '*exposure of his person*,'⁴²⁴ and exhibiting a picture of a naked body, Justice Tighlman convicted Sharpless and his co-defendants of obscene libel.

In their defence, Sharpless and co. argued that the indictment failed to describe the painting with sufficient detail to enable the court to determine whether or not its content was obscene:

the posture ought to have been so described as to enable the Court to judge, whether or not it was obscene. Opinions on matters of this sort differ. What to one may appear indecent, may to another appear perfectly chaste and proper. In every public exhibition there are pictures which are viewed with pleasure and approbation, by many respectable and pure-minded persons... while others, more fastidious, consider them improper to be exhibited to the public eye.⁴²⁵

The defence argument appeals to the idea of a public space in which differing opinions are held. To judge the painting properly, the court ought to exhibit it before the scrutiny

⁴²² *Ibid.* at 92, italics in original.

⁴²³ The case is cited in *Sharpless* as *Charles Sedley's case*, 1 Sid. 168, Latch 173.

⁴²⁴ *Sharpless*, *supra* note 367 at 101.

⁴²⁵ *Ibid.* at 97.

of what the defense refers to as the ‘public eye.’ But when confronted with the uncanny possibility that a future courtroom may resemble those ‘chambers within which the youth of the city might be corrupted,’ both the judges move to protect what Tilghman refers to as the ‘chastity of our records.’⁴²⁶ Justice Tilghman wrote:

Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records. These are circumstances which may be well omitted. Whether the picture was really indecent, the jury might judge from the evidence, or, if necessary, from inspection. The witnesses could identify it. I am of opinion that the description is sufficient.⁴²⁷

Justice Yeates also uses rhetorical questions to distance himself from the subject matter:

As to the nature and manner in which the painting is represented to have been made, I hold it to be sufficient to state, that it represented a man in an obscene, impudent and indecent posture with a woman, either clothed or unclothed, without wounding our eyes or ears, with a particular description of their attitude or posture. Why should it be so described? If the jurors are satisfied on the proof, that the persons represented were painted in an impudent and indecent posture, will not this give the Court all the information they can require?⁴²⁸

Neither judge wanted a minute description of the attitude and posture of the figures. Indeed, the court never actually saw the painting in question. The words ‘obscene, impudent and indecent’ function to designate what cannot be presented. The question of obscenity is a matter of fact, excluded from the court’s purview. The indictment fails to recognize that the obscene thing to which it refers is also a site of contestation. In turn, it is enough for the court to merely announce the obscenity. *Sharpless*, as its case headnote suggests, stands for the principle that: ‘In an indictment for exhibiting an obscene picture, it need not be averred, that the exhibition was *public*; if it be stated that the picture was shewn to sundry persons for money, it is a sufficient averment of its

⁴²⁶ *Ibid.* at 103.

⁴²⁷ *Ibid.* at 102. This passage is cited in *Rosen*, *supra* note 367 at 36.

⁴²⁸ *Ibid.* at 105.

publication.’⁴²⁹ The court substitutes ‘the eye of the law,’ or ‘our eyes and ears,’⁴³⁰ for the defence’s ‘public eye.’ As Bruce Burgett has noted,

The fact that Sharpless’s painting never appears in court reveals the institutional power behind this act of interpellation. Because the painting is neither displayed nor fully described, the court’s role in positing a common sensibility that it then defends remains unchallenged. Unlike the ‘public eye’ whose unity emerges only in and through debate, the eye of the law asserts its coherence by eliminating the occasion of that debate.⁴³¹

The concern with the ‘chastity of the records’ came up again six years later in Massachusetts in relation to books, at the 1821 trial of Peter Holmes for publishing the first American edition of John Cleland’s *Memoirs of a Woman of Pleasure*. Holmes is the first example of a United States court finding a non-pictorial work obscene.⁴³² The book contained a ‘lewd and obscene print,’ but both text and print were under indictment, and neither was fit to be shown to the court. The lawyer for Holmes claimed that the jury was called upon to deliver a verdict without having inspected the evidence, to which Chief Judge Parker replied:

It can never be required that an obscene book and picture should be displayed upon the records of the court: which must be done, if the description in these charges is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it.⁴³³

This formulation reflects the idea of the court record as permanent or ossified and as having a publicizing effect. When the same book was prosecuted again in 1842 along with several other books, including *Memoirs of the Life and Adventures of the Celebrated Courtesan Mademoiselle Celestine of Paris*, the indictment set forth paragraph-long excerpts, although it concluded by noting that the ‘most gross and filthy scenes of

⁴²⁹ *Ibid.* at 91.

⁴³⁰ *Ibid.* at 103.

⁴³¹ Bruce Burgett, *Sentimental Bodies: Sex, Gender and Citizenship in the Early Republic* (Princeton: Princeton University Press, 1998) at 145

⁴³² See further Robert Jacobs, “Dirty Words, Dirty Thoughts and Censorship: Obscenity Law and Non-Pictorial Works” (1992) 21 Southwestern University Law Review 155.

⁴³³ *Commonwealth v Holmes*, (1821) 17 Mass 336 at 337.

lewdness and obscenity' were 'not fit or proper to be used, named or mentioned in any language, or in any court of Justice.'⁴³⁴

Obscenity is the crime of making representations public.⁴³⁵ As part of its construction of obscenity offences, legal discourse sets up a distinction between public and private, constituting the former as the space of legal intervention and, implicitly or explicitly, rendering certain representations, or their use, private.⁴³⁶ As Hannah Arendt noted,

The distinction between private and public realms, seen from the viewpoint of privacy rather than the body politic, equals the distinction between things that should be shown and things that should be hidden.⁴³⁷

The boundary between what constitutes public and private is culturally and historically relative, varies between and within discourses, and is sustained by a number of largely unarticulated contradictions.⁴³⁸ The moral kind of privacy associated with a consumer's individual choice in what to read is distinct from the spatial idea of consumption of material behind closed doors, although each claim draws an impetus from the other.⁴³⁹ And although obscenity law is ostensibly about making representations public, it is equally concerned about scenes of privacy. When the defendants in *Sharpless* claimed

⁴³⁴ *People v. Richard Hobbes*, Sept. 28, 1842; District Attorney's Indictment Papers New York Court of General Sessions (N.Y. Mun Archives) cited in Dennis, *supra* note 11 at 59.

⁴³⁵ As Annette Kuhn points out, while representations which do not appear in public places cannot legally be indecent, 'they can be obscene. But in itself, obscenity is not an offence, nor is the private possession and use of obscene representations. The offence lies in making public such representations.' Kuhn, *supra* note 371 at 61.

⁴³⁶ 'Law constantly constructs distinctions between public and private as bases for its peculiarly authoritative discourse of regulation.' *Ibid.* at 58

⁴³⁷ Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) at 72.

⁴³⁸ Kuhn emphasizes that the boundaries between public and private spheres are culturally and historically relative, and 'vary within discourses within a single social formation, and constitute a potential site of struggle over exactly content and boundary-setting, even with discourses.' Kuhn, *supra* note 371 at 55-6.

⁴³⁹ 'In practice the notion of geographical space which governs the characterizations of, say, people's homes as private and the street in front of them as public is frequently imbued with a connotation of property: notions of private space and public property underpin laws of trespass. At the time, the notion of privacy of the individual which grounds arguments against legal moralism is called into question when other individuals became involved: where does personal morality end and the corruption of others begin? The issue is further complicated by a tendency to conflate privacy of the self with private space, so that the free play of personal morality may in fact be spatially circumscribed.' *Ibid.* at 60-62.

that the indictment had not specified that the painting was exhibited in public though 'publicity is the essence of the crime,'⁴⁴⁰ Justice Tighlman countered with a fantasy scene of public subversion effected through private means:

... if the privacy of the room was a protection, all the youths of the city might be corrupted, by taking them, one by one, into a chamber, and there inflaming their passions by the exhibition of lascivious pictures. In the eye of the law, this would be a publication, and a most pernicious one.⁴⁴¹

The eye of the law in *Sharpless*, then, is concerned not simply with an obscene public exposure, but with nefarious corruption in otherwise private chambers, or with the secret subversion of youth. Justice Yeates's concurring opinion further reflects this concern with the dangers of privacy: 'No man is permitted to corrupt the morals of the people; secret poison cannot be thus disseminated.'⁴⁴²

Vice reform movements in the nineteenth-century increasingly reflected anxieties over a contaminated, deviant public culture leaking into the presumed sanctity of the private, middle-class home. Beginning in the 1860s, reformers attempted to protect the nation's private homes by policing the public sphere, instituting new surveillance of urban vice districts and restrictions on taverns and liquor licensing.⁴⁴³ Temperance advocates urged controls on establishments serving liquor in order to keep men from bringing vice home to wives and children, and other reformers, including many women, fought the 'contamination' of and by prostitutes with the knowledge that disease contracted in the public sphere could infect women whose husbands frequented prostitutes.⁴⁴⁴ The idea

⁴⁴⁰ *Sharpless*, *supra* note 367 at 93. Indictments for 'open and gross lewdness,' the defense reminded the court, cannot be supported by evidence of a 'private act of lewdness'. *Ibid.* at 93-94. Tilghman rejected this distinction between public and private: 'the law is not to be evaded by an artifice of that kind.' *Ibid.* at 101

⁴⁴¹ *Ibid.* at 101.

⁴⁴² *Ibid.* at 101, 104.

⁴⁴³ Additionally, a number of states passed new obscenity statutes. By 1885, twenty-four state legislatures had passed "little Comstock laws," modeled on the federal statute or on a more stringent New York obscenity law passed shortly after the federal one.

⁴⁴⁴ See Judith R. Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (New York: Cambridge University Press, 1980).

that young rural males could be corrupted by reading this newly available pornography in private became a recurring trope:

... Bob, fresh-faced, lusty-limbed... with a sort of half-innocent curiosity, buys the abomination, and retires to his room to read it. He reads – and reads – and re-reads, and in one short hour that fresh young soul, pure as the country flowers among which it grew, and honest and open as the country skies in Summer – in one brief hour it is poisoned, degraded, ruined. Youthful imagination is warm, youthful conscience weak, youthful foresight limited. Who, then, will venture to assert that the whole current of Bob's life will not be changed by that one perusal?⁴⁴⁵

The private sphere thus came to be figured not only as a protected space, but as a source of danger in itself. The key vice reformer of the nineteenth-century, Anthony Comstock, was particularly concerned by the new prospects for privacy and secrecy afforded by private correspondence and mail order pornography, and the emerging conditions of middle-class domesticity, with larger houses and task-specific rooms. In *Traps for the Young*, he related the story of one young man who had loaned an obscene book to a classmate: the youth's father protested that 'You need not tell me any such stuff about my boy; he wouldn't look at such a book.'⁴⁴⁶ After a brief period of questioning, the boy 'confessed to having [the book], and to *reading it in his room at night after going upstairs to bed.*'⁴⁴⁷ The italics, Comstock's own, suggest his fear for the moral consequences of bourgeois children's new access to private space and time, reflected also in his concerns over boarding school. Like many of his contemporaries, Comstock believed masturbation caused a wasting of the body and a corruption of the soul.⁴⁴⁸ He wrote: 'Lust defiles the body, debauches the imagination, corrupts the mind,

⁴⁴⁵ "A Flagrant Nuisance", *New York Times*, (10 November, 1855)

⁴⁴⁶ Comstock, *Traps for the Young*, *supra* note 93 at 138.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ See, e.g., *Ibid.* at 136. See generally Thomas W. Laqueur, *Solitary Sex: A Cultural History of Masturbation* (New York: Zone Books, 2003).

deadens the will, destroys the memory, sears the conscious, hardens the heart, and damns the soul.⁴⁴⁹

Comstock focused his reform efforts on the postal system, which threatened the distinction between public and private spheres by offering an unusual crossover: widely accessible, but anonymous and therefore secret, the mail system was a public conduit of private consumption. By mid nineteenth-century in the United States, state and federal subsidies of canals, railroads, and the postal service enabled book publishers to deliver their products to regional and even national markets rather than purely local ones.⁴⁵⁰ For the famous pornographic salesman George Akarman, the postal system not only afforded superior privacy and convenience, but effectively disenfranchised states of the power to regulate the increasingly interstate, mail-order-based business of obscene publications.⁴⁵¹ Although the *Tariff Act of 1842* empowered Federal Customs to confiscate obscene ‘prints,’⁴⁵² organizations like the New York Society for the

⁴⁴⁹ Comstock, *Frauds Exposed*, *supra* note 93 at 416.

⁴⁵⁰ Ronald Zboray, *A Fictive People: Antebellum Economic Development and the American Reading Public* (New York: Oxford University Press, 1993); Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, Mass.: Harvard University Press, 1995).

⁴⁵¹ By the late 1850s, Akarman had built up a diversified business in commercial vice by selling erotic newspapers, sexually explicit books, pulp sensation novels, contraceptives, aphrodisiacs, and devices for gambling. He was best known for selling a fairly explicit erotic newspaper called *Venus’ Miscellany* and paperback sensation literature sporting plots of gory crime and sexually suggestive scenarios (marketed as “spicy” or “racy” books); as “Dr. Ashwell,” he sold aphrodisiacs and abortion-aids. Akarman advertised this broad array of sexual products in *Venus’ Miscellany*, which he sold by mail-order subscription for two dollars a year or through news agents at higher prices for individual issues. To avoid prosecution by state authorities outside New York, he pleaded with his customers to purchase their goods only through the mails rather than from local newsstands, bookshops, or street peddlers. Akarman promised that he would print much more explicit sex if *Venus’ Miscellany* became a subscription-only paper because it would fall beyond the reach of the morals police in various states and localities. As he put it, exclusive use of the mails would allow the paper to print ‘every delicacy we [are] pleased to serve’ and stories of the most ‘voluptuous grandeur . . . that could ever possibly be conceived,’ which ‘we could not publish while our paper circulated where it now does.’ *Venus’ Miscellany*, 9 May 1857 and 30 May 1857, cited in Dennis, *supra* note 11 at 392.

⁴⁵² *Tariff Act 1842*, 5 Stat. 566 (repealed 1846) ch. 270, § 28. Charles Rembar suggests that Congress, ‘in its customary xenophobic mood,’ passed the Act ‘to guard against infection from abroad.’ Charles Rembar, “The Outrageously Immoral Fact” in ed. Harry M. Clor, *Censorship and Freedom of Expression: Essays on Obscenity and the Law* (Chicago: Rand McNally & Co., 1971) 27 at 51.

Suppression of Vice (NYSSV), founded by Comstock five years after *R v Hicklin*,⁴⁵³ urged more comprehensive regulation. In an echo of the reference in *Sharpless* to ‘secret poison,’ and to the fantasy scene of public subversion through private means, Comstock wrote,

The mail of the United States is the great thoroughfare of communication leading up into all our homes, schools and colleges. It is the most powerful agent, to assist this nefarious business, because it goes everywhere and is secret.⁴⁵⁴

Comstock reported to the NYSSV that ‘the mails of the United States have been the channel above all others through which hundreds of thousands of insidious and corrupt publications have gone out to schools, seminaries, male and female colleges and the homes of our land.’⁴⁵⁵ He justified his regulation of the mail as opposed to the express carrier on the basis of the anonymity its services provided: ‘The man who goes to the express office or to the common carrier with a package to be delivered by them reveals his personal identity, while he may deposit the same matter without any person seeing or knowing about it in the mails of the United States, through some letter-box or post office.’⁴⁵⁶ Comstock campaigned vigorously for legislative reform, describing his opponents as ‘lechers and defilers of youth and American womanhood.’⁴⁵⁷ In addition to criminalizing the publication of obscene materials sent through the mails, the *Comstock Act* (1873) targeted contraceptive equipment and educational literature.⁴⁵⁸

⁴⁵³ William E. Nelson, “Criminality and Sexual Morality in New York, 1920-1980” (1993) 5 *Yale Journal of Law & the Humanities* 265 at 269.

⁴⁵⁴ Comstock, *Frauds Exposed*, *supra* note 93 at 391 (emphasis in original) (1880). Cited in Dennis, *supra* note 11. See the frontispiece of Comstock’s book, which shows the back of the NY post office, where obscene materials are deposited and withdrawn.

⁴⁵⁵ NYSSV, “The Second Annual Report of the New York Society for the Suppression of Vice,” 1876 at 7.

⁴⁵⁶ Comstock, *Traps for the Young*, *supra* note 446 at 224. ‘Comstock’s separate but related crusade against lotteries further reflected his suspicion of private machinations. He pointed out that lottery drawings were often made in secret, and were thus not subject to the potentially purifying influence of the public gaze.’ See Alyssa Picard, “‘To Popularize the Nude in Art’: Comstockery Reconsidered,” (2002) *Journal of the Gilded Age and Progressive Era* 195 at 203.

⁴⁵⁷ Leo M. Alpert, *Judicial Censorship of Obscene Literature* (1938) 52 *Harvard Law Review* 40 at 65.

⁴⁵⁸ On the use of obscenity law to curb the availability of contraception, sex information and abortion in the nineteenth-century United States, see April Haynes, “The Trials of Frederick Hollick: Obscenity, Sex

The *Comstock Act* ‘shifted censorship from the urban public sphere to the liminal space between the public sphere and private sphere—from bookstores, newsstands, and brothels to the mail.’⁴⁵⁹ Molly McGarry points out the close connection between the vice reformer’s quest and Spiritualism, a religious movement centered on communication with the spirit world that was ubiquitous in mid-nineteenth-century America.⁴⁶⁰ Like Comstock and the vice reformers, Spiritualists were concerned the realignment of public and private space, of things flowing outside their proper, framed boundaries: things out of place.⁴⁶¹ Obscenity became associated with the arena of privacy and secrecy: it *sexualized* privacy. Colligan writes,

as obscenity traversed media, markets and borders in the nineteenth century, it also took on its distinctive affective qualities for which it is still known today. Secreted in the backroom parlour, the bedroom, the secret library, under the floorboards, and in the attic, its circulation hindered and forbidden, the consumption of obscenity became furtive for the first time in the nineteenth century.⁴⁶²

If obscenity is private, then the censorship of obscenity must also be done privately – above or outside or beyond the public processes of law. As Paul and Schwartz point out, when Congress enacted the *Comstock Law*, they did not consider whether the statute

Education, and Medical Democracy in the Antebellum United States” (2003) 12:4 *Journal of the History of Sexuality* 543.

⁴⁵⁹ Molly McGarry, “Spectral Sexualities: Nineteenth Century Spiritualism, Moral Panics and the Making of US Obscenity Law” (2000) 12:2 *Journal of Women’s History* 8 at 21.

⁴⁶⁰ Spiritualism as a practice toyed with a number of telling nineteenth-century cultural anxieties, particularly middle-class anxiety over living in an industrializing, urbanizing culture of strangers. See Karen Haltunten, *Confidence Men and Painted Women: A Study of Middle-Class Culture, 1830–1870* (New Haven, Conn.: Yale University Press, 1982); and Ann Vincent Fabian, *Card Sharps, Dream Books, and Bucket Shops: Gambling in Nineteenth-Century America* (Ithaca, N.Y.: Cornell University Press, 1990). Molly McGarry, *Ghosts of Futures Past: Spiritualism and the Cultural Politics of Nineteenth-Century America* (California: University of Berkeley Press, 2008)

⁴⁶¹ McGarry notes that Comstock not only called upon a culturally resonant language, speaking of obscene images as ‘vile phantoms’ and visions that return to ‘haunt the mind,’ but also explicitly crafted his law to stop the distribution of one Spiritualist-free love newspaper. NYSSV, “The Third Annual Report of the New York Society for the Suppression of Vice,” 1877, 8–9 cited in McGarry, *supra* note 459 at 9.

⁴⁶² Colligan, *supra* note 375 at 21. The ‘phenomenology of obscenity’ was related to the ways in which it was trafficked in the nineteenth-century: Its exchange in cramped streets, its illicit mailings via the post, its movements across borders stowed away in embassy bags, informed the corporeal experience of obscenity. Trafficked in these ways, obscenity became associated with blushing, laughter, foreplay, masturbation, sexual fantasy, and (it was feared) graver sexual misconduct.’ *Ibid.*

authorized an independent censorship program as well as the criminal enforcement of the proscription against mailing obscene materials.⁴⁶³ The *Comstock Law's* most effective provision was arranged privately and weeks prior to the voting on the Act, when Senator William Windom persuaded the Committee on Appropriations to earmark \$3,425 for the use of a special agent, a sum that had been approved only with the Postmaster General's promise that Comstock would receive the appointment.⁴⁶⁴ Comstock thus came to occupy a peculiar position both within and outside the law – it was the law that he was charged to enforce, and he was issued a badge to signal his official status, but he was on no one's payroll, with no immediate superior, and was free to interpret the law as he saw fit. There were no restrictions on the means he might employ to catch the 'smut-peddlers:' he commonly answered advertisements under false names, donned disguises to examine suspicious wares in person, employed henchmen, etc.⁴⁶⁵ In Žižek's terms, Comstock was a figure who conjoined the public law (no smut) with its obscene supplement (no restrictions on how to catch smut).

Asked by a reporter from *The Times* to explain his seizure of the catalog produced by the Art Students' League in 1906, Comstock refused. 'Describe the pictures you objected to, Mr. Comstock, won't you?' He replied: 'No sir. I won't describe them here. They are not fit.'⁴⁶⁶ Comstock's speech claims absolute discretion and private judgment. In *Traps for the Young*, he described his position as necessarily secret: 'If I could drag out from their

⁴⁶³ These authors note that apparently neither the act of 1865 nor the recodification of 1872 was intended as a civil, "censorship" type statute; yet the Comstock Act followed the same textual structure of these earlier statutes when it declared: 'That no obscene...book, pamphlet, [etc]...shall be carried in the mail, and any person who shall knowingly deposit [such things in the mail shall be guilty of a crime.]' See James C.N. Paul and Murray L. Schwartz, "Obscenity in the Mails: A Comment on Some Problems of Federal Censorship" (1957) 106 University of Pennsylvania Law Review 214 at 218; James C. N. Paul and Murray L. Schwartz, *Federal Censorship: Obscenity in the Mail* (New York: Free Press, 1961) at 23.

⁴⁶⁴ See Kendrick, *supra* note 369 at 134. Comstock retained this unique commission until his death in 1915, and until 1907 his pay was not considered a salary, merely the defrayment of expenses. Wayne E. Fuller, *Morality and the Mail in Nineteenth-Century America* (Urbana: University of Illinois Press, 2003) at 108.

⁴⁶⁵ See Kendrick, *supra* note 369 at 136. See 'The Suppression of Vice' Mr Comstock's Report to the Society in 1882, North American Review 484.

⁴⁶⁶ "Art Students' League Raided by Comstock," *New York Times*, (3 August, 1906). Picard writes that Comstock negotiated and exploited the tension between suppression and revelation. Picard, *supra* note 456 at 224.

secrecy and expose to the public gaze, or paint these agencies for evil in their true colors, I am sure no decent person would differ from my views. But I cannot.⁴⁶⁷ Here, Comstock professes that he wants the obscene material to be exposed to the public, to garner support for his position, but he also fears this very possibility, not simply because the public would be contaminated, but because they might not agree with him. It is as though he says: 'I cannot tell you because it is not fit to disclose in public - *and* because you might disagree with me and I don't want to give you any grounds to do so.' It is not so much the obscene text that must be kept a secret, but the process by and conditions under which legal authority exercises its power upon that text. We can see a parallel in modern state discourse on terrorism, which also relies on a claim to necessary secretiveness: it is bad, but we can't tell you why for reasons of national security. The interiority of law is protected by this double deferral, a self-reinforcing claim for both obviousness and concealment. Regimes involving the exercise of discretionary power and private judgment are similarly protected. For the court in *Sharpless*, and for the vice reformers of the latter nineteenth-century, the public eye was not the scrutinizing eye. The public eye could not be trusted. The solution offered is to keep obscenity's corrupting force within the institutional corridors of law itself.

Corrupting the Law's Body

Obscenity is corporeal; it connotes a vulnerable bodily openness. In *Erotism: Death and Sensuality*, Georges Bataille argued that humans are discontinuous beings, but certain basic human experiences such as death, nakedness, and sex disrupt this self-sufficiency. Thus the concept of obscenity, with its assertion and disruption of representational limits, is central to the delineation of self. 'Bodies open out to a state of continuity through secret channels that give us a feeling of obscenity. Obscenity is our name for the uneasiness which upsets the physical state associated with self-possession, with the

⁴⁶⁷ Comstock, *Traps for the Young*, *supra* note 93 at 241.

possession of a recognised and stable individuality.⁴⁶⁸ Nead shows how both aesthetic and legal judgment about obscenity depended upon resisting the effects of viewing on the body:

As processes, art and obscenity rest upon acts of judgment performed by those that have particular knowledge and power. Since the eighteenth century, these judgments have been based not, as we might expect, on the presence or absence of sexual content, but on the imagined presence or absence of sexual arousal in any given viewing public. The arbiter may only distinguish art and obscenity from a position that is outside of the attractions and compulsions of sexual representation. The public body may only be regulated, it would seem, by one whose own body is still, composed, and unified, as opposed to aroused, disturbed, and fragmented.⁴⁶⁹

However, the body of the aesthetic or legal judge purporting to diagnose obscenity in an impartial, disinterested way is inevitably drawn into that which it seeks to regulate:

How can a discursive space be established between the cultural judgment of obscenity and obscenity itself? ... In seeking distinction from the obscene, the language of legal and aesthetic judgment all too often finds unity and becomes part of the corporealized, sensual discourse it seeks to contain and regulate. The judgment of the limits of art and obscenity may ultimately reveal the troubled body of the connoisseur, rather than the uncontrolled mass of women and the mob.⁴⁷⁰

Legal judgments of obscenity must remain immune to its effects, and sublimate those effects sufficiently within the legal process so that the chastity of the records is not corrupted and the danger not passed on. Hence the necessary fiction that regulatory officials like Comstock can identify prohibited items without ever being possessed or affected by them. As legal historians Ernst and Seagle note sarcastically in their 1928 history of obscenity law,

⁴⁶⁸ Bataille, *Erotism*, *supra* note 257 at 17. Barthes observes that ‘Bataille does not counter modesty with sexual freedom but... with *laughter*.’ Barthes, *The Pleasure of the Text*, *supra* note 20 at 55.

⁴⁶⁹ Nead, “Bodies of Judgment”, *supra* note 395 at 205.

⁴⁷⁰ Lynda Nead, “Bodies of Judgment”, *supra* note 395 at 206.

By the time the legal complaint is filed, no matter what its origin, the officers, stenographers, and clerks of the vice societies, and even the prosecutors, have been exposed to the corrupting influences of the provocative paragraphs. We must assume that familiarity produces a satisfactory sexual anti-toxin.⁴⁷¹

Sensing weakness in the court's own claim to stand outside the representations it regulates, defendants prosecuted under the *Comstock Law* in the 1890s began exploiting the court's reluctance to describe or denote the obscene material that was the subject of the charge. In *United States v Harmon* (1891)⁴⁷² the obscene material was an issue of an individualist anarchist journal called *Lucifer the Lightbearer*, published by Moses Harmon, containing an article headed 'A Physician's Testimony' which, according to the court,

sets out with much particularity various instances falling within his professional experience and practice of abuses of women by their husbands in coercive cohabitation; of family habits of men, boys, and girls, gratifying an unnamable propensity of the father, and the unnatural intercourse between a man and beasts. These acts are described in blunt, coarse terms, too indecent and filthy to be here given *in haec verba*. The pleader, however, has set the whole article out in exact words in the indictment.⁴⁷³

The court retreats to the Latin phrase *in haec verba* to further distance itself from having to designate the obscene words used in these stories of incestuous relationships.⁴⁷⁴ The

⁴⁷¹ Morris L. Ernst & William Seagle, *To the Pure... A Study of Obscenity and the Censor* (New York: Viking, 1928) at 3-4.

⁴⁷² *United States v. Harmon* (1891) 45 F. 414. (D.Kan.) [*Harmon*]. The mission of *Lucifer* was, according to Harmon, 'to help woman to break the chains that for ages have bound her to the rack of man-made law, spiritual, economic, industrial, social and especially sexual, believing that until woman is roused to a sense of her own responsibility on all lines of human endeavor, and especially on lines of her special field, that of reproduction of the race, there will be little if any real advancement toward a higher and truer civilization.' The court mentioned as a relevant fact that Harmon was 'a married man, living in wedlock with his second wife, having been divorced from the first.' *Ibid.* at 415.

⁴⁷³ *Ibid.* at 414.

⁴⁷⁴ On the use of Latin as a distancing mechanism when writing about the obscene, see Herbert Halpert, "Folklore and Obscenity: Definitions and Problems" (1962) 75 *The Journal of American Folklore* 190 at 192: 'Earlier in this century when anthropologists were busy collecting American Indian myths and tales in text, they usually published them in a museum or university anthropological series, with English translations. Invariably, when you get to the lustful doings of Coyote or some other trickster figure, or to a version of the toothed-vagina motif, the English translation suddenly lapses into Latin.'

court went on to ask about the probable effect of the article upon ‘society in general’, employing many words of ‘repetition’ (italicized in the quotation here):

How would such language and matter impress a public assembly of decent men and women? How would it be received in and affect the average family circle of 1,500 subscribers to whom the evidence shows this garbage was sent. The subjects discussed and the language employed are too coarse and indecent for the man of average education and refinement to *recapitulate*. They are so filthy in thought and impure in terms as not to admit of *recitation* without a shock to the common sense of decency and modesty; and it does seem to me that it is not too much to say that no ordinary mind can subject itself to the *repeated* reading and contemplation of such subjects and language without the risk of becoming indurated to all sense of modesty in speech and chastity in thought. The appetite for such literature increases with the feeding. The more it is pandered to, the more insatiable its craving for something yet more vicious in taste.⁴⁷⁵

The court’s repeated rejection heightens the sense of power and affective appeal attached to the impugned text – after all, why not simply say it is not appropriate to discuss in detail and move on? The court is drawn to it, and must circle round it, repeating its own refusal to repeat. The court’s observation that *Lucifer* will be subject to ‘recapitulation,’ ‘recitation’ and ‘repeated reading’ within social and domestic settings sets up a particular scene of corruption as an ongoing and intensifying process of engagement with the texts. For the danger identified to those of upright disposition does not lie in mere exposure to the material, but *repeated* exposure. The court here not only recognizes that can be obscene or pornographic text can be pored over, fantasized about, used again and again, but acknowledges a particular theory of repetition being consolidated in regulatory discourse about obscenity at this time, and which is echoed today in claims about pornography’s addictive and escalating properties: the repeated exposure to obscene material corrupts and erodes. Of course this repeated exposure is exactly what a judge may face in prosecutions for obscenity. As the *Harmon* court moves from conjuring a ‘public assembly of decent men and women’ to ‘the average family circle’ to ‘the man of average education and refinement,’ it comes ever closer to characterizing itself. When the *Harmon* court speaks of the

⁴⁷⁵ *Harmon*, *supra* note 472 at 418. Emphasis added.

dangers of repeated reading, it suggests fear of its own judgment being impinged upon, compromised or tainted – its own body under threat.

The parallel structures in the above passage from *Harmon* – ‘language and matter,’ ‘the subjects discussed’ and ‘the language employed’ to discuss them, the ‘filthy’ thoughts and ‘impure’ terms, the ‘modesty in speech’ and the ‘chastity in thought’ - reflects the court’s underlying assumption – and discursive creation – of a distinction between the object and the language used to discuss it, between referent and representation, matter and manner, content and form. The *Harmon* court must consider whether the subjects under discussion (incestuous relationships) can be discussed in language that does not offend. This question reproduces, at the level of language, the question facing the court when deciding the sufficiency of the indictment. Can the distinction between permissible designation (and discussion) and impermissible description (and reproduction) be maintained? On the one hand, the court expresses the obscenity of the article *in terms of* its resistance to recapitulation – to repetition or summation in different words. On the other hand, in order to shore up this distinction between designating and describing, a distinction which the law’s own processes rely upon, the court was obliged to affirm that it *was* possible to discuss the subject matter of the article in a way that was not obscene:

The problem of population, and other questions of social ethics and the sexual relations, may be publicly discussed on such a high plane of philosophy, thought, and fitness of language as to make it legally unexceptional. They may be discussed so as to be plain, yet chaste, so as to be instructive and corrective without being coarse, vulgar, or seductive. But when such publication descends to the low plane of indecent illustrations and grossness of expression as adopted by Dr. O'Neill, it loses all claim to respectability. This article sets forth with a bluntness of speech and a baldness of immodesty of expression instances of bestiality and human depravity not at all germane to the subject of the sexual relations, which is the professed object of the publication of “Lucifer;” and when the defendant and his coadjutors say that such language and subject-matter are

only impure to the overprudent it but illustrates how familiarity with obscenity blunts the sensibilities, depraves good taste, and perverts the judgment.⁴⁷⁶

The court's logic is circular: the defendant's argument that the magazine was not obscene is held to be fatally undermined because he has been exposed to his own 'obscene' magazine, thereby showing that the obscenity question has been prejudged. The court here suggests two planes of speech corresponding to the distinction between low and high culture to which obscenity laws are directed: the low plane comprising indecent illustrations, grossness of expression, bluntness of speech, baldness of immodesty, and all that is coarse, vulgar or seductive; the higher plane comprising philosophy, thought, and fitness of language, plain, yet chaste, instructive and corrective. For the court, the latter is the only manner of discourse appropriate and 'germane to the subject of sexual relations' and 'the problem of population.' The phrase 'plain yet chaste' sums up the paradox facing the court in these cases: how to designate accurately and clearly, without moving into that type of unwelcome transparency that is the hallmark of obscene words and images. Even as the *Harmon* court that the subject can be discussed in a non-obscene way, in another case that same year, the court suggested that 'pleasing attire' hiding obscenity amplified its morally dubious impact by overriding the 'natural feeling' of disgust that would have otherwise alerted the reader to the true nature of the work: 'The most debasing topic may be presented in the choicest language. In such garb it is the more dangerous. Impure suggestion clothed in pleasing attire allures and corrupts, when bald filth would disgust and repel.'⁴⁷⁷

⁴⁷⁶ *Ibid.* at 422-3. The judge continues by setting the legal test of obscenity within a biblical framework: 'To the pure all things are pure, is too poetical for the actualities of practical life. There is in the popular conception and heart such a thing as modesty. It was born in the Garden of Eden. After Adam and Eve ate of the fruit of the tree of knowledge they passed from that condition of perfectibility which some people nowadays aspire to, and, their eyes being opened, they discerned that there was both good and evil; "and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons." From that day to this civilized man has carried with him the sense of shame - the feeling that there were some things on which the eye-the mind-should not look; and where men and women become so depraved by the use, or so insensate from perverted education, that they will not veil their eyes, nor hold their tongues, the government should perform the office for them in protection of the social compact and the body politic.'

⁴⁷⁷ *United States v. Smith*, (1891) 45 F. 476 at 478.

The unstable position of the court vis-à-vis these obscene materials was rather ingeniously leveraged by the defendant's counsel in *Harmon*, who invoked the court's own potential complicity in the obscenity:

The [defendant's] argument is that if the offense in question is completed by the mere overt act of knowingly placing in the post-office an obscene print, publication, etc., it would subject to indictment and punishment *the judge circuit for sending the indictment herein containing the forbidden publication, sent him through the mail by mistake, back to the clerk of the court through the mails*, or that such a publication made in a law book as a report of this case would subject the publisher to the penalty of the law for mailing it to his subscribers; that as the overt act of the judge, for instance, can only be exonerated in law by proof of the absence of criminal intent, the rule of exception must be indifferently applied; so that in every case the question of intent, motive, purpose, must be open to inquiry; and if there was no evil design, no *animus mali*, the jury should be directed to acquit.⁴⁷⁸

The defendant's argument is another attempt to re-open the question of intention deemed irrelevant in *Hicklin*, by maintaining that since refusing to consider intention would leave the judge or clerk mailing the material open to an obscenity charge, and seeing as the law must apply equally to everyone, then the matter of intention always has to be an open question. The *Harmon* court dispensed with this argument by suggesting that the defendant had radically misconceived the postal laws, which authorized - not mandated - the government to maintain the postal office and roads, so the government could limit their use as it saw fit; furthermore, that a public officer or judge mailing the material in the manner described by the defendant 'was employing the mails within the purview of the object of the constitution.'⁴⁷⁹ The court's argument appears to be that even though legal officials are sending the forbidden publication via

⁴⁷⁸ *Ibid.* at 419. First italics mine.

⁴⁷⁹ 'The government is authorized, not commanded, by the constitution to maintain post-offices and post-roads. The system is organized and maintained by the government on the public responsibility, solely for the purpose of promoting the public welfare, in facilitating business, commercial, and social intercourse. It is designed to aid legitimate business, and not such as is calculated directly to corrupt the public morals, and sap the foundations of society and government. Having the right to establish or disestablish post-offices and post-roads, just as the public interests may require, congress may say to what extent the public or any individual may use them, and for what purpose, and may therefore limit both the quantity and the quality of the matter sent through the mails.' *Ibid.* at 419-20.

the mail (in the indictment), thus breaching the law, that in effect they are *not* breaching the law because their actions are somehow contemplated by it. In an echo of Justice Keating in *Steele*, the court's rejoinder appeals for its logic to nothing more than the impossibility of the law's self-contradiction. In short, if the court is doing it, it must be legal, because what a court does is legal. It cannot be obscene because it's law. Here, the precariousness of the law's self-instantiation, its deliberate fashioning of formal completeness and cohesion, and the illogical basis of its claim to authority, is exposed, and we see the epistemic violence which grounds law.

The Chastity of the Record Decided

Defendants continued to exploit the tension between the rights of the accused to have the subject of their charge clearly specified, and the court's increasing fear of the spectre of obscene material written into the record. The 1896 case of *Rosen v United States*, in which the United States Supreme Court adopted the United Kingdom's *Hicklin* test for obscenity, dealt again with the question of images and how they present a different citation problem for law. Rosen deposited a pornographic publication called *Broadway* in the mail which contained pictures partially covered with lamp black, the soot gathered in oil lamps, that could be easily erased with a piece of bread. 'The object of sending them out in that condition was, of course, to excite a curiosity to know what was thus concealed.'⁴⁸⁰ As the court notes, it did not matter what was under the lamp black, the excitement has already been generated, as a result of the hiding and the secrecy. The court here acknowledges the power of withholding it is itself engaged in.

Rosen appealed on the basis that the original indictment did not describe the pictures of female figures in question - it 'did not set out with reasonable particularity those parts of the paper relied on to support the charge in the indictment'⁴⁸¹ - and therefore violated

⁴⁸⁰ *Rosen*, *supra* note 367 at 31.

⁴⁸¹ The defendant insisted that the indictment 'was fatally defective, because it did not disclose in detail the contents of the 12 pages that were charged to constitute an obscene, lewd, and lascivious paper.' *Ibid.* at 34.

the constitutional guarantee that the defendant in a criminal case shall be informed of the nature and cause of the accusation against him.⁴⁸² The defendant's lawyers referred to an English prosecution for obscene libel, where Lord Justice Brett in the Court of Appeal had declared that 'in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment.'⁴⁸³ However, as the court pointed out, Lord Justice Brett had excluded obscene prints and pictures from the ambit of this principle, because 'they are not words.'⁴⁸⁴ The *Rosen* court thus read this English case as authority for the idea that while words should be reproduced in an indictment, a failure to reproduce images will not invalidate the indictment.⁴⁸⁵ The court also cited *Sharpless* in support of its view of images as identifiable, distinctive, self-evident, but also more troubling or difficult to incorporate into the legal records. But the *Rosen* court split on the sufficiency of the indictment, with the majority finding the indictment sufficient as long as the accused understood the nature of the charge,⁴⁸⁶ and the dissenting judgment finding the indictment insufficient, seeing as it merely named an issue of *Broadway* rather than specifying particular pictures or print therein.⁴⁸⁷

The issue came up again the following year in two cases. In *United States v Dunlop* (1897), which concerned the newspaper 'Chicago Dispatch,' the indictment stipulated that the eleventh page of the print, under the headings 'Personal' and 'Baths,' the

⁴⁸² 6th Amendment to the United States Constitution.

⁴⁸³ *Charles Bradlaugh and Annie Besant v. Queen*, (1878) 3 Q. B. Div. 607 at 634

⁴⁸⁴ *Rosen*, *supra* note 367 at 36.

⁴⁸⁵ *Sharpless*, *supra* note 367 at 102 cited in *Rosen*, *supra* note 367 at 36.

⁴⁸⁶ The defendant's constitutional right to be informed of the nature and cause of the accusation against him 'is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him.' *Rosen*, *supra* note 367 at 40.

⁴⁸⁷ 'It is impossible from the mere description of the title-page of the paper, and the averment that it contains 12 pages, and was published on a particular day, to in any way ascertain what part, whether pictures or print, contained in the 12 pages, was acted on by the grand jury. In other words, using the identification of the paper given by the indictment, the mind looks in vain for any reference to the particular things, found in the paper, which were considered as within the statute.' *Ibid.* at 48-9 *per* Justices White and Shiras.

publication contained 'certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full.'⁴⁸⁸ Two of the exhibits were copies of these advertisements in the 'Chicago Dispatch' marked, by order of the court, in blue pencil. The defendants objected that it 'did not appear that [the advertisements] contained matter that was too long, or too obscene, to be set out in the indictment, or to be spread upon the records of the court.'⁴⁸⁹ The *Dunlop* court deferred to the prosecutor's discretion in drafting indictments,⁴⁹⁰ but a few months later, an appeal reached the Supreme Court which turned solely on the argument that the indictment contained nothing more than a mere expression of the plaintiff's opinion that the book was so obscene as to be unfit for repetition in the indictment.⁴⁹¹ In other words, the defendant in *Price* argued that stating the book is too obscene to be written on the record does not amount to saying that the book is obscene. To *mention* is not to *use* or *demonstrate*. But the Supreme Court rejected this argument outright, characterizing it as a matter of 'plain English' or obviousness that to contend that a book is too obscene to be set forth in an indictment is to contend that the book is obscene:

it is said that, when an indictment contains a charge that a book 'is so obscene, lewd, and lascivious' that it would be offensive to set it forth in full in the indictment, it is not thereby charged that the book was in fact obscene, lewd, or lascivious. It takes stronger eyes than we possess to discover any real and material difference in the meaning of the two expressions. The plain English of an allegation that a book is so obscene and indecent as to be offensive if set forth in full in an indictment, and placed upon the records of the court, is that the book is obscene in fact and to the degree described. No one denies that there are degrees of obscenity, any more than that two and two make four; but, when a book is stated to be so obscene that it would be offensive if set forth in full in an indictment, such allegation imports a sufficient degree of obscenity to render the production nonmailable and obscene under the statute.⁴⁹²

⁴⁸⁸ *United States v Dunlop* (1897) 165 U.S. 486 at 490.

⁴⁸⁹ *Ibid.* at 497.

⁴⁹⁰ The court deferred to the discretion of the district attorney preparing the indictment as well as to the discretion of the lower court to say whether it was fit to be spread upon the records or not.

⁴⁹¹ *Price v. United States* (1897) 165 U.S. 311.

⁴⁹² *Ibid.* at 314-15.

Obscenity, for legal agents and prosecutors, is a matter of discretion, and for the courts, a matter of assertion, a word that replaces a specific reference with condemnation. Yet in this passage, the United States Supreme Court acknowledges that there are degrees of obscenity, which suggests the need for an act of legal judgment – the very act which the court seems almost desperate to outsource. This acknowledgment of degrees thus undermines its own claim to safely exclude obscene material from the court record and defer judgment to the prosecutors. By the end of the nineteenth-century, it was settled that indictments did not have to contain particulars of the obscene material that was the subject of the charge. The prosecutor was only required to identify the offending item by title, addressee or date, at the sole discretion of the court that considered it unnecessary ‘to spread the obscene matter in all its filthiness upon the record.’⁴⁹³ This trend continued throughout the early decades of the twentieth century.⁴⁹⁴ The court deals with the problem of citation by sublimating or obscuring the text it is confronted with. As more and more cases are decided, legal discourse covers up the scene of this confrontation, deferring the problem away from its formal processes towards a discretionary activity located off-stage. The law is hermetic, relying on the weight of precedence and bootstrapping its own claims to authority, and is constituted by an endless sequence of references and deferrals which both suspend and draw upon its grounding in violence.

⁴⁹³ *Grimm v United States*, (1895) 156 U.S. 604 at 608.

⁴⁹⁴ In his cultural history of sexual morality cases in the 1920s and 1930s in New York, William Nelson describes several cases in which judges invoked their reticence to describe sexual matters. Nelson, *supra* note 453 at 270-272. For instance, *People v Hall*, (1939) 16 N.Y.S.2d 328 (Jefferson County Court) was an attempted sodomy case in which the court stated the “nature of the case precludes a discussion of the facts.” at 329. In a prosecution by the New York Society for the Suppression of Vice to ban a book, a dissenting judge conjured up the notion of contagion when he remarked that it was dangerous to ‘spread upon our pages all the indecent and lascivious part[s]’ of the very book the Society was attempting to suppress. *Halsey v. New York Society for the Suppression of Vice*, (1922) 136 N.E. 219 at 223. Another court refused to even name a book that was the subject of prosecution for fear that it would ‘excite the curiosity of the prurient.’ *People v Berg*, (1934) 272 N.Y.S. 586 (N.Y. App. Div.) at 587. These last two cases are cited in Amy Adler, “The Perverse Law of Child Pornography” (2001) 101 Columbia Law Review 209 at 267.

II. Writing Pornography: The Power of Deferral

What makes a text obscene? In these cases, we see the court oscillating between a referential view, where the obscenity lies in the 'subject matter' of the text, and a stylistic view, in which the text is an improper discussion of possibly legitimate subject matter. This tension is replicated on the level of the obscene word itself. Primary obscenities are thought to draw their offensiveness from the taboo nature of the thing being referred to: primarily sex and excretion, although also religion, death and illness, and disfavored groups.⁴⁹⁵ Yet the existence of acceptable euphemisms means that obscene words have a power that exceeds their literal meaning. The fifteenth-century humanist Erasmus attempted to explain the excess power of obscene words through the idea of *exposure* – euphemisms are words which function to hide those body parts 'which are not dishonourable in themselves, yet are kept covered because of a sense of decency peculiar to civilized man.'⁴⁹⁶ In expletives, the names for the sexual organs or functions are not used as names, but as signifiers allowing the speaker to vent feeling in language freed from referential constraints.

Many scholars have suggested that the obscene word's relation to its referent differs from that of other words. As fetish, simulacrum or part object, the obscene word not only represents but replaces its referent.⁴⁹⁷ In the process of fetishizing certain words

⁴⁹⁵ One interesting example of taboo is Djirbal, an Aboriginal language of Australia, in which *every* word is taboo when spoken in the presence of mothers-in-law and certain cousins. Speakers have to use an entirely different vocabulary (although the same grammar) when those relatives are present. See D.F. Thomson, "The Joking Relationship and Organised Obscenity in North Queensland" (1935) 37 *American Anthropologist* 460. Wajnryb points out that although Japanese has no swear words *per se*, they have words that cannot be used in certain contexts or when speaking to certain people. Ruth Wajnryb, *Expletive Deleted: A Good Look at Bad Language* (Sydney: Free Press, 2005) at 218. Scientist Steven Pinker argues that swearing is a 'coherent neurobiological phenomenon,' common to all humans. Pinker, *supra* note 85 at 336.

⁴⁹⁶ Desiderius Erasmus, *De Copia Verborum ac Rerum* ed. Betty I. Knott, *Opera Omnia* 1:6 (North Holland: Elsevier Science Publishers, 1988), cited in Melissa Mohr, *Strong Language: Oaths, Obscenities and Performative Literature in Early Modern England* (Dissertation, English, Stanford University, 2003) [unpublished].

⁴⁹⁷ See Lucienne Frappier-Mazur, "Truth and the Obscene Word in Eighteenth-Century French Pornography" in Lynn Hunt, ed. *The Invention of Pornography: Obscenity and the Origins of Modernity, 1500 – 1800* (New York: Zone Books, 1993) 203 ["Truth and the Obscene Word"] at 221.

related to sex, obscene words come to occupy a place outside representation, standing for the object itself.⁴⁹⁸ The close referential function of obscene words arises from taboo's origins in orality, where names are not so much thought of as tags as the things themselves: 'Written or printed representations of words can be labels; real, spoken words cannot be.'⁴⁹⁹ This aspect of obscene words made them central to psychoanalytic understandings of language development.⁵⁰⁰ James Gordon Frazier's section on 'Tabooed Words' in *The Golden Bough* (1922), a book which significantly influenced literary modernism, noted that 'savages' confuse words both with the things to which they refer and the bodies from which they emerge:

Unable to discriminate clearly between words and things, the savage commonly fancies that the link between a name and the person or thing denominated by it is not a mere arbitrary and idea association, but a real and substantial bond which unites the two in such a way that magic may be wrought on a man just as easily through his name as through his hair, his nails, or any other material part of his person.⁵⁰¹

Though one of the foundations of linguistics is that the pairing between a sound and a meaning is arbitrary, most humans intuitively believe otherwise. We treat the name for an entity as part of its essence.⁵⁰² Accordingly, one of our fundamental modern assumptions of how obscenity words is that certain words are always obscene, that some words are 'dirty' no matter who uses them, and in no matter what context. This

⁴⁹⁸ Hunt, "Introduction," *supra* note 369 at 37. Obscene words function as 'a supernormal sign, a 'misplaced response,' if you will, standing for – and indeed amplifying by a process of ritualization – some natural object, upon which an individual has become preferentially imprinted in lieu of the object itself.' Thomas Seboek, "Fetish" (1989) 6 *The American Journal of Semiotics* 62 cited in Frappier-Mazur, "Truth and the Obscene Word," *supra* note 497 at 219.

⁴⁹⁹ Walter J. Ong, *Orality and Literacy: The Technologizing of the Word* (New York: Routledge, 1982) at 33.

⁵⁰⁰ Freud, for instance, in his study of *Jokes and its Relation to the Unconscious*, affirms that children are 'accustomed to treat the word as an object.' A.A. Brill, ed. and trans., *The Basic Writings of Sigmund Freud* [New York: Modern Library, 1938] 713. See also Sandor Ferenczi, "On Obscene Words" in *Sex in Psychoanalysis*, trans. by Ernest Jones, (Boston: Gorham Press, 1916); Ernest Begler, "Obscene Words" (1936) 5 *Psychoanalytic Quarterly* 5 226; and Leo Stone, "On the Principal Obscene Word of the English Language" (1954) 35 *International Journal of Psychoanalysis* 30.

⁵⁰¹ James Gordon Frazier, *The Golden Bough* (New York: Collier, 1922) at 284.

⁵⁰² Pinker, *supra* note 495 at 331

assumption obscures understanding of how obscene words gain their power from the social context of repetition:

The maledictory force of words like *cunt* or *fuck* is a cultural endowment over time; they are words that have absorbed the history of their past speaking. As such, their force exceeds their immediate context: curse words verge toward autonomy, congealing in themselves a quasi-magical and singular capacity to offend.⁵⁰³

As Ann Coughlin has argued, sexual euphemisms do not extinguish the naughtiness or the taboo of the subject.⁵⁰⁴ 'Circumspection, omission, and silence are conventional gestures that supply, rather than remove, sexual connotations.'⁵⁰⁵ Indirectness is in *itself* erotic - it works by withholding satisfaction through obfuscation, intermittence and ellipsis:

Is not the most erotic portion of a body *where the garment gapes*? In perversion (which is the realm of textual pleasure) there are no "erogenous zones" (a foolish expression, besides); it is intermittence, as psychoanalysis has so rightly stated, which is erotic: the intermittence of skin flashing between two articles of clothing...; it is this flash itself which seduces, or rather: the staging of an appearance-as-disappearance.⁵⁰⁶

Erogenous zones is a foolish expression for Barthes precisely because it assumes that erogeneity can be mapped onto a spatial structure, a corporeal *place*, as opposed to being a function of movement, affect, circulation, heat, friction, and contrast. Peter Sabor argues that the asterisks used in eighteenth century sexual censorship to indicate expurgated material actually heightened sexual pleasure because they 'invite readers to greater flights of sexual fantasy.'⁵⁰⁷ The deliberately-framed absence functions similarly

⁵⁰³ Kate E. Brown & Howard I. Kushner, "Eruptive Voices: Coprolalia, Malediction, and the Poetics of Cursing" (2001) 32 *New Literary History* 537 at 550.

⁵⁰⁴ Ann M. Coughlin, "Representing the Forbidden," (2002) 90 *California Law Review* 2143 at 2161.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ Barthes, *The Pleasure of the Text*, *supra* note 20 at 9-10.

⁵⁰⁷ Peter Sabor, "The Censor Censured: Expurgating Memoirs of a Woman of Pleasure," in 'Tis Nature's Fault: Unauthorized Sexuality during the Enlightenment, Robert Purks Maccubbin, ed. (Cambridge, 1987), 192-201 at 197.

to the spaces between comic book panels by which, according to theorists of comics like Scott McCloud, the reader is compelled to put the juxtaposed pictures together to generate meaning.⁵⁰⁸ The desire-invoking power of such ellipsis is reflected in Allen Walker Read's famous 1934 essay, where he stated 'I do not favor the use of the 'euphemistic dash'; it succeeds only in throwing a smutty atmosphere over a subject. The proper course is to print a word in full or not at all.'⁵⁰⁹ While a particular elision might satisfy the censor, there is no doubt that the readers identify the word. As Judge Richard Ervin remarked in his dissenting opinion in *C.J.R. v. Florida* (1983), no reader is going to think that the exclamation 'f..... pigs' might refer to cops who are "foolish,' 'fawning,' 'finicky,' 'flaccid,' 'foppish,' 'frantic,' 'fretful,' [or] 'fascist'.'⁵¹⁰

Obscenity is that which is prohibited, but the absence or deferral imposed by prohibitions itself constitutes desire. The prohibition of eroticization becomes the eroticization of prohibition. Nineteenth-century American 'racy' novels, also known as sensation fiction or 'yellow jacket' literature, combined graphic depictions of violence with elliptical treatment of sex, escaping legal censure because obscenity prosecutions were only interested in sex. New York sensation fiction writer George Thompson, who wrote in the late 1840s and 50s, was particularly adept at invoking the prohibition against explicit sexual representations in order to invest his tales with an aura of illicit excitement. One of his favorite stylistic devices was to initiate a sexual scene and then pull back: 'Our ready pen longs—yea, longs to glide off into the most delicious details... but Society, like a grim and harsh pedagogue, flourishes its rattan of Censure above our devoted pate, and talks of 'morality,' and 'propriety.'"⁵¹¹ Thompson's calculated omission of explicit sexual acts only heightened the prurience of his plots and invested

⁵⁰⁸ Scott McCloud, *Understanding Comics: The Invisible Art* (New York: Harper Perennial, 1994).

⁵⁰⁹ Allen Walker Read, "An Obscenity Symbol" (1934) 9 *American Speech* 264 at 278 fn.82.

⁵¹⁰ *C.J.R. v. Florida*, (1983) 429 So. 2d 753 (Fla. Dist. Ct. App.) at 755 (Ervin, J., concurring and dissenting). Cited in Coughlin, *supra* note 504 at 2150.

⁵¹¹ George Thompson, *The Housebreaker*, 20-21, as quoted in Christopher Looby, "George Thompson's "Romance of the Real": Transgression and Taboo in American Sensation Fiction" (1993) 65 *American Literature* 651 at 658.

the point at which he ‘drew the curtain’ or ‘drew the veil’ with extra frisson. As Dennis writes, ‘(e)choing the prurient circumlocutions of anti-obscenity tracts and legal prosecutions (as well as anti-sodomy discourse), George Thompson’s stylistic aposiopesis provided readers with sexual knowledge while allowing them to remain putatively chaste.’⁵¹²

In legal judgments, obscenity is defined through absence or deferral. In 1880 a New York court defined obscene writing as ‘one offensive to decency, indelicate, impure, and an indecent one, as one unbecoming, immodest, unfit to be seen.’⁵¹³ In this string of descriptors, obscenity is defined against what it is not (delicate, pure, decent, becoming, modest), and these traits are evoked and negated at the same time, rendering obscenity as a ghostly ‘other’ haunting the text.⁵¹⁴ Obscenity is a blank space waiting to be reinscribed. The power of sex or desire is displaced or deferred onto the representational gesture itself, exactly as it is in pornographic texts. Stewart describes pornography as ‘a discourse designed to mobilize the inexplicable power of a ‘sex itself’ behind a series of failed gestures of representation.’⁵¹⁵ Hence the failure of even frank sexual discourse to capture its subject matter in representation. In *The Novel and the Obscene*, Florence Dore suggests that twentieth century obscenity cases and American modernist novels depicting sexuality both ‘ironically produce sexuality as a prohibited feature of subjectivity.’ Despite appearing to speak frankly about sex, the modernist American novel is marked by a resilient silence, ‘a negative narration’ – the use of formal techniques such as elision, prolepsis, erasure and deferral – which ‘expresses a double bind affecting all cultural expression about sex: to uncover sexuality is to discover its persistent elusiveness, and to ‘speak’ about it is to create a silence.’⁵¹⁶

⁵¹² Dennis, *supra* note 11.

⁵¹³ *United States v Williams* (1880) 3 Fed 484 (E.D.N.Y) per United Commissioner Allen.

⁵¹⁴ See Daniil Kharms, “Blue Notebook #10” in *Today I Wrote Nothing: The Selected Writings of Daniil Kharms* ed. and trans. Matvei Yankelevich (London: Duckworth Press, 2008) at 45.

⁵¹⁵ Stewart, *Crimes of Writing*, *supra* note 67 at 236.

⁵¹⁶ Dore, *supra* note 392 at 11.

Stewart identifies the state's problem when judging pornography as one of 'doomed repetition,' noting that the 1986 *Final Report of the Attorney General's Commission on Pornography* (the Meese Commission Report) 'cannot escape the necessity of content' and became a pornographic bestseller.⁵¹⁷ Even Andrea Dworkin's famous polemical writing against pornography, quoted extensively in the Report, exhibited many of 'the traditional rhetorical devices of pornographic discourse,' including 'litotes and hyperbole in juxtaposition, serialism, parallelism, arrangement and display of detail, irony, parody, rhetorical climax, and resolution.'⁵¹⁸ This demonstrates for Stewart 'the impossibility of describing desire without generating desire' and 'the impossibility of constructing a metadiscourse of pornography once we recognize the interested nature of all discursive practices.'⁵¹⁹ A metadiscourse of desire will itself generate desire, and sublimation cannot contain the implications of sexual content.⁵²⁰

Pornography relies upon its capacity for reinscription... What pornography specifically parodies are the forms of rationality: learning, culture and control. The effort of the commission's *Report* to make sex be about other things (marriage and procreation) results of course in the eroticization of all things.⁵²¹

The Meese Report 'clearly posits a naturalized sexuality at pornography's unrepresentable center'⁵²² – the 'perversions of pornographic discourse are framed as testimony regarding the proper form and destination of a 'natural' sexual practice'⁵²³ (ie. 'married heterosexual couples engaging in sex for procreation.'⁵²⁴) This deployment

⁵¹⁷ Stewart, *Crimes of Writing*, *supra* note 67 at 237.

⁵¹⁸ *Ibid.* at 260-261. 'My name is Andrea Dworkin. I am a citizen of the United States, and in this country where I live, every year millions of pictures are being made of women with our legs spread. We are called beaver, we are called pussy, our genitals are tied up, they are pasted... In this country where I live as citizen, women are penetrated by animals and objects for public entertainment, women are urinated on and defecated on.' *Meese Commission Report* at 769 cited in *Ibid.* at 260.

⁵¹⁹ *Ibid.* at 236.

⁵²⁰ See also Lynda Nead, "Bodies of Judgment", *supra* note 395 at 213.

⁵²¹ Stewart, *Crimes of Writing*, *supra* note 67 at 261.

⁵²² *Ibid.* at 237.

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

of sexuality is ideological and social, but this is elided, so ‘pornography’s move toward exposure has as its referent a marvelous, even magical *hiding*.’⁵²⁵ The referent of pornography is always deferred, is ‘the ineffable and unspeakable referent of desire as it is socially structured.’⁵²⁶ This recalls Foucault’s definition of sex as ‘an imaginary point determined by the deployment of sexuality.’⁵²⁷

Legal judgments are implicated in and dependent on the capacity for desire to exceed or evade representation. Legal judgments of obscenity draw law into a performative contradiction, as its own citational practices mirror the obscenity that is being resisted, leveraging the tension between presence and absence, between desire and withholding. The courts facing obscene material adopt circumlocution and ellipsis in the manner of sensation fiction, with its deliberate invocation and then avoidance of sexual scenes by ‘drawing the veil.’ The law draws its authority from its deferral of desire, and like pornographic texts, its judgments function as perverse sites where direct gratification is absent and yet displaced satisfaction and desire are engaged. To quote Butler again, ‘prohibition does not seek the obliteration of prohibited desire; on the contrary, prohibition pursues the reproduction of prohibited desire and becomes itself intensified through the renunciations it effects.’⁵²⁸

III. Writing Literature: Repetition as Purification

In the twentieth-century, the ideological configurations that had sustained nineteenth-century obscenity law underwent another radical shift with the advent of modernism. In the early decades of the twentieth-century, the social changes associated with the consolidation of the nation state, mass culture, urban expansion, and the growing importance of the working class – particularly during the First World War - radically

⁵²⁵ *Ibid.* at 236.

⁵²⁶ *Ibid.*

⁵²⁷ Foucault, *History of Sexuality*, *supra* note 121 at 155.

⁵²⁸ Butler, *Excitable Speech*, *supra* note 13 at 117.

altered the cultural and intellectual landscape. The thematic preoccupations and stylistic experimentations of modernist literature reflected this broader loss of belief in authority and the concomitant emphasis on the fragmented and complicated nature of individual experience and perception. Eschewing conventional realism, modernist literature embraced its own status as representation, giving us the idea of language not as a transparent re-presentation but as conscious of its own artificiality.

If early British pornography as well as United States sensation fiction treated sex elliptically and avoided obscene words, Anglo-American modernist literature sought to reclaim the physicality and immediacy of obscene words to push at the uncomfortable boundaries of representation.⁵²⁹ Many, mostly male, Anglo-American writers, from James Joyce to William Burroughs to D.H. Lawrence, were highly invested in several primary obscenities that they viewed as integral to the literary projects. As a result, the key obscenity cases of the twentieth-century involved prosecutions for works of modernist literature, legal cases which directly turned on the ‘literariness’ of certain obscene words.⁵³⁰ In this section, I examine the use of obscene words in two such novels and the United States obscenity trials to which they gave rise – the trial of *Ulysses* (1922)⁵³¹ in 1933 and *Lady Chatterley’s Lover* (1928) in 1960. Loren Glass has argued that these obscenity trials ‘function as rituals of consecration whereby modernist texts could be affirmed as classics,’⁵³² a mutually-beneficial arrangement between expert

⁵²⁹ As Loren Glass observes, ‘a series of affinities have linked modernism and pornography from Flaubert to Burroughs. Both seemed to collapse ends and means so as to partake of a certain autonomous circularity of value; they were their own justification. Furthermore, both tended to figure as “crimes of writing,” focusing on subversive representations of carnality and deviance—particularly female sexuality and sexual autonomy—that challenged bourgeois moral protocols.’ Loren Glass, “Redeeming Value: Obscenity and Anglo-American Modernism” (2006) 32:2 *Critical Inquiry* 341 at 348 [“Redeeming Value”].

⁵³⁰ These included Henry Miller’s *Tropic of Cancer* (1934) (declared not obscene in 1964) and William Burrough’s *Naked Lunch* (1959) (declared not obscene in 1966).

⁵³¹ First published in serial form in the American journal *The Little Review* from March 1918 to December 1920, and then published in its entirety by Sylvia Beach in 1922 in Paris, James Joyce’s book had been banned in the United States since 1921.

⁵³² Thus Circuit Court Judge Augustus Hand, affirming on appeal District Court Judge John Woolsey’s decision in *Ulysses One*, asserted that literary value can be proven by “the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient.” *Ulysses One*, *supra* note 395 at 708.

literary critics and marketing-savvy publishers keen to capitalize on the popularity of underground texts. These two cases frame the heyday of literary obscenity, such that it is fitting that the term ‘four-letter word’ first appears in the Oxford English Dictionary in 1934, and that all the words to which this term refers first appeared in the Penguin English Dictionary in 1965.⁵³³

Ulysses and the Integrity of Dirty Words

For the crusaders against vice in the early twentieth-century, the distinction between high and low culture was a ruse whereby dissolute intellectuals attempted to satisfy their taste for smut. Comstock claimed that ‘garbage smells none the less rank and offensive because deposited in a marble fount or a gold or silver urn.’⁵³⁴ Or, as one local customs inspector claimed in 1930: ‘A classic is a dirty book somebody is trying to get by me.’⁵³⁵ For the publishers, literary critics, and authors who ushered in literary modernism, however, the difference was crucial, and with each new case they attempted to affirm that literary value is opposed to obscenity and should exempt a text from censorship or suppression. The initial difficulty was that judges were not required to recognize expert testimony concerning literary value. A turning point came in 1933 when United States District Court Judge John Woolsey, acknowledging ‘the reputation of *Ulysses* in the literary world,’ overturned the U.S. customs ban on the book.⁵³⁶ Judge Woolsey appealed to an idea of the author’s intention in order to contrast commercial literature aimed at satisfying pleasure with serious literature aimed at elevating the

⁵³³ See Loren Glass, “Modernism and Dirty Words” (2007) 14:2 *Modernism/Modernity* 209 at 210 [“Modernism and Dirty Words”].

⁵³⁴ Quoted in Paul S. Boyer, *Purity in Print: Book Censorship in America from the Gilded Age to the Computer Age* (Madison, Wis., 2002) at 21.

⁵³⁵ *Ibid.* at 209.

⁵³⁶ *Ulysses One*, *supra* note 397 at 183. As Loren Glass notes, Woolsey’s knowledge of this reputation had been arranged for him by Bennett Cerf of Random House, a publisher instrumental in popularizing modernist literature in the United States, and Morris Ernst, a New York lawyer who devoted much of his career to fighting literary censorship. Concerned that they couldn’t use the testimony of experts to exonerate *Ulysses*, they pasted critical reviews into one of the Paris editions and arranged to have it confiscated by customs at the New York docks. The trial was that held over the fate of that single copy of the book (hence the name of the case.) See further Loren Glass, “Redeeming Value”, *supra* note 529 at 345.

mind. He wrote: 'where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic, that is, written for the purpose of exploiting obscenity.'⁵³⁷ The author's fame and credentials were relevant, whether the author has 'the sanction of age and fame, and usually appeal to a comparative limited number of readers.'⁵³⁸ The author must be perceived to be honest and committed to artistry rather than money, to have 'a disinterested spirit' rather than 'the leer of the sensualist' who exploits 'dirt for dirt's sake.'⁵³⁹ The work should convey 'sincerity of feeling' as well as serious commitment to artistic innovation. 'If Joyce did not attempt to be honest in developing the technique which he has adopted in *Ulysses*, the result would be psychologically misleading and thus unfaithful to his chosen technique. Such an attitude would be artistically inexcusable.'⁵⁴⁰

In his discussion of the 'dirty words' throughout *Ulysses*, Judge Woolsey credits Joyce with a non-pornographic intent, a sincere and honest intention to 'show exactly how the minds of his characters operate'⁵⁴¹ by bringing out 'not only what is in the focus of each man's observation of the actual things about him, but also in a penumbral zone residua of past impressions.'⁵⁴² This artistic intent brings with it a certain obligation: Joyce would have 'funked its necessary implications'⁵⁴³ had he not told fully what his characters think. Joyce's 'attempt sincerely and honestly to realize his objective has required him *incidentally* to use certain words which are generally considered dirty words...'⁵⁴⁴ For Woolsey, in this specific context - given the author's framing intent and

⁵³⁷ *Ibid.*

⁵³⁸ *Anderson v. Patten*, (1917) 247 F. 382 at 384

⁵³⁹ *Ulysses One*, *supra* note 397 at 184.

⁵⁴⁰ *Ibid.* at 183.

⁵⁴¹ Published as part of the prefatory material in the Modern Library edition of *Ulysses* from 1934 onward. At ix.

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ulysses One*, *supra* note 397 at 183, emphasis added.

creative technique - words generally considered dirty are not really dirty, but are rather words that the author in all honesty must use. In fact, according to Woolsey, Joyce does not really 'use' the dirty words at all, but 'mentions' them, offering them as *examples* of language abuse, rather than committing the abuse himself. Obscenities clutter the minds and speeches of Joyce's characters, but they are always in quotes so far as Joyce himself is concerned. He mentions them to fulfill an obligation he has to provide a full picture of the imaginative life of his characters.

Although Joyce frequently used dirty words in connection with sexual scenes, he also uses them in non-sexual contexts. An oft-cited example is his phrase: '(n)ow it could bear no more. Dead: an old woman's: the grey sunken cunt of the world.'⁵⁴⁵ Neither sexual nor vulgar insult, the obscene word is here wielded as a 'metaphor of desolation.'⁵⁴⁶ As Elisabeth Ladenson has argued, it is 'as though Joyce were attempting to flout the very definition of obscenity, employing obscene language toward non-sexual, even antisexual ends, thus defying the censors to take issue with a use of those terms that seemed to run counter to the way obscenity had been delimited.'⁵⁴⁷ Joyce's novel is a profound exploration of the limits of representation: as Ladenson notes, in featuring 'the first noncomical defecation in literature,'⁵⁴⁸ *Ulysses* 'does not just represent defecation: it also, separately, ruminates on the traditional nonrepresentability of that function.'⁵⁴⁹ Joyce uses obscenity not to designate something outside itself – not for its referential function – but in order to refer to language itself. In modernism, literature (and art) travel beyond representation. The obscene words were uniquely helpful in this modernist endeavour, because they represented heightened points of tension within language, the accumulation of

⁵⁴⁵ See Ladenson, *supra* note 104 at 90.

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.* at 91.

⁵⁴⁸ *Ibid.* at 83.

⁵⁴⁹ *Ibid.* at 86.

citational force, an endowment uniquely charged by historical and social circumstance: an affective power.

The *Ulysses* case provided the precedent and template for almost all ensuing obscenity trials in England and the United States. As critics and historians have established, Woolsey's decision was based on his adoption of the aesthetic theories proposed by critics (whose opinions were attached to the volume entered into evidence) and Joyce himself.⁵⁵⁰ In a famous discussion of Aquinas in Joyce's *Portrait of the Artist as a Young Man*, Stephen Dedalus contrasts the 'static' emotion elicited by the 'proper' arts with the 'kinetic' emotion elicited by the 'improper' arts, such as pornography. A 'fleshy' response to a naked statue is a bodily 'reflex' that has nothing to do with beauty or aesthetics.⁵⁵¹ With 'proper' art, 'the mind is arrested and raised above desire and loathing.'⁵⁵² Woolsey's legal conclusion tracks Stephen's (Joyce's) argument about the redemptive power of art: 'reading *Ulysses* in its entirety, as a book must be read on such a test as this, did not tend to excite sexual impulses or lustful thoughts... Its net effect... was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women.'⁵⁵³ In this passage, Woolsey distinguishes between the disinterested response elicited by the aesthetic object and the 'interested' or kinetic affect elicited by obscenity. Some critics have suggested that Woolsey's decision helped to legitimate the Kantian framework of what Pierre Bourdieu calls 'legitimate taste:' a mode of interacting

⁵⁵⁰ See, in particular, Paul Vanderham, *James Joyce and Censorship: The Trials of Ulysses* (New York: New York University Press, 1998), and Marisa Anne Pagnattaro, "Carving a Literary Exception: The Obscenity Standard and *Ulysses*," *Twentieth-Century Literature* 47 (Summer 2001): 217–40. The critics whose opinions were pasted into the original copy included Marcel Brion, Valery Larbaud, Louis Cazamian, and Stuart Gilbert. In his brief to the court, Ernst references the opinions of Rebecca West, Paul Rosenfeld, Gilbert Seldes, Edmund Wilson, and many others, cited in Glass, "Redeeming Value", *supra* note 529 at 346.

⁵⁵¹ James Joyce, *A Portrait of the Artist as a Young Man* (Harmondsworth: Penguin, 2000 [1916]) at 222, 223.

⁵⁵² Joyce, *Ibid.* cited in Loren Glass, "Redeeming Value", *supra* note 529 at 346.

⁵⁵³ *Ulysses One*, *supra* note 397 at 185.

with art marked by disinterest, the appeal to aesthetic theory, and the value of expertise.⁵⁵⁴

Anglo-Saxon Words and the Trope of Authenticity

At stake in the prosecutions of *Ulysses* and *Lady Chatterley's Lover* was the authors' repetition of a small but potent number of obscene words: namely, 'fuck' and 'cunt.' The defence strategy in *Ulysses* involved repeatedly asserting the 'Anglo-Saxon' heritage of the obscene words in question. Ernst and Schwartz insist that the turning point in the trial was the explanation of 'each four-letter word in historic terms.'⁵⁵⁵ Defense counsel provided etymological arguments that persuasively carried the terms back to a time before they had become obscene. These arguments are peculiarly *ahistorical*, attempting to fix the term in an imagined pristine state, before any figurative extension, euphemism, repetition and denigration. The defense said of the word 'fuck', for instance, that: 'One etymological dictionary gives its derivation as from *facere* – to make - the farmer fucked the seed into the soil. This, your honor, has more integrity than a euphemism used every day in every modern novel to describe precisely the same event.'⁵⁵⁶ The farmer sowing his seed would have called things by their proper names, a metaphor which conjures an idealized agrarian world in which 'fuck' is as innocent and honest a word as any in the English language. Woolsey found this argument persuasive, characterizing Joyce's language as 'old Saxon words known to almost all men, and, I venture, to many women.'⁵⁵⁷ Woolsey's decision was steeped in ideological, nationalistic considerations, a vision of pastoral power and nostalgia for old uncorrupted England. Yet with his final nod to the delicate sensibilities of the female class, Woolsey's

⁵⁵⁴ Loren Glass, "Redeeming Value", *supra* note 529 at 346. See also Allison Pease, *Modernism, Mass Culture and the Aesthetics of Obscenity* (Cambridge: Cambridge University Press, 2000).

⁵⁵⁵ Ernst & Schwartz, *supra* note 471 at 94.

⁵⁵⁶ Michael Moscato & Leslie LeBlanc, eds. *The United States of America v. One Book Entitled "Ulysses" by James Joyce: Documents and Commentary* (Frederick, Md: University Publications of America, 1984) at 94.

⁵⁵⁷ *Ulysses One*, *supra* note 397 at 183-184.

decision nonetheless challenges the idea that women as *a class* must be protected from obscenity.

Almost thirty years later, the trope of authenticity associated with obscene words formed a major part of the defense argument in the United Kingdom prosecution of Penguin Books for publishing *Lady Chatterley's Lover*. As Ladenson points out, *Lady Chatterley's Lover* was deemed offensive not just because of its sex scenes, which appeared to defend adultery, but because 'it violated a specifically linguistic morality'⁵⁵⁸ or class division, in that obscene words were spoken by both lower class and upper class characters (such as in the exchange between Mellors and Connie's father⁵⁵⁹) as well as between men and women (when Mellors teaches Connie the difference between the words 'cunt' and 'fuck.'⁵⁶⁰) Lawrence's portrayal of a woman who is sexually awakened through words recalls the sexualized scene that formed the basis of the judgment in *Hicklin*: that between the priest and his female, and corruptible, confessant. But Lawrence inverts this scene, challenging the view that decent women need to be protected from this kind of language, in a critique that parallels his challenge to the idea of sex as exclusive to the domain of marriage and the family.

Learning from the successful argument in *Ulysses One*, the prosecutor Mervyn Griffith-Jones conceded that the words in Lawrence's book were 'good old Anglo-Saxon four-letter words.'⁵⁶¹ Literary critic Malcolm Cowley testified at trial to the shifting cultural significance of the dirty words in issue:

there are a certain number of short Anglo-Saxon words for bodily functions that were regarded until World War I as being wholly part of a secret language of men, comparable to the secret language of men that the anthropologists have found in the South Pacific tribes. These words were used in the smoking room, in

⁵⁵⁸ Ladenson, *supra* note 104 at 141.

⁵⁵⁹ Lawrence D. H. *Lady Chatterley's Lover and A Propos of 'Lady Chatterley's Lover'* (Cambridge: Cambridge University Press, 2002) at 283.

⁵⁶⁰ *Ibid.* at 177-178.

⁵⁶¹ C.H. Rolph, ed. *The Trial of Lady Chatterley: Regina v. Penguin Books Limited: the Transcript of the Trial*. (London: Penguin Books, 1961) at 6.

the bar room, in the barbershop, but no woman was supposed to know them unless she was an utterly degraded woman. After World War I, women increasingly demanded admission to what had been the sacred places of men, the smoking room, the barroom, the barbershop even, and demanded knowledge of the secret language of men. So that there came one word after another in one novel after another. Some literary historian should follow the fate of these four-letter words, when they first appeared, which of the first words appeared in Hemingway's *Farewell to Arms* in 1929, which of the words first appeared here in *Ulysses*, when it was introduced in 1931; which of the words appeared in, let us say, *The Naked and the Dead*, *From Here to Eternity* and, more lately, *Love Possessed*.⁵⁶²

Noting the connection between these words and the context of lower-class men-at-war, Loren Glass argues that the emphasis on the 'Anglo-Saxon' derivation of these terms is 'part of an attempt both to fetishize the language of soldiers as representative of national vernaculars and, coordinately, to affirm a certain Anglophone cultural hegemony in the context of literary modernism's internationalist pretensions in the wake of the Great War.'⁵⁶³ As Paul Fussell notes, the use of obscenity amongst soldiers in WWI was frequently figured in literary terms: "the intensifier of all work was *fucking*, pronounced *fuckin'*, and one exhibited one's quasi-poetic talents by treating it with the greatest possible originality.'⁵⁶⁴ Dirty words in mid-century, then, were associated with a very specific ethnographic group: lower-class English-speaking men. By contrast, the euphemisms used to refer to them – what Morris Ernst called 'the six deadly adjectives—*obscene*, *lewd*, *lascivious*, *filthy*, *indecent*, and *disgusting*—which are the basis of censorship'⁵⁶⁵ – are of Latin derivation and carry a bourgeois connotation. They are vague, abstract and polysyllabic, contrasting sharply with the short concrete terms

⁵⁶² Quoted in Charles Rembar, *The End of Obscenity* (New York: Bantam, 1968) at 80.

⁵⁶³ Glass, "Modernism and Dirty Words", *supra* note 533 at 211.

⁵⁶⁴ Paul Fussell, *The Great War and Modern Memory* (New York: Oxford UP, 1975) 179 cited in *Ibid.* at 211. Linguist Ruth Wajnryb affirms that 'wars do great things for the spread of swear words,' noting that the initial controversies over the publication of these words occurred in the context of accurately representing the speech of soldiers in World War I, especially in *A Farewell to Arms* and the English translation of Erich Maria Remarque's *All Quiet on the Western Front*. Wajnryb, *supra* note 495 at 244.

⁵⁶⁵ Ernst & Seagle, *supra* note 471 at vii.

that they describe.⁵⁶⁶ So Lawrence Durrell, in his 1968 preface to *Lady Chatterley's Lover*, speculates: 'it has always struck me as curious that most, if not all, the banned words seem to be of Saxon provenance, while the euphemisms constructed to convey the same meanings are of Latin-French. Does this argue some great split in the British conscience—a split occurring very far back in history when the Normans were the rulers?'⁵⁶⁷ The emphasis on Anglo-Saxon derivation, then, 'affirms the linguistic power and pedigree of an Anglophone vernacular in the face of political and artistic developments that were vitiating the integrity of nation-states.'⁵⁶⁸

Purifying Sex and Language

For Lawrence, 'these frank Anglo-Saxon terms go hand in hand with honest, liberatory attitudes toward sex.'⁵⁶⁹ He was deeply disturbed by the ways in which these words had become dirty and obscene, and wanted to purify language by inuring the reader to the shock and forcing them to reflect on the reading. He tried to sever these words from their capacity to be hurtful, their connotative force, and trying to restore them to their sexual referents in order to affirm 'a proper reverence for sex, and a proper awe of the body's strange experience.'⁵⁷⁰ Max Horkheimer identified as characteristic of modern culture 'a love-hate relationship with the body... The body is scorned and rejected as something inferior, and at the same time desired as something forbidden, objectified and alienated.'⁵⁷¹ Joyce and Lawrence used obscene words to attack an unhealthily

⁵⁶⁶ Ie. George Carlin's famous 'seven dirty words' are shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.

⁵⁶⁷ Lawrence Durrell, "Preface" in *Lady Chatterley's Lover* (New York: Bantam Books, 1968) ix. Durrell, citing his "deep repression," prints the words backwards as "kcuf" and "tnuc," cited in Glass at 212.

⁵⁶⁸ Glass, "Modernism and Dirty Words", *supra* note 533 at 212. 'The obscene 'four letter words' of the English language are not cant or slang or dialect, but belong to the oldest and best established element of the English vocabulary.' Read, *supra* note 509 at 264.

⁵⁶⁹ Ladenson, *supra* note 104 at 141.

⁵⁷⁰ Lawrence, *supra* note 559 at 333.

⁵⁷¹ Max Horkheimer & Theodor W. Adorno, "Notes and Drafts" in *Dialectic of Enlightenment* (1944; New York: Herder & Herder, 1972) at 232-233 cited in Frappier-Mazur, "Truth and the Obscene Word," *supra* note 497 at 213.

repressed attitude to the body and hypocritical cultural norms, breaking down the opposition between the aesthetic and the pornographic.⁵⁷² They each deploy obscene words differently: Joyce by placing ‘sexual’ words in non-sexual contexts, and Lawrence by using them to gesture towards a different kind of sex.

For Lawrence, a long abstraction or evasive euphemism – the terms ‘sexual intercourse’ or ‘making love’ or ‘sleeping together’ - function only as an escape or obfuscation of natural desire. Lawrence wanted to show the truth in all its detail: the prosecution objected to the sex scenes in *Lady Chatterley’s Lover* on the basis that ‘they are described in the greatest detail... in detail leaving nothing to the imagination. The curtain is never drawn. One follows them not only into the bedroom but into bed and one remains with them there.’⁵⁷³ Lawrence’s effort to ‘cleanse’ or ‘redeem’ the language used for corporeal reference, to convince the reader that dirty words are ‘a natural part of the mind’s consciousness and body,’ formed a major part of the legal defense.⁵⁷⁴ English professor Richard Hoggart testified for the defence that Lawrence was trying to restore something to the use of the word ‘fuck,’

... one of the things Lawrence found most worrying was that the word for this important relationship had become a word of vile abuse. So one would say ‘fuck you’ to a man, although the thing has totally lost its meaning; it has become simply derision, and in this sense he wanted to re-establish the meaning of it, the proper use of it.⁵⁷⁵

For Lawrence, ‘nomenclature and ideology are one.’⁵⁷⁶ If the words used to refer to sex are corrupted, then sex is corrupted. He thus sought to purify obscene words by repeating them deliberately, distinctly, and emphasizing their status as *description* – as

⁵⁷² See further Pease, *supra* note 554; Rachel Potter, “Obscene Modernism and the Trade in Salacious Books” (2009) 16:1 *Modernism/Modernity* 87.

⁵⁷³ Rolph, *supra* note 561 at 5, my emphasis.

⁵⁷⁴ Lawrence, *supra* note 559 at 333.

⁵⁷⁵ Rolph, *supra* note 573 at 26.

⁵⁷⁶ Ladenson, *supra* note 104 at 141.

tied to their sexual referent. Hoggart testified as to the effect of reading the obscene words as they were repeated throughout Lawrence's text:

The first effect, when I read it, was some shock, because they don't go into polite literature normally. Then as one read further on one found the words lost that shock. They were being progressively purified as they were used. We have no word in English for this act which is not either a long abstraction or an evasive euphemism, and we are constantly running away from it, or dissolving into dots, at a passage like that. He wanted us to say 'This is what one does. In a simple, ordinary way, one fucks,' with no sniggering or dirt.⁵⁷⁷

In forcing the reader to confront the word, again and again, Lawrence's text echoed the approach often adopted by defense counsel in obscenity cases, who repeat obscene words as often as possible to inure the jury from thinking them obscene. Lawrence recognized that the power of obscene words comes from their being taboo, unutterable, and if we break that taboo by uttering them, we break the obscenity. In other words Lawrence took the unutterableness of obscenity and tried to utter it, destroying its power. When the prosecution suggested that Penguin could have published an earlier draft of Lawrence's book, in which the words were rendered 'f..k' and 'c..t,' the defense responded:

Have we really descended to this? Are we so frightened of words that while it is perfectly all right to publish a book with 'f..k' it is all wrong to publish a book with the word in its full form? This would in fact have destroyed the whole purpose with which Lawrence was using the words. People in real life do not say 'f..k.'⁵⁷⁸

The idea that iterability was a way of taming words, and of seeing the signifier through or past the words, was central to Lawrence's theory of writing. This shows a significant difference in the theory of iterability from the view of pornographic texts as corrupting. It gestures towards the idea of repetition as cure not addiction. Barthes's definition of repetition suggests a way of understanding what Lawrence was trying to do. In *Writing degree Zero* (1953), Barthes argued that to write is to be immediately caught up in

⁵⁷⁷ Rolph, *supra* note 573 at 26.

⁵⁷⁸ *Ibid.* at 40-41.

particular discursive orders, the socially instituted forms of writing, a set of signs (a myth) of literature - hence the search for an unmarked language, before the closure of myth, a writing degree zero. In certain forms of repetition, Barthes saw the possibility of returning to this unmarked language. In *The Pleasure of the Text* (1975), he distinguished 'a mass banalization, linked to the repetition of language,' which is 'outside bliss but not necessarily outside pleasure,' from a repetition which 'itself creates bliss' – a bliss which 'may only come with the *absolutely new*, for only the new disturbs (weakens) consciousness.'⁵⁷⁹ As examples of the latter, Barthes cites 'obsessive rhythms, incantatory music, litanies, rites, and Buddhist nembutsu, etc', suggesting that 'to repeat excessively is to enter into loss, into the zero of the signified.'⁵⁸⁰

In short, the word can be erotic on two opposing conditions, both excessive: if it is extravagantly repeated, or on the contrary, if it is unexpected, succulent in its newness... In both cases, the same physics of bliss, the groove, the inscription, the syncope: what is hollowed out, tamped down, or what explodes, detonates.⁵⁸¹

Lawrence's repetition of 'cunt' and 'fuck' throughout the speech of his characters and the text of his novel was an attempt to hollow out the signified from the sign, as a precondition for investing it with new meaning. In his work, we can glimpse traces of a non-mimetic, differential account of language's power, of a repetition divorced (however momentarily) from reference, and released into pure representation.⁵⁸²

Conclusion: Repeating Differently

This chapter has traced legal prosecutions for obscenity throughout the nineteenth and twentieth century in order to examine the dynamics of representation, and in particular, the nature of repetition. At each moment law has performed the literary function of

⁵⁷⁹ Barthes, *The Pleasure of the Text*, *supra* note 20 at 41.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.* at 42.

⁵⁸² For a discussion of Lawrence's non-mimetic differential understanding of language, see further Anne Fernihough, *D.H. Lawrence: Aesthetics and Ideology* (Oxford: Clarendon Press, 1993).

interpreting the text and a political function of rendering a judgment. The actions of judges and figures like Comstock during the nineteenth-century preserved the power of obscene texts by asserting the necessity of private judgment. As the social and cultural changes in the twentieth century, including democracy, the rise of class critique, and modernism's loss of faith in paternalism, made secret judgment less tenable, obscenity cases began to address and engage with obscene texts in some detail, bringing literary understandings of representation to bear by carving out a role for expert evidence in deciding obscenity. The court's own understanding of what it is doing, and how it relates and is accountable to a broader public, was fundamentally altered over this time by shifts in ideology, as a fear of the lower classes in the nineteenth-century gave way to a rhetoric of the common man and a great hostility to the intellectuals and upper classes in the twentieth-century.

This historical transformation is thrown into relief by considering the different understandings of repetition that obscene words invoke across legal, pornographic, and literary discourses. For Comstock, repetition is about addiction, for the judges in *Harmon* it is about corruption, but for Joyce and Lawrence it is about purification. Faced with the idea of obscenity as addictive and corrupting, legal writing obscures rather than repeats, or seeks to contain repetition through euphemism and circumlocution. Pornographic texts themselves rely on the deferral towards sex as desire as that which cannot be captured in language. And modernist literature, whose hallmark is to foreground its own status as representation, sought by the repetition of obscene words to purify language and through it sexuality. These legal, pornography and literary texts offer different examples of what can be done with repetition, where at stake is the very political power of resignification – a repetition which significantly breaks with previous contexts and hails the horizon of possibility, of the genuinely new.

Restaging Speech: Theatrical Cursing, Police Performance, and Obscene Repression

It is the spectator, and not life, that art really mirrors.⁵⁸³

Introduction: Farce of Law

Late one night on a deserted street, Norm, a working class Anglo-Australian male, stops Ahmed, a younger student from Pakistan, to ask him for a light, and strikes up a conversation. Norm seems friendly enough, but there is an undercurrent of hostility to his speech and behavior, as if he is slyly baiting or taunting Ahmed. When the conversation draws to a close, Norm offers a parting handshake to Ahmed, which suddenly becomes a punch to the stomach and face. 'He grabs Ahmed's head and bashes it against the post. Then he flings the limp body over the handrail.'⁵⁸⁴ Norm then utters the final, shocking words: "Fuckin' boong."⁵⁸⁵

This explosion of violent racism is the confronting climax of the now-classic Australian play *Norm and Ahmed*, the first play by twenty-five year old Alex Buzo, who would become one of Australia's most outstanding playwrights.⁵⁸⁶ Having carefully aligned

⁵⁸³ Oscar Wilde, *The Picture of Dorian Gray* (London: Penguin, 1985) at 4.

⁵⁸⁴ Alexander Buzo, "Norm and Ahmed" in *Norm and Ahmed and Rooted* (Sydney: Currency Press, 1968) at 26 [*Norm and Ahmed*]

⁵⁸⁵ Boong is a highly offensive word used to refer to Australian aboriginals, more commonly used in the 1960s than now. By having Norm's character use this word in relation to Ahmed, who is from Pakistan, Buzo evokes his undifferentiating hatred towards a racialised, dark-skinned 'other'.

⁵⁸⁶ In 2005 Buzo received an Honorary Doctorate of Letters from the University of New South Wales for his contribution to Australian Literature. See Trevina Hall, "Rooted" *Sunday Mail*, (25 July 1999). page 84;

Norm, 'one of the earliest identifiable stage ockers,'⁵⁸⁷ with the Australian norm – his character speaks fondly of Australian national myths and institutions, espousing the virtues of tolerance, freedom, and friendliness towards others – the final revelation renders the play a powerful exploration of 'racism and generational envy'⁵⁸⁸ that remains disturbingly relevant to Australian society forty years after it was initially performed.⁵⁸⁹

The earliest performances of *Norm and Ahmed* were shocking for other reasons. One Saturday night at the Twelfth Night Theatre in Brisbane, two police officers mounted the stage and arrested the actor playing Norm for using obscene language in a public place.⁵⁹⁰ It was not Norm's racial slur that the police were concerned with, but rather the word 'fuckin.'⁵⁹¹ The following month, a performance of *Norm and Ahmed* by the Cairns Little Theatre Group in Townsville was edited by local police backstage, and several further cuts to the dialogue enforced. The police attitude towards the play was not supported by the courts: a Queensland magistrate refused to issue an injunction to prevent the Twelfth Night Theatre production from proceeding after the actor's arrest,⁵⁹² and his initial conviction was overturned by the Supreme Court of Queensland

"Alexander Buzo, Playwright and Humorist" *The Independent* (30 August 2006), <http://www.independent.co.uk/news/obituaries/alexander-buzo-413889.html>

⁵⁸⁷ Gordon Graham, "The year our view broke" *The Australian Sunday Edition* 1, (9 June 1999) B21.

⁵⁸⁸ Alex Buzo, 2005 television interview, Sydney ABC TV 2006 'Remembering Alex Buzo' DVD Sydney.

⁵⁸⁹ *Norm and Ahmed* was performed at the Old Fitzroy Hotel in Sydney by the Alex Buzo Company in 2007, and inspired Alana Valentine's play *Shafana and Aunt Sarrinah*, performed as a companion piece to Buzo's play at the Seymour Centre in 2009: Louise Schwartzkoff, "Holding a mirror to an Australian classic" (4 August 2009) <http://www.smh.com.au/news/entertainment/arts/holding-a-mirror-to-an-australian-classic/2009/08/03/1249152555456.html>; Graeme Blundell, "Triumph of censor's target" *The Australian* (27 July 2009) <http://www.theaustralian.com.au/news/triumph-of-censors-target/story-0-1225754902800>; John McCallum, "Veil tale paired with an old gem" *The Australian* (11 August 2009) <http://www.theaustralian.com.au/news/veil-tale-paired-with-an-old-gem/story-e6fgr8of-1225759985201>. It was placed on the Higher School Certificate Reading List in 2010.

⁵⁹⁰ Under Section 7(c) of the *Vagrants, Gaming and Other Offences Act Qld Vagrancy Act* (1931).

⁵⁹¹ For an expression of surprise that the outrage was over the first word, not the second, see Katharine Brisbane "Introduction" in *Plays of the 60s*, Vol. 3 (Sydney: Currency Press, 1999).

⁵⁹² *Attorney-General (Qld) v. Twelfth Night Theatre* [1969] Qd R 319.

the following year, on the grounds that the word was not obscene in the context of the play.⁵⁹³

By this time, public reaction to 'the crude puritanism' of the police interventions into theatre in Queensland and other states had formed the catalyst for a fierce nationwide debate which cultural critic and playwright Max Harris called 'the most explosive censorship crisis in the history of the country.'⁵⁹⁴ Far from justifying the grounds for censorship in the public mind, the police actions revealed those grounds to be 'anomalous and confused.'⁵⁹⁵ Reforms to the censorship regime soon followed, and Australian theatre has never again been targeted by the censors at the level of 1969.⁵⁹⁶ While *Norm and Ahmed* is now viewed as a 'landmark in the development of a national drama,'⁵⁹⁷ the scene of police officers walking onstage to arrest an actor for uttering obscene words is now recalled as 'farce'.⁵⁹⁸

My aim is to explore what this farce reveals about the workings of law, and in particular, about the tendency of theatrical, spectacular or explicit measures to undermine or

⁵⁹³ *Bradbury v Staines ex parte Staines* [1970] QR 1970 76. It was a 2:1 decision.

⁵⁹⁴ Max Harris, "It's war on the censors" *The Australian* (26 July 1969) at 22. See Geoffrey Dutton & Max Harris, *Australia's Censorship Crisis: The Uncensored Examination of Australian Censorship* (Melbourne: Sun Books, 1970) [*Australia's Censorship Crisis*]. In July 1969, three actors were charged on summons for obscene language uttered in the course of performing *The Boys in the Band* at the Playbox Theatre in Melbourne, Victoria. See "Damn! Another 'obscene' play" *Courier Mail* (21 June 1969); "Boys in the Band is serious play, say police" *The Australian* (11 July 1969) at 4; "Vice squad man reads 'filthy' words to court" *The Australian* (31 July 1969) at 2; "Tangle of Censors" *The Age* (29 November 1969). In December 1969, the Minister for Customs, Mr. Donald Chipp, banned the play *Oh! Calcutta!* and in February 1970, the Victorian Supreme Court issued an order forbidding its production in Melbourne.

⁵⁹⁵ Harris, "It's war on the censors", *supra* note 594 at 22.

⁵⁹⁶ In the 1970s, the Australian approach shifted from a closed censorship approach to a more open, liberal and accountable regime, based around classification as the norm and direct banning of material as the exception. In 1974, both South Australia and New South Wales replaced statutory obscenity offences with the administrative classification system that now operates throughout Australia under the principle that adults 'should be able to read, hear and see what they want.' Office of Film and Literature Classification *Guidelines for the Classification of Publications* OFLC Sydney 1999. The national scheme is currently administered under the National Classification Code determined under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

⁵⁹⁷ Philip Parsons, founder of Currency Press, in *Remembering Alex Buzo*, *supra* note 588.

⁵⁹⁸ Neil Wiseman, "Cops in stage farce" *Courier Mail* (7 October 2007) <http://www.news.com.au/couriermail/story/0,23739,22540656-5008700,00.html>

compromise law's authority.⁵⁹⁹ As cultural forms and functions, law and theatre have always been inextricably intertwined.⁶⁰⁰ 'Law spoke, was enacted, from within a ceremonial space, from a solemnized stage as a profoundly theatrical symbolization of the gravity and majesty of social rule.'⁶⁰¹ But if theatricality is essential to law's power, it also seems to hold the potential for undermining it – by being too visible, too exposed:

If law has historically exploited its theatricality – offering an exemplary spectacle of punishment, awing its subjects with its pomp and ceremony, replaying the crime, and dramatizing the defendant's story through impersonation – at the same time it has rebuked or abjured its own theatricality. While law has often gained a performative power from its exploitation of theatrical means, it has also gained a kind of surplus legitimacy from its disavowal of these means: we are not exploiting theatrical tactics (claim the producers of the legal event), and this is precisely what shows our strict adherence to the law.⁶⁰²

To appreciate this farce is to acknowledge the charged symbolic role played by the police in the public performance of state law. Those who wish to command must constantly invoke violence, if not directly, then in displaced or mimetic form. Police represent the state's most direct claim to the 'monopoly of the legitimate use of

⁵⁹⁹ 'Theatricality may allow some all-encompassing totalitarian "symbolic" to achieve its effects or help "the great prohibitions" to "deploy their effects" (as Legendre says), but it also often embarrasses and confuses them'. Julie Stone Peters, "Legal Performance Good and Bad" (2008) 4 *Journal of Law, Culture and the Humanities* 179 at 197.

⁶⁰⁰ 'Law and theater, in the form of a strictly coded rhetoric of legal causes, was all about conjuring the illusions, the *phantasma*, of earlier deeds or transactions and conveying a sense of their justice or iniquity, their innocence or guilt.' Peter Goodrich, "Screening Law", *supra* note 60 at 5. Goodrich traces the historical rivalry between law and theatre to their 'commonality of form and function,' the 'proximity of the genres,' where 'one is an illusion, the other a litany of injustices.' *Ibid.* at 6. Many scholars have noticed the 'remarkable proximity of theater to law', a closeness which is 'geographical and architectural as well as being artistic, institution and existential.' *Ibid.*

⁶⁰¹ *Ibid.* at 6.

⁶⁰² 'Theatricality is essential to the production of law. At the same time, theatricality in law often bears its historically negative charge: law is about accessing truth; theatre is about presenting lies. Law might be theatre's cure, insofar as it can uncover the truth, but law must always be wary of the theatre that lies in its heart. In short, law's history is marked by an oscillation between the antinomies of theatricality and antitheatricality, in a relationship of attraction-revulsion – a kind of *fortda* – between the theatrical and its antithesis. Theatre is law's twisted mirror, its funhouse double: ever-present, substantiating, mocking, reinforcing, undermining.' Peters, *supra* note 599 at 198.

physical force.’⁶⁰³ Their ‘embarrassing’ proximity to authority is manifested in perpetual displays of force, even in peaceful public places.⁶⁰⁴ As ‘front line agents in the reproduction of social order’⁶⁰⁵ and the primary vehicle for ‘the state’s symbolic monopolization of legitimate force,’⁶⁰⁶ the police embody the possibility of enforcement necessary to any thinking about law.⁶⁰⁷ Cultural studies of policing insist that there is no hard and fast distinction between ‘real’ police work (solving crime) and symbolic or meaning-making functions like the projection of authority and order.⁶⁰⁸ The symbolic power exercised by police depends on the recognition of an audience.⁶⁰⁹ As criminologist Ian Loader writes, ‘popular attachment to policing is principally *affective* in character, something which people evince a deep emotional commitment to and which is closely integrated with their sense of self.’⁶¹⁰ ‘Popular sentiment towards policing is marked by a high ‘fantasy content’ regarding what the police can and should do... It is attracted to the idea of an omnipotent source of order and authority that is able to face

⁶⁰³ Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Vol. 2 (Berkeley: University of California Press, 1978 [1972]) at 54. Egon Bittner argued that the fundamental feature of policing was its legitimate use of force. Without a recognition of the degree to which the function of police rests in the last instance on the expectation that police will act without being resisted, on the basis that in the last resort, force will be used, we cannot distinguish police functions from those of other state agents. Egon Bittner, “The Function of the Police in Modern Society” (1970) in *Aspects of Police Work* (Boston: Northeastern University Press, 1990) 89.

⁶⁰⁴ Agamben, “Notes on Gesture”, *supra* note 329 at 104.

⁶⁰⁵ Richard Victor Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982) at 3

⁶⁰⁶ Robert Reiner, *The Politics of the Police* (New York: St Martin’s Press, 1985) at 17.

⁶⁰⁷ Derrida, “Force of Law” *supra* note 26 at 925.

⁶⁰⁸ Christopher P. Wilson, *Cop Knowledge: Police Power and Cultural Narrative in Twentieth-Century America* (Chicago: University of Chicago Press, 2000) at 12. As Loader puts it: “[I]t is necessary to avoid making a hard and fast distinction between the symbols and practices of police work... The routine activities and symbolic forms that comprise the social phenomena of policing cannot so easily be divided. The craft skills and coercive powers that police employ on a daily basis are not just goal-oriented. They serve too to communicate meaning, not only about the police and their role, but also about power and authority in society.’ Ian Loader, “Policing and the Social: Questions of Symbolic Power” (1997) 48:1 *British Journal of Sociology* 1 [“Policing and the Social”] at 9.

⁶⁰⁹ ‘Symbolic power is the form that all other kinds of capital (economic, cultural, and social) take once they are perceived and recognized as legitimate.’ Pierre Bourdieu, “Social Space and Symbolic Power” (1989) 7:1 *Sociological Theory* 14 at 17. ‘Symbolic capital is a credit; it is the power granted to those who have obtained sufficient recognition to be in a position to impose recognition.’ *Ibid.* at 23. On the affective nature of popular attachment to policing, see Loader, “Policing and the Social”, *supra* note 608 at 4.

⁶¹⁰ Loader, “Policing and the Social”, *supra* note 608 at 3.

up to the criminal Other.’⁶¹¹ The spectacle of policing ‘strives to make actual, both to its subjects and to itself, the authorized face, and force, of the state.’⁶¹²

If policing is state law at its most theatrical, it is also sovereign authority at its most vulnerable – recall the Tranny Cops. In Townsville in 1969, the spectacle of policing turned the force of law into farce. How did this happen, and what can we learn from it? In realist or naturalist theatre the spectator is absorbed in the onstage action and the supporting apparatus or ‘backstage’ is obscured, for its exposure would undermine the dramatic illusion. But at certain moments, or in other types of theatre, the audience is made conscious of the fact that they are watching a performance: through the excess of farce, the self-conscious reference to theatre within theatre itself known as ‘meta-theatre’ (such as plays-within-plays), or when an actor flubs his or her lines. Tracy C Davis identifies this awareness of spectatorship as central to ‘theatricality.’⁶¹³ Its political power was perhaps most rigorously explored by playwright Bertolt Brecht, who, as Thomas O. Beebee explains, ‘wanted his actors to remain outside their roles, the spectators to remain outside the story which seeks to involve and entrap them;’⁶¹⁴ such theatre ‘wishes to show its backstage area *as a political gesture*.’⁶¹⁵ Theatricality, then, is a viewing experience in which the backstage mechanisms that sustain the onstage spectacle are revealed to the audience. Brechtian theatre ‘wishes to show its backstage area *as a political gesture*’⁶¹⁶ but as Beebee observes in relation to the theatricality of

⁶¹¹ *Ibid.* at 2.

⁶¹² Jean and John Comaroff, “Criminal Obsessions, after Foucault: Postcoloniality, Policing, and the Metaphysics of Disorder” (2004) 30 *Critical Inquiry* 800 at 805.

⁶¹³ ‘Theatricality is not likely to be present when a performance is so absorbing that the audience forgets it is spectating.’ Tracy C. Davis, “Theatricality and Civil Society,” *supra* note 115 at 128. The art critic Michael Fried argues that whenever a consciousness of viewing exists, in life or in painting, absorption is replaced by theatricality, defined as the sacrifice of ‘dramatic illusion vitiated in the attempt to impress the beholder and solicit his applause.’ Michael Fried, *Absorption and Theatricality: Painting and Beholder in the Age of Diderot* (Berkeley: University of California Press, 1980) at 100, cited in Tracy C. Davis & Thomas Postlewait, ‘Introduction’ in Davis & Postlewait, *supra* note 115 at 20.

⁶¹⁴ Thomas O. Beebee, “The Legal Theaters of Bertolt Brecht” in Roberta Kvelson, *Law and Aesthetics* 37 at 40.

⁶¹⁵ *Ibid.* at 55.

⁶¹⁶ *Ibid.*

courtroom procedure, ‘no one is interested in seeing the law’s backstage, which seems to invalidate its results.’⁶¹⁷ The theatricality of the police interventions into *Norm and Ahmed* revealed ‘the law’s backstage:’ the police purport to represent law-preserving violence, but actually exercise lawmaking violence, instantiating the force of law they purport to draw upon.⁶¹⁸

This chapter reconstructs this historical encounter between law and theatre, drawing on contemporary newspapers as well as letters written to Alex Buzo by the actors and directors of his play – contemporary written accounts by those who witnessed the play and the spectacle of policing, and found the latter less than convincing.⁶¹⁹ Theatre is gesture - Peggy Phelan called it ‘representation without reproduction’⁶²⁰ – and cannot ever be recreated exactly, but we can chart the traces of its force or affect through accounts of spectatorship. Part 1 examines the onstage arrest in Brisbane to show how the encounter between two performances ended in a farcical moment in which the police action was judged by the players and media as a performance. Part 2 examines the backstage censorship in Townsville, where a letter to Buzo from the director recounts how the police presence in the audience led to a moment of unscripted laughter which undermined both the dramatic illusion of the play and the censorious power of the police. Part 3 adopts the perspective of the audience to explore a reading of the performance made possible by the decision of the police to enter the theatrical

⁶¹⁷ *Ibid.* at 53.

⁶¹⁸ Reading Walter Benjamin’s “Critique of Violence,” Derrida explains: ‘The police are the force of law [*loi*], they have the force of law, the power of the law.’ Derrida, “Force of Law” *supra* note 26 at 925. ‘... law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable.’ *Ibid.* That which Derrida identifies of the judge – who suspends the rules in every legal decision in order to re-instantiate them – also obtains of police actions, in which, as Benjamin noted, “the separation of law-founding violence and law-preserving violence’ is suspended.’ *Ibid.* at 927.

⁶¹⁹ Papers of Alex Buzo, National Library of Australia. A handwritten note by Alex Buzo attached to the correspondence says: “The sequence of letters exposes censorship in Oz in 1969 and shows why it died in 1970. They are from Bill Pepper, Norm Staines, Graham McKenzie and Maren Tinman. BP saw N+A in Sydney in ’68, got the rights. 12th Night Theatre staged it in Brisbane with N. Staines. There was a court case over the play’s last line. Then G.M. secured it for Townsville, M. Tinman directed and the police cut much more than one line. *Scary and hilarious reading!*” Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26.

⁶²⁰ Phelan, *supra* note 53 at 3.

frame and be judged as players in the drama. The police intervened to transform Norm's racist statement into an obscene one. From the perspective of historical distance, we appreciate the irony: the police were preoccupied with the wrong word. The police were reacting to the play's exposure of obscenity, but their own reaction revealed this racist violence as that which is repressed by law. In this doubling of theatre and law, actors and police, the character's racism is revealed as the fantasmatic kernel ensuring the consistency of liberalism, the obscene superego underside of law.

I. Onstage: The Collision of Two Scripts

At the close of the 1960s in Australia, the decade's warring forces of social revolution and reactionary conservatism converged on the local theatre in what became known as the 'censorship crisis.' Australia has always had one of the most rigid censorship regimes in the western world, comparable only to Ireland and South Africa.⁶²¹ As a sea-locked island that historically imported all its literature, Australia censored as a means of shoring up its borders against racial degeneracy and moral corruption, with the idea that White Australia should become the empire's 'moral centre.'⁶²² For most of the twentieth century, the Department of Trade and Customs prohibited the importation of publications or goods deemed obscene, indecent, blasphemous and seditious, or those identified to excessively emphasise sex, violence or crime. The public was prevented from even knowing which texts were being kept from them until 1958.⁶²³ Each state's Chief Secretary had long held the power to ban plays 'where it is fitting for the preservation of good manners and decorum to do so,'⁶²⁴ but this power had been

⁶²¹ 'Between 1901 and the Second World War, Australia had arguably the severest censorship laws of any democratic country.' Deana Heath, "Literary Censorship, Imperialism and the White Australia Policy" in Maryn Lyons & John Arnold, *A History of the Book in Australia, 1891-1045* (St Lucia: University of Queensland Press, 2001) at 69.

⁶²² *Ibid.* at 70.

⁶²³ See further Nicole Moore, *The Censor's Library* (St Lucia: University of Queensland Press, 2012).

⁶²⁴ *Theatre and Public Halls Act 1908* (N.S.W.) s 27. State Ministers also had the power to ban material under the *Obscene Publications Act 1857* and *1864* (U.K.) 20 & 21 Vict., c.83.

exercised on relatively few occasions.⁶²⁵ Then, reforms to the national censorship regime in the 1950s shifted the locus of censorship battles to state officials and local vice squads, eagerly took up the charge of protecting public morals by using the obscene language provisions of the various state *Vagrancy Acts*.⁶²⁶

When *Norm and Ahmed*, directed by Jim Sharman, premiered in April 1968 at the Old Tote in Sydney, the final line was changed to 'bloody boong' to evade controversy.⁶²⁷ The following year, the Twelfth Night Theatre in Brisbane, Queensland, performed *Norm and Ahmed* in unamended form.⁶²⁸ On Friday 18th April, two plain-clothed policemen from the Licensing Squad sat in the audience, and, after Norm spoke the play's final line, climbed onto the stage and identified themselves as police. The actor Norman Staines recalled: 'They asked me my name and if I had used the words. I said I had and they warned me I could be arrested and charged with using obscene language.'⁶²⁹ The

⁶²⁵ In 1935 NSW Chief Secretary Baddeley banned Clifford Odet's anti-Nazi play *Till the Day I Die* after complaint from the German consul. For an account of police officers interrupting the New Theatre's performance of Odet's play, see John Tasker, "Censorship in the Theatre" in Dutton & Harris, *Australia's Censorship Crisis*, *supra* note 594 at 38; see further Katharine Brisbane, *Not Wrong, Just Different: Observations on the Rise of Contemporary Australian Theatre* (Sydney: Currency Press, 2005) [*Not Wrong, Just Different*] at 90.

⁶²⁶ 'The establishment in 1967 of the National Literature Board of Review, a joint effort between the federal and state governments (excluding Queensland) aimed at achieving some uniformity in literature censorship throughout Australia, worked to shift the primary site of political battles to state arenas.' Barbara Ann Sullivan, *The Politics of Sex; Prostitution and Pornography in Australia since 1945* (Cambridge: Cambridge University Press, 1997) at 77. 'These Federal agencies have been with us a long time. What is new is the increased virulence of State actions in these matters, often in spite of the supposed gentleman's agreement of uniform censorship arrived at by the State attorneys-general.' Max Harris, "Sparks that are bringing the censorship crisis to a flashpoint" *The Australian* (2 August 1969)

⁶²⁷ Graeme Blundell, *The Naked Truth: A Life in Parts* (Sydney: Hachette, 2008) at 126 [*Naked Truth*]. Blundell comments: 'Sharman was always clever at subverting authority by accommodating it.' A few months later the New South Wales Chief Secretary banned the play *America! Hurrah!*, which had been performed by the New Theatre, where Buzo worked as an actor. Public protest over the ban culminated in a free performance of the banned play, attended by police, and the resulting scuffle marked the high point of state intervention into theatre in New South Wales. Tasker, *supra* note 625 esp. at 43; Katharine Brisbane, Report June 24, 1968, *The Australian*, reprinted in "On the Record – From the Pages of The Australian – 40 years of the Australian: The Culture" Part 6 of 13, *The Australian* (23 July 2004). See further Brisbane, *Not Wrong, Just Different*, *supra* note 625.

⁶²⁸ We do not know the exact number in the audience, but the venue sat less than 100 people. Judith Wright & David Lake, "Censorship in Queensland," in Dutton & Harris, *Australia's Censorship Crisis*, *supra* note 594 at 113.

⁶²⁹ "Twelfth Night production shock: Police Raid on City Theatre – Warning" *Courier Mail* (19 April 1969) at 1. ["Police Raid"]

director Barry Routledge reported: ‘They asked us to cut the line out of future performances otherwise if there were any more complaints a separate charge would have to be made on each. We will replace it with some other words.’⁶³⁰ However, the following evening, Staines delivered the final line of the play according to the script, and the police mounted the stage again and arrested him.⁶³¹ He was taken to the City Watchhouse and fingerprinted before being released on bail.⁶³² A handwritten letter from Staines to Buzo one week later captures the actor’s bemused delight with the publicity:

Well Alex, what a furore! The business made about four front page headlines with oodles of garbage and crap on the inside. There was also quite a bit on TV and radio.⁶³³

The police warning to Staines that Friday night was a display of force as well as an exercise of discretion, as the criminal obscenity had already occurred prior to the warning not to repeat it. The threat also engendered the opportunity for defiance: Staines allegedly told some newspaper reporters that ‘as far as he was concerned, the police could go to hell.’⁶³⁴ Nonetheless, the arrest apparently took the troupe by surprise, because at a meeting that afternoon the police had agreed to proceed by

⁶³⁰ *Ibid.*

⁶³¹ Norman Staines’ letter to Alex Buzo gives a rather unlikely account of this moment: “I must tell you. Last Saturday night we had just finished the play – came heavy footsteps – down the aisle and four sinister looking gentleman (?) mounted the stage (gasp!). One fellow [feller(?)] stepped forwards – pointed a pistol at the audience and told sixty faces to keep calm (and [word unintelligible]). They were taking Mr Staines away for questioning. (God, my writing is getting worse – I am 3/4 slooshed).” Handwritten letter from Norman Staines, 6th May, 1969, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26.

⁶³² Wright & Lake, *supra* note 628 at 114.

⁶³³ Handwritten letter from Norman Staines, 28th April, 1969, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26.

⁶³⁴ The Crown Solicitor’s statement at Staines’ prosecution was quoted in “Actor Staines fined for use of ‘that word’” *Courier Mail* (24 May 1969) at 1 [“Actor Fined”]

summons rather than arrest.⁶³⁵ Joan Whalley, Director of the Twelfth Night Theatre, wrote to the *Courier Mail*:

Events of Saturday night since reported reveal a clear breach of that agreement. We are puzzled by all this and deeply hurt.⁶³⁶

Letters to the *Courier Mail* during the following days demonstrate that the arrest of Staines provoked public debate about how these officers had performed their role as police. In particular, they were criticised for deviating from the *Queensland Police Manual* protocol, which recommended proceeding by summons rather than arrest in such minor instances.⁶³⁷ A solicitor wrote,

... one wonders why it was necessary for the detectives to arrest the actor, to take him to the watch-house and to have him fingerprinted. The same charge could be brought before the court by the issue of a summons which could have been served on the actor at any time. Indeed the Queensland Police Manual instructs: 'Member of the Police Force, even though authorized by law, should abstain, unless when specially instructed to the contrary, from making an arrest for a minor offence when proceedings against the offender by complaint and summons would be effective.' Who gave special instructions to the contrary, and why?⁶³⁸

Another anonymous letter quoted the remainder of the *Manual*:

"199(2) - Although members of the Police Force are expected to zealously carry out their duties, they should exercise forbearance and discretion in dealing with minor offences, committed inadvertently or in ignorance, or without evil intent, by citizens who are ordinarily law-abiding." Whether the police on Saturday night acted under a special instruction contrary to this, or deliberately declined

⁶³⁵ Wright and Lake report that police met with the theatre troupe on the Saturday, the troupe refused to change their script, whereupon the police promised to prosecute. *Wright & Lake, supra* note 628 at 114.

⁶³⁶ The remainder of her letter said: 'a letter delivered to the police prior to the performance of the play on Saturday night last contained confirmation of an agreement made with the Sub-Inspector Worth of the Police Department at approximately 1.15pm on Saturday afternoon that, if any action was taken by the police, it would be taken by way of complaint and summons and not by way of arrest.' "Police Action at Theatre". Letters To the Editor, *Courier Mail* (24 April 1969) at 2.

⁶³⁷ Norman Staines told the press that the police "said they would not arrest me but would refer the complaint to Licensing Squad Chief for any further action." "Police Raid" *supra* note 629. See "Police arrest of actor criticized" in "Letter to the Editor" *Courier Mail* (23 April 1969).

⁶³⁸ C.E.K. Hampson, from the Inns of Court in Queensland in *Ibid.* at 2.

to follow the Manual of Instructions, is not known, but in any event a review of their conduct suggests a preference to act in an unnecessarily overbearing manner. Such conduct is more likely to instill in the minds of the public a feeling of fear rather than respect for the police. Is this by choice?⁶³⁹

These letters evince genuine puzzlement over the motivations of the police, raising questions that cannot be definitively resolved. We do know that the Queensland Police was notorious in a political climate known for its ‘cynical abuse of power’⁶⁴⁰ – just two months previously, Police Commissioner Bischof had resigned amidst allegations of corruption,⁶⁴¹ and Ray Whitrod, appointed as Commissioner the following year, recalled in his memoir ‘a society crisscrossed by a network of obligations and pre-arranged mutual benefits.’⁶⁴² The Fitzgerald Inquiry into police corruption would later demonstrate high levels of interference within the police chain of command from politicians at both local and state levels in Queensland at this time.⁶⁴³ Indeed, given the centralized organization of Australian state police forces, and the fact that newly-appointed conservative Premier Bjelke-Petersen was still in charge of the Police Ministry portfolio,⁶⁴⁴ we could even speculate that a directive came from him, an action that would be in keeping with his pursuit of repressive measures to quash dissent over the

⁶³⁹ “Police duties...” Letters To the Editor, *Courier Mail*, April 24, 1969 at 2.

⁶⁴⁰ Julianne Schultz, “Disruptive Influences” (2008) Griffith Review 21: Hidden Queensland 1 [“Disruptive Influences”]; Jill M. Bolen, *Reform in Policing: lessons from the Whitrod Era* (Sydney: Hawkins Press, 1997) at 32.

⁶⁴¹ The Fitzgerald inquiry later found that police had been running protection rackets for organized prostitution and starting-price betting, as well as other forms of gambling. Mark Finnane, *Police and Government: Histories of Policing in Australia* (Melbourne: Oxford University Press, 1994) at 175. Interview with Ray Whitrod, Australian Biography project, interviewer Robin Hughes, tape 8, October 19, 2000 <http://www.australianbiography.gov.au/subjects/whitrod/interview8.html>; As Fitzgerald observed, ‘in some respects police corruption had acquired a quaint quasi-legitimacy by the Bischof era.’ W. Ross Johnston, ‘Bischof, Francis Erich (Frank) (1904 - 1979)’, *Australian Dictionary of Biography*, Volume 13 (Melbourne: Melbourne University Press, 1993) pp 186-187 <http://adbonline.anu.edu.au/biogs/A130221b.htm>

⁶⁴² Ray Whitrod, *Before I Sleep* (University of Queensland Press, 2004) cited in Schultz, “Disruptive Influences”, *supra* note 640.

⁶⁴³ G. Fitzgerald, QC, *Report of a Commission of Enquiry Pursuant to Orders in Council*, Department of Attorney General, Brisbane, June 1989. Then-Minister for Police Max Hodges later reflected on the independence of police from executive, saying ‘... politicians won’t allow it. They can’t keep their sticky fingers out of it. They can’t help themselves.’ Hodges, 1993, personal communication with Jill M. Bolen, Bolen, *supra* note 640 at 35.

⁶⁴⁴ Premier Bjelke-Petersen appointed Max Hodges as Police Minister on 29 May 1969. See *Ibid.* at 35

following decade.⁶⁴⁵ But the role played by a given politician in the actions of police is almost always open to question, given the passage of time and the insular nature of police agencies,⁶⁴⁶ and this difficulty is compounded in the context of corruption.⁶⁴⁷ As Mark Finnane suggests, while ‘police decision-making invariably takes place in a political context,’⁶⁴⁸ ‘neither judiciary nor political figures can substantially affect police in their everyday work.’⁶⁴⁹

Rather than inquiring into the motivation for the arrest of Staines, we can understand this public speculation about motivation as itself an effect generated by its performance. Police work has a fundamentally theatrical or dramaturgical inflection, mobilising ‘illusion, praxis, and imagery’ in ‘well-directed social productions.’⁶⁵⁰ As a choreographed ‘interaction ritual,’⁶⁵¹ a dramatization of the force of the state over bodies, an arrest achieves a theatrical effect that a summons cannot. The decision to perform a public arrest allows the law to take centre stage, to be *seen* to be done. The *affect* generated by an arrest – how it is perceived and felt by the spectator - is thus crucial to its power.

The director Barry Routledge recalled, ‘(w)hen the police came on stage there was not a whisper from the audience. The police were very good about it. One of them said to Staines, ‘congratulations on a brilliant performance.’”⁶⁵² The officer’s compliment

⁶⁴⁵ See Raymond Evans, *A History of Queensland* (Melbourne: Cambridge University Press, 2007) esp. at 223-224; Raymond Evans & Carole Ferrier, eds., *Radical Brisbane: An Unruly History* (Melbourne: Vulgar Press, 2004); Julianne Schultz, “Disruptive influences” *supra* note 640.

⁶⁴⁶ John P. Crank, *Understanding Police Culture* (Cincinnati, OH: Anderson, 1998).

⁶⁴⁷ Finnane, *supra* note 641 at 3. ‘The notorious difficulties facing investigators of police corruption complaints has been seen as symptomatic of the closed shop character of policing.’ *Ibid.* at 171.

⁶⁴⁸ *Ibid.* at 57.

⁶⁴⁹ *Ibid.* at 146.

⁶⁵⁰ Malcolm Young, *An Inside Job: Policing and Police Culture in Britain* (Oxford: Clarendon Press, 1991) at 4.

⁶⁵¹ Erving Goffman, *Interaction Ritual: Essays in Face-to-Face Interaction* (Chicago: Chicago University Press, 1967)

⁶⁵² Wiseman, *supra* note 598; originally in “Police Raid”, *supra* note 629.

appears incongruous with his role, an embarrassed acknowledgment that he was going through the motions of the arrest and not entirely in command of his own performance. His momentary admiration partakes of a theatrical framework in which Staines gave a convincing and powerful performance as Norm, rather than a legal framework in which a subject uttered obscene language in a public place. The police officers seem confused over what their role was, as if, once they took the stage, they entered a liminal space of uncertainty and the heightened self-consciousness of theatricality. Later that night, Staines joked to the press that Buzo would have to write two more parts into his play: “two detectives. They both said their lines well, but one was a bit nervous.”⁶⁵³ The police needed to be better actors to convince their audience – less apologetic and more indignant perhaps. The role reversal in this scene – as police judge the actors for their performance and are in turn judged by the actors for *their* performance – is quintessential farce.

In the ‘onstage’ story of policing in a democracy under the rule of law, the police ‘apply’ the law by adhering to the pre-authorized script of legal constraints, free from political interference or personal motivations.⁶⁵⁴ The success of a performed arrest lies in the capacity of the police to make the mask they are wearing appear natural, and the force they are wielding appear inexorable. As Beebee explains, ‘In order to function, the law needs to demonstrate that it does not possess interiority; costume alone, the robe and the hat, are sufficient.’⁶⁵⁵ But in the awkwardness of these police officers, in their apparent hesitation and confusion, we become aware of an interiority behind the costume and masks of their roles, which in turn forces recognition of the force of law as a function of its performance.

⁶⁵³ “Police Raid”, *supra* note 629.

⁶⁵⁴ W. Wesley Pue, “Policing, the Rule of Law, and Accountability in Canada: Lessons from the APEC Summit” in W. Wesley Pue, ed., *Pepper in Our Eyes: The APEC Affair*. Vancouver, University of British Columbia Press: 2000) 3.

⁶⁵⁵ Beebee, *supra* note 614 at 53.

While in some sense police officers are always *acting like* police, following scripted and ritual behavior which derives its power from ‘the force of reiterated convention,’⁶⁵⁶ the fact of this acting, and its discretionary, improvisational nature, becomes strikingly apparent in certain – theatrical – circumstances. Just as the performance of drag ‘implicitly reveals the imitative structure of gender itself - as well as its contingency,’⁶⁵⁷ the police, by coming onstage, standing in costume under the lights, and reciting their lines, shine the spotlight on their own imitative structure.⁶⁵⁸ Recall that for Butler, a drag performance will be an effectively subversive to the extent that it is *theatrical* – a successful gender parody cites, doubles, mimes, copies, but in a way which makes the conventions that it is reversing seem hyperbolic or exaggerated.⁶⁵⁹ Like the Tranny Cops, whose parody forced recognition of the textual, linguistic gestures of policing, here the doubling of the police and actors, enforcer and legal subject, framed by the conventions of theatre, forced recognition of their gestures as contingent performance. Are the police performing an arrest, or performing a performance of an arrest? As Staines concluded, “Looking back - it almost seems hilarious.”⁶⁶⁰ Two scripted performances – the play and the arrest – collide onstage in an unscripted, improvised moment which reveals ‘law’s backstage.’ The police are not exercising law-preserving power, they are exercising lawmaking power. They are the law, or rather, the law is nothing but the effect of their performance, and they are making it up as they go along.

⁶⁵⁶ Butler, *Excitable Speech*, *supra* note 13 at 33.

⁶⁵⁷ *Gender Trouble*, *supra* note 171 at 137. ‘When gender is alienated or foregrounded, the spectator is enabled to see a sign system *as* a sign system.’ Elin Diamond, “Brechtian Theory/Feminist Theory” (1988) 32:1 *The Drama Review* 82 at 85 cited in Shannon Jackson, “Theatricality’s Proper Objects: Genealogies of Performance and Gender Theory” in Tracy C. Davis & Thomas Postlewait, eds. *Theatricality* (Cambridge: Cambridge University Press, 2004) 186 at 195.

⁶⁵⁸ As Freud wrote, ‘whatever reminds us of [the] ‘compulsion to repeat’ is perceived as uncanny.’ Freud, “The ‘Uncanny,’” *supra* note 92 at 361. ‘The feeling of the uncanny would seem to be generated by being reminded of the repetition compulsion, not by being reminded of whatever it is that is repeated.’ Neil Hertz, *The End of the Line* (New York: Columbia University Press, 1985) at 117.

⁶⁵⁹ Butler, *Gender Trouble*, *supra* note 171 at 232.

⁶⁶⁰ Handwritten letter from Norman Staines, 28th April, 1969, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26. In this letter Norman Staines proposed releasing a copy of *Norm and Ahmed* entitled ‘That word’ which would include as an appendage ‘his own version of recent events.’

II. Backstage: Unscripted Laughter

In June 1969, one month after the Brisbane arrest, the Cairns Little Theatre Group offered *Norm and Ahmed* as their contribution to the Tenth Annual North Queensland Drama Festival in Townsville.⁶⁶¹ Preparations were underway prior to Staines' arrest, and the director, Graham McKenzie, and the troupe were well aware of the reaction to the play in Brisbane. In a letter to Buzo, McKenzie wrote, "Can't imagine people being so narrow minded but then again that is Brisbane all over."⁶⁶² He also reported on the pressure felt by the theatre troupe:

Was speaking to Peter [the actor playing Ahmed] yesterday and he tells me that he is having trouble with the police in Cairns. Also the local radio station HCA has had a shout at him about "that word" and accused him of trying to cash in on the publicity the play has received in Brisbane.....The police have threatened him if the word is said there will be action taken.

....Isn't it amazing all the nonsense over one word that you can hear anywhere, any day of the week especially up in this godforsaken part of Australia. By the way we have a Norm but that is another sore point, his wife is kicking up a fuss over the word too.⁶⁶³

The play was scheduled to finish the Festival on the evening of Saturday 14th June.⁶⁶⁴ That morning, the Townsville Bulletin reported that the Townsville Police Chief, after reading the script, warned members of the Festival Committee that if the play was performed according to the script, police officers would be ready in the Theatre Royal to make an arrest.⁶⁶⁵ As the troupe had not yet arrived from Cairns, the newspaper

⁶⁶¹ Held at the Theatre Royal in Townsville, June 12-14th, 1969.

⁶⁶² Handwritten letter from Graham McKenzie, 24/6/1969, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26.

⁶⁶³ *Ibid.*

⁶⁶⁴ There is a suggestion that it was moved to the last position on the schedule in case the police shut the festival down after it was performed: see Mr. Ron Hamilton, retelling the story as part of the Townsville Yarns, part of the Townsville Centenary Celebrations in 2003, in Kylie Stockdale, "Police rewrote script" *Townsville Bulletin* (20 October 2003).

⁶⁶⁵ "Warning on play by Inspector," *Townsville Daily Bulletin* (14 June 1969).

speculated on what their response might be.⁶⁶⁶ Festival officials were aware of the police directive to substitute some other language for the controversial last line, but police interest in the play did not end there.⁶⁶⁷ Several hours before the performance, three officers met with the producer, Maren Tinman, and the two actors and went through the script, imposing further changes and removing other offending lines. The head of the drama festival reported:

It was obvious that the cast were very upset by the changes. They weren't sure what they were to do, right up until the last minute. The play was drastically cut. They had been warned by the police that if they put a foot wrong they would be charged, and that the festival organizers would be prosecuted as well.⁶⁶⁸

The play was performed in amended form. A review suggested it was 'an anti-climax for which the hard-working producer and cast could hardly be blamed,' and that the actors, who were 'clearly unnerved,'⁶⁶⁹ gave 'very subdued performances.'⁶⁷⁰ An interview with Alex Buzo by Joan McRalley in the *Brisbane South* soon afterwards revealed Buzo's displeasure at the 'mutilation' of his script, and that he would have preferred that the play not be performed at all. So both McKenzie and Tinman wrote letters to Buzo apologising for the cuts. McKenzie wrote,

I am sorry that you weren't notified of any cuts but as far as I knew there weren't going to be any cuts at all. The police were back stage right up until the play went on and naturally enough the two players, Eric and Peter were very upset and were at a point of not going on at all... Just to show how childish the police were in Townsville, they wanted to cut – 'a long stretch of Pelican shit' – but Eric said

⁶⁶⁶ *Ibid.*

⁶⁶⁷ 'That 'word' out of 'Norm and Ahmed' *Courier Mail* (16 June 1969 at 17 ["That 'Word' Out"]. Inspector J.E. Osborn.

⁶⁶⁸ *Ibid.*

⁶⁶⁹ Townsville Daily Bulletin (16 June 1969).

⁶⁷⁰ Mr. Ron Hamilton, retelling the story as part of the Townsville Yarns, part of the Townsville Centenary Celebrations in 2003, in Stockdale, *supra* note 664.

to them if I substitute poop for shit would that be OK and they agreed. I reckon that just tops the lot.⁶⁷¹

Tinman explained to Buzo that his employment as a school teacher meant he could not afford to be arrested, and that Eric Reese (the actor playing Norm) had already been threatened with the sack if arrested.

... the Townsville police were much more delicate than we thought. Detective Osborne... made us cut the words, 'pelican shit', 'a lug in the griller', 'going at it hammer and tongs', 'don't have a wolley', 'drop their tweeds for a ripe banana', and anything else that might be considered (by him) as 'indecent phraseology'. This was upsetting enough in itself, but to cap it off he sent three enormous detectives to the play, and seemed determined to make an arrest.

The actors were so upset and nervous that I had the detectives come backstage with me and we went through the script there and then, two hours before we were due on stage. I think he chose the three biggest, ugliest and most frightening men in the force; however, they agreed that so long as we didn't say what detective Osborne had forbidden us to say we would be alright...

I almost refused to allow the play on stage because of the cuts in the script, and wanted an announcement made to that effect; but so many people had paid to see it that we more or less had to perform... They also would not allow us to say, "Norm and Ahmed" by Alexander Buzo and the Townsville Police.⁶⁷²

Instead of offering an alternative theatrical performance – a farce - the Townsville police chose to work within the tradition of realist theatre of which *Norm and Ahmed* was a part. Their refusal to allow their authorship to be foregrounded - in a wry attribution of co-authorship which was actually Buzo's idea⁶⁷³ - suggests that they feared exposure to ridicule, but also signals their dependence, like the actors, on the conventions of naturalist theatre in which the constructed nature of the script is invisible. For their backstage intervention to succeed in censoring the play's performance, it must remain,

⁶⁷¹ Handwritten letter from Graham McKenzie, 24/6/69, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26.

⁶⁷² Handwritten letter from Maren Tinman 17/6/69, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26.

⁶⁷³ Jeremy Webb, "A detective turns writer" *The Australian*, 3 September 1969.

at least for the duration of the performance, in the realm of the taken-for-granted and unquestioned.

Yet the police did not want to remain entirely backstage. They sat in the audience, presumably to ensure the play was performed to their requirements, but perhaps also to be seen in their function as protectors of the public. And, as Tinman's letter to Buzo reveals, there came a moment in the play when the theatrical frame slipped. This occurred at the moment Norm speaks warmly of policemen: 'They only want to preserve law and order in the community.... Go easy on the old wallopers... give the coppers a fair go,'⁶⁷⁴ As Tinman reported to Buzo:

... the lines concerning the 'wallopers' and the wonderful efforts of our policeman drew a hearty laugh from the audience at the expense of the three bruisers present.⁶⁷⁵

To identify and make explicit the implications of this laughter, we can turn to Erving Goffman's distinction between the laughter of a theatregoer and of an onlooker. The theatregoer spends time and money to watch a play for various real-life reasons (it was in their capacity as theatregoers that the audience pressured Tinman to continue with the performance despite the last-minute alterations). Each theatregoer is also an onlooker who collaborates in the reality onstage and participates in it sympathetically or vicariously. Laughter in response to clownery by a staged character is laughter as an onlooker; laughter in response to an actor who flubs his lines is laughter as a theatregoer.⁶⁷⁶ In Goffman's terms, the audience responded to Norm's line about giving the police 'a fair go' in the mode of theatregoers. Most of the spectators clearly perceived the irony of Norm's character coming to the defence of the police force who would censor him. This unexpected connection between the world in the theatre and

⁶⁷⁴ Buzo, *Norm and Ahmed* at 20.

⁶⁷⁵ Handwritten letter from Maren Tinman 17/6/69, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26.

⁶⁷⁶ Erving Goffman, *Frame Analysis*, *supra* note 162 at 130.

the world of Buzo's play broke the dramatic illusion, and the audience laughed at the sudden appearance of meta-theatre within a realist play.

The Townsville police had seen the power of realist theatre, and thought they could simply rewrite the script and the illusion would pass. The political impact of the revised play on the audience would be favorably transformed: sanitised of obscenity and thus rendered less subversive. But the police presence in the theatre reframed the players' performance as meta-theatre, which packs its political punch precisely through exposing the theatrical illusion *as* illusion. The juxtaposition that allows Norm's character to appear to speak directly to the police interference in the play also focuses the audience's attention on the fact that they are watching a play. In this moment of awareness, 'the mechanics and conventions of illusion'⁶⁷⁷ relied on by both actors *and* police are made visible and thus undone, and the constructed and political nature of the spectacle before the audience becomes painfully apparent. The audience laughed when the censor's power, which can only succeed backstage, was forced onstage and its effects ruined.

We laugh, in short, in passing very abruptly, all of a sudden, from a world in which everything is firmly qualified, in which everything is given as stable within a generally stable order, into a world in which our assurance is overwhelmed, in which we perceive that this assurance was deceptive. Where everything had seemed totally provided for, suddenly the unexpected arises, something unforeseeable and overwhelming, revelatory of an ultimate truth: the surface of appearances conceals a perfect absence of response to our expectation.⁶⁷⁸

⁶⁷⁷ Mark Ringer, *Electra and the Empty Urn: Metatheater and Role Playing in Sophocles* (Chapel Hill: University of North Carolina Press, 1998) at 8.

⁶⁷⁸ Georges Bataille, "Un-Knowing: Laughter and Tears" trans. by Annette Michelson (1986) October 89 at 90.

III. Audience: Obscene Racism Revealed

The legal regulation of swearing, defined by linguists as ‘the intentional, if not always deliberated, utterance of obscene or dirty words,’⁶⁷⁹ has a different history than the regulation of obscene texts or images. Our modern offensive language provisions date back to nineteenth-century public order statutes, like the *Vagrancy Acts*, as well as older regulations against blasphemy.⁶⁸⁰ The historical move from blasphemy to obscenity, and from a concern with offences against God or the king (blasphemy, sedition and treason) to offences against civility, reflects a long process whereby the early modern criminal law began to define and enforce an ethos of politeness, translating the hierarchical rankings of speech and speakers into rankings of social power and privilege.⁶⁸¹ For a short time at the end of the 1960s, public order offences, which were traditionally applied to control how working class and racial minorities moved through, used and spoke in public places, were pressed into service by Australian state police forces to censor theatrical performances. Staines’ prosecution for obscene language marked the first time an actor had been prosecuted under the *Vagrants, Gaming and Other Offences Act 1931 (Qld)*.⁶⁸²

⁶⁷⁹ Ashley Montague, *The Anatomy of Swearing* (New York: The Macmillan Company, 1967); Geoffrey Hughes, *Swearing: A Social History of Foul Language, Oaths and Profanity in English* (Oxford: Basil Blackwell Ltd., 1991); Lars Andersson & Peter Trudgill, *Bad Language* (Oxford: Basil Blackwell, 1990); Keith Allan & Kate Burridge, *Forbidden Words: Taboo and the Censoring of Language* (Cambridge, Cambridge University Press, 2006).

⁶⁸⁰ Cabantous describes how laws against impious behaviors (spitting, worshipping idols, and so on) and speech (“God damn it!”) in the seventeenth and eighteenth centuries reflect the demise of the monarchy and the arrival of a more indirectly governing state. Alain Cabantous, *Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century* (New York: Columbia University Press, 2002).

⁶⁸¹ Richard P. Gildrie, *The Profane, the Civil, & the Godly: The Reformation of Manners in Orthodox New England, 1679-1749* (University Park, Penn.: The Pennsylvania State University Press, 1994); Jane Kamensky, *Governing the Tongue: The Politics of Speech in Early New England* (New York: Oxford University Press, 1997); John F. Kasson, *Rudeness & Civility: Manners in Nineteenth-Century Urban America* (New York: Hill and Wang, 1990.).

⁶⁸² As Staines’ lawyer Mr. L.J. Wyvill unsuccessfully argued at his client’s initial conviction: ‘This section was designed to catch the drunken sailors on the wharf, or drinks on the street who might abuse anyone who might come past. In order to be affronted by my client the public had to seek him out. They had to pay to see him in a theatre.’ cited in “Actor Fined”, *supra* note 634.

At first blush, it seems peculiar and even farcical that such a legal provision could encompass the utterance of an actor onstage. The theatrical world would more likely locate responsibility for a character's utterances with the director, producer or playwright.⁶⁸³ As the director of the Brisbane production, Barry Routledge, commented to the press, "I was surprised they didn't want to arrest me but they said they could only take action against Norm as he had used the words."⁶⁸⁴ The occurrence of obscene words in a play like *Norm and Ahmed* seems distinct from their occurrence in heated encounters on the street, where the words arrive unscripted.⁶⁸⁵ But prosecutions for offensive language have generally not been concerned with the distinction between speaker and 'author': the earliest regulations against obscene language in Jacobean England were aimed directly at actors in the theatre,⁶⁸⁶ and modern obscene language laws do not rely on the speakers' intention, the actual giving of offense, or – at least ostensibly – the context of the utterance, but simply the fact of 'obscene words' being uttered in a public place.⁶⁸⁷

⁶⁸³ Erving Goffman cites as a central feature of the stage in modern times that an 'almost ideally loose connection exists between stage actor and part.' Erving Goffman, *Frame Analysis*, *supra* note 162 at 277, see further 277-8.

⁶⁸⁴ "Police Raid" *supra* note 629.

⁶⁸⁵ The idea of a written script has served to distinguish 'performativity' from theatrical performance. Where Austin viewed an actor reciting their lines as a peculiar or non-serious use of language (Austin, *supra* note 157 at 22), Derrida identified it as a 'heightened instance' of 'a general citationality - or rather a general iterability' underlying all language-use, 'the graphematic structure of every communication.' Derrida, "Signature, Event, Context," *supra* note 163 at 17, 12, 19. For Andrew Parker and Eve Kosofsky Sedgwick, the *scripted* nature of theatre, which fixes the relationship between the speaker and words in advance, distinguishes it from performativity more generally, which has a 'contingent, heterogenous and contestable relationship between subject and utterance'. Andrew Parker & Eve Kostofsky Sedgwick, "Introduction" in Andrew Parker & Eve Kostofsky Sedgwick, eds., *Performativity and Performance* (New York: Routledge, 1995) 1 at 13.

⁶⁸⁶ The 'Act to Restraine Abuses of Players' of 1606' preceded the 1623 act which proscribed swearing in public generally. 3 James I. c.21 cited in Hughes, *supra* note 679 at 105. For the debate over the actor's intentionality within theater theory and performance practice, see references in Jackson, *supra* note 657 at 213.

⁶⁸⁷ Historically, the theatre was a paradigmatic public place, and modern courts have decided that the necessity of payment and entry restrictions does not change its essentially public nature: see for instance *Oh! Calcutta!*. *A-G (SA) v Huber* (1971) 2 SASR 142. The producer argued that his proposed restrictions on entry to the theatre could take the work outside of the legal definition of public place, but in rejecting the argument, Wells J quoted with approval the concept of the 'public *qua* public,' formulated in *Ward v Marsh* [1958] ALR 724: to be considered a public place '[a]ll that is necessary is that at the time in question

But the obscenity of Norm's final line does not seem to account for the intensity of police interest in *Norm and Ahmed*: for what initially drew the Brisbane police to attend the play and seek to suppress its run, in the absence of any complaint from the public,⁶⁸⁸ or for why the play was subject to further cuts by the Townsville police, who ignored other 'more obscene' plays at the Queensland Drama Festival.⁶⁸⁹ Legal action against the play was not limited to Queensland: when producer Graeme Blundell, keen to leverage the play's notoriety in order to promote local theatre,⁶⁹⁰ staged *Norm and Ahmed* in Melbourne in July and December of 1969, both he and the actor playing Norm were convicted and fined for obscene language on each occasion.⁶⁹¹ In each case, the police were performing the role of rescuer, entering to protect and shelter the audience from obscenity. But the audience evidently did not find the play obscene. The police were upset because the audience was *not* upset. Rather than trying to protect them, the police were censuring the audience for approving of the play. As J.M. Coetzee has observed:

The censor acts, or believes he acts, in the interest of a community. In practice he often acts out the outrage of that community or imagines its outrage and acts it out: sometimes he imagines both the community and its outrage.⁶⁹²

members of the public may, because they are members of the public, go to the place if they choose' at 725 (Lowe J).

⁶⁸⁸ There is no evidence of public complaint in relation to the Brisbane performance. On the absence of public complaint in Townsville, see handwritten letter from Graham McKenzie 24 June 1969 in Papers of Alex Buzo, National Library of Australia MS 6383 Box 4 Folder 26.

⁶⁸⁹ The Festival's chairman, Mr Ian Gay, recalled: '*Norm and Ahmed* was the only play the police took any notice of, and yet I consider others were probably more obscene than this one. The Pinter Play *The Collection* put on by the Townsville State High School is concerned with homosexuality, and there was a very ribald piece called *Bird Bath*.' "That 'Word' Out", *supra* note 667. As Graham McKenzie remarked to Buzo, 'Other plays in the festival were probably more obscene than N+A – so it just doesn't seem to add up.' (Handwritten letter from Graham McKenzie, 24 June 1969 Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26). See also Wright and Lake 1970: 117.

⁶⁹⁰ "Being involved in a new, possibly controversial, production might shine a media spotlight on the Carlton theatre movement." Blundell, *Naked Truth*, *supra* note 627 at 126.

⁶⁹¹ As producer, Blundell was actually charged with aiding and abetting the utterance of obscene language in a public place. For newspaper coverage of the dismissal of their appeal, see: "That word is obscene, says judge" *The Age* (24 July 1970) at 2. See further Blundell, *Naked Truth*, *supra* note 627 at 135.

⁶⁹² J.M. Coetzee, *Giving Offense: Essays on Censorship* (Chicago: University of Chicago Press, 1996) at 9.

By focusing on the affective experience of watching the play, that is, the ways in which the spectator is implicated in or addressed by the performance, another understanding of the police action emerges. While *Norm and Ahmed* was not the only play targeted by the vice squads that year, it differed from the others in one crucial respect – it was Australian.⁶⁹³ Buzo was one of a number of playwrights who, at the time, ‘instigated a cultural revolution on the Australian stage’ by crafting ‘an expletive-ridden Australian vernacular’ and ‘a rough, larrikin aesthetic’ which ‘defined itself against the Anglophile ethos that dominated Australian theatre until the late ‘50s.’⁶⁹⁴ As playwright David Williamson recently commented,

It's hard for the present generation working in the arts to understand what the late 1960s and early '70s were like in Australia. The idea that Australian creativity was important and could connect with Australian audiences was the pipedream of an energetic but relatively marginalised artistic fringe.⁶⁹⁵

The importance of the audience’s connection with Norm as a representative and familiar figure is reflected in Justice Hart’s refusal to issue an injunction against *Norm and Ahmed* continuing its Brisbane run after Staines’ arrest on the basis that ‘to do so would mean that the theatre in this State will be prohibited from displaying some Australians as they actually are.’⁶⁹⁶ In relating war stories and praising Australian institutions, Norm’s character invites the audience to identify with him and with his familiar vision of Australia as a place of opportunity, ‘the lucky country’ (recalling Donald Horne’s famous indictment of the complacency of Australian society.⁶⁹⁷) Norm reassures Ahmed (and the audience): “We’re not such a bad mob out here, you know. We might be a bit on the

⁶⁹³ *Norm and Ahmed* was the first play to explore Australia within an Asian context. See Brisbane, *Not Wrong, Just Different*, *supra* note 625 at 167.

⁶⁹⁴ Glenn D'Cruz, “The Rally of the Dolls” *The Age* (15 April 2006) at 20. Others included Jack Hibberd, David Williamson, John Romeril, Richard Wherrett, Rex Cramphorn, John Bell, and Max Gillies.

⁶⁹⁵ David Williamson, “From bit part to main stage” *The Australian* (15 January 2009) <http://www.theaustralian.com.au/news/arts/from-bit-part-to-main-stage/story-e6frg8n6-1111118564022>

⁶⁹⁶ *Attorney-General (Qld) v. Twelfth Night Theatre* [1969] Qd R 319 at 328 (Justice Hart).

⁶⁹⁷ Donald Horne, *The Lucky Country: Australia in the Sixties* (Melbourne: Penguin Books, 1964).

rough-and-ready side, but our heart's in the right place."⁶⁹⁸ At the same time, however, an uneasy atmosphere is created through the audience's awareness of the underlying hostility in Norm's words. Before the first word of the play is spoken, Norm has already raised our suspicions with his puzzling action of throwing away his cigarette and putting another in his mouth, unlit, as Ahmed approaches.⁶⁹⁹ After Norm re-enacts his violent treatment of the German prisoner of war — 'knocked one of 'em down with me bare hands', 'jobbed him one' and 'floored this bloody Kraut. Really laid him out'⁷⁰⁰ — he offers Ahmed a cigarette, apparently as a gesture of apology, lighting it for him with his own cigarette lighter, 'beamingly benignly,'⁷⁰¹ but in the process revealing that Norm's initial reason for stopping him — 'Got a light?'⁷⁰² — was a ruse.

Norm's speech is peppered with racial slurs, references to violence, and idioms which seem designed to elude Ahmed's more formal, literary and slightly stilted grasp of English: 'You look as if a kick in the crutch and a cold frankfurt'd finish you off.'⁷⁰³ Buzo makes the contrast in speaking styles between his two characters a point of explicit tension:

Norm: ... I bet a lot of people say you speak better than the average native-born Australian.

Ahmed: Yes, I have been paid that compliment.

⁶⁹⁸ Buzo, *Norm and Ahmed*, *supra* note 584 at 24.

⁶⁹⁹ The play begins with the following stage directions: 'Lights up on NORM, who is leaning against the fence ... Norm moves around restlessly looking up and down the street. He takes out a cigarette packet, looks in it, then screws it up and flings it on the ground angrily. He brings out a fresh packet, rips off the cellophane with his teeth and takes out a cigarette, which he lights with a lighter. He moves around a bit more and then leans on the fence again. He waits. Then he starts moving around some more, and suddenly straightens up, looking to his left. He puts his cigarette out and takes another from the packet, putting it in his mouth unlit. He leans casually against the fence. The sound of footsteps is heard and AHMED appears...' *Ibid.* at 3.

⁷⁰⁰ *Ibid.* at 8-10.

⁷⁰¹ *Ibid.* at 3.

⁷⁰² *Ibid.*

⁷⁰³ *Ibid.* at 6.

Norm: Yes, I could very well ... envisage that.⁷⁰⁴

The pause in Norm's line accentuates the menace of his ironic choice of words.⁷⁰⁵ Even as Norm professes the liberal rhetoric of goodwill towards outsiders - 'We're forging the bonds of friendship with our Asian neighbours. Knowledge is the key to the door of understanding and friendship'⁷⁰⁶ – his overwrought language suggests his distance from the sentiment. Norm elicits Ahmed's opinion of Australia only to imply that he should not have expressed it:

Norm: ... I want you to tell me, here and now, what you feel, in your own mind, is a bad thing in this country.

Ahmed: Well then, if you are so keen to hear my opinion, I would say that ... Uh ... well, for one thing, one of the, uh, less desirable aspects of your society, to my mind, would be the tendency of the mass media to be merely the mouthpiece of the big commercial and military interests... the, uh, free press, as it were. They brainwash the people. They ... oh, please forgive me, I forget myself. As I said, it is not perhaps my place to seek to condemn your country. I have my own opinion, but I do not go around broadcasting it as it would not be the diplomatic thing to do.

Norm: Well, that's fair enough, Ahmed. I can see your point of view. For instance, if I went over to Pakistan, I wouldn't tell you blokes how to run your country. I'd keep it to meself.⁷⁰⁷

This exchange prefigures Norm's final censorious act of violence that will render Ahmed silent (and unconscious). The play's climactic display of obscene ('fuckin') racism ('boong') towards an encompassing dark-skinned 'other' both shocks the audience and resolves their uncertainty over Norm's intentions. The character's physical and verbal

⁷⁰⁴ *Ibid.* at 21.

⁷⁰⁵ Here is another similarly inflected pause:

Ahmed: One always experiences difficulties when one is seeking to adjust to an alien environment. But once the initial period of adjustment is over, it is easier to acclimatise oneself.

[Pause]

Norm: That's very true. *Ibid.* at 5.

⁷⁰⁶ *Ibid.* at 11.

⁷⁰⁷ *Ibid.* at 7-8.

violence are intertwined. As director Tinman commented to Buzo, 'Can you imagine a character such as Norm saying "bloody boong?" It is just too ridiculous for words.'⁷⁰⁸ Most disturbingly, the play's ending suggests that Norm's platitudes about tolerance were a way to repress or distance himself from his racism. But that which is merely tolerated remains unwanted. The ending of the play 'outs' this censored racism and, in doing so, criticises the discourse of tolerance that ultimately nourishes it.⁷⁰⁹ This is what makes the last line of the play so traumatic. What is repressed in the symbolic returns in the real — what is masked by empty appeals to liberal rhetoric becomes a fist to the stomach. Buzo's play is a kind of seduction, a trap 'to catch those not easily caught.'⁷¹⁰ It sets up the audience to sympathize with the liberal platitudes of *Norm* and then, once tricked, it punches the audience in the gut with their own racism. The fact that Norm's final two words are adjoined blurs the obscenity and racism together, inviting the question: which is the clincher, and which is the crime?

For Tinman, the police missed 'the whole point of the play':⁷¹¹ its denunciation of violent racism and racist violence. Instead, the police focused their outrage onto an obscene word, divorced from its theatrical context and understood as a criminal speech act, and missed the real obscenity in the process. In 1969, the *Courier Mail* reported Norm's offending line as '----- boong.'⁷¹² Today, magistrates have held that the word 'fuck' is now too commonly heard to give offence, while there is an increased sensitivity to the

⁷⁰⁸ Handwritten letter from Maren Tinman 17/6/69, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26.

⁷⁰⁹ Wendy Brown has demonstrated how the discourse of tolerance functions within liberalism to reduce engagement with difference in the public sphere, to depoliticise sources of conflict, and to enable the state to abrogate its commitments to the protection of minorities. Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2007).

⁷¹⁰ Henry James said this about the ending of the *Turn of the Screw* in The New York Preface, *Norton* at 120 cited in Shoshana Felman, *Writing and Madness: Literature/Philosophy/Psychoanalysis* (Ithaca, NY: Cornell University Press, 1985) at 32.

⁷¹¹ Handwritten letter from Maren Tinman 17/6/69, Papers of Alex Buzo, National Library of Australia, MS 6383, Box 4 Folder 26

⁷¹² "Police Raid" *supra* note 629; and "'Mockery" claim at hearing over word," *Courier Mail* (April 22 1969) at 9.

promulgation of racist terms in speech and print.⁷¹³ But the focus of the police was simply an accident which we can attribute to the less-enlightened historical past. It was *ideology* at work. Censorship is always missing the point because the effect is to get others to ‘miss the point’ too – and thus to misdirect opposition or dissent. By focusing on this obscene moment, the crimino-legal arm of the state maintained its control over the question of ideological social structure. We don’t talk about the implications of ‘boong’ because we are too busy worrying about ‘fuckin.’ Identifying the censorship of *Norm and Ahmed* as the ideology of indirection invites us to note its broader historical parameters and parallels, such as the persistence with which offensive language laws have served to perpetuate racism under the guise of neutrality, as they continue to be disproportionately applied to Aboriginal people and other minorities,⁷¹⁴ or the attacks on Indian students in Australia during 2009 and 2010, as well as the disavowal of racist motivations for those attacks by government officials.⁷¹⁵

Žižek’s theory of law’s obscene superego underside offers us a further understanding of ‘the whole point of the play’ – a deeper irony which signals the precariousness of law’s authority. For Norm’s hymns to liberal rationality are the conventional pretext that ordinarily legitimates law’s power. Throughout the play, Norm explicitly aligns himself with law, telling Ahmed that his father ‘tried to buck the system. You can’t do that.... He

⁷¹³ ‘The president of the *NSW Parents & Citizens Association* said that the word “fuck” was acceptable in her house, but “wog” was not.’ *Police v Butler* 2003 NSW LC 2 at para. 31. See further Katharine Gelber & Adrienne Stone, eds. *Hate Speech and Freedom of Speech in Australia* (Sydney: Federation Press, 2007).

⁷¹⁴ For the extensive literature on this topic, see Joanne Lennan, “The “Janus Faces” of Offensive Language Laws, 1970-2005” in Patrick Keyzer, ed. *Racism, Religious Intolerance and the Law* (Broadway: Halstead Press, 2007) 118; NSW Bureau of Crime Statistics and Research, “Race and Offensive Language Charges,” *Bureau Brief*, August 1999; NSW Aboriginal Justice Advisory Council, *Policing Public Order: Offensive Language & Behaviour, the Impact on Aboriginal People* Report 1998; Kathryn Pirie & Sheryl Cornack, “What is Obscene – The Language or the Arrest that Follows?” (1992) Australian Institute of Criminology Discussion Paper. On judicial disquiet over the notorious ‘trifecta’ of charges – using offensive language, resisting arrest and assaulting a police officer - see *DPP v Carr* [2002] NSW SC 194, and *Director of Public Prosecutions v AM* [2006] NSWSC 348. The shift from ‘obscene’ language to laws against ‘offensive language’ in the *Summary Offences Acts* of Australian states has meant little in practice, as ‘offensive’, ‘obscene’ and ‘insulting’ have always tended to be defined similarly by the courts. See Tamara Walsh, “Offensive Behaviour, Offensive Language and Public Nuisance: Empirical and Theoretical Analyses” (2005) 24:1 *University of Queensland Law Journal* 123 at 131-2.

⁷¹⁵ Gail Mason, “Violence against Indian Students in Australia: A Question of Dignity” (May 2010) Sydney Law School Legal Studies Research Paper No. 10/48

had no respect for law and order, and that's a terrible thing.'⁷¹⁶ Like the audience, the police witnessed Norm speaking in support of understanding and tolerance, standing up for others, fighting against national enemies (the law's 'acceptable violence'), respect for authority, democracy, and so on — the very values they were duty-bound to uphold. They witnessed these values violently upended by the final moment of the play. Perhaps they felt compelled, for the benefit of the audience, to distinguish their legitimate violence from Norm's illegitimate violence, by asserting theirs as acceptably civilized. *Their* violence would never use the f-word, because that would make it an improper and savage way to beat up a boong (which *is* legitimate.) Like the character of Norm, who conceals his violent intentions by mouthing platitudes about tolerance, the police are also trying to conceal something — the political punch of the play. But in displacing their disquiet over Norm's violent racism onto his obscenity, the police only reveal their complicity in that racism. The rage of the police is precisely that they identified with Norm, and they were tricked. No one likes being tricked so they focused on an indirection to justify their anger (which is how people always respond to being tricked - their shame won't allow them to admit what tricked them directly so they seek a symptom).

Just as Norm's liberal platitudes were undermined by the revelation of his irrational xenophobia, the pretext to rationality buttressing the exercise of police power was undermined by theatricality's revelation of the irrational lawmaking violence that forms a necessary part of that power. The police intervened in *Norm and Ahmed* to suppress the obscene, the unspeakable. Obscenity always works by this logic of substitution, repression, and indirection, focusing on manners in order to defang the uncomfortable, rude, abrasive truth that it cannot confront directly. For the law what is unspeakable is its backstage: the discretionary, political and racist foundations of its claim to legitimacy. And when law takes the stage, foregrounding the background and making the tacit explicit, it risks subverting its claim to legitimacy. Onstage, the force of law appears as

⁷¹⁶ Buzo, *Norm and Ahmed*, *supra* note 584 at 20.

farce and the 'illusion of legitimacy' is revealed as such. This is just like Buzo's play, for when we see Norm's dramatic final violence, we see through his pretensions to liberal tolerance. The theatricality of the police actions 'outs' the force of law in parallel with the way the performance of *Norm and Ahmed* 'outs' the conventions and platitudes that hide racism and brute force: the obscene ideological underpinnings of the law, the fantasmatic kernel of racism. The censorship meant to ensure the obscene remained hidden instead exposed the obscenity of law: the irrational lawmaking violence that marks every performance made on its behalf.

Conclusion: Unmasking Law

Theatre, like law, comes into being as a function of framing. Theatre is constituted by three key 'limits or divisions or closures' – one delineating the distinction between the theatre itself and, for instance, the foyer, one between audience and stage, and one between stage and backstage.⁷¹⁷ These framings institute a spectatorial relationship that brings with it a set of expectations and conventions for social behavior.⁷¹⁸ When the police crossed the limit that separates the stage from the spectators by entering the stage, or by inserting their actual presence into the imaginative world of the play, the theatrical frame was broken, and the distinction between art and life began to unravel. The theatre of law (the fact that the law is theatre) was exposed by the law of the theatre (as a mode of representation which doubles life rather than reflecting it). To

⁷¹⁷ Geoffrey Bennington, *Lyotard: Writing the Event* (New York: Columbia University Press, 1988) at 10-11. See further Philippe Lacoue-Labarthe, "Theatrum Analyticum" (1977) *Glyph* 2; Michal Kobińska, *Of Borders and Thresholds: Theatre History, Practice, and Theory* (Minneapolis: University of Minnesota Press, 1999).

⁷¹⁸ Goffman devotes a chapter of *Frame Analysis* to the theatrical frame, describing the conventions and understandings that shape the experience of theatre in order to lay groundwork for his sociological theory more broadly. 'The central understanding is that the audience has neither the right nor the obligation to participate directly in the dramatic action occurring on the stage, although it may express appreciation throughout in a manner that can be treated as not occurring by the beings with the stage performers present onstage.' 125 'During performance it is only fellow performers who respond to each other in this direct way as inhabitants of the same realm, the audience responds indirectly, glancingly, following alongside, as it were, cheering on but not intercepting.' Goffman, *Frame Analysis*, *supra* note 162 at 127. See Richard Mohr's analysis of change and continuity in law using frames as a semiotic device: Richard Mohr, "Shifting Ground: Context and Change in Two Australian Legal Systems" (2002) 15 *International Journal for the Semiotics of Law* 1.

break a frame or transgress a limit is to draw attention to it and therefore to momentarily escape its circumscribing function: this idea is taken up at length in the following chapter as a way of analyzing how law's vulnerability relates to framing and desire.

Censorship is ideology by indirection: it works by a sleight of hand, focusing on an impugned object in place or a larger social structure. But as Butler observes, 'censorship is exposed to a certain vulnerability precisely through becoming explicit and escapes it most shrewdly when it operates without being clearly identifiable.'⁷¹⁹ In this chapter, I have drawn on the idea of theatricality as a viewing experience in which the mechanisms of power are revealed, in order to identify how the attempts by police to censor *Norm and Ahmed* exposed the ideology of censorship and rendered law vulnerable. Part 1 examined the farce in Brisbane, arguing that as the police officers took the stage, forgot their lines, and were forced to improvise, the hidden backstage of law — the political foundation of its claim to legitimacy — was thrust painfully into the spotlight. Just as in the traditional conventions of farce, in which the characters don't see what is happening, but the audience does, here the police don't see what is happening, but the audience does. Part 2 examined the meta-theatre in Townsville, in which the police, rather than confronting one script with another, attempted to harness the power of naturalist theatre by rewriting Buzo's script. But as theatre historian Baz Kershaw insists, the audience always has 'a *choice* as to whether or not the performance may be efficacious for them,'⁷²⁰ and in this performance, the efforts of the police to censor the play were thwarted by the audience's unwillingness to maintain the dramatic illusion. As Hariman explains, 'Whatever the authority of a discourse, those who are

⁷¹⁹ Butler, "Ruled Out", *supra* note 148 at 250.

⁷²⁰ 'For the lucid role of the spectator permits the participant to treat the performance as of no consequence.... If the spectator decides that the performance is of central significance to her or his ideology than such choice implies a commitment [which is] the source of the efficacy of performance for the future.' Baz Kershaw, *The Politics of Performance: Radical Theatre as Cultural Intervention* (London: Routledge, 1992) at 28-9 cited in Davis, "Theatricality and Civil Society," *supra* note 115 at 129.

seeing it as an image, as a mask that has been revealed to be a mask, now have the capacity to judge whether it represents their own condition.⁷²¹

In Part 3, I drew on the spectator's experience of viewing *Norm and Ahmed* to argue not that the police intervention was reality imitating art, but that the intervention showed us how law was already inside the play. As Butler suggests, '[i]f the censor is never fully separable from that which it seeks to censor, perhaps censorship is implicated in the material it seeks to censor in ways that produce paradoxical consequences.'⁷²² In this case, the law refused to accept the performance that subverted its legitimacy, so it employed the pretext of obscenity as a way to subvert the subversion. But in the process the law's subversive attempts became comical, exposing the irrationality beneath our liberal pretensions to authority, and thus paradoxically achieving the playwright's goal. In trying to censor the political power of theatre, the law was drawn into theatricality and exposed its own power as political. As Derrida wrote, 'the menace of repetition is nowhere as well organized as in the theatre.'⁷²³ Theatre and performance can be deployed to consolidate and institutionalize cultural norms and narratives just as strategically as they can upend them. Theatre is an art form of risk, and performances can always fail to convince, persuade or enthrall their audience. So too with law, and while its performances need to be repeated and consolidated to maintain their effects, each repetition necessarily runs the risk of revealing law's backstage and reframing the force of law as farce.

⁷²¹ Hariman, *supra* note 303 at 256.

⁷²² Butler, "Ruled Out", *supra* note 148 at 249.

⁷²³ Derrida, *Writing and Difference*, *supra* note 49 at 247.

Reframing Images: Photographing Children and Desiring Law

It is as if we could rid ourselves of social evils by lobotomizing some social unconscious.⁷²⁴

Introduction: Framing Henson

If there is a modern crisis of representation, it has to be that which has emerged, in recent years, over photographs of children. In May 2008, the photograph on the following page appeared on an invitation mailed out to patrons of Sydney's exclusive Oxley9 gallery, announcing the latest exhibition of Australian photographer Bill Henson. The invitation came to the attention of journalist Miranda Devine, who published an editorial describing the photograph in terms that recalled the statutory definition of child pornography, and denouncing the exhibition as featuring 'naked 12 and 13 year-olds.'⁷²⁵ The show's opening night was cancelled within hours.⁷²⁶ The following morning, on national television, Prime Minister Kevin Rudd was shown the photographs, covered with black bars, and pronounced them 'revolting.'⁷²⁷ The police raided the gallery and took away over 20 photographs, announcing they would press charges against Bill Henson for indecency and child pornography. Over the following week, police officers

⁷²⁴ Stewart, *Crimes of Writing*, *supra* note 67 at 265.

⁷²⁵ S 91 *Crimes Act* NSW: "child pornography" means material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to reasonable persons, a person who is (or appears to be) a child: (a) engaged in sexual activity, or (b) in a sexual context, or (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context). Devine wrote: 'Such images presenting children in sexual contexts are so commonplace these days they seem almost to have lost the capacity to shock.' Miranda Devine "Moral backlash over sexing up of our children" *Sydney Morning Herald* (22 May 2008) <http://www.smh.com.au/news/multimedia/moral-backlash-over-sexing-up-of-our-children/2008/05/21/1211182891875.html> ["Moral Backlash"]

⁷²⁶ David Marr, *The Henson Case* (Melbourne: Text Publishing Company, 2008) [*Henson Case*] at 20-22.

⁷²⁷ Kevin Rudd, on *The Today Show*, with host Karl Stefanovic, Channel 9, 23 May 2008 <http://www.youtube.com/watch?v=k6zReaqDIwk>.

visited and examined collections of works by Henson held at various art galleries around the country, including the National Gallery.⁷²⁸ A number of artists wrote an open letter calling on the prime minister and other politicians to reconsider their comments, an event which garnered international publicity.⁷²⁹ A week later, the Classification Board gave the unbarred image a PG (parental guidance) classification, indicating that it was a ‘mild’ display of nudity.⁷³⁰ Finally, the police investigation into Henson was quietly dropped, after the N.S.W. Director of Public Prosecutions advised the police that mere nudity in a photograph does not make it obscene or pornographic.⁷³¹



Figure 2 Untitled, Bill Henson, 2008

Like similar controversies in the United States over photographs of children by Sally Mann, Robert Mapplethorpe and Jock Sturges, the Henson case played out according to a familiar script: ‘artistic’ photographs

⁷²⁸ See Marr, *Henson Case*, *supra* note 726 at 88-96.

⁷²⁹ The letter was released on Tuesday May 27, 2008. Corrie Perkin & Lauren Wilson, “Cate Blanchett calls on Kevin Rudd to soften Bill Henson art remarks”, *The Australian* (28 May 2008) <http://www.theaustralian.com.au/news/arts/cate-calls-on-pm-to-soften-art-remarks/story-e6frg8n6-1111116463098>

⁷³⁰ Classification Board, report, 3 June 2008, T08/2235 cited in *Henson Case*, *supra* note 726 at 118. The image with black bars appearing in the context of ‘legitimate reportage’ was an ‘image of nudity that is very mild in viewing impact and justified by context,’ and warranted a G classification. Classification Board, Attorney-General’s department, Canberra, reports T08/2273, T08/2275, T08/2274, T08/2278 and T08/2276, 29 May 2008. David Marr notes that these decisions were not immediately reported in the media. See *Henson Case*, *supra* note 726 at 117-118.

⁷³¹ “Indecency investigation of artist Bill Henson dropped” *cbc.ca* (6 June 2008) <http://www.cbc.ca/arts/artdesign/story/2008/06/06/henson-nocharges.html>. The D.P.P. held: ‘The models are naked, but in my view that is not sufficient to cause offence to reasonable persons in all the present circumstances. There is nothing about the manner in which they are depicted, in all the circumstances, that would cause offence. Mere nudity is not sufficient to create a ‘sexual context’. The context is the subject taken with what surrounds it and interacts with it. There is nothing in the photographs of the girl and her surroundings, in my view, that could be fairly described as providing a sexual context to her image.’ He also held that they were not indecent: ‘In my view, mere nudity is not indecent in the legal sense. In the photographs under consideration, there is no quality in the poses, facial expressions, positioning or context that could reasonably be regarded as rendering them indecent.’ Quoted in *Henson Case*, *supra* note 726 at 122-123.

brought to the public's attention by 'moral entrepreneurs'⁷³² provoked public outrage and an initially enthusiastic response from law enforcement, but did not in the end attract legal sanction.⁷³³ The Henson case did, however, increase public debate about the representation of children in art and the implications of new digital media, highlighting concerns that continue to be difficult for artists and authorities to arbitrate.⁷³⁴ It also formed the catalyst for regulatory changes, such as the 2010 removal of the 'artistic defence' from the N.S.W. *Crimes Act's* definition of child pornography,⁷³⁵ and the development of explicit guidelines for all nationally-funded artists regulating the use of children in art.⁷³⁶ But since no material prosecuted as child pornography has ever

⁷³² Sheldon Ungar, "Moral Panic versus the Risk Society: The Implications of the Changing Sites of Social Anxiety" (2001) 52 *British Journal of Sociology* 271 at 284 notes that moral entrepreneurs 'exercise social control by amplifying deviance and orchestrating social reactions so that the panic becomes a consensus generating envoy for the dominant ideology;' cited in Daniel M. Filler, "Terrorism, Panic and Pedophilia" (2003) 10 *Virginia Journal of Social Policy and the Law* 345 at 360.

⁷³³ Photographs of children which have attracted controversy and legal sanction include Lewis Carroll's photographs of Alice, Balthus, Robert Mapplethorpe's 'Jesse (McBride)' (1976) and 'Rosie' (1976), Larry Clark's *Tulsa* (1971), *Teenage Lust* (1983), *Kids* (1996) and *Bully* (2001), Sally Mann's photographs of her family in *At Twelve* (1988) and *Intimate Family* (1992), Nancy Honey's *Entering the Masquerade* (1992), Jock Sturges, *The Last Days of Summer* (1991) and *Radiant Identities* (1994). See for instance Richard B. Woodward, 'The Disturbing Photography of Sally Mann' *New York Times Magazine* (27 September 1992) 52. On the 'culture wars' over the funding decisions of the National Endowment of the Arts, see Brian Wallis, Marianne Weems & Philip Yenawine, eds., *Art Matters: How the Culture Wars Changed America* (New York: New York University Press, 1999) and Michael Brenson, *Visionaries and Outcasts: The NEA, Congress, and the Place of the Visual Artist in America* (New York: New Press, 2001).

⁷³⁴ See for example Nick O'Malley, "Hospital charity rejects exhibition over boy photo" *Sydney Morning Herald* (5 January 2011) <http://www.smh.com.au/entertainment/art-and-design/hospital-charity-rejects-exhibition-over-boy-photo-20110104-19f37.html>; Matthew Westwood, "'Sexualised' Romeo and Juliet ad removed from print" *The Australian* (Feb 03, 2012) <http://www.theaustralian.com.au/news/arts/sexualised-romeo-and-juliet-ad-removed-from-print/story-e6frg8n6-1226261274442>; Case No. 0497/11, *Advertising Standards Bureau*, ACT, 18 January 2012 <http://122.99.94.111/cases/0497-11.pdf>

⁷³⁵ The laws adopt commonwealth provisions where the court looks at the artistic merit of the material when deciding whether it is child pornography, rather than relying on the defence of artistic purpose. David Marr, "Brush with Henson becomes rush to change porn laws" *Sydney Morning Herald* (27 October 2008) ["Brush with Henson"] <http://www.smh.com.au/news/opinion/brush-with-henson-becomes-rush-to-change-porn-laws/2008/10/26/1224955851147.html>; *Final Report of the Child Pornography Working Party*, 8 January 2010 [http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/Final_Child_Pornography_Working_Party_Report_8Jan.pdf/\\$file/Final_Child_Pornography_Working_Party_Report_8Jan.pdf](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/Final_Child_Pornography_Working_Party_Report_8Jan.pdf/$file/Final_Child_Pornography_Working_Party_Report_8Jan.pdf); Malcolm Brown, "State Plans Change to Child Porn Laws" *Sydney Morning Herald* (10 January 2010) <http://www.smh.com.au/national/state-plans-change-to-child-porn-laws-20100109-lzv4.html>; Andrew Clennell, "Art or child porn? Now censors must decide" *Sydney Morning Herald* (10 March 2010) <http://www.smh.com.au/national/art-or-child-porn-now-censors-must-decide-20100309-pvuk.html>

⁷³⁶ In December 2008, the Australia Council for the Arts released its 'Children in Art Protocols' which state that artists working with children under 15 years of age who are to be fully or partly naked must furnish

been ‘saved’ by recourse to the defence that it had artistic merit,⁷³⁷ and since there were already guidelines in place for artists working with child subjects,⁷³⁸ these initiatives are symbolic rather than practical, examples of what Scott Beattie calls ‘regulatory fortressing.’⁷³⁹ There is more than a hint of repetition-compulsion⁷⁴⁰ in our repeated replaying of this cultural-legal script.

written evidence of permission from the child’s guardians declaring that both the guardian and child ‘understand the nature and intended outcome of the work,’ ‘commit to direct supervision of the child while the child is naked’ and ‘agree it is not a ‘sexual, exploitative or abusive context.’ Those exhibiting photos involving children under 18 years of age who are fully or partly naked must take from the artist a written statement that they followed the laws and regulations in force where they worked when creating the image, otherwise the images must be classified by the Classification Board prior to exhibition. Australia Council for the Arts. *Children in Art Protocols* (December 2008) http://www.australiacouncil.gov.au/data/assets/pdf_file/0018/44055/Children_in_art_protocols.pdf at 3. See further: “Children in the Creative Process: Information for Artists and Art Organisations” *Arts Law Centre of Australia* (2008) <http://www.artslaw.com.au/info-sheets/info-sheet/children-in-the-creative-process-information-for-artists-and-arts-organisat/> and “Arts Censorship Guide” *National Association of the Visual Arts* (2009) <http://www.visualarts.net.au/advicecentre/resources/publications/artcensorshipguide>

⁷³⁷ The working party that recommended the change followed the reasoning of a 2008 report by former Supreme Court Judge James Wood, which conceded that the use of the artistic defence by a child pornographer was hypothetical, but that its removal was symbolic. *Penalties Relating to Sexual Assault Offences in New South Wales, Vol. 1*, NSW Sentencing Council (August 2008) at 87-89. [http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/Vol_1_Sexual_Offences_report.pdf/\\$file/Vol_1_Sexual_Offences_report.pdf](http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/Vol_1_Sexual_Offences_report.pdf/$file/Vol_1_Sexual_Offences_report.pdf). Wood said: ‘We are getting more and more bombarded with this material. Barriers are breaking down. The concern is more in the potential. There needs to be a bit of a brake.’ Cited in David Marr, “Brush with Henson”, *supra* note 735.

⁷³⁸ See comments by Tamara Winikoff, executive director of the National Association of the Visual Arts, in Joyce Morgan, “Children in art: some say rules are just fine” *Sydney Morning Herald* (23 October 2008) <http://www.smh.com.au/news/entertainment/arts/laws-fine-as-they-are/2008/10/22/1224351344275.html?page=1> and Joyce Morgan, “Artists a ‘soft target’ as regulators tighten rules on child porn” *Sydney Morning Herald* (12 January 2010) <http://www.smh.com.au/national/artists-a-soft-target-as-regulators-tighten-rules-on-child-porn-20100111-m2s5.html>. Home Affairs Minister Bob Debus was one of the few politicians who spoke out against the need to change the guidelines. ‘If you ask me how we can change the classification rules to deal better with the Henson-type situations, I simply can’t tell you. We would be in a bad way if innocent photographs of children without their duds should somehow or other of themselves become objectionable. It’s just impossible.’ Cited in Marr, *Henson Case*, *supra* note 726 at 142.

⁷³⁹ Scott Beattie, *Community Space and Online Censorship: Regulating Pornotopia* (London: Ashgate, 2009). ‘The consequence of regulatory fortressing is the construction of a regulatory system that is self-justifying and exists as a perceived solution to a real or imagined social problem but in effect provides merely a disconnected image of regulatory coherence and inviolability.’ at 19. On the frequency of amendments to child pornography laws in the U.S., Adler, “The Perverse Law of Child Pornography”, *supra* note 494 at 236-237, and on the role of moral panic in driving legislative amendments to U.S. child safety legislation, see Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (New York: Yale University Press, 1998) and Kristen M. Zgoba, “Spin Doctors and Moral Crusaders: The Moral Panic behind Child Safety Legislation” (2004) 17:4 *Criminal Justice Studies* 385.

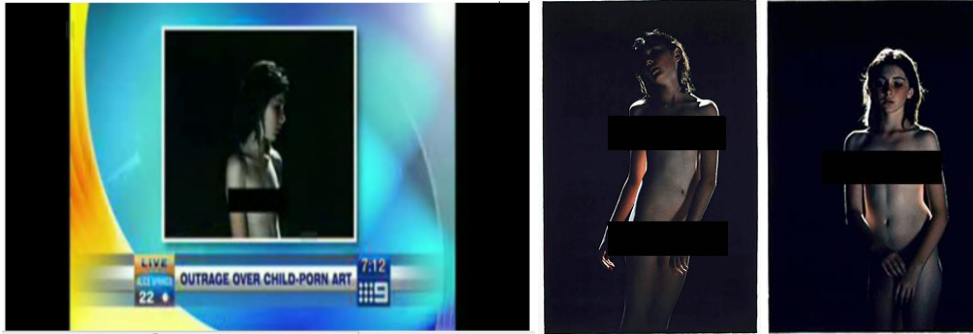


Figure 3: On left, still image from *The Today Program*; on right, as they appeared in online media.

Just as we saw in chapter 2's obscenity cases, which seemed doomed to reproduce obscenity in the very process of attempting to repress it, the censorial mechanisms by which sexuality was supposed to be warded off in media coverage of the Henson case only functioned to amplify its effects. As several members of the Classification Board noted, the addition of black bars when Henson's photographs were shown on television and in news media rendered 'a mild display of nudity' 'dirty and more confronting.'⁷⁴¹ The 'blacking out' not only visually confirmed but actually constructed the obscene nature of the photographs.⁷⁴² In the photographs above on the right, the bar over her already heavily shadowed genitals is hiding something that is already hidden, but since it is hidden a second time, the viewer of the photograph cannot know about the first concealment, and assumes that underneath the black bar, something is exposed. The blacking out thus immediately enlists the fantasy of the subject, just as any redaction of a text teases the fantasmatic. Through the act of censoring the image, the crimino-legal complex actually produced pornography, eliciting or generating the very hysterical

⁷⁴⁰ See Sigmund Freud, "Remembering, Repeating and Working-Through (Further Recommendations on the Technique of Psychoanalysis II)" (1914) in J. Strachey, ed. *The Standard Edition of the Complete Psychological Works of Sigmund Freud Vol. 12* (Hogarth: London, 1978) 147.

⁷⁴¹ Classification Board, Attorney-General's Department, Canberra, reports T08/2273, T08/2275, T08/2274, T08/2278 and T082276, 29 May 2008.

⁷⁴² For a similar analysis, see Sarah Edge & Gail Baylis, "Photographing Children: the Works of Tierney Gearon and Sally Mann" (2004) 5:1 *Visual Culture in Britain* 75 at 76. David Gurnham writes that some of Gearon's photographs were reproduced in U.K. newspapers with the genitals blacked out 'either to avoid causing offense or else to ensure that readers would interpret the photographs as sexual.' David Gurnham, *Memory, Imagination, Justice: Intersections of Law and Literature* (London: Ashgate, 2009) at 113.

response – the ‘outrage’ - it was purporting to document. This is the irony which this chapter seeks to unravel.

As many commentators have noted, each side of the Henson debate – a political discourse concerned with harm to children, and an aesthetic discourse marshalled in Henson’s defence—appeared to be ‘speaking a different language.’⁷⁴³ The gazes with which each regarded Henson’s photographs were highly polarized: on the one side was a political gaze, feverish and sexualized, consumed with the spectres of child exploitation and pedophilic fantasy, and on the other side, a neutral, ‘aesthetic’ gaze, which, in emphasizing the political values of free artistic expression, evacuated the image of politics altogether. The (hysterical) overpoliticization of the image was answered by the (self-serving) underpoliticization of the image. But neither side of this debate can account for how particular images provoke a turn to law: how they incite the *desire* for law, or for action through law. In order to get beyond a purportedly ‘neutral’ aesthetic reading which purports to limit the photograph’s meaning within the frame of ‘art object,’ and the political reading which would claim for it a specific trajectory of affect, we must, in Derrida’s words, ‘weigh up and bear on the frame, which is the decisive structure of what is at stake.’⁷⁴⁴

A frame transforms something into an object to be looked at, sets something apart for our contemplation, cutting out what is important from what is not, and thus organizing ‘meaning as such.’⁷⁴⁵ To frame is to make something visible and at the same time to connect this visibility to that which cannot and must not be seen. What cannot be seen is the ‘outside’ of the frame, but what *must* not be seen is the frame itself. The frame stands out against the two grounds that it constitutes – the work and the setting – but

⁷⁴³ Kate MacNeill, “When Subject Becomes Object: Nakedness, Art and the Public Sphere” (2010) *Media International Australia* 82 at 84.

⁷⁴⁴ Derrida, *Truth in Painting*, supra note 22 at 61.

⁷⁴⁵ ‘This permanent requirement – to distinguish between the internal or proper sense and the circumstance of the object being talked about – organizes all philosophical discourses on art, the meaning of art and meaning as such... This requirement presupposes a discourse on the limit between the inside and outside of the art object, here a *discourse on the frame*. *Ibid.* at 45.

with respect to each of these, it always dissolves into the other.⁷⁴⁶ This oscillation marks its presence and effaces its effect. It is meant to be seen but also to escape visibility. The function of the frame is thus to be invisible – or more precisely, to not be a part of what you are looking at. The frame around a photograph in an art gallery is neither visible nor invisible, but oscillates in and out of our vision – if we are looking at the photograph, it is part of the wall, and if we are looking at the wall, it is part of the photograph. The characteristic of the frame is ‘not that it stands out but that it disappears, buries itself, effaces itself, melts away at the moment it deploys its greatest energy.’⁷⁴⁷ The frame is a visible invisibility – it’s meant to be perceived, but not *noticed*.

The Henson photograph is politically troubling for precisely the reason it is artistically interesting: it directs our attention to the normally-invisible work of framing. ‘A frame is essentially constructed and therefore fragile: such would be the essence or truth of the frame.’⁷⁴⁸ Henson’s work confronts us with our own semantic over-investment in the lines and borders which separate adult from child, art from pornography, sex from not-sex, real from representation. As Henson said in an interview:

I think the period between childhood and adolescence, you know, or adolescence in itself, is a really interesting period. It’s a world between the world of childhood and the adult world... that thing of having one foot in the world of childhood and one foot in the adult world produces a certain uneasiness, a certain disposition which I find really interesting.⁷⁴⁹

The human body, and particularly the female body, is a particularly potent image, freighted with ideological and libidinal investments. As Devine’s description of the

⁷⁴⁶ *Ibid.* at 61.

⁷⁴⁷ ‘... the parergonal frame stands out against two grounds [*fonds*], but with respect to each of those two grounds, it merges [*se fond*] into the other. With respect to the work which can serve as a ground for it, it merges into the wall, and then, gradually, into the general text. With respect to the background which the general text is, it merges into the work which stands out against the general background. There is always a form on a ground, but the *parergon* is a form which has as its traditional determination not that it stands out but that it disappears, buries itself, effaces itself, melts away at the moment it deploys its greatest energy.’ *Ibid.*

⁷⁴⁸ *Ibid.* at 73.

⁷⁴⁹ Bill Henson, quoted in ABC 7.30 Report (May 27, 2008) http://www.youtube.com/watch?v=IT0z_QtPRY0&feature=related

photograph on the invitation makes clear – ‘the light shining on her hair, eyes downcast, dark shadows on her sombre, beautiful face, and the budding breasts of puberty on full display’⁷⁵⁰ – this image breaks a particular taboo in showing developing breasts, a body in a liminal state between girlhood and womanhood.⁷⁵¹ Mary Douglas explains that ‘danger lies in transitional states, simply because transition is neither one state nor the next, it is undefinable.’⁷⁵² The limits of the body, the margins of genre, and the edges of categories, are the most critical in the construction of symbolic meaning, and are thus the sites at which policing is concentrated. ‘Any structure of ideas is vulnerable at its margins.’⁷⁵³ The liminality of and in the photograph accounts for why the image hails the law: its borderline status is ‘imagined as desiring a repressive response.’⁷⁵⁴

This chapter is structured around the different overlapping gazes brought to bear upon such photographs of children, where gaze is understood as a multi-directional motion set into play by framing and affect. As Lacan writes: ‘In our relationship to things as constituted by the path of vision and ordered in the figures of representation, something glides, passes, transmits itself from stage to stage, in order always to be in some degree eluded there – it is that which is called the gaze.’⁷⁵⁵ The gaze, then, is something that eludes representation and yet remains present within the structure of the visual field: the complex trajectory of desire. Part 1 examines how the ‘aesthetic gaze’ functions to shore up the ideological boundaries of art, but is unable to account for its own ideological investment in the distancing work of the frame, and subsequently the operations of reframing. It suggests that what is missing from an aesthetic gaze is an account of the affective work of framing and reframing. Part 2 examines the ‘political

⁷⁵⁰ Devine, “Moral Backlash”, *supra* note 725.

⁷⁵¹ “Henson’s work undoubtedly involves a broken taboo. Without breasts or with full breasts this image would also have caused less fuss. Perhaps it would have passed unremarked. But these are budding breasts, rarely seen and almost never celebrated. In our culture, budding breasts are extraordinarily private.” Marr, *Henson Case*, *supra* note 726 at 5.

⁷⁵² Douglas, *Purity and Danger*, *supra* note 91 at 119.

⁷⁵³ *Ibid.* at 122.

⁷⁵⁴ Young, *Judging the Image*, *supra* note 18 at 44.

⁷⁵⁵ In French, ‘le regard.’ Lacan, *Four Fundamental Concepts of Psychoanalysis*, *supra* note 247 at 70.

gaze' that reads such photographs as a betrayal of childhood innocence and/or a play into heterosexual pedophilia. In attempting to stand outside the viewing relationship and predetermine the 'meaning' of the photograph by reference to an overdetermined ideological framework, the political gaze overlooks its own position within the affective regime of the image. The political reading is precisely a reading that maintains our *own* innocence about the complicity of our neoliberal, patriarchal and heteronormative politics in the facilitation and perpetuation of child exploitation and abuse.

Part 3 turns to the legal gaze, exploring how the focus of child pornography law in Australia, Canada, and the United States has in recent years shifted away from a focus on the content of the photographs and towards questions of their creator's and viewer's intentions or purposes. Although this is a more sophisticated understanding of aesthetics, in that it ties the meaning of a photograph to variations of context and not to some pornographic essence in the image, it undoes law's capacity for judgment. Proceeding on the assumption that children are harmed whenever photographs allow predatory adult sexual projections onto children forces the courts to race to keep up with a fantasy, a fantasy which is itself constituted through the limits it pushes up against. It makes everything potentially polluting, and requires the court to take on the pedophile's gaze. This crisis is manifest in the recent extensions of child pornography law to include images of pure fantasy or animation, as well as the incongruous criminalization of teenage girls for photographs they have created by and of themselves, in the so-called 'sexting' cases.

The polarized nature of the debate over photographs of children, manifest in legal cases over the scope and definition of child pornography, has obscured a deeper understanding of how photographs work. We need to re-aestheticize the image: to analyze how images affect us, what the image hails and brings to the surface, and what it judges and finds wanting in us - some deviant desire. Part 4 explores how Henson's photograph hails the law, or forms the occasion of a dramatic turning to law, through the notion of disgust. Disgust is about our image of the image of another's desirous

responses – to feel disgust is to see ourselves reflected in and implicated in the pedophilic fantasy. When the crimino-legal complex declared itself ‘disgusted’ by these images, we can glimpse how the law itself is implicated in those deviant desires. Law tries to reframe the image as pornography not art, but law is reframed in the process, dragged into the scene it cannot master: the image itself. To perceive the irony is to glimpse law’s investment in remaining outside the image, as well as the fact that it is already inside the image by virtue of framing it. The Henson photograph demonstrates law’s limits, exceeding its grasp, and reflecting back law’s obscene fantasmatic kernel: a desire which the law cannot satisfy, and a social unconscious which we would like to forget.

I. The Aesthetic Gaze: Reframing Art and Pornography

In her book *Frames of War*, Butler describes the function of the photographic frame in terms which echo her description of gender performativity (in relation to bodily theatrical gestures) and resignification (in relation to repeating words in new contexts):

The frame that seeks to contain, convey, and determine what is seen (and sometimes, for a stretch, succeeds in doing precisely that) depends upon the conditions of reproducibility in order to succeed. And yet, this very reproducibility entails a constant breaking from context, a constant delimitation of a new context, which means that the ‘frame’ does not quite contain what it conveys, but breaks apart every time it seeks to give definitive organization to its content.⁷⁵⁶

The susceptibility of representations to *reframing* is critical to their status as representations: they depend on ‘conditions of reproducibility’ which, in our modern area of digital imaging and the internet, allow for the instant proliferation of images. Reframing is the name for a process that opens to, and through, the image, as the image both ‘lands in new contexts’ and also ‘creates new contexts by virtue of that landing, becoming a part of the very process through which new contexts are delimited and

⁷⁵⁶ Butler, *Frames of War: When is Life Grievable?* (New York: Verso, 2009) at 10.

formed.⁷⁵⁷ But like resignification and performativity, reframing is also a process ‘where a political consequential break is possible.’⁷⁵⁸ Just as in resignification’s potential for ‘showing up’ authority (usually in insurrectionary speech against the state, in Butler’s narrow focus), and the subversive potential of performativity (especially in contexts of heightened theatricality, like drag performance), the potential for images to take on non-normative meanings depends on their repetition in different contexts: the ‘frame functions normatively, but it can, depending on the specific mode of circulation, call certain fields of normativity into question.’⁷⁵⁹ She concludes that the frame is always provisional and incomplete; its ‘perpetual breakage’ or ‘self-breaking’⁷⁶⁰ is defined ‘as the very function of the frame.’⁷⁶¹ Just as Derrida identified the iterability of discourse as essential to communication, Butler argues that the frame’s susceptibility to slippage is a precondition to it working at all.

The Henson case presents a dramatic example of a photograph breaking out of its constraining contexts, moving through different media and inaugurating new possibilities and trajectories of affect.⁷⁶² Produced within the artist’s studio for initial display within an art gallery, the Henson photograph appeared in the media in different forms, doctored and undoctored, and circulated on the internet to such a degree that it was accorded the status of a network ‘meme.’⁷⁶³ In one context, it appeared to be ‘beautiful,’ and in another, ‘disgusting.’ Its title changed too: in the art gallery it was ‘untitled,’ like the exhibition’s other works, an artistic practice which signals a resistance

⁷⁵⁷ *Ibid.* at 9. Butler’s example is the photographs of torture at Abu Ghraib, which travelled beyond their confined context and took on dramatically different affective trajectory.

⁷⁵⁸ *Ibid.* at 24.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Ibid.* at 10.

⁷⁶¹ She writes further ‘This leads us to a different way of understanding both the frame’s efficacy and its vulnerability to reversal, to subversion, even to critical instrumentalization.’ *Ibid.*

⁷⁶² *Ibid.* at 11, 13.

⁷⁶³ Munster, *supra* note 97 at 3. A meme is a unit for carrying cultural ideas symbols or practices, which can be transmitted from one mind to another, transforming itself in time and space in response to selective pressures.

to definition, offering the viewer no starting point for entry into the subject of the photograph. But in the media and in Marr's book *The Henson Case*, it was referred to as 'the photograph of N' – both hinting at and immediately obscuring the child subject's name, in the convention of child protection discourse. In one context, the photograph was 'art,' and in the other, it was documentary evidence of criminality. The radical effects of these reframings on the Henson photograph led art historian Kate MacNeill to suggest that 'what lay at the heart of the controversy was the inadequacy of the art system to confront the nature of images when they move beyond its physical and discursive boundaries.'⁷⁶⁴ Instead of viewing art as a realm of representations, we need to view it as a field of cultural production intent on framing its territory and policing its boundaries.

Art as a Field of Cultural Production

Defenders of Henson within the art context usually proceeded by denying the sexual charge of his photographs, connecting them to an artistic tradition developed through painting, and likening them to Caravaggio's paintings, in their 'moody use of light and dark subject matter.'⁷⁶⁵ His subjects were cast as abstracted and idealized forms existing in a 'dramatized elsewhere,' 'far removed from the pornographic scene.'⁷⁶⁶ Unlike Mapplethorpe, for instance, whose work deliberately and self-consciously toyed with the pornographic, Henson's 'allusive, mysterious, ambiguous'⁷⁶⁷ style facilitated these arguments. Art critics also turned their gaze from the photograph to stress the photographer's artistic credentials: his prestigious awards, the museums in which his

⁷⁶⁴ MacNeill, *supra* note 743 at 83-84.

⁷⁶⁵ John Elder, "The controversial career of Bill Henson" *The Age* (25 May 2008) <http://www.theage.com.au/articles/2008/05/24/1211183189567.html>

⁷⁶⁶ Mr Norbert Loeffler, 'Disturbing Australia: Art or Porn?' Courting Controversy Lecture Series Melbourne University Law School, 16 June 2008. Lynda Nead has noted the tendency of erotic art to legitimize the representation of the sexual through the assertion of form which holds off the collapse into the pornographic. Lynda Nead, "Above the Pulp-Line: The Cultural Significance of Erotic Art" in Pamela Church Gibson ed. *Dirty Looks: Women, Pornography, Power* (London: British Film Institute, 1993) 144 ["Above the Pulp-Line"] at 147

⁷⁶⁷ Patrick McCaughey, "On the Edge" *The Australian* (7 June 2008) 4

works are held, his technical ability and training as an artist.⁷⁶⁸ MacNeill expressed dissatisfaction with how the institutional definition of art was invoked by curators, collectors and art historians who emphasized Henson's artistic imprimatur, concluding '(t)he aesthetic alibi was being played as a trump card.'⁷⁶⁹ For her, the Henson controversy demonstrated 'the contingency of the image and the way in which the art system operates to credential works of art.'⁷⁷⁰

The institutional definition of art reflects the terms of the post-Kantian aesthetic gaze which has meant that, since at least the eighteenth-century, art and pornography have been defined through mutual exclusion.⁷⁷¹ In their formal and technical qualities, attention to alignment, light and detail, and absence of a definite locality, Henson's photographs could be seen to fit within an artistic tradition of painting and sculpture, in which the nude signals mastery. The medium of photograph adds an extra complication— more than iconic, its indexicality anchors it in a political reality that is

⁷⁶⁸ Henson's work has been exhibited in the Bibliotheque Nationale in Paris, Musee d'Art Moderne de la Ville de Paris, the Solomon R. Guggenheim Museum in New York, the Museum of Modern Art in Vienna, the Venice Biennale, as well as many Australian museums and gallery shows in the United States. The *Sydney Morning Herald* art critic John McDonald commented, 'Any attempt to stigmatise Henson's work as 'pornographic' is doomed to end in failure. Where are the victims? What pornographer has his work in the collections of public museums around the world?' John McDonald, 'Snapshot of a small-minded people' *Sydney Morning Herald*, (31 May 2008) p 16.

⁷⁶⁹ MacNeill, *supra* note 743 at 83. See further 86. Martin Jay described the aesthetic alibi as 'a special case of freedom of speech,' one which affords protection to what might otherwise be considered offensive 'if it is understood to take place within the protective shield of an aesthetic frame.' Martin Jay, 'The Aesthetic Alibi' in *Cultural Semantics* (Amherst: University of Massachusetts Press, 1998) 110-111.

⁷⁷⁰ MacNeill, *supra* note 743 at 92.

⁷⁷¹ 'If art represents the public and legitimate display of the female body, then pornography is its 'other', one in which the display of the body is illicit and confined to the marginal spaces of public and private culture.' Nead, *The Female Nude*, *supra* note 388 at 99. "Art and obscenity need each other; their relationship is one of mutual dependency in which neither term is necessarily primary or subordinate. The boundaries of the two terms abut each other and each becomes the limit of the other. Obscenity's beginning is art's end; art starts where obscenity terminates. Historically, there are no absolute criteria that determine where an object is categorized in relation to sex and aesthetics, illegitimate and legitimate culture. At any given moment, however, the critical place of definition is the borderline, where art and obscenity brush up against each other and where the matter of distinction becomes more urgent. This would suggest that art and obscenity are in a constant state of definition and re-definition. It might be more accurate, therefore to conceive of them as social, moral and cultural processes than as finite categories.' Nead, "Bodies of Judgment", *supra* note at 205. As Allison Pease notes, 'since the eighteenth century, what is aesthetic and what is pornographic have repeatedly been defined as mutually exclusive.' Pease, *supra* note 554 at 1.

more troubling for the aesthetic gaze to accommodate.⁷⁷² A photograph acts as a truth claim about an event having taken place: a girl stood unclothed, the light flashed, her image was captured. 'The photograph's essence is to ratify what it represents.'⁷⁷³ This accounts for the affective charge of photographs over and above other forms of visual representation, like painting. Unlike a painting's showcased mediality – its brushstrokes - a photograph tends to efface its own status as representation,⁷⁷⁴ suggesting 'the sameness of a sign and what it represents.'⁷⁷⁵ Barthes wrote that we tend to view photographs as transparent windows: we do not look at a photograph for its own sake but because we are looking for something else: 'a photograph is always invisible: it is not it that we see.'⁷⁷⁶

Devine's politically galvanizing use of the word 'naked' to describe the subjects of Henson's photographs in her editorial tapped into an understanding of nakedness as anti-representational and thus anti-art, a discourse which is captivated by photography's promise of a link to a real unmediated physical body outside of representation.⁷⁷⁷ But as John Tagg cautions, photographic indexicality 'can guarantee nothing at the level of

⁷⁷² Barthes calls photography 'iconic discourse', in that it can be understood on a level completely clear of connotations, by virtue of its 'absolutely analogical nature.' Roland Barthes, "The Rhetoric of the Image" in *Image, Music, Text.*, ed. and trans. by Stephen Heath (New York, Hill and Wang, 1977) 32 at 42-43. Solomon-Godeau speaks of the photograph's semiotic status as 'index, or motivated sign': 'the photograph's direct and causal linkage to its referent determines its ontological difference from other iconic systems.' Abigail Solomon-Godeau, *Photography at the Dock: Essays on Photographic History, Institutions, and Practices*, (Minneapolis: Minn. University Press, 2nd ed., 1995) [*Photography at the Dock*] at 232. She concludes 'the ramifications of the dual nature of photographic imagery – indexical and iconic – ... historically underwrite all debates in and around the medium.' *Ibid.* at 233.

⁷⁷³ Roland Barthes, *Camera Lucida* (London: Vintage, 1993 [1980]) [*Camera Lucida*] at 85.

⁷⁷⁴ 'Photography, a medium popularly believed to directly transcribe the real, naturalizes the codes it employs to a far greater extent than do other forms of visual representation.' Solomon-Godeau, *supra* note 772 at 223-5.

⁷⁷⁵ Anne Higonnet, *Pictures of Innocence: The History and Crisis of Ideal Childhood* (New York: Thames and Hudson, 1998) [*Pictures of Innocence*] at 113. 'However potent or arousing to the viewer, the hand-made image offers evidence of its own mediation, whereas it is in the nature of photographic representation to normally efface it.' Solomon-Godeau, *supra* note 772 at 233.

⁷⁷⁶ Barthes, *Camera Lucida supra* note 773 at 6.

⁷⁷⁷ See Nead, *Female Nude*, *supra* note 771 at 14-16. Recall Kenneth Clarke's famous distinction between nakedness and nudity, where to be naked is to be without clothes and to be nude is to be always already without clothes. Kenneth Clark, *The Nude: A Study in Ideal Form* (New York: Pantheon Books, 1956) at 3.

meaning.⁷⁷⁸ When Devine claimed that ‘comparisons to Caravaggio and Michelangelo miss the point that Henson’s art is photography, which has none of the ambiguity of painting,’⁷⁷⁹ she missed the point that Caravaggio’s work is not indifferent to a gender critique or concerns about the sexualisation of young females – it has just become an art form which is so specialized we no longer know how to read it. In his painting-like photograph, Henson has brought a representative tradition anachronistically forward, and we do not have the same structure of sublimation supporting it, or the same cultural framework of understanding.⁷⁸⁰

Scholars have argued that the ways in which the aesthetic gaze, operating through supposedly purely aesthetic criteria, distinguishes itself from the ‘naïve gaze,’ masks power relations. Bourdieu explains that upper-class aesthetics preclude reacting with ‘horror at the horrible’ or ‘desire for the desirable,’ as well as shunning ethical reactions to artistic depictions,⁷⁸¹ and suggests that only persons unschooled in aesthetic standards – standards that are upper-class and essentially amoral – are likely to be upset by art.⁷⁸² The value of art is produced by a process of consecrating producers as artists and products as art objects.⁷⁸³ Agents position themselves within this field, both possessing and acquiring symbolic capital, and carrying with them the dispositions that constitute and derive from their habitus.⁷⁸⁴ A photograph in an art gallery assumes an

⁷⁷⁸ John Tagg, *The Burden of Representation: Essays on Photographies and Histories* (Basingstoke: Macmillan, 1988) at 3.

⁷⁷⁹ Miranda Devine, “Artistic crowd the real philistines” *Sydney Morning Herald* (20 May 2008) <http://www.smh.com.au/news/miranda-devine/puerile-defence-of-henson/2008/05/28/1211654120223.html>

⁷⁸⁰ As Higonnet emphasizes, ‘(i)t would be impossible... to comprehend the power of the photographs of children we take most for granted today unless we saw how they inherited, and subliminally refer to, the prestige and genius of elite paintings.’ Higonnet, *supra* note 775 at 13.

⁷⁸¹ Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (Cambridge, MA: Harvard University Press, 1984) at 54.

⁷⁸² *Ibid.* at 53-4.

⁷⁸³ ‘The producer of the *value of the work of art* is not the artist but the field of production as a universe of belief which produces the value of the work of art as a *fetish* by producing the belief in the creative power of the artist.’ Pierre Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field* (Stanford: Stanford University Press, 1996) at 229.

⁷⁸⁴ The field defines ‘the space of artistic position-takings, both actual and potential’ in *Ibid.* at 87.

aura of uniqueness and lustre lent by the aesthetic and economic 'value' associated in our society with high art. Debates over whether a photograph is erotic or pornographic become a key mechanism for asserting and reinforcing cultural capital. Linda Williams shows that those who argued that Robert Mapplethorpe's photography was 'high end' erotic art rather than 'low end' pornography were announcing they could withstand the temptation of pornographic appeal to the body.⁷⁸⁵ As Nead asks, 'What better way to demonstrate your cultural disinterestedness and superiority than to come into contact with the erotic and to be – practically – unmoved?'⁷⁸⁶ The genre of 'erotic art' functions precisely to take the viewer to the frontier of legitimate culture, facilitating their arousal and containing it within 'purified, contemplative mode of high culture.'⁷⁸⁷

In *Art as a Social System*, Niklas Luhman describes the need to 'establish a frame within the frame of the art system', one that produces 'an art specific establishment of more or less significant experts,' who can pronounce on an object's art status as it teeters on the boundary of art.⁷⁸⁸ Abigail Bray observes that during the Henson debate, the expert gaze of the art critic, embodying 'the proper bourgeois response' of 'distance and differentiation,'⁷⁸⁹ circulated in the media to shame aversion to Henson's images and

⁷⁸⁵ Linda Williams, "Epilogue" in *Hard Core: Power, Pleasure and the 'Frenzy of the Visible'* (Berkeley: University of California Press, 1999) at 280.

⁷⁸⁶ Nead, "Above the Pulp-Line", *supra* note 766 at 147.

⁷⁸⁷ *Ibid.*

⁷⁸⁸ Niklas Luhmann, *Art as a Social System*, trans. by Eva M. Knodt (Stanford: Stanford University Press, 2000) at 307. Luhman identifies the art system as a one of a number of self-referential sub-systems coexisting in society – two others being religion and law. He argues that the strength of the art system derives from its capacity to maintain an apparent coherence and at the same time play with its boundaries. His work has been described as 'a shift from a more traditional sociological notion of representation to a concept of social meaning that is contingent not only on particular systems but also upon the process of observation itself.' Francis Halsall, "No Medium Just a Shell: How Works of Art Configure Their Medium" (2007) 6:1 *Journal of Visual Art Practice* 45 at 49.

⁷⁸⁹ Abigail Bray, "Governing the Gaze: Child Sexual Abuse Moral Panics and the Post-Feminist Blindspot" (2002) 9:2 *Feminist Media Studies* 173 ["Governing the Gaze"] at 175.

humiliate the intolerant non-expert gaze as being part of a politically irresponsible moral panic, a threat to freedom of choice and artistic expression.⁷⁹⁰ She writes:

The Henson case suggests that overcoming an aversion to erotic photographs of naked children through aestheticization is implicitly equated with the liberation of thought from the yoke of a mindless public morality.... One must gaze at Henson's pictures of strangely docile naked girls with budding breasts and hairless vaginas in order that one over-come the boorish temptation to think and feel obvious 'moralistic' 'claptrap' about the sexual exploitation of female children. The governmentality of the private upper-class art gallery – the compulsory celebration of sexual transgression, the genteel inbred world of experts, the obedient consumption, the polite regulation of aversion – is now expanded into the public sphere, becoming a normative technology of the progressive middle-class self.⁷⁹¹

Such readings appealed to the class politics underpinning the supposedly neutral and intellectual 'aesthetic gaze' in order to bolster their 'common sense' – or in Bray's case, 'experienced streetwise feminist'⁷⁹² – reading of the photograph as unproblematically sexual. The lucid persuasiveness of such criticisms of the aesthetic gaze meant that Henson's work was denounced not *in spite of* being accepted as art, but *because of* that acceptance. People were fascinated by the idea that an 'elegant art gallery'⁷⁹³ was being used as an artifice or smokescreen for sordid sexuality: in the words of the NSW Opposition Leader, 'the sexualisation of children *under the guise of* art is totally unacceptable.'⁷⁹⁴ Broadcaster Phil Clark pronounced critical discourse on Henson's work 'waffle',⁷⁹⁵ commenting that 'wankers walk around with glasses of champagne and call it

⁷⁹⁰ *Ibid.* at 180-1. In our neo-liberal governance framework, 'a tolerance for transgressive aesthetics becomes a normative technology of the self and a form of self-governance that *shames intolerance* as a sexually repressed and repressive, unsophisticated and reactionary affect.' at 179. 'Such positions rest on the assumption that an *affective* reading of sexualized images of children is an *effect* of the CSA moral panic.' Abigail Bray, "The Question of Intolerance: Corporate Paedophilia and Child Sexual Abuse Moral Panics" (2008) 23:57 Australian Feminist Studies 323 ["Question of Intolerance"] at 327.

⁷⁹¹ Bray, "Governing the Gaze", *supra* note 789 at 185.

⁷⁹² *Ibid.* at 182.

⁷⁹³ Devine, "Moral Backlash", *supra* note 725.

⁷⁹⁴ Opposition Leader Barry O'Farrell cited in C Masters and J Vallejo, "Who would call this art?" *The Daily Telegraph* (23 May 2008), p 4, emphasis mine.

⁷⁹⁵ Quoted in Marr, *Henson Case*, *supra* note 726 at 17-18.

art.⁷⁹⁶ In calling those who adopt the aesthetic gaze ‘wankers,’ he links academics and perverts, rendering the sanctified space of an art gallery a scene of sordid sexual arousal. Devine’s editorial pitted parents, feminists, psychologists, teachers, and grandparents concerned with sexualisation of children against ‘artists, perverts, academics, libertarians, the media and advertising industries, respectable corporations and the porn industry,’⁷⁹⁷ in rhetoric intended to avow that this issue, ‘like an ideological Möbius strip,’⁷⁹⁸ only permits one side. The sandwiching of the word ‘perverts’ between artists and academics reflects their common function of undermining boundaries and unsettling certainty, provoking or revealing constitutive anxieties.

Reappropriation Art



Figure 4: Gary Gross, *The Woman in the Child* (1978) Figure 5: Richard Prince, *Spiritual America* (1992)

The paradoxical effects of reframing in the Henson case, as well as the ideological underpinnings of the aesthetic gaze, find an illustrative counterpart in the various

⁷⁹⁶ Phil Clark, 2GB radio, Thursday 22 May, quoted in Marr, *Henson Case*, *supra* note 726 at 22.

⁷⁹⁷ Devine, “Moral Backlash”, *supra* note 725.

⁷⁹⁸ Lee Edelman, *No Future: Queer Theory and the Death Drive* (Durham: Duke University Press, 2004) at 2.

reframings of Gary Gross' infamous 1978 photograph of ten-year old Brooke Shields, taken as part of a project entitled *The Woman in the Child*.⁷⁹⁹ Like Henson, Gross was attempting to challenge the separation between childhood and adulthood, and like the Henson image, Gross' photograph [Figure 4] draws its affective charge from the boundary between them: the combination of the child subject's body and the mature, made-up face with its coquettish pout. Three years after the photographs were taken, Shields unsuccessfully sued to stop their circulation on the grounds of invalid contract and breach of privacy.⁸⁰⁰ The court's two successive rulings against Shields embraced two distinct and contradictory readings of the photographs. The first reading denied that the images were sexual: they 'are not sexually suggestive, provocative or pornographic, nor do they imply sexual promiscuity. They are pictures of a prepubescent girl posing innocently in her bath.'⁸⁰¹ The second reading admitted that the photos may be sexual, but that in any event, the damage to her 'image' had already been done: Shields could not claim that the further publication of the images would cause her 'harm, embarrassment and personal distress,' because the photos had already been 'widely disseminated,' and her career had developed by 'projecting a sexually provocative image.'⁸⁰² The photographs were innocent, but Shields herself was no longer innocent.⁸⁰³ These two readings are interconnected and mutually dependent. The court's denial of the sexual politics of her image in the first reading depends upon the imagined violation in the second reading - she has already been damaged. The public

⁷⁹⁹ The aim was to reveal the femininity of prepubescent girls by comparing them to adult women. Shields received a fee of \$450 from Playboy Press, Gross's partner in the project, and her mother signed a contract giving Gross full rights to exploit the images of her daughter. The series was first published in *Little Women*, and then in *Sugar and Spice*, a Playboy Press publication. Large prints were also exhibited by Charles Jourdan on 5th Avenue in New York.

⁸⁰⁰ After trying unsuccessfully to buy back the negatives, Shields brought a legal action against Gross for breach of contract, arguing that her mother had agreed to give up her rights for one publication only, but the photographer had marketed the photographs to other 'decidedly disreputable' publications. The court held that the contract signed by Shields' mother was valid and binding on her daughter. *Shields v. Gross*, 563 F. Supp. 1253 (S.D.N.Y. 1983) at 1254. *Shields v. Gross* 58 N.Y. 2d 338 (N.Y. 1983)

⁸⁰¹ *Shields v. Gross*, 563 F. Supp. 1253 (S.D.N.Y. 1983) at 1256-7.

⁸⁰² *Ibid.* at 1257.

⁸⁰³ Shields had controversially appeared nude as part of her role as a child prostitute in *Pretty Baby* (Paramount Pictures, 1978) dir. Louis Malle.

law adopts the neutrality of the aesthetic gaze to proclaim the innocence of the images, while the obscene superego underside whispers that 'you cannot lose something you never had.' The aesthetic gaze is here buttressed by an unseen, obscene ideology which lends it plausibility and credence.

The second reframing of this image occurred in 1992, when appropriation artist Richard Prince re-photographed the image so that it was darker in tone and filtered with a golden hue, and added the title *Spiritual America* [Figure 5]. This title referred to a famous 1923 photograph by American modernist Alfred Stieglitz, a close-up shot of a gelded horse, a critique of the repressed, materialist and culturally bankrupt American lifestyle as well as a nod to its religiosity. Prince thus reframed Gross' photograph within a specific political and artistic tradition which suggested a critical distance upon, and condemnation of, the sexualization and falsity of children in makeup, and perhaps the hypocrisy of America's overt religiousness in the wake of its institutionalized abuse of children. Prince's work was accorded both cultural and monetary value by an art establishment taken, particularly at that time, with a postmodern critique of originality.⁸⁰⁴ By politicizing and historicizing the photograph with a suggestive title, Prince had rendered Gross' photograph a material or cultural artifact and suspended its indexical and pornographic power. Importantly, the status of the print as a commodified art object meant that the image did not circulate beyond the confines of the art system and those schooled in the aesthetic gaze.

The third reframing of this image occurred in 2009, in the midst of our current representational crisis over images of children. In an exhibition planned for the Tate Modern Gallery entitled *Pop Life: Art in a Material World* exploring the relationship between commercial and artistic images, and which included sexually explicit images of penetration, Prince's photograph was to be shown behind closed doors bearing a warning that the photo was 'challenging'. An essay in the exhibition catalogue explained

⁸⁰⁴ The print sold at Christies in 1999 for \$151,000. For a favourable review of Richard Prince's reappropriative artistic practice, see Roberta Smith, "Pilfering a Culture Out of Joint" (28 September 2007) <http://www.nytimes.com/2007/09/28/arts/design/28prin.html>

that the image, of 'a bath damp and decidedly underage Brooke Shields,' was not intended to spark the 'lubricious titillations' of the original, but to provoke thought about the child star's story. After reading previews of the exhibition, the Obscene Publications Unit of the London Metropolitan Police visited the gallery and forced the exhibition room containing the Prince photograph to be closed and the exhibition catalogue withdrawn. The gallery's efforts to reframe the photograph were not only unsuccessful, but were deemed to enhance the danger of the photography: as Michele Elliott, founder of children's charity Kidscape, stated:

This has been put in a pouty adult way, it sounds like, and to masquerade under the guise of edgy art is ridiculous. It is soft kiddy porn. Putting a sign on the door like that means every pedophile in the land will head straight to that room.⁸⁰⁵

Unlike Prince's more elliptical critical reframing, this third iteration involves the public display of a 'forbidden fruit' – the photograph was rendered inescapably sexual by the gallery's own framing techniques, which were held hostage to the photograph and its culturally over-determined affect. Here, as in the Henson case, the mechanisms of framing that purport to offer us critical distance on, or a position to adjudicate, an image, are themselves inevitably eroticized. The art establishment which would de-sexualise Henson's photographs finds itself unable to account for the unexpected failures of its own reframing techniques, and for the affectivity of images once they are reframed and made public in new ways. Instead, the aesthetic gaze appeals to cultural capital, connoisseurship, and artistic imprimatur, all of which establish themselves along class lines. The aesthetic gaze cannot confront or account for the process of reframing itself, and how that changes the affective charge of the photograph.

⁸⁰⁵ Paola Totaro, "Tate Forced to remove nude Brook Shields picture" (1 October 2009) <http://www.smh.com.au/news/entertainment/shields/2009/10/01/1253989984214.html?referrer=email> ; "Tate Modern removes naked Brooke Shields picture after police visit" *The Guardian* (30 September 2009) <http://www.guardian.co.uk/artanddesign/2009/sep/30/brooke-shields-naked-tate-modern> ; see Adrian Searle, "Naked Brooke Shields photo is an image for which you must write your own commentary" (30 September 2009) <http://www.guardian.co.uk/artanddesign/2009/sep/30/art-tate-modern>

II. The Political Gaze: Children, Sex, and the Trouble with Innocence

Twenty-first century Australian politics is marked by what Barbara Baird calls 'the fundamentalism of the child.'⁸⁰⁶ The year leading up to the Henson controversy witnessed a Senate Inquiry into the sexualisation of children, especially young girls, in the media,⁸⁰⁷ and a Federal government intervention into the Northern Territory mobilized around the issue of child protection, bipartisan support for which demonstrated that 'the child in need of protecting' currently stands as an absolute truth outside politics.⁸⁰⁸ In Anglo-American culture, 'sexual vulnerability has become one of the prominent characteristics of childhood.'⁸⁰⁹ This development can be traced back at least to the explosion of discourse around child sexual abuse in the 1970s, when the narrative or image of child sexual abuse became a site where cultural anxieties were displaced and consolidated.⁸¹⁰ Since this time, the increasing criminal vigilance against

⁸⁰⁶ Barbara Baird, "Child Politics, Feminist Analyses" (2008) 23:57 *Australian Feminist Studies* 291 at 295.

⁸⁰⁷ Rush, Emma & La Nauze, Andrea. *Corporate Pedophilia: Sexualisation of Children in Australia*, Australia Institute Discussion Paper No. 90 (October, 2006) http://www.tai.org.au/documents/dp_fulltext/DP90.pdf; Emma Rush, "Adult world must let girls be girls" (10 October 2006) <http://www.smh.com.au/news/opinion/adult-world-must-let-girls-be-girls/2006/10/09/1160246068431.html>. For discussions of the corporate sexualisation of children and particularly girls see: Sharon Stephens, ed. *Children and the Politics of Culture* (Princeton: Princeton University Press, 1995); Frigga Haug, "Sexual Deregulation or the Child Abuser as Hero in Neoliberalism" (2001) 2:1 *Feminist Theory* 55; Lawrence Grossberg, "Cultural Studies, the War against Kids, and the Re-Becoming of US Modernity" (2003) 6:3 *Postcolonial Studies* 327; Angela McRobbie "The Rise and Rise of Porn Chic" *The Times Higher* (1 February 2004) at 23; Rush & La Nauze, *supra* note 807; Bray, "Question of Intolerance", *supra* note 790; Rosalind Gill, "Empowerment/Sexism: Figuring Female Sexual Agency in Contemporary Advertising" (2008) 18 *Feminism and Psychology* 35 and Melinda Tankard Reist, ed., *Getting Real: Challenging the Sexualisation of Girls* (Melbourne: Spinifex Press, 2009).

⁸⁰⁸ As leader of the opposition following the policy Kevin Rudd suggested 'when it comes to the challenge of child abuse we should be taking the party politics right out of it.' Lateline 2007a: Child abuse plan divides Indigenous leaders. ABC Television, 22 June. <http://www.abc.net.au/lateline/content/2007/s1959765.htm>. Pearson, "I'm amazed that anybody would put the protection of children as secondary to anything." Lateline 2007b: Noel Pearson discusses the issues faced by Indigenous communities. ABC Television, 26 June. <http://www.abc.net.au/lateline/content/2007/s1962844.htm> in Baird *supra* note 806 at 294.

⁸⁰⁹ See Adler, "The Perverse Law of Child Pornography", *supra* note 494 at 229.

⁸¹⁰ '... the emergence of child abuse as a key social problem concerns, in part, its functions as a generative metaphor serving to displace other collective unconscious anxieties and contradictions in American society.' Nancy Scheper-Hughes and Howard F. Stein, "Child Abuse and the Unconscious in American Popular Culture" in Henry Jenkins, ed. *The Children's Culture Reader* (New York: New York University Press, 1998) at 178. 'Child sexual abuse is now a master narrative of our culture,' Adler, "The Perverse

child sexual abuse has coincided with the attenuation of social policy responses to child welfare in neoliberal states like Australia, Canada, the United States and the United Kingdom.⁸¹¹ The primary regulatory focus of child welfare initiatives in these states is now concentrated on child pornography – the use of which is apparently constantly increasing.⁸¹² As Canadian legal scholar Lise Gotell observes,

In many ways... the contemporary panic around child pornography constitutes a backlash against feminist inspired insight that child sexual abuse is social, structural and systemic, with the privatized family constituting one of its main forums. We are encouraged to focus on the evil outsider and against this “dangerous” outside, the family reconstituted as a safe haven.⁸¹³

The externalization of the threat of child abuse, its relegation to the realm of perverts and wankers, was assisted by the subtle but pervasive mis-identification of homosexuality with pedophilia.⁸¹⁴ When it was revealed that Henson had scouted for models in high schools, the media made liberal use of metaphors of hunter and prey, ‘trawling’⁸¹⁵ round the playground, to ‘scour,’⁸¹⁶ ‘hunt’ and ‘stalk,’⁸¹⁷ conjuring a

Law of Child Pornography”, *supra* note 494 at 214-229, especially at 218. See also *Capturing the Friedmans* (Magnolia Pictures, 2003) dir. Andrew Jarecki.

⁸¹¹ Lise Gotell observes about Canada that ‘concerted governmental effort to enhance criminal penalties against child abuse has coincided with the attenuation of social policy responses to child welfare.’ Gotell, “Inverting Image and Reality” *supra* note 99 at 12.

⁸¹² Dan Oakes, “Child porn use out of control” *Sydney Morning Herald* (February 8, 2012) <http://www.theage.com.au/national/child-porn-use-out-of-control-20120207-1r5m8.html>

⁸¹³ Gotell, “Inverting Image and Reality” *supra* note 99 at 16. Writing about the *Sharpe* case, Canadian legal scholar Lise Gotell observes that the complexities of child welfare ‘have been reduced to the most simplistic terms through the equation of child sexual abuse and child pornography:’ ‘The constructed image of the child pornographer not only works to shift our attention to representation, it also functions to deny the systemic nature and characteristics of child sexual abuse.’ *Ibid.* at 14-15. Anna Higonnet: “We live in a society that is willing to pay for FBI agents and DA offices to launch massive legal investigations based on photographs of naked children that might or might not be interpreted by some person as possibly showing lascivious intent, but not willing to pay for social workers who deal every day with already documented abuse of, rape and murder of children” Higonnet, *supra* note 775 at 189.

⁸¹⁴ One commentator on the Henson affair asserted that it revealed ‘a subculture of pedophilia among gays.’ Paul Sheehan, “Artists crying out for martyrdom” *Sydney Morning Herald* (26 May 2008) <http://www.smh.com.au/news/opinion/paul-sheehan/2008/05/25/1211653841090.html>

⁸¹⁵ Ashleigh Wilson and Matthew Westwood, “Bill Henson patrolled primary school for models” *The Daily Telegraph* (4 October 2008). This article was accompanied by a rather sinister photograph of Henson, taken by Gary Ramage: <http://www.news.com.au/story/0,23599,24444102-421,00.html>

⁸¹⁶ Stuart Rintoul, “Henson publisher linked to school” *The Australian* (8 October 2008) <http://www.theaustralian.news.com.au/story/0,25197,24463662-5001986,00.html>

dangerous predatory wildness, and further distancing the site of child sexual abuse from the normal heterosexual family. The image of the pedophilic ‘child pornographer’ elides the systemic nature and characteristics of child sexual abuse, focusing crimino-legal efforts on only a small fraction of the children suffering sexual abuse and an even smaller fraction of the number of children suffering non-sexual abuse, homelessness, and neglect.⁸¹⁸ The image of the child, or rather the *imaged* child, seems to shut down our critical faculties of scale even as it affects us more than actual children: compare the public outcry over Henson’s photography with the results of a 2010 Australian survey suggesting widespread unwillingness to report child abuse and neglect that is *known* to be occurring.⁸¹⁹ The image obfuscates or supersedes reality, functioning as a metonymy

⁸¹⁷ *The Australian’s* cartoonist Bill Leak showed him roaming a schoolyard with kids cowering behind bushes. Readers were invited to have a laugh at the pun ‘arts bandit’. Rudd was of course ‘disgusted’ by the report, and that parents would be ‘revolted and horrified if this were true.’ “Henson ‘school scouting’ outrage” *Sydney Morning Herald* (4 October 2008) <http://www.smh.com.au/news/national/henson-school-scouting-outrage/2008/10/04/1223013839119.html>. Julia Gillard told the Nine Network: ‘To find out now that someone has been allowed to go into a school to look at children I think would send a shudder through people’s spines.’ Jonathan Pearlman & Ellie Harvey, “Gillard attacks artist’s search for models” *Sydney Morning Herald* (6 October 2008) <http://www.smh.com.au/news/entertainment/arts/gillard-attacks-artists-search-for-models/2008/10/05/1223145173695.html>. David Marr pointed out that Bill Henson’s process of scouting for models in a private school had been detailed in an article four years earlier, without any outcry, and suggested that time was needed for a debate over the conditions in which television producers, filmmakers, artists and modelling agencies should continue to be allowed to visit schools to spot for talent. David Marr, “Naked rage ignores some facts” (6 October 2008) <http://www.smh.com.au/news/entertainment/arts/naked-rage-ignores-some-facts/2008/10/05/1223145173119.html>; David Marr, “David Marr on the Henson Case,” *The Monthly* Melbourne, October 2008, <http://www.themonthly.com.au/tm/node/1268>. After the school principal admitted it was a mistake, Henson’s school model search ‘a mistake’ ABC (4 October 2008) <http://www.abc.net.au/news/stories/2008/10/04/2382190.htm>, the Victorian Government began investigating the circumstances under which Henson was allowed into the Melbourne primary school to scout for models. “Henson ‘school scouting’ outrage” *Sydney Morning Herald* (4 October 2008) <http://www.smh.com.au/news/national/henson-school-scouting-outrage/2008/10/04/1223013839119.html>

⁸¹⁸ Australian Institute of Health and Welfare, *A Picture of Australia’s Children 2009* <http://www.aihw.gov.au/publications/index.cfm/title/10704>. In 2003, there were 12,400 reported victims of physical assault and 7,500 reported victims of sexual assault among children, with three-quarters of sexual assault victims being girls. (112). In child protection notifications, the main type of abuse reported was emotional abuse, reported in 39% of substantiations, followed by neglect (28%), physical abuse (24%) and sexual abuse (9%) (110). Around 64,800 children, or 16 out of every 1,000 Australian children, accompanied a parent or guardian to a Supported Accommodation Assistance Program agency in 2006–07. These children were either homeless or at risk of becoming homeless (114). ‘In 2007–08, there were 7.4 child protection substantiations per 1,000 children aged 0–12 years. Indigenous children were over-represented at 8 times the rate of other children.’ (109)

⁸¹⁹ ‘More than half of Australians say they would turn a blind eye when confronted with signs of abuse, according to a survey of 22,000 people for the National Association for Prevention of Child Abuse and Neglect. They would do that for fear that they might be wrong (48 per cent), because it was not their

or distillation of the threat of sexual abuse, symptomatic of the broader tendency within crimino-legal discourse to focus on semblance rather than substance.

Within this charged cultural context, the political reading of the Henson photograph was a foregone conclusion: critics appealed to the innocence of childhood under threat from television, films, books, advertising, art and the internet, with the common refrain: 'Just let children be children.'⁸²⁰ This section explores what is missing from this political gaze: the implication of our own politics in the problem of 'innocence' we construct. As Ummni Khan observes, the discourse of disgust prevents us from seeing the ways in which 'our own well-intentioned discourse has incited a pedophilic logic.'⁸²¹ This section examines the discursive changes that installed the figure of the child at the focal point of our sexual economy, and critiques the way we conceive of harm to children as a question of innocence rather than relational vulnerability. The political gaze maintains our own innocence about our own cultural fascination with stories about child exploitation and sexual abuse – for despite the horror and disgust such stories solicit, we invite them back continuously.⁸²²

business (42 per cent), because they would not know what to do (38 per cent) or because they did not want to admit that the abuse had happened (22 per cent). Only one third would contact the police if a child disclosed sexual abuse.' Rachel Browne, "Most of us would not report child abuse cases" *Sydney Morning Herald* (5 September 2010) <http://www.smh.com.au/national/most-of-us-would-not-report-child-abuse-cases-20100904-14v6l.html>

⁸²⁰ Kevin Rudd, quoted in *Henson Case*, *supra* note 726 at 46-47. Of the *Art Monthly* cover photograph, Rudd said: "We are talking about the innocence of little children here. A little child cannot answer for themselves about whether they wish to be depicted in this way." "Australian PM in new nude art row" BBC (7 July 2008) <http://news.bbc.co.uk/2/hi/asia-pacific/7492579.stm>. Hetty Johnston called Henson's photographs 'a chink in the armour protecting childhood.' Quoted by David Marr, <http://www.themonthly.com.au/tm/node/1268>. Minister for Youth Kate Ellis said: 'Let's let kids be kids. When was it decided that we wanted to step in and snatch away that innocence before it happens naturally?' Pearlman & Harvey, *supra* note 817.

⁸²¹ Ummni Khan, "Having Your Porn and Condemning It Too: A Case Study of a 'Kiddie Porn' Expose" (2009) 5 *Law Culture and the Humanities* 391 at 424. As Kincaid has argued, 'The eroticising of children is blamed on somebody else, as if it were an accidental and freakish thing we could wipe out by being sufficiently sanctimonious.' James Kincaid, *Erotic Innocence: The Culture of Child Molesting* (Durham: Duke University Press, 1998) [*Erotic Innocence*] at 281.

⁸²² Kincaid observes that stories about child molestation '...are doing something for us: we wouldn't be telling this tale of exploitation of the child's body if we didn't wish to have it told'; these stories '... keep the subject hot so we can disown it while welcoming it in the back door'. *Ibid.* at 6. 'Since the 1970s', Adler observes, 'the problem of child sexual abuse has been 'discovered' as a malignant cultural secret,

The Empty Image of the Child

The desire to represent children, and the fear about those representations, are not contradictory but co-implicated. As Higonnet argues, 'our culture does more than tolerate constant spectacles of children's bodies, it craves and promotes them.'⁸²³ Practices of displaying children, from the quotidian practice of dressing, and performing in spectacles like school plays, parades and recitals, ceremonies and sporting events, to the more obvious examples of pageants, can often only be differentiated along class lines.⁸²⁴ Advertising and consumer photographs of children frequently seek out the affective charge that accrues around the limit between permissible and erotic display.⁸²⁵ These practices cannot be disentangled from the erotics of looking generally, as to display or represent is necessarily to eroticize or fetishize. The idea of childhood innocence under threat from images – from film, television, advertising etc. – is itself largely produced by and constituted through images.⁸²⁶ We create an image of childhood that maintains our desire for it. Like many commentators in the Henson debate, Devine expressed nostalgia for 'the special protection once afforded childhood'⁸²⁷ and called for an understanding of puberty as 'a private time of exquisite vulnerability, under siege from a sex-saturated culture.'⁸²⁸ But nostalgia does not simply

wrenched out of its secret hiding place, and elevated to the level of a 'national emergency.' Adler, "The Perverse Law of Child Pornography" *supra* note 494 at 211.

⁸²³ Higonnet, *supra* note 775 at 143.

⁸²⁴ See further Chuck Kleinhans, "Virtual Child Porn: The Law and the Semiotics of the Image" (2004) 3 *Journal of Visual Culture* 17 at 20.

⁸²⁵ '[Consumer photographs] have to make the children look physically charming, but not intentionally. They have to provide child bodies to their audience without making those bodies enticing or even available. They have to allow us to enjoy the sight of children and think "cute", not "desirable," let alone "sexy," and maybe not even "beautiful." Basically, successful commercial photographs have to make children seem there and not there, which is quite a feat in the realistic medium of photography.' Higonnet, *supra* note 775 at 77.

⁸²⁶ 'For the last two centuries, the social protection of children has been based on the assumption of their innocence, an innocence whose sexual component turns out to be crucial, and whose credibility turns out to depend rather more on images than we had realized.' *Ibid.* at 133.

⁸²⁷ Devine, "Moral Backlash", *supra* note 725.

⁸²⁸ Miranda Devine, "Tales of self-absorption laid bare" *Sydney Morning Herald* (6 October 2008) <http://www.smh.com.au/news/entertainment/arts/tale-of-selfabsorption-laid-bare/2008/10/05/1223145173125.html>

repeat or duplicate the past. Stewart called nostalgia ‘a social disease,’ defining it as ‘the repetition that mourns the inauthenticity of all repetition.’⁸²⁹ In the words of Henry Jenkins, it is ‘the desire to re-create something that has never existed before, to return to some place we’ve never been, and to reclaim a lost object we never possessed.’⁸³⁰ The idea of childhood comes into being as the object of adult desire, and as James Kincaid remarks, ‘no child can ever live up to our imaginative and nostalgic demands. The child can never fulfill our desire for it.’⁸³¹ This is the very nature of desire, which ‘implies a lack that no object can appease.’⁸³² ‘The child is precisely who we are not and, in fact, never were. It is the act of adults looking back. It is a ghostly, unreachable fancy.’⁸³³

Historians have demonstrated that the idea of ‘childhood’ is a relatively modern invention.⁸³⁴ The Romantic view of childhood that emerged in the seventeenth and eighteenth-centuries prized innocence as natural and prior to ‘corruption’ by culture.⁸³⁵ It promotes the need to protect children from what is perceived to be a hostile world – against sexuality because they are asexual, against violence because they are weak,

⁸²⁹ Susan Stewart, *On Longing: Narrative of the Miniature, the Gigantic, the Souvenir, the Collection* (Baltimore: The Johns Hopkins University Press, 1984) at 23.

⁸³⁰ Henry Jenkins, “Introduction: Childhood Innocence and Other Modern Myths” in Jenkins, *The Children’s Culture Reader*, *supra* note 810 at 44.

⁸³¹ Kincaid, *Erotic Innocence*, *supra* note 821 at 144.

⁸³² Adam Phillips, *On Kissing, Tickling and Being Bored: Psychoanalytic Essays on the Unexamined Life* (Harvard: Harvard University Press, 1998) at 58.

⁸³³ Kathryn Bond Stockton, *The Queer Child, or Growing Sideways in the Twentieth Century* (Durham: Duke University Press, 2009) at 5.

⁸³⁴ Phillipe Ariès famously argued that that before the seventeenth century children were essentially viewed as miniature adults, and were therefore given the freedom to fight, steal, study, have sex, travel, find homes and work, with little protection or interference from adults. Phillipe Ariès, *Centuries of Childhood* (New York: Vintage Books, 1962). Subsequent work has refined this historical account: Foucault, *History of Sexuality*, *supra* note 121; Jacques Donzelot, *The Policing of Families*, trans. by Robert Hurley (London: Hutchinson & Co., 1979); Michelle Perrot, ed. *A History of Private Life Vol 4: From the Fires of Revolution to the Great War*, Philippe Ariès & Georges Duby, series eds., trans. by Arthur Goldhammer (Cambridge: The Belknap Press of Harvard University Press, 1990); James R. Kincaid, *Child-Loving: The Erotic Child and Victorian Culture* (New York: Routledge, 1992); Kincaid, *Erotic Innocence*, *supra* note 821; Stockton, *supra* note 833.

⁸³⁵ Jean Piaget, *The Child’s Conception of the World* (St Albans: Paladin, 1973[1929]); Jean Jacques Rousseau, *Emile*, trans. by Barbara Foxley (London: Dent 1992 [1762]).

against knowledge because they are innocent, etc. Foucault's *History of Sexuality* is concerned with how knowledge and sex became conceptually inseparable from one another so that after the late nineteenth-century, in Sedgwick's words, 'knowledge means in the first place sexual knowledge; ignorance, sexual ignorance; and epistemological pressure of any sort seems a force increasingly saturated with sexual impulsion.'⁸³⁶ When knowledge and sex intertwine to the extent that the lack of knowledge is lack of knowledge of sex, children come to occupy the side of innocence (not knowing, and not sexual). A child gaining (always-sexual) knowledge thus amounts to them being harmed.⁸³⁷ The figure of the 'innocent' child guarantees our hetero- and repro-normative sexual order, and any threat to this innocence heralds the total breakdown of the sexual economy.⁸³⁸ This is why Žižek reads the possibility of thinking 'child sex' as the radical frontier of contemporary politics,⁸³⁹ and Lee Edelman writes that the figure of childhood innocence serves as 'an ideological limit on political discourse as such.'⁸⁴⁰

The Victorian ideal of childhood was defined through absence, lack or negation. The child's innocence and purity are 'negative inversions' of adult attributes - innocence is

⁸³⁶ Sedgwick, *Epistemology of the Closet*, *supra* note 104 at 73.

⁸³⁷ See Kerry Robinson, *Innocence, Knowledge and the Construction of Childhood: The Contemporary Nature of Sexuality and Censorship in Children's Contemporary Lives* (London: Routledge, 2012).

⁸³⁸ Lise Gotell observes this when she writes 'the child as a symbol of innocence, asexuality and moral boundaries comes to represent sexual order. The visible sexuality of the child symbolizes, in turn, the violation of sexual order.' Gotell, "Inverting Image and Reality" *supra* note 99 at 13.

⁸³⁹ 'the attitude towards sex between adults and children is the best indicator of the changes in sexual mores: three or four decades ago, in the heyday of the Sexual Revolution, child sex was celebrated as overcoming the last barrier, the ideologically enforced desexualisation of children, while the Politically Correct ideology of victimization offers the sexually abused child as the ultimate image of horror... Without directly taking sides in this debate, one should read it as a sign of the change in our mores from the utopian energies of the '60s and early '70s to the contemporary state Political Correctness, in which every authentic encounter with another being is denounced as a victimizing experience. What we are unable even to conjecture today is the idea of revolution, be it sexual or social. Perhaps, in today's stale times of the proliferating pleas for tolerance, one should take the risk of recalling the liberating dimension of such excess.' Slavoj Žižek, "On the Prospects of Radical Politics Today" (2008) 5:1 *International Journal of Baudrillard Studies*, http://www.ubishops.ca/baudrillardstudies/vol5_1/v5-1-article3-Žižek.html

⁸⁴⁰ Edelman, *supra* note 798 at 3. The figure of 'the Child,' he writes, 'marks the fetishistic fixation of heteronormativity: an erotically charged investment in the rigid sameness of identity that is central to the compulsory narrative of reproductive futurism.' *Ibid.* at 21.

lack of guilt, sinfulness, knowingness, experience etc. – the child is ‘a set of *have nots*.’⁸⁴¹ This constitution-through-negation assures that the innocent child is forever attended by its shadowy double, the sexual child. In Foucault’s account, the sexuality of children came into view in the Victorian era as a problem of increasing importance within a context organized around the control of populations and the production of docile bodies. Children’s masturbation was subjected to parental, religious, and scientific observation and monitoring, and a host of discourses were developed to analyze, explain and provide ‘solutions’ to this problem. But in keeping with his challenge to the repressive hypothesis, Foucault argued the effect of these discourses was not the successful separation of sex from childhood, but rather ‘the sexualizing of the infantile body, a sexualizing of the bodily relationship between parent and child, and a sexualizing of the familial domain:’

One might argue that the purpose of these discourses was precisely to prevent children from having a sexuality. But their *effect* was to din it in into parents’ heads that their children’s sex constituted a fundamental problem... this had the consequence of sexually exciting the bodies of children while at the same time fixing the parental gaze and vigilance on the peril of infantile sexuality.⁸⁴²

The problem is that ‘conceiving of something entirely as a negation brings irresistibly before us that which we’re trying to banish.’⁸⁴³ Saying ‘don’t think of an elephant’ is

⁸⁴¹ Kincaid, *Erotic Innocence*, *supra* note 821 at 27. Kincaid argues that the modern child was ‘deployed as a political and philosophical agent’ to assault ‘the virtues of adulthood, sophistication, and rational moderation,’ replacing them with innocence, purity and emptiness, ‘a coordinate set of *have nots*, of negations.’ *Ibid.* at 15. ‘The construction of the modern ‘woman’ and modern ‘child’ are very largely evacuations, the ruthless distribution of eviction notices. Correspondingly, the instructions we receive on what to regard as sexually arousing tell us to look for (and often create) this emptiness, to discover the erotic in that which is most susceptible to inscription, the blank page.’ *Ibid.* at 16. He asks whether we are ‘defining the child’s innocence in the way older societies defined women’s virginity.’ *Ibid.* at 17. Because (the child’s) flatness signifies nothing,’ says Kincaid, it ‘does not interfere with our projections,’ our ability ‘to discover the erotic... in the blank page.’ *Ibid.* at 10.

⁸⁴² Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. and trans. by Colin Gordon (Pantheon Books 1980 [1977]) at 120.

⁸⁴³ Kincaid, *Erotic Innocence*, *supra* note 821 at 55. He argues that once the Victorians ‘managed to make their concept of the child dependent on the erotic’ (*Ibid.* at 52) ‘the idea of innocence and the idea of ‘the child’ became dominated by sexuality – negative sexuality, of course, but sexuality all the same. Innocence was filed down to mean little more than virginity coupled with ignorance; the child was, therefore, that which was innocent: the species incapable of practicing or inciting sex.’ *Ibid.* at 55.

guaranteed to make one think of an elephant. Once childhood is defined in terms of a *lack* of sexuality, it is thus defined sexually, or framed by sexuality, and vice versa. Framing does not separate inside from outside, but irrevocably ties them together. Just like the black bars on the Henson photograph, negation engages the fantasmatic. Placing a limit on fantasy fails because limits are what fantasy is about – fantasy cannot exist without limits to buttress against, to stretch and protest and rewrite in desirous terms:

The effort to enforce a limit on fantasy can only and always fail, in part because limits are, in a sense what fantasy loves most, what incessantly thematizes and subordinates to its own aims. They fail because the very rhetoric by which certain erotic acts or relations are prohibited invariably eroticises that prohibition in the service of fantasy. These prohibitions of the erotic are always at the same time, and despite themselves, the eroticisation of prohibition.⁸⁴⁴

Childhood is what is forbidden to sexuality, but what is forbidden is what sexuality strives for, what its fantasy constantly remakes – the prohibition is what generates the fantasy in the first place, the imaginative testing at the boundary. In short, once childhood gets defined as a-sexual, the sexualization - and indeed fetishization - of children begins. If sex is the limit of childhood, then the fantasy immediately suffuses children with sexual context, so to speak. We don't want it, and that is precisely why we have it.

Critiques of Innocence

The ideal of childhood innocence has been attacked on both pragmatic and critical grounds. The eroticization of innocence – the idea that the lack of sexuality is precisely what is sexual -has led many scholars to suggest that our cultural and legal valorization of innocence is self-defeating, since it sexualizes the child by protecting and emphasizing the very quality which arouses sexual interest.⁸⁴⁵ It intensifies the problem of the

⁸⁴⁴ Butler, "Force of Fantasy" *supra* note 147 at 111.

⁸⁴⁵ Jenny Kitzinger, "Defending Innocence: Ideologies of Childhood" (1988) 28 *Feminist Review* 77 at 79-80.

dialectic of transgression and taboo: the more you prohibit images of children the more those images are sexualized.⁸⁴⁶ Studies showing that even so-called ‘innocent’ images of children can be used for sexual purposes led Amy Adler to suggest that ‘the peculiar nature of pedophilic desire itself may make the governance of child pornography an impossible task.’⁸⁴⁷ The discourse of innocence places a presumption of value on the absence of sexual experience over presence; and assumes and mandates that children are not properly sexual. This kind of reasoning, as Linda Alcoff has observed, ‘leads to the practice of asking rape victims about their sexual past, of taking the rape of sexually active persons less seriously, and of judging sexually active or knowledgeable children as ‘bad’ and therefore necessarily complicit in their violation.’⁸⁴⁸ Valorizing innocence implies that some children are more deserving of protection than others, installing a dangerous hierarchy.⁸⁴⁹ There may be some political advantages in asserting the agency of children who are routinely subjected to processes beyond their control - whether displayed, analyzed, controlled, ignored, neglected, or brutalized. Bray suggests that appealing to an unreconstructed and essentialist concept of innocence can, as a practical tactic, be used to make strategic gains in ways that do not interfere with the agency of children.⁸⁵⁰ In the realm of child sexuality and sexual abuse, however, it seems

⁸⁴⁶ One half of Adler’s argument is that ‘child pornography law and the eroticization of children exist in a dialectic of transgression and taboo: The dramatic expansion of child pornography law may have unwittingly heightened pedophilic desire.’ Adler, “The Perverse Law of Child Pornography”, *supra* note 494 at 212.

⁸⁴⁷ *Ibid.* at 260. See refs in *Ibid.* at 259 footnote 281. ‘Some offenders (5.4 per cent of the extra-familial offenders and 14.8 per cent of those who had offended both within and outside family settings) reported having collected non-pornographic pictures of children, such as might be obtained from children’s clothing catalogues, for sexual purposes.’ Stephen Smallbone & Richard Wortley, “Child sexual abuse in Queensland: Offender characteristics and Modus operandi” (2000) Queensland Crime Commission and Queensland Police Service http://www.childtrafficking.com/Docs/child_sexual_abuse_2000_in_queensland_offender_characteristi_1.pdf at 29.

⁸⁴⁸ Linda Alcoff, “Dangerous Pleasures: Foucault and the Politics of Pedophilia” in Susan Hekman, ed., *Feminist Interpretations of Michel Foucault* (University Park, PA: Pennsylvania State University Press, 1996) 99 at 131.

⁸⁴⁹ Suzanne Ost, “Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society” (2002) 29:3 *Journal of Law and Society* 436 at 456-7. See Gurnham, *supra* note 742 at 93-4.

⁸⁵⁰ For such arguments see Bray, “Question of Intolerance”, *supra* note 790; Danielle R. Egan & Gail Hawkes, “Girls, Sexuality and the Strange Carnalities of Advertisements: Deconstructing the Discourse of

that the effectiveness of this tactic will decline the more pressing the need for it becomes, like a sprinkler system that turns off when the fire gets too hot.⁸⁵¹

The political argument against innocence, particularly in relation to sexual abuse, is that it misunderstands the basis of a child's vulnerability to harm. This vulnerability does not turn on an interior psychic space free of 'knowledge,' or the possession of a quality of 'innocence.' Vulnerability is relational. The image of the child hides the fact that children live their lives within a nexus of power relations, and with the daily presence of bigger people who have more say than them. Shauna Van Praagh observes the 'paradoxical mix of real vulnerability and authentic strength' in childhood.⁸⁵² Children may have the agency to resist and take up new discursive positions, but 'they are positioned differently than adults and subject to more strenuous and invasive techniques of domination.'⁸⁵³ They are not only physically weaker than adults but economically dependent on adults for their livelihood, the quality of their education, the adjudication of disputes with other children, their sense of security and well-being, and their health. As Alcoff insists, the relationship between children and adults 'is not reciprocal, mutually interdependent, or equal: children have a vastly reduced ability to get away or fight back, to talk or argue back, and to maintain their sense of self against adult mediation.'⁸⁵⁴ 'The institution of childhood can be radically altered, and children can become significantly more empowered than at present, but the vulnerability,

"Corporate Pedophilia" (2008) 23:57 *Australian Feminist Studies* 307. See further Danielle R. Egan & Gail Hawkes, *Theorizing the Sexual Child in Modernity* (London: Palgrave Macmillan, 2010).

⁸⁵¹ The metaphor is from Clifford Geertz, "Fact and Law in a Comparative Perspective" in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1985) 167 at 221.

⁸⁵² She continues 'The obvious vulnerability of a baby at one end of the spectrum of childhood can be contrasted with the abilities and independence of a teenager at the other. But... such a characterisation is not so clear-cut. Instead, children can be both victims and agents all along that spectrum.' Shauna Van Praagh, "Adolescence, Autonomy and Harry Potter: The Child as Decision-Maker" (2005) 1:4 *International Journal of Law in Context* 335 at 335.

⁸⁵³ Alcoff, *supra* note 848 at 122.

⁸⁵⁴ *Ibid.*

dependency and relative powerlessness of children vis-à-vis adults cannot ever be completely eradicated.’⁸⁵⁵

Instrumentalizing the Bodies of Girls

A number of cultural theorists have critiqued the constructed, politicized or arbitrary nature of legal frames around childhood by appealing to the vagaries of law, and in particular, of the legal limits on sexual behavior between children and adults: the ‘age of consent.’ In a 1978 interview on the topic of legal jurisdiction over sexual panelists between adults and children or youths, Foucault suggested that children have their own sexuality over which the law has historically imposed an absolute repression, and rejected the psychiatric view that childhood sexuality ‘is a territory with its own geography that the adult must not enter,’ or that ‘the child must be protected from his own desires, even when his desires orientate him towards an adult.’⁸⁵⁶ For Foucault, age of consent laws serve to regulate norms of decency and criminalize forms of sexuality, as part of ‘a new penal system whose function is not so much to punish offences... as to protect populations and parts of populations regarded as particularly vulnerable (for example children). Therefore, there would be on one side the fragile population and on the other side, the ‘dangerous population.’⁸⁵⁷ Foucault maintained that we must ‘listen to children’ and that ‘the child may be trusted to say whether or not he was subjected to violence.’⁸⁵⁸

Foucault seems to have been primarily concerned with the possibility of non-exploitative sexual relations between older and younger males, and his comments have been criticized by feminists for his apparent blindness to gendered dimension of sexual exploitation and abuse. Child sexual abuse is overwhelmingly committed by men against

⁸⁵⁵ *Ibid.* at 123.

⁸⁵⁶ Foucault, “Sexual Morality and the Law” in Lawrence D Kritzman, ed., *Politics, Philosophy, Culture: Interviews and Other Writings 1977-84* (New York: Routledge, 1988) 271 [“Sexual Morality and the Law”] at 276.

⁸⁵⁷ *Ibid.* See further Foucault, *History of Sexuality*, *supra* note 121.

⁸⁵⁸ Foucault, “Sexual Morality and the Law”, *supra* note 856 at 284.

girls, and by those who are family members, friends, or a trusted member of the girl's community.⁸⁵⁹ Alcoff cautions that sexual behavior is an avenue that the dominant structures which favor adult men provide for young girls, and therefore 'the seductive, coy or coquettish behavior of young girls must be analyzed in the context of a system of differential power relations and domination.'⁸⁶⁰ When adults interpret children's behavior as consenting to sex, they are assimilating and incorporating the child's expressions within an economy of meaning based on sameness.⁸⁶¹ She suggests that the only way to avoid this is 'to leave children alone sexually, and thus allow the development and maintenance of their own sexual discourses, either with themselves or with each other.'⁸⁶² Butler goes further, problematizing the very notion of consent and the ideas of 'choosing' and 'knowing' on which it rests: 'We make the mistake of confusing the juridical model of consent with the yes-saying and no-saying that happens in sexual activities. Liberal notions of contract have limited efficacy in controlling and interpreting primary experiences of loss, rejection, replacement, desire, etc.'⁸⁶³ If 'consenting' to sex is about making oneself available to the unknown, then none of us start as fully self-conscious deliberate and autonomous individuals when we consent to sex. The boundaries of consent are not even clear for adults - something of childhood necessarily persists in adult sexuality.

⁸⁵⁹ See R.J.R. Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (Bloomington: Indiana University Press, 1999), at 154; M. Taylor & E. Quayle, *Child Pornography: An Internet Crime* (New York: Brunner-Routledge, 2003) at 23, and Jenny Kitzinger, "Media Representations of Sexual Abuse Risks" (1996) 5 *Child Abuse Review* V 319; Marianne James, ed. *Paedophilia: Policy and Prevention* (1997) *Australian Institute of Criminology Research and Public Policy Series* No. 12 <http://www.aic.gov.au/documents/A/D/2/%7BAD2B7912-AA15-4DB3-84B5-5AE6680D0C15%7DRPP12.pdf>.

⁸⁶⁰ Alcoff, *supra* note 848 at 124.

⁸⁶¹ *Ibid.* at 124. Alcoff's focus is on the contradictions suffusing pro-pedophilia discourses produced by the libertarian politics in the 1960s and 1970s, exemplified by the writings of Michel Foucault, Gail Rubin, Kate Millet and Shulamith Firestone.

⁸⁶² *Ibid.* at 126. 'A truly transformative future would be one in which children could be, for the first time, free of the economy of adult sexual desire and adult sexual demands. Only this future will be truly new and unknown, and the sexuality of children that emerges from it, and that we indeed have no way to predict, will be determined then and only then by the children themselves.' *Ibid.* at 133.

⁸⁶³ Judith Butler, "Keynote," *A Symposium Honoring Judith Butler's Contributions to the Scholarship and Practice of Gender and Sexuality Law* at the Columbia Law School (5 March 2010).

The Henson debate continued a longstanding tradition of treating children as being incapable of contributing to public discourse, and merely in need of protection from its dangers. Neither side of the debate consulted children for their views nor gave consideration to the interests that children might have in artistic expression.⁸⁶⁴ These issues are particularly significant in adolescence, a period of development marked by both ‘the need for protection and the development of self-reliance and independence.’⁸⁶⁵ They have come to the forefront of policy debate through the ‘sexting’ cases that emerged in 2009 in the United States.⁸⁶⁶ The teenage girls who are the producers *and* subjects of the photographs are paradoxically figured both as victims needing the law’s protection and as active agents who must be prevented from producing materials that are dangerous, both to themselves and to society.⁸⁶⁷ Yet many such girls describe this practice in terms of empowerment and exploration rather than exploitation, asserting a control over the meaning of their images: ‘I get to frame them, to say what they mean.’ The girl called ‘N,’ the model for Henson’s photograph, claimed to suffer from the media attention rather than the process of making the photograph.⁸⁶⁸

⁸⁶⁴ This was noted by both Professor Andrew Kenyon, and Mr. John Tobin from *Childwise* in the public seminar: ‘Disturbing Australia: Art or Porn?’ (Courting Controversy Lecture Series, Melbourne University Law School, 16 June 2008). Matthew Waites has noted that in the 1990s debate in the U.K. over equalizing the age of consent laws for homosexual and heterosexuals at age 16, the conditions of sexual youth were not thought about – activists, social workers and kids themselves were not canvassed for anything they had to say about youth culture and debate. Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (London: Palgrave, 2005).

⁸⁶⁵ Van Praagh, *supra* note 852 at 336 citing work on this tension: Michael Freeman, ed. *Children’s Rights: A Comparative Perspective* (Brookfield, VT: Dartmouth Publishing, 1996). According to Richard M. Lerner adolescence is a period where the individual is constantly redefining his or her self in order to find his or her societal role. ‘If adolescence is a time of increased autonomy, however, it is also a time of particular sensitivity and vulnerability, a time characterised by doubt, mistakes, and the making, breaking and testing of relationships with others. It is a stage at which the ‘self’ – especially sensitive to countless stimuli – is prone to transformation and retransformation. No longer child, not yet adult, the young person in flux confronts those who try to respond to both adolescent claims and needs.’ Richard M. Lerner, *Adolescence: Development, Diversity and Context* (Upper Saddle River, N.J.: Prentice Hall, 2002) at 337.

⁸⁶⁶ ‘Sexting’ has been defined as ‘the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet.’ *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010).

⁸⁶⁷ See Jessica Whyte, “Criminalising ‘Camera Fiends’: Photograph Restrictions in the Age of Digital Reproduction” (2009) 31 Australian Feminist Law Journal 99 at 116.

⁸⁶⁸ N was reported as being ‘very happy with the process she went through, perhaps not so much with the current attention.’ Quoted in Kenyon, *supra* note 864.

It is worth asking about the source of the injury, and considering whether there is an injustice done in reading sexuality onto her photograph, or treating as irrelevant her own sense of her body and its expression. Whether modeling nude for photographs is a feminist display 'of power through and control over one's identity invention and reinvention,'⁸⁶⁹ or merely the product of the neoliberal narrative of compulsory sexual agency,⁸⁷⁰ will fall to be determined by specific contexts. However, the crimino-legal approach to such images – which extends to the criminal prosecution of girls as child pornographers - presents us with the uncomfortable irony of a law designed to protect children being used against them.⁸⁷¹

The feminist scholarship that has developed around representations of children, and particularly girls, was largely set aside in the debate over the Henson photographs.⁸⁷² It occupied a blind spot in the debate: no one mounting a defence of Henson on the grounds of freedom of artistic speech was invested in analyzing the codes and conventions of cultural images of girls; and those adopting the political gaze were focused on the idealized image of the innocent child rather than the situated dynamics of girlhood, and the ways in which girls take up different subject positions within competing discourses of gender.⁸⁷³ The feminist gaze, then, is significant in shifting our attention from 'children' to girls, from the gender neutral to the sexually specific, and, as

⁸⁶⁹ Anita Harris, "gURL scenes and grrlzines: The Regulation and Resistance of Girls in Late Modernity" (2003) 55 *Feminist Review* 38 at 40.

⁸⁷⁰ Gill, *supra* note 807 cited in Bray, "Governing the Gaze", *supra* note 789 at 174.

⁸⁷¹ Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, (2009) 16 *Michigan Telecommunications and Technology Law Review* 151 and JoAnne Sweeny, "Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?" (2010), online at <http://ssrn.com/abstract=1703964>. In a similar vein, Amy Adler notes that since the term 'child predator' emerged, its meaning has expanded to encompass a broadening and unstable range of sex criminals, including teenagers who sleep with younger teenagers: Amy Adler, "To Catch a Predator" (2010) *New York University Public Law and Legal Theory Working Papers*. Paper 229. http://lsr.nellco.org/nyu_plltwp/229m ["To Catch a Predator"] at 3.

⁸⁷² This has been noted by MacNeill, *supra* note 743 at 90; Bray, "Governing the Gaze", *supra* note 789.

⁸⁷³ See further Catherine Driscoll, "Girls Today: Girls, Girl Culture and Girl Studies" (2008) 1:1 *Girlhood Studies* 13; Sinika Aapola, Marnina Gonik and Anita Harris, *Young Femininity: Girlhood Power and Social Change* (Basingstoke: Palgrave MacMillan 2005); Catherine Driscoll, *Girls: Feminine Adolescence in Popular Culture and Cultural Theory* (New York: Columbia University. Press 2002).

Bray suggests, ‘from the random, a-historical trans-cultural pathology of individual pedophiles to the complex heteronormative practices of a culture which has long oppressed and exploited girls.’⁸⁷⁴ Within this framework, Devine’s seemingly exaggerated claim that Henson’s photograph showed its subject in a sexual context is oddly irrefutable. Henson’s image does not stand in a neutral space, but is differentiated only in relation to a network of circulating images of females within our heteronormative patriarchal culture, in which sexualised images of girls ‘represent cultural norms, not cultural exceptions.’⁸⁷⁵ As Patricia Holland observed in her research on popular cultural images of boys and girls, ‘a little girl may be denied knowledge of sex, but as a feminine creature her image cannot fail to indicate sex.’⁸⁷⁶ She found an underlying binary system of the energetic boy and seductive girl, suggesting the impossibility of ‘separating femininity from sexuality.’⁸⁷⁷

The problem with reading the Henson image exclusively through this cultural context is that the context that is allowed to so overdetermine the photograph’s meaning is as much a construct of patriarchy as that which it seeks to diagnose. For example, using ‘an experienced streetwise feminist gaze,’ Bray reads ‘in Henson’s posing, framing and lighting of girls the long-established codes of hetero-erotic pedophilia,’ arguing that ‘the framing of the erotic female child as a transgressive object of wonder, beauty and ambiguity functions to sanitise and exclude the abject otherness of sexual violation.’⁸⁷⁸ N’s ‘limp surrender before the camera,’ her ‘downcast vulnerability,’⁸⁷⁹ are read as signifiers of domination and submission: ‘Henson’s photographs of thin, demure, virginal girls with downcast eyes, parted rosy lips, hands shyly crossed over their vaginas, highlighted budding breasts and hairless vaginal folds, are part of a long-standing history

⁸⁷⁴ Bray, “Governing the Gaze”, *supra* note 789 at 184.

⁸⁷⁵ Higonnet, *supra* note 775 at 155.

⁸⁷⁶ Patricia Holland, *What is a Child? Popular Images of Childhood* (London: Virago, 1992) at 138.

⁸⁷⁷ *Ibid.* at 12 and 138.

⁸⁷⁸ Bray, “Governing the Gaze”, *supra* note 789 at 181.

⁸⁷⁹ *Ibid.* at 183.

of heterosexual pedophilic objectification.⁸⁸⁰ The photograph's black background 'suggests an attempt to vanish the social context, to erase her socio-historical situation. She hangs there in the dark, suspended like an erotic specimen on a strange stage, taken out of her clothes and her history, reified, humiliated, framed.'⁸⁸¹ The idea that the photograph of N *humiliates* its subject appeals to discourses of harm through photography that are frequently mobilized in the media.⁸⁸² Like the reading of the Shields photograph which saw her as already 'degraded,' Bray's reading accepts and completes the trajectory of patriarchal discourse by reading the photographic subject as 'humiliated.' This reading assimilates the photograph into the codes of a totalizing political discourse – so that gazing away *must* be read as submission, stillness as objectification, etc. The political gaze that reads the Henson photograph as a signifier of betrayed innocence or a pandering to heterosexual pedophilia ignores both framing (the photograph's openness to context, its susceptibility to reframing) and affect (our own susceptibility to the image, our own interested viewing practices).

⁸⁸⁰ *Ibid.* at 182.

⁸⁸¹ *Ibid.* at 183.

⁸⁸² Photography is understood as bearing a closer existential relation to its subject than other forms of documentation, and therefore more capable of causing harm. Andrew McLurg associates unauthorized photography with a loss of control over one's body: a photograph 'enables an observer to, in effect, take a part of the subject with him... the victim loses control over an aspect of herself.' Andrew McLurg, "Bringing Privacy out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 North Carolina Law Review 989 at 1041; Christa Ludlow writes that 'a photograph of oneself is part of oneself, an associated likeness which communicates something about us to the viewer.' Christa Ludlow, "The Gentlest of Predations: Photography and Privacy Law" (2006) 10 Law Text Culture at 135, cited in Whyte, *supra* note 867 at 116. For example, when photographs of teenage rowers in Melbourne, taken without their consent, were posted on a gay website in the United States in 2002, the media reacted with outrage: 'USA: Vic gay website containing Melbourne schoolboys withdrawn', *Australian Associated Press* (22 February 2002); 'Schoolboys counselled on net pics', *MX Newspaper* (21 February 2002); 'Vic-Police powerless to act on gay website containing schoolboys' *Australian Associated Press* (22 February 2002). 'Teen put on gay site may lead to camera ban', *Herald Sun* (3 April 2002) 25. The schoolboys reported 'feelings of anger, a sense of violation, anxiety about going out in public places, feelings of exploitation and invasion of privacy' upon discovering that their photos had been placed on the website. While there is no reason to doubt that the boys did experience such feelings, as Jess Whyte notes, 'it is worth asking whether the discourse of violence and harm that circulated in the media in response to the case contributed to generating the feelings to which the boys attest.' Whyte, *supra* note 867 at 116.

III. The Lascivious Gaze: The Expansion of Child Pornography Law

In recent years, child pornography law has come to be seen as perverse, marked by an often-ironic divergence between legal rationales and legal effects.⁸⁸³ Since its development in the 1990s as a specific area of legislative concentration in North America and Australia, child pornography law has shifted its approach to photographs of children away from the circumstances of their production towards the context of viewing. A key turning point was the 1994 case *United States v. Knox*,⁸⁸⁴ in which the defendant possessed videotapes featuring ‘vignettes of teenage and preteen females’ wearing ‘bikini bathing suits, leotards, underwear and other abbreviated attire,’ engaging in baton twirling and gymnastics routines and sometimes ‘striking provocative poses for the camera.’⁸⁸⁵ The court held that a photograph can constitute a ‘lascivious exhibition of the genitals’ and therefore child pornography even if the child depicted is fully clothed. This decision shifted the law from using the photograph as evidence from a crime scene or an act of abuse to the child subject, asking not what the photograph captures but what it means for the viewing subject.⁸⁸⁶ In this way, the law moved towards a more sophisticated theory of meaning that acknowledged that every reading of the image is going to lean towards some bias or agenda or cultural ideology, because analysis consists in a complex social subject reading an object through a variety of preconceptions. But it did so by rigidly bifurcating or separating the question of what the photograph captures from what the photograph means.

This development allowed for a much expanded range of representations to come under the rubric of child pornography (nude photographs, clothed children, or photographs without any erotic posing). In the Supreme Court of Canada case *R. v. Sharpe*, McLachlin J, as she then was, argued that since prohibited visual representations of children must

⁸⁸³ Adler, “The Perverse Law of Child Pornography”, *supra* note 494.

⁸⁸⁴ *United States v. Knox* (1994), 32 F. 3d 733 (3rd Cir.).

⁸⁸⁵ *Ibid.*

⁸⁸⁶ Higonnet, *supra* note 775 at 182-5. Higonnet suggests that in *Knox* ‘all photographs of children [are treated] as actions,’ at 184.

be explicit, involve nudity and have a clear sexual purpose defined as being ‘intended to cause sexual stimulation,’⁸⁸⁷ a photograph of a small child in a bath would not in most instances fall within this definition, but should that same photo be found among other clearly sexual images, its meaning could change.⁸⁸⁸ By acknowledging that the context among which innocent photos were viewed fundamentally alters their legal ‘status’ the court suggests that the meaning of a photograph is a question of context and intention rather than content. Although seemingly a more sophisticated approach to photographs, recognising that their meaning changes on context, this shift has eroded the law’s capacity for judgment in two interrelated ways: firstly, because it makes everything equally polluting, and secondly, because it compels the court to adopt a lascivious gaze.

Fantasizing about Fantasy

The expanding definition of child pornography turns the law’s attention away from the bodies of abused children and towards the fantasy of the viewer: or more accurately, the fantasies of legal agents and officials about how the viewer is fantasizing when they look at a photograph, and how that experience may be the cause or precipitate of abuse. Recent legislation in Australia, Canada and the U.K. has extended the definition of child pornographic material to include digitally manipulated images of children, animations, and drawings.⁸⁸⁹ The U.S. Supreme Court quashed laws purporting to regulate computer-generated or animated child pornography, because the First

⁸⁸⁷ *R. v. Sharpe* 2001 SCC 2, [2001] 1 S.C.R. 45 at para. 44-53, quote at 50.

⁸⁸⁸ *Ibid.*

⁸⁸⁹ I. O’Donnell and C. Milner, *Child Pornography: Crime, Computers and Society* (London: Willan Publishing 2007) at 66-67. Gareth Griffith and Kathryn Simon, “Child Pornography Law” New South Wales Parliamentary Library Research Service Briefing Paper 9/08 (August 2008) [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/289C584B88554BCBCA2574B400125787/\\$File/Child%20pornography%20law%20and%20index.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/289C584B88554BCBCA2574B400125787/$File/Child%20pornography%20law%20and%20index.pdf) at 11. In Canada, producing and distributing a record of actual child sexual abuse is treated in the same manner as a sketch, painting or sculpture that depicts children engaging in sexual activity. Bruce Ryder, “The Harms of Child Pornography Law” (2003) 36 University of British Columbia Law Review 101 at 106. In a 2008 New South Wales case, a man was convicted of possessing child pornography for downloading an animation of Bart and Lisa Simpson, the court deciding that ‘(a) fictional cartoon character, even one which departs from recognizable human forms in some significant respects, may nevertheless be the depiction of a person’ under the law. *McEwen v. Simmons & Anor* [2008] N.S.W.S.C. 1292 (8 December, 2008).

Amendment protects ideas expressed in pictorial form,⁸⁹⁰ but such material can still be prosecuted under state obscenity laws, excluded from First Amendment protection.⁸⁹¹ While prohibited child pornography in the United States is exclusively pictorial,⁸⁹² Canada and Australia have criminalized written material also – even written stories kept by the writer and never intended for public use.⁸⁹³ This causal narrative has justified the criminalization of pure ‘possession’ (not within the traditional scope of obscenity laws, which were concerned only with publication or transmission). Like drugs, the possession of child pornography offers ‘physical evidence of an evil that is otherwise entirely

⁸⁹⁰ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) at 1402 per Justice Kennedy.

⁸⁹¹ In 2010 a manga collector from Ohio was sentenced to 6 months in prison for ordering several anime books depicting children engaging in sexual activity. He was charged and pled guilty under laws dealing with traffic in visual depictions of minors engaging in sexually explicit conduct that is obscene: 18 U.S.C. § 1466A(a). See David Kravets, “U.S. Manga Obscenity Conviction Roils Comics World” *Wired Magazine* (May 28, 2009). <http://www.wired.com/threatlevel/2009/05/manga-porn/> Because the images do not depict real children but instead merely cartoon depictions of children, the images were measured by the standard of obscenity enunciated in *Miller v. California*, (1973) 413 U.S. 15 at 24.

⁸⁹² *The Child Protection Act* 1984 clarified that purely textual pornography did not fall within the scope of the statute. The language substituted ‘visual depiction’ for ‘visual or print medium’ since the latter could be interpreted to include text. H.R. Rep No. 98-536 (1983) at 3 cited in Adler, “The Perverse Law of Child Pornography”, *supra* note 494 at 237 footnote 162.

⁸⁹³ S. 163.1.c. of the *Criminal Code of Canada* prohibits ‘written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years.’ In 1994, when assessing whether Eli Langer’s sketches and paintings involving ‘deeply disturbing’ depictions of children engaged in sexually explicit activity were ‘advocating’ child sexual abuse, Justice McCombs found that ‘the purpose of the work is not to condone child sexual abuse, but to lament the reality of it.’ *Ontario (Attorney-General) v Langer* 1995 123 DLR (4th) 289 Ontar Ct Gen. Div. at 306. In *R. v. Sharpe* (2001), McLachlin CJ limited the definition of ‘advocates or counsels’ to material that ‘actively promotes the commission of sexual offences with children,’ distinguishing between a text like Plato’s *Symposium*, and writing that sends ‘the message that sex with children can and should be pursued’: *R. v. Sharpe* [2001] 1 S.C.R. 45 at 56. Applying this test on retrial, Justice Shaw found that Robin Sharpe’s written stories, describing sadomasochistic sexual activity involving children and youth, did not counsel or advocate the commission of crimes, but ‘simply describe(d) morally repugnant acts.’ *R. v. Sharpe* [2002] B.C.J. No 610 (B.C.S.C.) (QL) at 35. In 2005 the definition of child pornography in s 163.1 (1)(c) of the *Criminal Code* was extended to include ‘any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years,’ eroding ‘the distinction between description, examination or analysis of harm on the one hand, and advocacy of harm on the other.’ Ryder, *supra* note 889 at 115. Also in 2005 the Ontario Court of Appeal decided that stories describing, in graphic language, sexual activities between adults and children under the age of 14, could fall within the *Sharpe* formulation of written material sending the message that ‘sex with children can and should be pursued.’ *R. v. Beattie* [2005] 75 O.R. (3d) 117, leave to appeal refused *R. v. Beattie* [2005] Can LII 41352 (S.C.C.). Judge Bora Laskin determined that ‘the stories send two messages: children want and enjoy sex with adults; and those adults who know and love children the most and are most responsible for their upbringing routinely have sex with them because sex is good for them.’ *R. v. Beattie* [2005] 75 O.R. (3d) 117 at [24].

metaphysical.⁸⁹⁴ As Desmond Manderson argues, crimes of possession punish the fact of someone's proximity to an object.⁸⁹⁵ To fulfill the offence of 'knowingly accessing child pornography'⁸⁹⁶ in the *Criminal Code* of Canada, it is sufficient to *look* at something that you know to be child pornography. 'The act is made so passive as virtually to vanish... the crime of possession is the crime of being possessed.'⁸⁹⁷

Although rarely acknowledged directly by courts, the expansion of child pornography law is driven by the idea that representations *themselves* injure, and assumes a set of tightly causal relationships between action and the feeling generated by looking, and the relationship of that looking to further action.⁸⁹⁸ The ascription of an injurious power to the photograph itself echoes the arguments of anti-pornography feminists in the 1980s, endorsed by the Supreme Court of Canada in *R v Butler* (1992), that women are degraded by obscene representations *themselves*, rather than by men who might (or might not) have been affected by what they see.⁸⁹⁹ As Butler writes, the drive to

⁸⁹⁴ Desmond Manderson, "Possessed: Drug Policy, Witchcraft and Belief" (2005) *Cultural Studies* 35 ["Possessed"] at 43.

⁸⁹⁵ *Ibid.* at 37.

⁸⁹⁶ S 163.1(4.1) *Criminal Code* as amended by Supreme Court 2002 c. 13 s. 5(3)

⁸⁹⁷ Manderson, "Possessed", *supra* note 894 at 35, 36. See Giannina Marin, "Possession of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving For You" (2008) 60 *Fla. L. Rev* 1205.

⁸⁹⁸ When the U.S. Supreme Court found that virtual child pornography was protected by the First Amendment (thus overturning the *Child Pornography Prevention Act* 1996) because there was no harm at the scene of production, they confusingly suggested that the causal link between such materials and *future* child abuse was somehow thus attenuated:

In contrast to the speech in *Ferber*, speech that is itself the record of sexual abuse, the *CPA* prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily flow from the speech, but depends upon some unquantified potential for subsequent criminal acts. *Ashcroft v Free Speech Coalition* at 1402 per Justice Kennedy.

⁸⁹⁹ *R. v. Butler* [1992] 1 SCR 452 at 501. As an example illustrating the court's slippage between representation and conduct, Mariana Valverde cites Justice Sopinka citing Justice Bertha Wilson's interpretation of obscenity law's 'undue exploitation of sex' in *Towne Cinema*: 'The problem is that we know so little of the consequences we are seeking to avoid. Do obscene movies spawn immoral conduct? Do they degrade women? Do they promote violence? The most that can be said, I think, is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in

regulate representations as acts or conduct rests on ‘a theory of fantasy’ which ‘propose(s) to establish a logical or causal continuum among fantasy, representation, and action,’ such that ‘there is no interpretive leeway between the representation, its meanings, and its effects; they are given together, in one stroke – as it were – as an instantaneous teleology for which there is no alternative.’⁹⁰⁰ The conflation of fantasy with action underlies the ease with which we conflate pedophiles and child sexual abusers in public discourse.⁹⁰¹ But the effects of viewing ‘pornography’ on fantasy are not unilateral, determinative or stable – even from an empirical point of view, there is little evidence that viewing child pornography leads to a contact offence with a child.⁹⁰² No general theory, such as the repetition-addiction model, in which desire increases

some way. It must therefore be controlled when it gets out of hand, when it becomes "undue".’ *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494 at [76] cited in Mariana Valverde, “Judging Speech: An Inquiry into the Supreme Court’s Theory of Signification” in Klaus Petersen and Allan C. Hutchinson, eds. *Interpreting Censorship in Canada* (Toronto: University of Toronto Press, 1999) 56 at 63.

⁹⁰⁰ Butler, “Force of Fantasy” *supra* note 147 at 109, 113. This argument is ironically self-undermining – as Butler points out, in positing that no interpretive distance can be taken from the injurious effects of pornography, Andrea Dworkin precludes the very possibility of interpreting pornography that enables her own analysis in the first place. ‘Dworkin’s unflinching epistemological framework that equates masculinity with agency and aggression, and femininity with passivity and injury, restricts her viewing position to that of position of mute and passive injury, even as the force and eloquence of her interpretation belies this position.’ *Ibid.* at 113.

⁹⁰¹ The term ‘pedophile’ is often incorrectly used as a generic term for all child sex offenders, but a child molester does not necessarily have pedophilia or any other psychosexual disorder – and indeed most child sex offenders are not pedophiles, as clinically described. The DSM-IV diagnostic criteria for pedophilia are: ‘A. Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges or behaviours involving sexual activity with a prepubescent child or children (generally aged thirteen years or younger). B. The fantasies, sexual urges or behaviours cause clinically significant distress or impairment in social, occupational or other important areas of functioning. C. The person is at least sixteen years and at least five years older than the child or children in criteria A.’ See further Diana Kenny, “Opinion, Policy and Practice in Child Sexual Abuse: Implications for Detection and Reporting” in Marianne James ed. *Paedophilia: Policy and Prevention* (1997) *Australian Institute of Criminology Research and Public Policy Series* No. 12 <http://www.aic.gov.au/documents/A/D/2/%7BAD2B7912-AA15-4DB3-84B5-5AE6680D0C15%7DRPP12.pdf> 14 at 17-18, and Karen Gelb, “Recidivism of Sex Offenders” Research Paper January 2007 <http://www.deakin.edu.au/hmnbs/psychology/pdf-docs/colloquia/reading-for-1-aug-graffam2.pdf>. See further Gail Mason, “Prejudice and Paedophilia in Hate Crimes Laws: *Dunn v R*: (2009) 34:4 *Alternative Law Journal* 253 at 255, and the critical response by Allan Ardiff & Ben Wardle, “Firebombs and Ferguson: A Review of Hate Crime Laws as Applied to Child Sex Offenders” 34:4 *Alternative Law Journal* 257 at 258.

⁹⁰² There is evidence to suggest that, at least for some offenders with a sexual interest in children, fantasy plays an important role in their sexual life and that various individuals report satiation with types of images and an escalating interest in more extreme forms of child pornography. See Taylor & Quayle, *supra* note 859. “While some studies have found that “highly erotic materials” incite offences, others suggest that such materials reduce the incidence of abuse by relieving sexual tensions.” Gotell, “Inverting Image and Reality” *supra* note 99 at 16.

upon the feeding, nor the satisfaction-satiation model, in which the consumption of pornography releases desire, can fully account for the ways in which affect and desire work through representations as they are reframed in different contexts.

Circulating Desires

The law's shift towards the context of viewing heralds a legitimacy problem for law: the more the crime of child pornography becomes about desirous looking rather than actual child abuse, the more the court is itself implicated in that crime. As Adler writes, the law 'requires us to study the pictures of children to uncover their potential sexual meanings, and in doing so, it explicitly exhorts us to take on the perspective of the pedophile.'⁹⁰³ When determining whether a photograph contains 'a lascivious exhibition of the genitals'⁹⁰⁴ United States courts utilize a six-factor test enunciated by the Supreme Court in *United States v Dost* (1986) which requires the court to determine, *inter alia*, 'whether the visual depiction is intended or designed to elicit a sexual response in the viewer' and whether the visual depictions suggests sexual coyness or a willingness to engage in sexual activity.'⁹⁰⁵ These questions go directly to the spectator's sense of being addressed by the photograph, immediately engaging fantasy: the court is obliged to fantasize the viewer's fantasy of the inner psychic space of the photographic subject! The *Dost* court analyzed a picture of a ten year old girl sitting naked on a beach and concluded that her 'open legs do imply... a willingness... to engage in sexual activity,'⁹⁰⁶ attributing a state of mind to the photograph's subject that is itself a fantasy of pedophilic desire. Similarly, in *R v. Nedelec* (2001) Shaw J of the British Columbia Court of Appeal found that a photograph of a young girl opening Christmas presents, and wearing a nightgown that had ridden up around her waist, was child pornography not

⁹⁰³ Adler, "The Perverse Law of Child Pornography", *supra* note 494 at 256.

⁹⁰⁴ The *Child Protection Act* 1984 adopted the broader term 'lascivious' for the previously used 'lewd,' prohibiting using a child in a 'sexual performance' including 'sexual conduct' including 'lascivious exhibition of the genitals.' See Adler, "The Perverse Law of Child Pornography", *supra* note 494 at 238.

⁹⁰⁵ *United States v Dost* (S.D. Cal 1986) 636 F. Supp. 828 at 832.

⁹⁰⁶ *Ibid.* at 833.

because of the circumstances in which it was produced, but because the accused had collected it for sexual gratification.⁹⁰⁷ The court observed: 'However innocently the picture was taken, the clear and prominent depiction of the little girl's genital area is startling.'⁹⁰⁸ As Robert J. Danay responded,

If it was truly 'innocently taken,' there should be nothing even remotely startling about a photograph in which a toddler's genitals happen to be exposed. By branding such materials as sexual in nature, the Court is publicly reinforcing the notion that children, even toddlers opening their Christmas presents, can reasonably be considered to be sexual objects.⁹⁰⁹

In these instances, 'a criminal trial concerning child pornography involves a public display wherein the image of the child as a sexual creature is exhibited and reinforced, even though it is being condemned in the process.'⁹¹⁰ In this critical narrative, the law is not only intensifying the eroticization of innocence through prohibition, but actually participating in pedophilia. In scrutinizing every image through the frame of possible desire, the law 'produces the spectacle of the sexual child' which 'threatens us all,' because we now 'see the world from a pedophile's perspective.'⁹¹¹ In short, law is doomed to make a bad situation worse.

⁹⁰⁷ The importance of the context of viewing rather than procuring is well illustrated in a Tennessee case of invasion of privacy in which a man secretly photographed his neighbour's children in their bath for the purposes of sexual gratification, but where the photos themselves were indistinguishable from what the court called 'innocent' family photos. The court deemed the photographs 'child pornography' based *not* on what he had done to procure the image *but how he had subsequently used it*. *State v. Dixon*, WL 712344 (Tenn. Crim. App. Oct 13, 1998) Compare the English case of *R v. Graham-Kerr*, in which the defendant took photographs of a boy at a swimming pool. Even though the defendant admitted being sexually aroused by the boy, the photographs were only indecent in that the boy was naked (there was no erotic posing). On appeal it was held that the motivation or attitude of the person who takes or makes the images is irrelevant in determining whether or not an offence has been committed. *Graham-Kerr's* conviction was overturned because even though he did admit to pedophilic tendencies, this should have been irrelevant in the jury's assessment of the images. *R. v. Graham-Kerr* [1988] 1 WLR 1098; (1989) 88 Cr App R 302.

⁹⁰⁸ *R. v. Nedelec*, [2001] B.C.J. No. 2243 (B.C.S.C.) (QL) at para 49.

⁹⁰⁹ Robert J. Danay, "The Danger of Fighting Monsters: Addressing the Hidden Harms of Child Pornography Law" (2005) 11:1 *Revue d'études constitutionnelles* 151 at 159.

⁹¹⁰ *Ibid.* at 154. For a similar argument, see Ryder, *supra* note 889.

⁹¹¹ Adler, "The Perverse Law of Child Pornography", *supra* note 494 at 213. 'The legal discourse on prohibiting child pornography may represent yet another way in which our cultural drenches itself in sexualized children,' (213) by effectively creating 'a space for the perpetual discussion of children and sex,

The idea that child pornography law is pedophilic, forcing judges to adopt the pedophilic gaze and stage the sexualized child, is fast becoming a critical cliché. While these scholars are surely right to emphasize the productive power of law, which cannot stand apart from or outside the sexual economy it purports to regulate, their accounts tend to assume that law and deviant pedophilic desire are already-unitary forces locked in an escalating dialectic. But the lascivious gaze is not a universal position. Desire is not distinct or singularly locatable in individual bodies. It is not all or nothing.⁹¹² Desire is both socially constructed and irreducible to particular bodies, and law, which both constitutes and is called upon to respond to such desire, has a permanent stake in it. The apparently unitary nature of pedophilic desire is itself a historically specific product of the disciplinary forces of the confessional, law and psychiatry, which aimed to eradicate ‘peripheral sexualities,’ but required their consolidation and ‘implantation’ or ‘incorporation’ in individual bodies which could be normalized and disciplined.⁹¹³ In short, we have carved out a socially-constructed desire and located it in the figure of the

where children and sex are bound together.’ (267-8). ‘The legal tools that we designed to liberate children from sexual abuse threatens to enslave us all, by constructing a world in which we are enthralled – anguished, enticed, bombarded – by the spectacle of the sexual child.’ (210). ‘What does it do to children to protect them by looking at them as a pedophile would, to linger over depictions of their genitals? And what does it do to us as adults to ask these questions when we look at pictures of children? ... Our vision changes the object that we see. Child pornography law constitutes children as a category that is inextricable from sex. The process by which we root out child pornography is part of the reason that we can never fully eliminate it; the circularity of the solution exacerbates the circularity of the problem. As everything becomes child pornography in the eyes of the law—clothed children, coy children, children in settings where children are found—perhaps [children themselves] become pornographic.’ At 264. She is drawing on the work of Kincaid: ‘those protecting the child and those exposing it play for the same team. Eroticizing exists in symbiotic relation with sanitizing, and the veiling and the exposing exist in an encircling doublespeak.’ Kincaid, *Erotic Innocence*, *supra* note 821 at 102.

⁹¹² Kincaid has suggested that we must posit ‘a range of erotic feelings within and toward children... Rather than assuming that such feelings exist in only two forms - not at all or out of control – perhaps we could learn something of their differences, manner of expression, and effects, allowing them a complex and dynamic relativity.’ *Ibid.* at 24.

⁹¹³ ‘The implantation of perversions is an instrument-effect: it is through the isolation, intensification, and consolidation of peripheral sexualities that the relations of power to sex and pleasure branched out and multiplied, measured the body and penetrated modes of conduct.’ Foucault, *History of Sexuality*, *supra* note 121 at 48. Foucault offers the controversial case of Jouy, the ‘simple-minded’ peasant who paid young village girls for sexual favours because the older ones would not provide him with them,’ as an example of a shift in the sexual economy whereby an individual’s sexual practices ceased to be seen as something that could change with circumstances, and became identifiers of a stable self. at 42-43. For feminist criticisms of Foucault’s account here, see Alcoff, *supra* note 848; and references cited in Chloë Taylor, *The Culture of Confession from Augustine to Foucault: A Genealogy of the ‘Confessing Animal’* (London: Routledge, 2009) at 78.

pedophile, the embodiment of fear in our social unconscious. In its rush to locate discrete desires in unitary individuals, the dominant crimino-legal framework prevents us from facing the important policy question: how far do we wish to go in prohibiting objects that *might* be used for various forms of sexual gratification, and how should we decide this question? Rather than viewing the law's adoption of the pedophilic gaze as a momentary lapse in an otherwise seamless portrayal of legitimate authority, we should see this ironic moment of law's apparent 'pedophilia' as a reminder that desire does not cleave to identity but travels around the social body. In other words, we need to look at how desires and affects circulate through the image and the viewing subject, and how the law is constituted in and through these processes.

IV. Re-Aestheticizing the Image: Desire and Disgust

How do images like the Henson photograph hail or solicit the law? To answer this question, we need to return to what is missing from the both purportedly neutral but ideologically-riven 'aesthetic gaze' and the overdetermined and externalisable 'political gaze': the question of affect. Affect is concerned with neither the 'content' of the image nor how its meaning is 'determined' by context. It is concerned instead with relations of looking, with the complex trajectories of desire in the visual field. It is concerned with how the image affects us: how it gets under our skin. The expression or performance of bodily disgust played a central role in the public controversy over the Henson photograph. When Prime Minister Rudd was confronted by the photographs with black bars, much was made of the language he used to describe his reaction. Unlike the morally-ambiguous words used by the aesthetic gaze to describe Henson's photographs – troubling, disquieting, confronting, suggestive, transgressive – Rudd named his discomfort through the embodied language of disgust. Similarly, N.S.W. Premier Morris lemma said, 'As a father of four I find it offensive and disgusting.'⁹¹⁴ Rudd repeated this

⁹¹⁴ Masters & Vallejo, *supra* note 794, p 4. For further high profile quotes on the Henson issue see – F. Walker and H. Gilmore, 'Threat to burn art gallery as Henson anger turns vicious', *The Sun-Herald* (25 May 2008), p 8.

language when responding to the *Art Monthly Australia* magazine cover - 'Frankly, I can't stand this stuff'⁹¹⁵ - and to the 'disgusting' news of how Henson recruited his models: 'I think parents would be revolted and horrified.'⁹¹⁶ By focusing on the spectator's sense of being addressed by an image, and the relations of looking thereby inaugurated, we can explore how the reaction of disgust generated by the Henson photograph is bound up with a desire for law – or law as desire.

Looking and the Collapse of Distance

The affect of an image can be explored through the multidirectional notion of the gaze. As Žižek explains, for Lacan, 'the gaze marks the point in the object (in the picture) from which the subject viewing it is already gazed at, ie. it is the object that is gazing at me.'⁹¹⁷ In similar terms, Miriam Hansen explains that the 'aura' which Walter Benjamin ascribed to art objects, including early photographs, did not inhere in the object, but was 'a particular structure of vision'⁹¹⁸ in which the spectator is regarded by the image: 'To perceive the aura of an object we look at means to invest it with the ability to look at us in return.'⁹¹⁹ The mutual regard of spectator and art object is not evenly freighted or neutral, particularly when it comes to representations of the female body, which our culture constructs as an object to be consumed and fetishized.⁹²⁰ As art historians have

⁹¹⁵ "Australian PM in new nude art row" *BBC* (7 July 2008) <http://news.bbc.co.uk/2/hi/asia-pacific/7492579.stm>

⁹¹⁶ "Henson playground report disgusts PM" *ABC News* (4 October 2008) <http://www.abc.net.au/news/2008-10-04/henson-playground-reports-disgust-pm/531406>

⁹¹⁷ Slavoj Žižek, *Looking Awry: An Introduction to Jacques Lacan through Popular Culture* (Cambridge, MA: MIT Press, 1991) at 125.

⁹¹⁸ Miriam Hansen, "Benjamin's Aura" (2008) 34 *Critical Inquiry* 336 at 342. Walter Benjamin recalled that early photography, even though used for experiment, recording or as a technical aid to painting, rather than as a medium of communication in itself, often evoked a sense of presence in the viewer that was different from other forms of representation - some could not bear to look at the first daguerreotypes because of the uncanny feeling that the subjects were returning their gaze. Walter Benjamin, "A Small History of Photography" trans. Edmund Jephcott, in *One-Way Street, and Other Writings* (London: NLB, 1979) 240 at 244.

⁹¹⁹ Walter Benjamin, "Paris: The Capital of the Nineteenth Century" in *Charles Baudelaire: A Lyric Poet in the Era of High Capitalism* (London: Verso, 1983) 146 at 148.

⁹²⁰ Carol Brooks Gardner, *Passing By* (Berkeley: California University Press, 1995); Susanne Kappeler, *The Pornography of Representation* (Cambridge: Polity, 1986); Lynne Pearce, *Woman/Image/Text* (Brighton:

noted, representations of the female body in photography, pornography, advertising, erotic and other genres fall within an overarching sexual economy of looking in which ‘*men act and women appear*. Men look at women. Women watch themselves being looked at.’⁹²¹ Abigail Solomon-Godeau observes that ‘the sexual economy of looking – particularly looking directed at the woman’s body – overarches the contingent and relative distinctions between culturally sanctioned and illicit forms of representation.’⁹²² Given this, we do better to ‘attend to the erotics of looking, rather than attempting to empirically locate the erotics in the contents of the image,’⁹²³ because the borders of the pornographic in a given historical moment ‘reside in a mode of address, a syntax, a rhetoric of the image.’⁹²⁴

The historically specific and class-based distinction between art and pornography that has developed since the eighteenth century has turned on the relationship between the image and the viewing body. Pornography is defined as that which creates within the reader or viewer an acute awareness of the body, while the aesthetic creates ‘an experience of disembodiment, a movement away from sense towards rational or

Harvester Wheatsheaf, 1994); Jacqueline Rose, *Sexuality in the Field of Vision* (London: Verso, 1986), all cited in Young, “In the Eyes of the Law” *supra* note 55 at 9.

⁹²¹ John Berger, *Ways of Seeing* (New York: Viking Press, 1972) at 47, emphasis in original. Crucially, masculine and feminine, or active and passive, are ‘subject positions, not ideological givens’: ‘to be the active-subject-of-the-gaze is generally the masculine prerogative.’ Solomon-Godeau, *Photography at the Dock*, *supra* note 772 at 220. The persistent hostility of censors towards objectified representations of men, particularly erect genitalia, is a function of this sexual economy: Geoffrey Robertson, *Obscenity* (London: Weidenfeld & Nicolson, 1979) at 282. Commenting on the development of modern European pornography, Lynn Hunt observes that although written by and for men, a determined focus on women meant that pornography as a genre persistently obscured male sexuality, as if this topic were ‘too threatening to contemplate.’ Hunt, “Introduction,” *supra* note 369 at 41.

⁹²² Solomon-Godeau, *Photography at the Dock*, *supra* note 772 at 220. ‘the structural determinations of the look, and the discursive strategies common to the representations themselves, indicate that the problems of oppression, subordination and objectification do not exclusively reside in the given contents of an image.’ Solomon Godeau claims she is ‘far less certain about the difference between ‘good’ and ‘bad’ images and even more doubtful about the political utility in differentiating them for censorship purposes.’ at 221. ‘... since the act of representation and its reception occurs *within* a patriarchal framework, even ostensibly innocent or inoffensive images will be marked by its terms.’ At 221.

⁹²³ *Ibid.* at 229.

⁹²⁴ *Ibid.* at 230.

intellectual pleasure.⁹²⁵ The transforming effect of *distancing* on the viewing experience was noted by Edmund Burke in his theory of the sublime, when he wrote that while immediate pain or danger ‘are simply terrible... at certain distances, and with certain modifications, they may be, and they are delightful.’⁹²⁶ Conversely, obscenity is often conceived as a *collapse* in the distance between spectator and art object.⁹²⁷ Jean Baudrillard explained obscenity as everything having ‘equal visibility,’ sharing ‘the same space without depth.’⁹²⁸

Obscenity begins precisely when there is no more spectacle, no more scene, when all becomes transparency and immediate visibility, when everything is exposed to the harsh and inexorable light of information and communication.⁹²⁹

The apparent disappearance of the frame means that obscene representations belie their own status as representations: they appear to be *too real*. Kant defined disgust as when ‘the artistic representation of the object is no longer distinguished from the nature of the object itself in our sensation, and thus it is impossible that it can be regarded as beautiful.’⁹³⁰ Disgust is in this sense the absolute ‘other’ of the system of taste.⁹³¹ Hal Foster writes that in the obscene, ‘the object-gaze is presented *as if there were no scene*

⁹²⁵ Pease, *supra* note 554 at 1.

⁹²⁶ Edmund Burke, *A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and Beautiful* (Oxford: Oxford University Press: 1990 [1757]) at 14.

⁹²⁷ In a 1983 essay, Jean Baudrillard asserted that ‘our’ (modern) obscenity was ‘no longer the hidden, filthy mien of that which can be seen,’ but rather ‘the abjection of the visible,’ by which he meant ‘(s)tupidity, foolishness, insanity, violence.’ This obscenity corresponds to the ‘insubstantiality’ or ‘nullity’ of the real; it is not ‘a sexual obscenity’ but rather ‘an obscenity of accuracy – the order of the real – itself,’ an obscenity that manifests in *too much detail*: exhibiting the body with ‘pure indifference,’ as pure object, ‘the body’s indifference to being looked at, the body’s victory over the stare of the viewer,’ the sumptuous indifference of the prostituted body.’ ‘Our obscenity, our pornography does not stem from sexual lust, it stems from the paralyzed frenzy of the image.’ These ‘disproportionately inflated images’ ‘have become our real sex objects, the objects of our desire, and it is this substitution, this confusion (between desire and its materialized equivalent in images...) ... that gives rise to the obscenity in our culture.’ Our obscenity exists in ‘this promiscuity and this ubiquity of images, this viral contamination of things by images.’ Jean Baudrillard, “What Are You Doing After the Orgy?” (1983) 22 *Artforum* 42 [“After the Orgy”] at 42-44.

⁹²⁸ *Ibid.* at 43.

⁹²⁹ Baudrillard, “The Ecstasy of Communication” in Hal Foster, ed. *The Anti-Aesthetic Essays on Postmodern Culture* (Port Townsend, Washington: Bay Press, 1983) 126 at 130.

⁹³⁰ Immanuel Kant, *Critique of Judgment* (New York: Cosimo, 2007 [1917]) at 155.

⁹³¹ Sianne Ngai, *Ugly Feelings* (Cambridge, MA: Harvard University Press, 2005) at 334.

to stage it, no frame of representation to contain it,⁹³² and Nead writes that the 'obscene body is the body beyond representation, without borders or containment.'⁹³³ In her analysis of Andres Serrano's *Piss Christ* and Marcus Harvey's *Myra*, Young argues that the shuddering sensation of encountering 'obscene' art arises out of an *imagined* rather than real touching – what she calls 'the affect of representation.'⁹³⁴ She shows how obscene art can initiate a visceral response in the spectator that 'transcends the cushioning effect of representation and threatens metaphorically to touch the spectator.'⁹³⁵

... the spectator's sense of disgust at the artwork does not derive solely from the disturbing conjunctions represented within it. What is crucial here is the effect of the 'disgusting' artworks' *address to the spectator*, its intimation of connection with her and its erosion of any sense of separate space from which it can be viewed – its unbearable *proximity* to the spectator. Out of this proximity comes the shuddering sensation that can be called 'aesthetic vertigo.'⁹³⁶

Disgust here is figured as a collapse in the critical distance between the viewer and the image, an intrusion of the Real: 'the affective charge of the artwork's illegitimate touch (crucifix and urine, faxes and religious figure, or child's hand and child-killer) reduces the interim space between the viewer and the artwork (the space in which the viewer knows that 'it's only an image.')

⁹³⁷ The photograph is at once real, but not real, a representation, but also *not* a representation: this is the affect of indexicality. 'At the same time as the image looms ever closer with its threat of contamination, the viewer

⁹³² Foster, "Obscene, Abject, Traumatic" in Douzinas & Nead, *Law and Image*, *supra* note 34 at 243, emphasis in original.

⁹³³ Nead, "Bodies of Judgment", *supra* note 771 at 218. In her earlier work, she observes that in critical attempts in art discourse to shore up a distinction between 'a seductiveness that is permissible in art and a category of obscenity that goes beyond art, outside of art,' art is 'defined in terms of containing form within limits' whereas obscenity 'is defined in terms of excess, as form beyond limit, beyond the frame and representation.' Nead, *Female Nude*, *supra* note 771 at 20. She demonstrates that Clark's analysis of the distinction between nude and naked is torn between 'a category of art which is concerned with stylistic procedure and form and a category of 'obscenity which has to do with excess and lack of boundaries.' *Ibid.* at 21.

⁹³⁴ Young, *Judging the Image*, *supra* note 18 at 42.

⁹³⁵ *Ibid.*

⁹³⁶ *Ibid.* at 41.

⁹³⁷ *Ibid.* at 43.

knows that what she sees is only a reproduction.’⁹³⁸ An art critic praising a photograph and a moralist denouncing it each claim a certain distance from the photograph, and to be separate from and competent to judge what they see there. The claim to critical autonomy, however, is precisely what is threatened through the encounter with a representation of the naked (female) body. The viewer’s body ‘all too often finds unity [with] and becomes part of the corporealized, sensual discourse it seeks to contain and regulate.’⁹³⁹

Fantasizing the Fantasy of the Other

The disgust expressed by Rudd and other politicians who viewed Henson’s photograph does not seem directed towards the subject of the photograph nor even the photograph itself, but towards at an imagined fantasy of looking that attaches to this photograph: the specter of N’s photo being ‘drooled over by pedophiles.’⁹⁴⁰ As Miller observes, ‘one can readily experience disgust on someone’s behalf for their having been defiled.’⁹⁴¹ But the disgust here is not really about the teenage girl known as ‘N’ – it is not experienced on her behalf, and not directed at her image. Rather it is an imagined scene of looking that is disgusting. To experience disgust is to see someone else seeing the image in a certain way. These performances of disgust thus consist in an identification with desire, and then a suspension of that identification. The ‘revolting’ photograph revolts *in and through* the viewer, who then expels it. These public performances of disgust – the identification and expulsion of deviant desire – form part of the discursive function by which deviant desires are identified and then located in one portion of the population, in pursuit of the minoritizing view. At the same time, the fear behind the disgust, the reason that such a performance is deemed necessary, the reason why it is felt *as* disgust,

⁹³⁸ *Ibid.* at 43-44. ‘The illegitimate touching within the image; the threat of metaphorical contamination by the image; the lack of an interim space in which the image can be viewed as an image; the defensiveness generated by disgust; and the spiralling emptiness within the image (for it is, after all, ‘only’ an image): all combined to effect a vertiginous collapse, or falling away, within the spectator.’ *Ibid.* at 44.

⁹³⁹ Nead, “Bodies of Judgment”, *supra* note 771 at 206.

⁹⁴⁰ Derryn Hinch of Melbourne radio station 3AW cited in *Henson Case*, *supra* note 726 at 68-69.

⁹⁴¹ Miller, *supra* note 91 at 195.

provides implicit support for the universalizing view. To feel disgust at someone else's (the 'Other's') reading of an image is by necessity to perform that reading oneself – to have 'a filthy mind.' Driving the critique of the court's adoption of the pedophilic gaze is the recognition that disgust 'is inseparable from an intrinsic interest in the object' provoking the disgust.⁹⁴² As Nead notes, 'disgust is a strong response. The disgusted viewer is the affected viewer, highly motivated, in a state not unlike desire.'⁹⁴³ Motivating the display of disgust then is the fear and disturbance of seeing one's own aberrant desire reflected within a pedophilic fantasy. 'Obscenity's revenge is always double-edged: it's never where you think it is, it's always there where there are those thinking of it.'⁹⁴⁴

Disgust is a reaction to matter out of place. It is generated by a failure of framing and a fear of contamination, of leaking boundaries.⁹⁴⁵ That which crosses lines, boundaries or margins is polluted and polluting.⁹⁴⁶ William Ian Miller observes that disgust seeks to include or draw others into its exclusion of its object, enabling a strange kind of sociability,⁹⁴⁷ and 'is especially useful and necessary as a builder of moral and social community.'⁹⁴⁸ Cultural psychologists have suggested that disgust is at 'the very heart of what it means to be human.'⁹⁴⁹ not only does it seem to be an affective experience unique to the human animal, but when engaged within a moral context, it draws the line between who counts as human (those who feel disgust) and who is relegated as inhuman (those who inspire disgust – by feeling desire). This boundary-making activity,

⁹⁴² Aurel Kolnai, *On Disgust* (Chicago: Open Court, 2004) at 100.

⁹⁴³ Nead, "Bodies of Judgment", *supra* note 771 at 213.

⁹⁴⁴ Baudrillard, "After the Orgy?", *supra* note 927 at 44.

⁹⁴⁵ Manderson, "Possessed", *supra* note 894 at 37.

⁹⁴⁶ Douglas, *Purity and Danger*, *supra* note 91, Miller, *supra* note 91; Dan M. Kahan "The Progressive Appropriation of Disgust" in *The Passions of Law*, Susan A. Bandes, ed., (New York: New York University Press, 1999) 63.

⁹⁴⁷ Miller, *supra* note 91 at 190-191.

⁹⁴⁸ *Ibid.* at 194.

⁹⁴⁹ P. Rozin, J. Haidt & C.R. McCauley, "Disgust" in M. Lewis & J.M. Haviland-Jones, eds., *Handbook of Emotions* 2nd ed. (New York: Guilford Press, 2000) 650.

where the human and the pervert are distinguished from one another by idioms of disgust, involves ‘a multivalent satisfaction.’⁹⁵⁰ Politicians, police, journalists and media consumers became united in a shared moral and social community by the language of disgust, caught up in ‘a cycle of desire and gratification.’⁹⁵¹ As Lisa Z. Sigel has observed, stories about perverse desires ‘allow the ‘good’ people of society to discuss, relish, pity, reconstruct, and narrate the deviant from a position outside.’⁹⁵² These desires take corporeal form in the ‘pedophile,’ who is never a figure whom one may identify with, only against. The community is itself brought into being through this hatred for pedophiles.⁹⁵³

The rhetoric of disgust and condemnation not only hides the gratification of desire but forms the occasion of its possibility. Linda Williams coined the term ‘on/scenity’ to mark the unwitting paradox that the desire to prohibit a sexual representation is implicated in the desire to re-produce it – albeit within a framework of outrage.⁹⁵⁴ Likewise, Ummni Khan argues that media coverage of child exploitation stories is ‘*perverse*. They are sites where direct gratification is absent and yet displaced satisfaction and desire are engaged.’⁹⁵⁵ ‘Disgust licenses the reader to, if not completely violate, then at least relish the taboo of child pornography.’⁹⁵⁶ But this enjoyment or relish is not an ironic

⁹⁵⁰ Khan, *supra* note 821 at 407.

⁹⁵¹ Nead, “Bodies of Judgment”, *supra* note 771 at 206.

⁹⁵² L.Z. Sigel, “Autobiography of a Flea: Scrutiny & the Female Porn Scholar” in M.L. Johnson, ed. *Jane Sexes it Up: True Confessions of Feminist Desire* (New York: Four Walls Eight Windows, 2002) at 242 cited in Khan, *supra* note 821 at 402.

⁹⁵³ Sara Ahmed stresses the way in which hate itself organizes bodies, producing affiliations and identifications with bodies precisely at the moment of the disavowal of other bodies: Sara Ahmed, “The Organization of Hate” (2001) 12 *Law and Critique* 345.

⁹⁵⁴ Linda Williams, “Porn Studies: Proliferating Pornographies On/Scene: An Introduction” in Linda Williams, ed., *Porn Studies* (Durham: Duke University Press, 2004) 1 at 3–4.

⁹⁵⁵ Khan, *supra* note 821 at 394. She argues that ‘narratives about child pornography become covert opportunities for mainstream society to sexualize children through utterances of concern.’ At 396.

⁹⁵⁶ *Ibid.* at 422. Similarly, Adler argues that the primetime television show *To Catch a Predator* restages the spectacle it condemns. Adler, “To Catch a Predator”, *supra* note 871. The climax of each episode arrives when, in order to break down and castigate the predator, host Chris Hansen reads his internet chat back to him: ‘You said “I wanna see and taste your beautiful body. You’re a gorgeous 13 year old boy.”’ *Ibid.* at 13. Safe within his contempt, Hansen luxuriates in the details of these sex scenes, long after the predator

aberration, inconsistent with the public law's denunciation of pedophilia. Rather, this enjoyment itself guarantees the coherence of the law's prohibition against pedophilic desire. As Žižek observed, what most deeply holds together a community is not so much identification with the law that regulates the community's 'normal' everyday circuit – the denunciation of pedophilia – but rather identification with a specific form of transgression of the law or a specific form of enjoyment.⁹⁵⁷ The law functions by distancing itself from its subjects and from desire itself. It needs that distance because its register is the symbolic (the realm of speech, words and texts), which inaugurates the subject into language, separating it from the imaginary (the realm of images and mirrored reflections). The public symbolic law tries to prohibit the desire, to stand outside and regulate it. This is the law of the father who says 'no'. But the obscene superego underside commands us to enjoy: this is law of the anal father, he with access to pleasure, the father who says yes. The injunction 'no' arises out of the idea of another experiencing pleasure I want and can't have – hence Rudd's concern with 'the enjoyment of the other.' The symbolic does not merely repress the Real of politics and violence, but supports and symptomatizes it.⁹⁵⁸ This desire is the unacknowledged obscene support *needed* for the maintenance of the 'disgusted' regulatory order – it cannot be extinguished, but must be sustained.

This chapter began by noting the irony of the censor's black bars making an 'innocent' photograph 'dirty.' Žižek's analysis gives us a way of understanding the significance of this irony for law. The black bars on the Henson photograph enabled a double reading: at the level of public appearance, of public law, the text is censored, safe, cordoned off sexuality – it can be shown in mainstream media. But at the level of the obscene superego, the bars on the photograph bombard us with the injunction to enjoy, engage

admits he was wrong and begs him to stop, in a dramatic restaging which works to preserve, disseminate and normalize the predator's sexual fantasies. The high ratings mean that viewers attain satisfaction from these fantasy scenes: 'our experience of pleasure... aligns us with the predator.' *Ibid.* at 15.

⁹⁵⁷ Žižek, "Superego by Default," *supra* note 277 at 926.

⁹⁵⁸ This is the central argument in William P. MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Stanford: Stanford University Press, 2007) at 10.

our fantasies and let our imaginations go wild. This double reading is not simply a compromise: the law *needs* its unacknowledged obscene support. The accessibility of this desire – its incitement or provocation as a fantasy which is socially-constructed and therefore *available* to us – is necessary in order to maintain the coherence of the disgust – a disgust which would posit that deviant desires sit outside the law in individual bodies waiting to be eradicated. Public law attempts to reframe the image as pornography but is reframed by it, drawn into the image, and always-already implicated in the cycles of desire and gratification it seeks to regulate.

Conclusion: Inside the Frame

Henson's work and the discomfort it generates points to a certain perversity at the core of our imaging practices, and provides an occasion in which politics and aesthetics play out on the terrain of law. Each of the 'gazes' examined in this chapter purported to stand outside of the viewing relationship and judge Henson's photograph by external standards: either by the litmus test of the bourgeois art object (the aesthetic gaze), the codes of a corrupt or exploitative culture (the political gaze), or the fantasy of a deviant sexual minority (the lascivious gaze). By charting a course between these different gazes, I have identified a blind spot common to each of them: an account of how photographs affect us. As critical analyzers of images and their circulation, we are always-already implicated in these affective relations of looking. As Mieke Bal observes, the 'perlocutionary effectivity'⁹⁵⁹ of visual representation does not disappear before a critical analysis of the images but affects the critic writing about them. As Young insists, 'the experience of looking' is 'a prior state which necessarily antedates the critical moment and the distance of analysis,' but '(n)o moment of first sight can be 'innocent' or independent of cultural structures and devices.'⁹⁶⁰ These dynamics are intensified in the case of obscene representations whose affective charge is drawn from transgressing normative boundaries, and where 'the nature of the subject functions to elicit the

⁹⁵⁹ Mieke Bal, "The Politics of Citation" (1991) 21:1 *diacritics* 25 at 26

⁹⁶⁰ Young, *Judging the Image*, *supra* note 18 at 18-19.

investigator's own stake in an explicitly sexual field. Hence, there can be no reassuring illusion of neutrality, no refuge in a metadiscourse that exempts or purges the interest of the scholar or critic from the implications of his or her looking.⁹⁶¹ The typology of gazes I have adopted here does not presume to escape their confines but to occupy each in turn with the purpose of understanding how the law is refracted through them.

The irony, paradox and perversity attending the crimino-legal regulation of photographs of children explored in this chapter does not signal a crisis of legitimacy for public law, confirm the failure of legal regulation, or demonstrate that the law is inherently compromised in its efforts to deal with 'deviant' sexual desires. Rather, it reveals the law's own productive role in the erotics of looking and the proliferation and reframing of representations, as they move through different contexts. Our public debate about child welfare and innocence takes place within a series of neoliberal, patriarchal and heteronormative frames which seek to banish the threat to the outside of community, but the very discursive mechanisms of framing which attempt to ward off this threat are doomed to amplify it. Conceiving of childhood as a lack of sexuality renders children sexual just as the black bars render the photograph suggestive, and placing a limit on fantasy eroticizes that limit itself. The liminality of the Henson image taps into our social desire for law's reassertion of the borders between adulthood and childhood, but it also draws our attention to the law's complex investment in such frames, and thus reframes law for our gaze.

⁹⁶¹ Solomon-Godeau, *Photography at the Dock*, *supra* note 772 at 220. As Higonnet states, 'A book on pictures of children replays the risk of the pictures it is about.' Higonnet, *supra* note 775 at 13.



Figure 6: Works done in 2001, named by the artist on his website. *Scissors*, Saint-Laurent Blvd. and Duluth Ave. October 2001; *Screwed*, St Urbain and Duluth St, October 2001; *Zipper*, Parc Ave November 2001.



Figure 7 Works done in 2004, named by the artist on his website. Clockwise from top left, *V.I.P. Crossing*, St Laurent Blvd, May 2004; *Life Support System*, St Laurent Blvd and Bernard Ave, July 2004; *Asphalt Glory*, De Bullion and St Joseph St, July 2004; *Attention all Drivers*, De Maisonneuve St, July 2004.

Repurposing Signs: Street Art, Public Space, and Legal Semiotics



Figure 8 Roadsworth's first stencil. Esplanade Ave, Montreal, October 2001.

The very uncontrollability of discourse, its penchant for superseding and reversing the purposes for which it is instrumentally deployed, provides for the possibility, if not the necessity, of regulatory regimes producing the very terms by which their purposes are undermined.⁹⁶²

Introduction: Outlaw Art

In late 2001, painted yellow bicycles began appearing on roads in the Plateau area of Montreal. Soon more elaborate stencils appeared, often incorporating the existing road markings - climbing vines wrapped around a crosswalk, scissors cut along the 'dotted line' of lane markings, pedestrian crossings became giant footprints or a row of candles,

⁹⁶² Butler, "Force of Fantasy" *supra* note 147 at 119.

heart monitor-like spikes punctuated centre lines on roadways.⁹⁶³ Their quality and aesthetic sensibility led many – even the Mayor – to initially assume they had been executed by City of Montreal authorities, or at least with their authorization.⁹⁶⁴ The popular stencils, however, were the work of a ‘community art vigilante’ who was finally introduced to the public by the ‘winking pseudonym’⁹⁶⁵ ‘Roadsworth.’ After three prolific years, the 27-year-old artist (whose real name is Peter Gibson) was arrested in November 2004 at 4 o’clock in the morning, spray paint can in hand. Police detained him for 14 hours while they searched his apartment with a pre-prepared warrant, seizing his computer, camera, stencils and paint cans. He was charged with 53 counts of public mischief, and faced up to \$250,000 in fines, jail time, and a criminal record.⁹⁶⁶ But following an unprecedented wave of public support for the artist, including international media attention, letter writing campaigns and online petitions,⁹⁶⁷ Roadsworth was granted a conditional discharge in January 2006, which meant he had no criminal record, a \$250 fine and 40 hours of community service – devising stencil art for a local schoolground.⁹⁶⁸ Less than six months later, the City commissioned him to paint the foreground of the prestigious Palais de Congrès in downtown Montreal. Acting Mayor

⁹⁶³ For photographs of Roadsworth’s pieces, visit the artist’s website at www.roadsworth.com, and also see this blog: <http://freshpics.blogspot.com/2009/09/street-art-by-roadsworth.html>

⁹⁶⁴ Helen Fotopoulos, in *Roadsworth: Crossing the Line* (National Film Board of Canada, 2008) dir. Alan Kohl [*Crossing the Line*]. Marc Meyer, director of the Montreal Museum of Contemporary Art, said: ‘At first, because they were so slick and so well done and so clever, I just presumed that it was a grant that somebody got with the city’s permission.’ Ric Peterson at CJAD Radio recalled thinking, ‘Montreal is being innovative, isn’t this different, who at city hall do we have to thank for this?’ *Ibid.* ‘Many people who see his art in public think it has been done by the city.’ Christian Hundertmark, *The Art of Rebellion 2: World of Urban Art Activism* (Mainaschaff: Publikats Verlag, 2006) at 72.

⁹⁶⁵ T’Cha Dunlevy, “Artist gets his show on the road” *Gazette* (Oct 21, 2004) D.10 (Proquest) [“Artist gets his show on the road”].

⁹⁶⁶ Patrick Lejtenyi, “Roadsworth busted” in *The Montreal Mirror* (9-15 December 2004 20 (25) <http://www.montrealmirror.com/2004/120904/front.html> [“Roadsworth busted”]; T’cha Dunlevy, “Artistic wink has become an urban whirlwind” *The Montreal Gazette* (January 15, 2005) D.1 (Proquest) [“Artistic wink”].

⁹⁶⁷ Montreal’s Public Art Commissioner Francine Lord commented: ‘To my knowledge, this was the first time that pedestrians, the public, ordinary people addressed the municipality in support of an artist’s work. It’s really quite special.’ *Crossing the Line*, *supra* note 964.

⁹⁶⁸ He pled guilty to 5 of the 53 charges, and was given a conditional discharge, involving 18 months probation during which he must remain on good behaviour and avoid public use of stencils or spraycans without the city’s approval. For his community service, he was invited to paint the courtyard of Lambert-Closse school. Louise-Maude Rioux Soucy, “Roadsworth retourne à l’école” *Le Devoir* (30 mai 2006) b.8.

Benoit Labonte embraced the artist's spirit of rebellion, declaring proudly: 'Roadsworth est un artiste qui symbolise très bien le bassin de créativité que nous retrouvons à Montréal.'⁹⁶⁹

The outcome of *l'affaire Roadsworth*, in which the artist was sentenced to do what he had been prosecuted for, only this time with the City's authorization, was identified by many media and public commentators as 'ironic.'⁹⁷⁰ The farce of chapter 3, whereby the police became theatre performers, and the irony of chapter 4, whereby the condemnatory public law actually produced pornography, is echoed here when the City finally not only sanctions but facilitates Roadsworth's 'vandalism.' The City's reversal reveals the contradiction of a law that purports to be objective and free from politics (applying to all unauthorized marking equally) and is in fact contingent and inherently political (there's something different about Roadsworth's art). The ironic outcome of Roadsworth's case exposes the ideological structures, networks and dynamics of power and privilege which determine which uses of public space are permissible, and which kinds of representational practices are dominant, aesthetic and worthy of legal status or protection.

However, the irony of Roadsworth's case goes further from that of the pornographers, playwrights and photographers examined in previous chapters. It is not simply that the law's response to Roadsworth's illicit representation is ironic. Roadsworth's illicit appropriation of legal representation is also ironic. Roadsworth's art works precisely by

⁹⁶⁹ CCN Matthews News Report (4 Juillet 2006).

⁹⁷⁰ 'L'ironie, c'est que la Ville et l'artiste se sont entendus hors-cour, la journée même de l'ouverture du procès, et que Peter Gibson, c'est le nom du Picasso du pochoir, travaille désormais à contrats, le plus souvent pour la Ville de Montréal à donner libre cours à son imagination sur le bitume ou le béton des trottoirs.' François Houde, « On ne rigole pas avec l'art » *Le Nouvelliste (Trois-Rivières) Arts et Culture*, (13 janvier 2010) at 31. 'Irony is a prominent feature in Gibson's drawings and the city's decision to commission works on a scale for which he would recently have paid steep fines is a particular delight.' Sean Gordon, "Cheeky street artist now paints for city" *The Record, Toronto Star* (August 19, 2006). '... there's classic irony in both Kohl's film and the real life it chronicles.' Bernard Peruss, "Who owns public space?" *The Montreal Gazette* (18 November 2008) at D.6. Roadsworth's trial had 'ironic consequences.' Greg Quill, "A rocky road to acclaim" *Toronto Star* (May 9, 2009) at E.4. Roadsworth has managed to develop a legitimate artistic career out of his early notoriety: he now earns a living from doing artistic work for municipalities, art events, and exhibitions, and has recently published a book: Roadsworth & Bethany Gibson, *Roadsworth* (Montreal: Goose Lane Editions, 2011)

invoking and then playing with legal forms. City streets are some of the most heavily regulated places, and this regulation is performed primarily through semiotics: stop signs, traffic signals, median strips, pedestrian crossings, lane markers, arrows, etc., which prescribe behaviors: stop, turn, park, yield, cross, etc. Roadsworth intervened directly in this legal language, suspending its legal functioning, symbolic efficiency, and sovereign conceit, its capacity to mean what it says, its ability to be purposively and instrumentally deployed. He explained to a journalist, 'I am turning the city's language around on its head. I take something and re-appropriate it, parodying it. And by doing this, I can bring out the nature of the old meaning, exposing it.'⁹⁷¹ As Agamben suggests, in exposing the materiality or textuality of its object, its particular mode or way of being, parody opens a space for a different political relation, for things to be other than they are.

Part 1, *Performing Street Art*, explores Roadsworth's art as an unlawful, ephemeral, performative, representational practice that is connected to, but differentiated from, a range of other unauthorized aesthetic interventions into public space. In examining the affective experience of encountering Roadsworth's particular works, and the ways in which they respond to particular places in the city, I contribute to the scholarship of 'criminological aesthetics' which views 'graffiti and street art as cultural practices with the potential to contest perceptions and uses of urban space, in ways producing affective and experiential shifts for the inhabitants of cities.'⁹⁷² The remainder of the chapter investigates three different forms of irony suggested by *l'affaire Roadsworth* and its crimino-legal context. Part 2, *Repurposing Legal Semiotics*, examines the irony of Roadsworth's semantic play in repurposing legal signs illegally. In converting authoritative, didactic signs into questioning, dialogic, open-ended art, he rendered legal forms unlawful, exposing and challenging legal representation itself.

⁹⁷¹ Quoted in Reid Cooper, "When the stencil hits the road" *Globe and Mail* (6 January 2005) <http://www.goodreads.ca/reidcooper/>.

⁹⁷² Alison Young, "Negotiated Consent or Zero Tolerance? Responding to Graffiti and Street Art in Melbourne" (2010) 14:1 *City* 99 at 100 ["Negotiated Consent or Zero Tolerance?"].

Part 3, *Imagining Public Urban Spaces*, examines the irony of Roadsworth's reception by City authorities, who were obliged to embrace the artist because he subverted the City's authority in a way which appealed to the City's image of itself. Drawing on local and national French and English newspapers, media coverage and interviews, I show how Roadsworth's work was distinguished from unwanted 'graffiti,' and characterized as an act of city-zenship, in a way which illuminates how modes of being in the city are constructed and policed. Part 4, *Regulating Graffiti*, considers the broader lessons that Roadsworth's case holds for the regulation of graffiti in modern cities. The irony whereby Roadsworth is arrested and then sentenced to do the very thing he was arrested for arises by virtue of the way in which law has to legitimize or authorise practices within its space. Yet the very site-specific and locational nature of street art gestures towards an understanding of modern cities not as homogenous hermetic spaces but as constellations of sites of multiple intersecting normative orders. The law may seek to reincorporate street art's opposition or protest to the law in a way which reintroduces fixity of meaning – by authorizing, containing or commodifying it – but the law's own practices can always be repurposed in turn. Street art is inherently political because it obliges us to read the law otherwise, and gestures towards an aesthetic pluralism that is always-already present in modern cities – if we stop and look.

I. Performing Illegal Art

Graffiti is the crime of making unauthorized markings on urban surfaces. It is a mode of representation defined by its illegality,⁹⁷³ which is in turn a question of placement: like obscenity, graffiti is utterance out of place.⁹⁷⁴ Krauss argues that as 'a trace of the marker's violation of the surface,' graffiti is performative, 'not so much generating a meaning as causing something to happen. It belongs less, then, to the logic of

⁹⁷³ 'The decisive point is the committed crime when applying graffiti in a public place. This is the nucleus of the graffiti-movement as well as the reason for the disharmony of the institution art and graffiti. Graffiti with its aesthetical and performative moments cannot be separated from this juridical aspect.' Robert Kaltenhäuser, *Art Inconsequence: Advanced Vandalism* (Mainaschaff: Publikat, 2007) at 95.

⁹⁷⁴ Tim Cresswell refers to this as 'the crucial 'where' of graffiti.' Tim Cresswell, *In Place/Out of Place: Geography, Ideology, Transgression* (Minneapolis: University of Minnesota Press, 1996) at 31.

signification than it does to the structure of events.⁹⁷⁵ Graffiti cannot be separated from 'the event of writing illicitly,'⁹⁷⁶ which has strong affective implications for the artist (the body who runs a risk in executing the representation), the form of the object itself (the diverse styles of graffiti developed out of the necessity of working *quickly*) and the spectator (for whom the affective experience of confronting graffiti is shaped by a number of assumptions about permission or the lack thereof). Even when the styles of graffiti are brought within the sanctified sphere of art institutions (eg. exhibited in galleries or books), they retain the trace of this harried scene of production, this affective baggage. Graffiti is 'a crime in mode of production,'⁹⁷⁷ and falls to be understood in terms of a performative gesture rather than object, a series of encounters connecting bodies 'known and unknown.'⁹⁷⁸ Taking seriously art as an event and encounter means we must 'displace the object of interpretation from work to process.'⁹⁷⁹ Hence this section will analyze Roadsworth's art by examining how it was produced and disseminated, with particular reference to the artist's own account of views, desires, motivations, and process.

Art on the Street

As an illegal aesthetic intervention into urban space, Roadsworth's art falls within a set of practices commonly known as 'street art.'⁹⁸⁰ While connected to traditional

⁹⁷⁵ Krauss, *supra* note 40 at 14-15.

⁹⁷⁶ Mark Halsey & Alison Young, "'Our Desires are Ungovernable: Writing Graffiti in Urban Space'" (2006) 10:3 *Theoretical Criminology* 275 at 278 ["Our Desires are Ungovernable"].

⁹⁷⁷ Stewart, *Crimes of Writing*, *supra* note 67 at 226.

⁹⁷⁸ '[G]raffiti as an image connects bodies' 'known and unknown.' Halsey & Young, "Our Desires are Ungovernable," *supra* note 976 at 278. Martha Buskirk observes that an art object is not only constructed through its site of dissemination, but also through the viewer who experiences the work as a series of unfolding encounters. Martha Buskirk, *supra* note 42 at 22.

⁹⁷⁹ Mieke Bal, *Quoting Caravaggio: Contemporary Art, Preposterous History* (Chicago, IL: University of Chicago Press, 1999) at 36.

⁹⁸⁰ Nicholas Ganz, *Graffiti World: Street Art from Five Continents* (London: Thames & Hudson, 2004); Tristan Manco, *Stencil Graffiti* (London: Thames and Hudson, 2002); Tristan Manco, *Street Logos* (London: Thames and Hudson, 2004); Jake Smallman & Carl Nyman, *Stencil Graffiti Capital: Melbourne* (Brookvale, NSW: Tower Books, 2005); Christine Dew, *Uncommissioned Art: The A to Z of Australian*

signature-based or 'hip-hop' graffiti writing (including tagging, throwups, and pieces), street art typically differs in terms of medium, form, legibility, and audience. Although the spray can continues to be a key tool in the dissemination of illegal street art, other media, such as oil and acrylic paint, oil-based chalk, charcoal, stickers, posters, stencils, wool and mosaic tiling are now widely employed. Roadsworth's chosen medium is stenciling, in which an image is created in a template form, placed flat against the surface, and sprayed, allowing artists to quickly achieve complicated and precise designs that are then highly reproducible.⁹⁸¹ Unlike traditional graffiti writing's reliance on letters, street art is mostly 'iconographic or pictographic,'⁹⁸² employing figuration, abstraction, and symbols that are much less visually cryptic. While marshaling graffiti's sense of an illicit and exclusive 'counter-public,'⁹⁸³ street art often reflects a desire to be 'more visible, less cryptic and communicate to a wider audience,'⁹⁸⁴ and to provoke surprise and play in the urban environment. In his reliance on the structure of the urban terrain as a necessary condition for the conception and production of his work, Roadsworth's art exemplifies what has come to be called 'post-graffiti art,'⁹⁸⁵ a site-

Graffiti (Melbourne: Melbourne University Publishing, 2007); Alison Young, Ghostpatrol, Miso & Timba, *Street/Studio: The Place of Street Art in Melbourne* (Melbourne: Thames & Hudson, 2010).

⁹⁸¹ Anton von Dalen, one of the earliest New York stencil artists in the late 70s and early 80s calls stencils 'a portable printing press.' Interview August 7th 2003 cited in Joshua MacPhee, *Stencil Pirates* (Berkeley: Soft Skull Press, 2004) at 11. For scholarship on stencil art, see J. McGaw, "Complex relationships between *detournement* and *recuperation* in Melbourne's Street (Graffiti and Stencil) Art Scene" (2008) 13:2 *Architectural Theory Review* 222; Rafael Schacter, 'An Ethnography of Iconoclasm' (2008) 13:1 *Journal of Material Culture* 35; Stephanie Kane, "Stencil Graffiti in Urban Waterscapes of Buenos Aires and Rosario, Argentina" (2009) 5:1 *Crime, Media, Culture* 9.

⁹⁸² Manco, *Street Logos*, *supra* note 980 at 19.

⁹⁸³ A 'counterpublic' comes into being through an address to indefinite strangers, but constitutes itself through a kind of friction against, or conflictual relationship to, the dominant public, and 'maintains at some level, conscious or not, an awareness of its subordinate status.' Warner, *supra* note 4 at 118-119.

⁹⁸⁴ Manco, *Street Logos*, *supra* note 980 at 8; see Anna Waclawek, *Graffiti and Street Art* (London: Thames & Hudson, 2011) at 30-32. There seems to be something at stake for some street artists in differentiating themselves from taggers. Toronto-based street artist Dan Bergeron (fauxreel) maintains: 'Very few street artists come from a tagging background, and that area is a lot different in terms of what the people are trying to say and what their appeal is. Graffiti is often too codified for the general public, so they don't understand it and usually don't like it. Street art, on the other hand, tends to be more inclusive.' Fauxreel tweaks billboards and does poster art: <http://fauxreel.ca/> Quoted in Vanessa Farquharson, "Paint Misbehavin'" *National Post* (November 22, 2008) at W.5.

⁹⁸⁵ Manco, *Street Logos*, *supra* note 980 at 7, first coined by Sennet 1990 at 211 to describe those graffiti artists in New York and Paris whose practice evolved from what he called 'simple smears of self' to more

conscious art form that seeks to be integrated as part of urban art, architecture, and landscape, and which includes placing objects or sculptures in urban spaces, pasting-up drawings, posters or stickers on walls or other surfaces, altering the words or image on a billboard, guerrilla knitting, and performance-based actions.⁹⁸⁶ Like many street artists, Roadsworth envisages his work as an address to a public:

For me it was also a way of sort of communicating anonymously to the city. I think about the idea of your audience and the people you are trying to communicate with, and it's very abstract because you do have a sense of the community, a sense of the people around you... you don't know them personally but somehow there is a desire to communicate with these people, this anonymous kind of public.⁹⁸⁷

Roadsworth takes a hidden, illegal act and turns it into an address to a 'public': a space of discourse that exists only by virtue of being addressed.⁹⁸⁸

Roadsworth initially did not see himself as making art. The first stencil he ever did was on the road, and he described his activity as 'a form of activism,' 'a means to an end.'⁹⁸⁹

exploratory and experimental artistic pieces which engaged with the urban fabric. Anna Waclawek writes that the term 'post-graffiti art' identifies 'a renaissance of illegal, ephemeral public art production,' and stresses that it has not surpassed graffiti writing but flourishes alongside it. Waclawek, *supra* note 984 at 29.

⁹⁸⁶ M-City, Nuria, Jace and Swoon are examples of street artists whose (illegal) work places a high premium on placement and integration with the urban landscape and reclaiming non-places or liminal spaces. On site-specificity in art more generally, see Kwon, *supra* note 42; Mike Pearson, *Site-Specific Performance* (New York: Palgrave Macmillan, 2010); Nick Kaye, *Site-Specific Art: Performance, Place and Documentation* (London & New York: Routledge, 2000); Phelan, *supra* note 53.

⁹⁸⁷ Roadsworth, Interview with author, 18 December 2009, Montreal Canada [*Interview*]. Montreal-based street artist Francisco Garcia puts up posters of the faces of people he knows – family members, local personalities – on buildings in Mile End, with the tacit permission of many shop owners, who are pleased with the attention. His images, a reporter writes, 'evoke an intangible and ephemeral sense of community,' and make 'an everyday walk to the *depanneur* more romantic.' Christopher DeWolf, "Portraits of a neighbourhood" *The Montreal Gazette* (20 November 2006)

⁹⁸⁸ Warner, *supra* note 4 at 67. To make a public address requires us to imagine the prior existence of an audience who might understand (and be receptive to) the form and content of our address. So the paradox is that while public address takes for granted the existence of a public sphere – 'an arena of self-organised discursive interaction' – which can be addressed, those public spheres exist only by virtue of being addressed. Kurt Iveson, *Publics and the City* (London: Blackwell, 2007) at 21.

⁹⁸⁹ He recalls having a difficult time coming to terms with the appellation 'artist.' Quoted in Bernard Lamarche, « Le peintre poète du macadam » *Le Devoir* (21 décembre 2004) a1 ["Le peintre poète du macadam"]. 'I have a hard time keeping a straight face sometimes when people are trying to engage me in a deep conversation about 'stencil art'. I even have a hard time saying the word 'art.' I feel this is closer to

Although he had been musing about how to translate the spontaneity of UK artist Andy Goldsworthy's work into an urban setting,⁹⁹⁰ he never acted upon his ideas until the atmosphere of fear and urgency after 9/11 made him decide 'now's the time to say something.'⁹⁹¹ He decided to paint bikes on roads to protest the lack of bike lanes in the City and the hegemony of car culture with its insidious dependence on oil.⁹⁹² He wanted to communicate a political message - he was trying 'to compete on the level of advertising,' albeit 'with lesser means.'⁹⁹³ Unlike the threatening illegibility or 'coded confidence'⁹⁹⁴ of traditional graffiti, Roadsworth's stencils employed recognizable semiotics, and like much signage in the city, was addressed to a broader public:

I was trying to make it accessible, like there was nothing really too esoteric about what I was doing. It was very legible and clean and clear unlike graffiti which is almost a coded language... a lot of people don't get it. It is illegible to your average Joe, and I wouldn't call graffiti accessible, which is why the public reacts in kind. People don't like what they don't understand.⁹⁹⁵

cartoons than it is to high art.' *Crossing the Line*, *supra* note 964. 'The first stencil I think I ever did was on the road... when I started out I definitely didn't think I was going to make a career out of it and I didn't necessarily think I was doing art. It was just a form of activism so it was just a means to an end. It wasn't like I'm really into making stencils and I'm really into stencil art. I wasn't. Never. It was a means to an end. It was like, how can I do this, make this, reproduce this image as many times and as quickly as possible?' Roadsworth, *Interview*, *supra* note 987.

⁹⁹⁰ Goldsworthy rearranges elements of nature – twigs, leaves, mud – into unique and ephemeral sculptures or patterns. Roadsworth calls them 'little universes based on his imagination.' *Crossing the Line*, *supra* note 964.

⁹⁹¹ *Ibid.*

⁹⁹² This activist method is shared with the approach of *Urban Repair Squad* who in 2007 began to establish or refresh bike lanes in the city of Toronto when the City fell behind schedule on implementing its bike lanes project. Urban Repair Squad (URS) <http://urbanrepairs.blogspot.com/> ; Robyn Doolittle, "Bike activists going guerilla" *The Star* (18 June 2007) <http://www.thestar.com/news/article/226454>

⁹⁹³ Roadsworth, *Interview*, *supra* note 987.

⁹⁹⁴ Manco, *Stencil Graffiti*, *supra* note 980 at 11. The hegemonic legibility of capitalist cities intensifies the threat of hip hop graffiti's illegibility: it is frequently interpreted as 'a flaunting of nonsense in an exclusive conversation between individual writers,' 'an exclusionary device which dares to traffic meaning in the urban sphere without using the simple visual vernacular of the everyday sign.' Young, *Judging the Image*, *supra* note 18 at 73. See further Stewart, *Crimes of Writing*, *supra* note 67 at 219.

⁹⁹⁵ Roadsworth, *Interview*, *supra* note 987. Kohl, the director of *Roadsworth: Crossing the Line*, said 'I like some graffiti, but most of it is very limited and exclusive. What Roadsworth does is inclusive... his purpose is to engage the public imagination.' Cited in Quill, "A rocky road to acclaim", *supra* note 970 at E.4.

Graffiti and street art allows artists to work in an unmediated manner, unlike the art institution and commissioned public art, which both typically involve numerous decision-makers in a project from conception to fruition. Roadsworth was politically motivated, but also working instinctively, and recalls being obliged to articulate a purposive vision behind his open-ended art pieces as he transitioned from outlaw to criminal to celebrity to authorized artist.⁹⁹⁶ Regardless of the writer's intention, producing art on the street is in itself a form of resistance to sanctioned imagery. The unauthorized visual alteration of city spaces is a type of rebellion against the capitalist construction of space. Graffiti and illegal street art has long been credited with challenging the 'aesthetic of authority'⁹⁹⁷ and undermining our 'orthodox senses of urbanity – of order, cleanliness, purity and integrity,'⁹⁹⁸ and disrupting the hegemonic commercialized codes of property, propriety, and bounded space.⁹⁹⁹ While graffiti is inherently political, in that the defiant act of getting up is in essence one of rebellion and reclamation, street art often quite obviously draws on the commercialization of space in order to produce meaning; the

⁹⁹⁶ "J'avais commencé à peindre de façon spontanée. Je n'y avais pas vraiment pensé avant. Mais là, il a fallu que je développe un langage et que j'élabore sur mes intentions. Tout cela m'a forcé à articuler ma pensée", Jean-Christophe Laurence, « Roadsworth: Crossing the Line Star de l'asphalte » *La Presse Cinema* (22 novembre 2008) at 10.

⁹⁹⁷ Jeff Ferrell, *Crimes of Style: Urban Graffiti and the Politics of Criminality* (Boston, Mass.: Northeastern University Press, 1996) at 178. 'graffiti threatens not only the economic value of private property, and the political control of property and space, but the sense of ordered style, the aesthetic of authority, that is intertwined with them. When those in authority assign epistemic and aesthetic traits to graffiti, they reveal in the process their own sense of beauty, meaning and power.' *Ibid.* 179.

⁹⁹⁸ Halsey & Young, "Our Desires are Ungovernable," *supra* note 976 at 296.

⁹⁹⁹ Brassai, one of the earliest photographers documenting graffiti, called it "subversive energy," the "violent groundswell," the "mastering [of] the frenzy of the unconscious". Brassai, "From Cave Wall to Factory Wall," in *Brassai. The Monograph*, ed. Alain Sayag and Annick Lionel-Marie (Boston: Little Brown, 2000) at 292. 'Graffiti writing breaks the hegemonic hold of corporate/governmental style over the urban environment and the situations of daily life. As a form of aesthetic sabotage, it interrupts the pleasant, efficient uniformity of 'planned' urban space and predictable urban living.' Ferrell, *supra* note 997 at 176. 'I contend that graffiti arouses such a response because it changes the way we experience the city. It causes an interruption to a commercialised system of signs and codes. It offers a possibility of difference and exposes cracks in the ordered routine of everyday life. Street art conveys a lifestyle that baffles those driven by a world of economy. It takes inhabitants on a treasure hunt to unknown places where countless gifts of creative, unexpected inspiration lie in wait.' Susan Bird, "Aesthetics, Authority and the Outlaw of the Street" (2009) 3 *Public Space: The Journal of Law and Social Justice* 1 at 2.

affective punch of street art is dependent on the pervasive privatization of public space.¹⁰⁰⁰

By targeting the surface of the street, Roadsworth was not only intervening in city-regulated property, but also in public space *par excellence*. There is a rich history of linking streets to broader notions of democracy, urban civility and the public sphere.¹⁰⁰¹ Jane Jacobs defined sidewalks as ‘the main public place of a city’ and ‘its most vital organs.’¹⁰⁰² Nicholas Blomley emphasizes that streets, sidewalks, squares and parks are not ‘public’ simply because they are publicly owned, but because ‘they are spaces within which the ‘public sphere’ is formed, policed and contested.’¹⁰⁰³ Legally, the use of streets has often been equated with the exercise of the privileges and rights of citizenship.¹⁰⁰⁴ Streets are not merely spaces of physical transit but places of political communication and contestation.¹⁰⁰⁵ They are frequently seen as sites of political inclusiveness,¹⁰⁰⁶ romanticized as symbols of democracy,¹⁰⁰⁷ and exalted as settings for

¹⁰⁰⁰ Wacławek, *supra* note 984 at 185.

¹⁰⁰¹ Some of this scholarship is nostalgic for an inclusive public space never actually realized in history. See further Rosalyn Deutsche, *Evictions: Art and Spatial Politics* (Cambridge, Mass: MIT Press, 1996); Iveson, *supra* note 988 at 6.

¹⁰⁰² Jane Jacobs, “The Uses of Sidewalks,” in *The Death and Life of Great American Cities* (New York: Random House, 1961). See further Anastasia Loukaitou-Sideris, Evelyn Blumemberg & Renia Ehrenfeucht, “Sidewalk Democracy: Municipalities and the Regulation of Public Space” in Eran Ben-Joseph & Terry S. Szold, eds. *Regulating Place: Standards and the Shaping of Urban America* (London: Routledge, 2005) 141.

¹⁰⁰³ Nicholas Blomley, “Introduction” in Nicholas Blomley, David Delaney & Richard T. Ford, eds., *The Legal Geographies Reader: Law, Power and Space* (Oxford, Blackwell, 2001) [“Introduction”] at 3.

¹⁰⁰⁴ ‘Whenever the title of the streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights, and liberties of citizens.’ *Hague v. CIO*, 307 U.S. 496, 515 (1939).

¹⁰⁰⁵ In his urban study, *Great Streets*, Allan Jacobs points out: ‘Streets are more than public utilities, more than the equivalent of water lines and sewers and electric cables, which, interestingly enough, most often find their homes in streets; more than linear physical spaces that permit people and goods to get from here to there. These may be the primary or only reasons for a few public ways, toll roads, freeways, turnpikes, but only a very few... Communication remains a major purpose of streets, along with unfettered public access to property...’ Allan Jacobs, *Great Streets* (Cambridge: The MIT Press, 1993) at 3.

¹⁰⁰⁶ Don Mitchell, “Political Violence, Order, and the Legal Construction of Public Space: Power and the Public Forum Doctrine” (1996) 17:2 *Urban Geography* 152.

¹⁰⁰⁷ Michael Walzer, “Pleasures and Costs of Urbanity” (1986) 33:4 *Dissent* 470.

debate and political action.¹⁰⁰⁸ Don Mitchell argues that ‘revolutions entail a taking to the streets and a taking of public space,’¹⁰⁰⁹ and that only on the streets can marginalized groups make themselves publicly (and thus politically) visible enough ‘to be counted as legitimate members of the polity.’¹⁰¹⁰ Lefebvre spoke of ‘the right to claim presence in the city, to wrest the use of the city from privileged new masters and democratize its spaces.’¹⁰¹¹ As Roadsworth notes,

I miss the possibilities that exist in doing stuff out in public, creating unexpected situations or potential surprises for the world when they wake up. Doing stuff on the street has a certain power. There’s a certain audience, there’s a certain impact that’s created. That kind of impact will never exist in the context of organized and institutionalized event.¹⁰¹²

Guilty Pleasures

In their interviews with graffiti writers in Melbourne, Mark Halsey and Alison Young found that the *pleasure* associated with ‘the affective or visceral elements of writing,’¹⁰¹³ ranging from the physical experience of holding the spray can,¹⁰¹⁴ to individual pride in one’s work, to ‘pleasures of recognition,’¹⁰¹⁵ was a powerful motivating factor in continuing to make illegal art. Likewise, Roadsworth derived many sources of satisfaction from his work:

¹⁰⁰⁸ Lynn Staehli and Albert Thompson, “Citizenship, Community, and Struggles for Public Space” (1997) 49:1 *Professional Geographer* 28.

¹⁰⁰⁹ Don Mitchell, “The End of Public Space? People’s Park, Definitions of the Public, and Democracy” (1995) 85: 1 *Annals of the Association of American Geographers* 108 [“End of Public Space?”] at 124.

¹⁰¹⁰ *Ibid.* at 115.

¹⁰¹¹ Henri Lefebvre, “*The Right to the City*” in Eleonore Kofman & Elizabeth Lebas, trans. and eds., *Writings on Cities* (London: Blackwell, 1996 [1967]) [*Writings on Cities*] 151. See further Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford Press, 2003).

¹⁰¹² *Crossing the Line*, *supra* note 964.

¹⁰¹³ Halsey & Young, “Our Desires are Ungovernable,” *supra* note 976 at 279, 281 285, 289.

¹⁰¹⁴ Halsey and Young note, ‘there has been little discussion of the pleasures derived for writers through the act of writing: seeing the can or pen in the hand, seeing the words take shape, feeling a connection between their control of the implement and the writing as it appears on the surface.’ *Ibid.* at 282.

¹⁰¹⁵ *Ibid.* at 279.

There was the creative, artistic pleasure I derived from it. A desire to inject a sense of playfulness into my own life and surroundings not to mention the feeling of adventure and the undeniable rush associated with breaking the law. There was the egotistical thrill of getting up and the vicarious pleasure associated with the thought of an anonymous spectator discovering something I had left on the street.¹⁰¹⁶

Roadsworth here acknowledges the affective thrill of breaking the law, or of occupying a space beyond or outside the law. During his first interview to *The Gazette*, when his identity was still a secret, Roadsworth likens his experience to being a superhero with a hidden identity: 'There's a thrill in hearing people say, 'Hey, did you see that?' It's kind of a Clark Kent thing.'¹⁰¹⁷ He later recalls the weight of 'leading a secret life.'¹⁰¹⁸ 'When I was doing (my stencils), I wasn't talking about it. It was a very personal activity. Only a few friends knew about it. It was a guilty pleasure. I was almost embarrassed about it.'¹⁰¹⁹ As is common with graffiti writers, these pleasures were addictive and the practice intensified – over a three-year period, Roadsworth did hundreds of pieces. Towards the end, he recalls, 'I had this momentum going where I was almost addicted. I was like a gambler, knowing you're really pushing your luck but you can't help it.'¹⁰²⁰ Perhaps if he had been less prolific, the police would simply have asked him to stop.¹⁰²¹ There were warning signs that he was pushing his luck - both a documentary filmmaker and a reporter at *The Gazette* had managed to track him down.

I went from being anonymous to people coming up to me at parties and asking "Are you the guy that is doing the stuff on the street?" So I was getting kind of nervous, and the night I got arrested, I remember just thinking like this is the last

¹⁰¹⁶ Roadsworth, "Artist Statement" (2007) available on website: <http://www.roadsworth.com/main/index.php?x=page&title=STATEMENT> (Last accessed Feb 29, 2012). ["Artist Statement"].

¹⁰¹⁷ Roadsworth interviewed in Dunlevy, "Artist gets his show on the road," *supra* note 965.

¹⁰¹⁸ *Crossing the Line*, *supra* note 964.

¹⁰¹⁹ T'Cha Dunlevy, "Rough road ends for street artist" *The Montreal Gazette* (26 January 2006) at D.8

¹⁰²⁰ *Crossing the Line*, *supra* note 964.

¹⁰²¹ In 2001, the police asked Maclean, a Mile-End based artist, to stop putting tape on ARRET signs to make them say 'A R T,' without actually arresting him. François Cardinal, "Illégal, l'art urbain?" *La Presse* editorial (8 janvier 2005) A19.

thing ... I can't ... I've got to chill and it was November too so it was the end of the season, but I really wanted to do this last thing...¹⁰²²

Documentary footage of Roadsworth in action taken shortly before he was arrested demonstrates that his work shared graffiti's 'hounded scene of production.'¹⁰²³ A figure balances on a bike holding several large pieces of cardboard under his arm, the stencils pressed between them. Hooded, his face still hidden from the camera, he waits for a car to pass, steps out onto the road and carefully positions the cardboard stencil, adjusting as necessary. He retreats for a car to pass before stepping forward again, a spray can tucked up his long sleeve. Holding the can with both hands, he uses long strokes to saturate the surface with paint, working quickly and efficiently. When not spraying, he is standing alert and on the lookout.

Some pieces I do, especially in more sort of high profile busy areas, could take the whole night because it is not about the execution, it's the waiting game. It's a lot of patience, it's waiting for cars and waiting for traffic... it's just being very cautious. Sometimes it would take me the whole night just to do one because I was very wary about being arrested.¹⁰²⁴

Roadsworth recalled that *Candles* – a row of white stenciling for the wicks, and then swirls by hand for the flames - took a particularly long time because he was on a busy street next to St Laurent. At the end of a night's work, Roadsworth would retrace his steps, taking the photographs that would later be used as evidence against him:

Often I would carry my camera, go out at night, I'd start at midnight or 1 o'clock, 2 o'clock in the morning, I'd go all night and then by the time morning came I'd have my camera on me, I'd just retrace my steps and take pictures of everything. Plus the light is nice in the morning... 6 o'clock in the morning.¹⁰²⁵

¹⁰²² Roadsworth, *Interview*, *supra* note 987.

¹⁰²³ Stewart, *Crimes of Writing*, *supra* note 67 at 218

¹⁰²⁴ Roadsworth, *Interview*, *supra* note 987.

¹⁰²⁵ Roadsworth, *Interview*, *supra* note 987.



Figure 9 *Candles*, Fairmount Ave and Saint-Dominique St, September 2004 and *Full Asphalt Jacket*, Rivard St. and Saint-Denis Blvd., Montreal, Quebec. October 2004.

Roadsworth's practice shows how photography has become part of the graffiti act: getting the shot is just as important as writing the piece. Even while graffiti as art object is valued for its ephemerality, as an artistic practice it is almost incomplete without being captured in some way: 'Graffiti artists do what we do to photograph it. You're accustomed to feeling this is never going to last forever. So we photograph them for our archives.'¹⁰²⁶ For some graffiti artists, photographs on magazines and internet sites do not document but constitute their artistic achievement.¹⁰²⁷ Rather than considering the

¹⁰²⁶ D Gonzalez, "Walls of Art for Everyone, but Made by Not Just Anyone", *New York Times* (4 June 2007) <http://www.nytimes.com/2007/06/04/nyregion/04citywide.html>

¹⁰²⁷ The practice of documenting feats and producing magazines, videos and websites to share with others occurs across numerous subcultures, including skateboarding, snowboarding, street racing and BASE jumping, see eg. J. Ferrell, D. Milovanovic and S. Lyng, "Edgework, Media Practices, and the Elongation of Meaning (2001) 5:2 Theoretical Criminology 177. As the editors of the Wooster Collective pointed out in an interview: 'The most positive effect is that the internet allows the movement to be completely inclusive on a global level. The current street-art movement is a global phenomenon that is being fuelled largely by the internet. With the internet you now don't have to live in New York, Paris, London, Barcelona, or São Paulo to get your work up and get noticed.' See interview in Pitchaya Sudbanthad, "Roundtable: Street Art" *The Morning News* (23 March 2005) http://www.themorningnews.org/archives/personalities/roundtable_street_art.php Brazilian reverse-graffiti artist and photographer Alexandre Orion takes the fusion of photography and stencil art to a new level,

audience of the physical graffiti site, they paint, take a flick, and send it off to numerous graffiti magazines or post it online.¹⁰²⁸ Being photographed elevates graffiti to the status of ‘worth looking at,’ placing it into a network of circulating images, and thus affecting the notion of what legitimately belongs in the public sphere.¹⁰²⁹ British street artist Banksy observes how the internet has changed the practice of graffiti:

The web has done wonders for graffiti; it perfectly reflects its transient nature, and graffiti is ludicrously overrepresented on its pages. The ability to photograph a street piece that may last for only a few days and bounce it round the world to an audience of millions has dramatically improved its currency. On the other hand, the internet is turning graffiti into an increasingly virtual pastime. It is now possible to achieve notoriety by painting elaborate pieces in secluded locations, without the associated risk of arrest that is usually attached. By posting photographs online you can become a significant graffiti writer from a town where none of your work is actually visible.¹⁰³⁰

Many of us now experience graffiti primarily through such photographs, which flatten and ignore the effort, risk and effects of how these artworks came to be.¹⁰³¹ Roadsworth’s work has taken on another life through the photographs on the website, which allow him to add names and captions which convey his political and artistic intent. Part of his identity-work as an artist involves giving his art a coherent political vision, formulating a statement and performing a reading of the political implications of the

sometimes waiting for days in order to photograph a moment of synchronicity between his work and the passerby. www.alexandreorion.com/ See Waclawek, *supra* note 984 at 101.

¹⁰²⁸ One of the first graffiti websites and now a major hub for graffiti on the internet is the *Art Crimes* site, (www.graffiti.org) begun in 1994 by Susan Farrell with a few photos of graffiti in Atlanta and Prague. The site has reviews of nearly two hundred graffiti magazines, and now contains thousands of images from 445 cities and attracts 30,000 hits per day. *Art Crimes* archives a particular type of graffiti deemed to have aesthetic value, with the sites authors claiming that they want to “spread the truth that this kind of graffiti, called ‘writing’ is being done by *artists* who call themselves ‘writers,’ not by gangs” (original emphasis). <http://www.artcrimes.com/index/story.html>

¹⁰²⁹ Susan Sontag, *On Photography* (New York: Farrar, Straus & Giroux, 1977) at 3 and 9.

¹⁰³⁰ Banksy, “The Writing on the Wall” *The Guardian* (24 March 2006) <http://www.guardian.co.uk/artanddesign/2006/mar/24/art.australia> Graffiti-spotting, and being the first to capture a new piece of graffiti by photographing it, has become a competitive sport. This often means that works of graffiti are displayed on a publicly accessible image-hosting website like Flickr, while their physical location is kept a secret. Karl Fabricius, “Graffiti is Watching You” (17 August 2009) <http://www.environmentalgraffiti.com/featured/graffiti-watching-you/14031>

¹⁰³¹ Young, *Judging the Image*, *supra* note 18 at 4 pursues a similar argument in relation to Tunick’s photography.

photographs of his works. The pedestrian crossing as a row of bullets is named *Full Asphalt Jacket* [Figure 9] and explained as ‘a tribute to the relationship between the military-industrial complex and our fuel-injected lifestyle,’ and *Cattle Crossing* [Figure 10] contains the caption: ‘No matter what your mode of transportation, it’s easy to feel like cattle in an environment where the imperative to move product and people engenders a kind of herding instinct.’¹⁰³² The pedestrian crossing transformed into a giant footprint *North American Footprint* [Figure 10] is labeled: ‘If you’re from Bangladesh, your ‘eco-footprint’ is about the size of... a foot. If you’re from North America it looks something like this.’¹⁰³³ In this way, his photographs become a political message rather than a trace of a performative event, a non-instrumental response to the urban environment that generates an embodied encounter in space.

The photographs which Roadsworth took enable us to analyze his art today, but photographing street art necessarily transforms its meaning and affective force. The intersection between the work, the street and the viewer creates an element of surprise on the artwork’s discovery, allowing the artwork to momentarily ‘complete’. The meeting point of art, place and person can be conceived of as a ‘performative space... in which the artist, the work, the viewer and the location all play a part: the artist through the process of diffusion, the work and viewer by virtue of reception, and the location by providing the site of confrontation.’¹⁰³⁴ In the absence of the work’s relationship to its place of diffusion, the piece’s material presence in a particular site is obscured, and the dislocation transforms the piece or in a way constitutes the work itself, blurring the line between event and document, object and experience. Graffiti understood as surprise encountered accidentally vanishes. The digital realm unifies those who have access to it, creates new publics and allows for a new life for travelling digital images, but also fundamentally distances its users from physical experiences with the street art *in situ*.

¹⁰³² <http://roadsworth.com/main/index.php?showimage=179>

¹⁰³³ <http://roadsworth.com/main/index.php?showimage=163&category=2>

¹⁰³⁴ Waclawek, *supra* note 984 at 96.

II. Repurposing Legal Semiotics

Street signs are always serious, never playful: they always implicitly indicate that ‘we are not kidding around.’ Brian Sutton-Smith distinguishes between the ‘deadly serious’ rule-bound character of ordinary play, of which law is one manifestation,¹⁰³⁵ with *playfulness*, defined as unpredictable and disruptive of all rules and expectations. Playfulness exists outside of ordinary play, it involves ‘play[ing] with the frames of play’ itself.¹⁰³⁶ To be playful is to engage in an activity both bound *and* unbound by rules. Playfulness thus consists not in an absence of rules, but a relationship with them. Roadsworth’s art was playful in this sense: it attached to a rule and subverted that rule. His initial bike signs deliberately recalled the signs used to designate bike lanes, but their positioning and level of formal detail marked them as different, less functional and more suggestive. The footprint pedestrian crossing and the heart-beat median strip would not be so effective without the viewer’s delighted recognition that the authorised semiotics of the city are being played with. Roadsworth’s art cites or parodies the sign’s instrumentalism and therefore leaves all signs open to a reinterpretation or at least to doubt.

Even that most seemingly directive and explicit of legal forms – a street sign – marshals a cultural basis for its operation. We respond to road signs as normative because we construct a purpose or rationale animating them; we realize that a message is being communicated, that this is a *directed* form of language. Jason McLean and Roderick Macdonald show that when we encounter a red shape with a diagonal line in a public place like a street or at the entrance to a carpark, we bring ‘an imported assumption of normativity. We assume that the pictogram is meant to command or prohibit action.’¹⁰³⁷ These assumptions are neither external nor internal to such signs

¹⁰³⁵ Johan Huizinga, *Homo Ludens: A Study of the Play Element in Culture* (Boston: Beacon, 1950) at 78.

¹⁰³⁶ Brian Sutton-Smith, *The Ambiguity of Play* (Cambridge, Mass.: Harvard University Press, 2001) at 148.

¹⁰³⁷ The authors illustrate their thesis with a neat example of the ineluctably social dimension to discovering and engaging with a legal rule: ‘No theory of legal interpretation that rests only upon words, grammar and syntax, and no general theories of authorial intent, the temper of the times, or the technical capacities of natural languages, can alone answer why in Montreal in 2005 “No Toilets in Park” will typically be

themselves, but are bound up in the interpretive practice of law as a social enterprise.¹⁰³⁸ To read a street sign as prohibiting or commanding is to discover and engage with a legal rule.¹⁰³⁹ Roadsworth intervened directly in this process. He even used the same type and colour paint as existing road markers, themselves the product of stenciling.¹⁰⁴⁰ As one Plateau resident said, ‘It is like someone is playing a game.’¹⁰⁴¹ Usurping the function of the city authorities was part of his playful intent: ‘I want people to think that maybe, just maybe the city decided they should put an ON switch in a parking lot. I’ll let people decide why the city might want to do such a thing.’¹⁰⁴² Roadsworth’s work did not only expose the political constellation underlying a particular regime of city semiotics. In opening up the inconsistency and ambiguity of a legal form that is intended to be fixed and certain, he challenged the instrumentalism upon which legal language relies.

Moving through the City

By taking the lane markings and pedestrian crossings as his raw material, Roadsworth’s work was aimed squarely at disrupting the givenness of the semiotic order that governs our everyday movements throughout the city. The way a city is designed and managed

understood as descriptive and “No Vehicles in Park” will usually be read as prohibitive.’ Roderick Macdonald & Jason MacLean, “No Toilets in Park” (2005) 50 McGill Law Journal 721 at 724.

¹⁰³⁸ ‘Neither the signified referents nor the normative consequences of the signs are to be found within their formulation and presentation,’ rather, the sense of such signs ‘is bound up with and constitutive of the matrix of social relations through which they are generated and read.’ *Ibid.* Fuller writes that law is the ‘product of sustained purposive effort’ on the part of its participants. Lon L. Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, 1969) at 106.

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ Other stencil artists have also drawn upon the powerful effect of mimicking official city semiotics to execute pieces of subversive art. British stencil artist Banksy drew on the official crest to create a logo for a fake streets and sanitation agency with the words: ‘This Wall is a Designated Graffiti Area.’ He took follow-up photographs to observe how the wall was allowed to become covered with graffiti. Banksy, *Wall and Piece* (London: Random House, 2005). In Chicago, dozens of official-looking logos for *The Department of Space and Land Reclamation* appeared around the city, advertising an event but also announcing the presence of this new ‘city department.’ The official look of the stencils camouflaged them and many were allowed to remain. MacPhee, *supra* note 981 at 27.

¹⁰⁴¹ Quoted in Cooper, “When the stencil hits the road”, *supra* note 971.

¹⁰⁴² *Crossing the Line*, *supra* note 964.

produces and disciplines the bodies that move through it.¹⁰⁴³ People in modern cities ‘move about in a space which tends towards a geometric isotopy, full of instructions and signals, where qualitative differences of places and moments no longer matter.’¹⁰⁴⁴ The city is increasingly structured around the car, and geared towards the movement of vehicular traffic.¹⁰⁴⁵ Traffic management segregates pedestrians, cyclists, and cars, which makes it difficult to conceive of pedestrians having an equal value to drivers.¹⁰⁴⁶ Ironically, research has found that fewer traffic signs increase safety, because without any clear right of way, motorists are forced to slow down to safer speeds, make eye contact with pedestrians, cyclists and other drivers, and decide among themselves when it is safe to proceed.¹⁰⁴⁷

Roadsworth chose the surface of the roads as part of an effort to combat ‘what seemed like an exaggerated deference shown to the road, even by graffiti writers whose work

¹⁰⁴³ Henri Lefebvre, *Rhythmanalysis: Space, Time and Everyday Life* (London: Continuum, 2004). ‘(T)he form, structure and norms of the city seep into and effect all the other elements that go into the constitution of corporeality and/as subjectivity,” in Elizabeth Grosz, “Bodies-Cities” in Beatriz Colomina, ed., *Sexuality and Space* (Princeton: Princeton University Press, 1992) at 301.

¹⁰⁴⁴ Lefebvre, *Writings on Cities*, *supra* note 1011 at 128. As Butler writes, drawing on Lefebvre, urban abstract space is buttressed by ‘an abstract and quantified social time, dependent on the preeminence of linear repetition over other rhythms in the city’ and privileging ‘the unrelenting, repetitious flow of high-speed traffic as the dominant rhythmic mode’ of city life. He writes that ‘political struggles aimed at resisting the logic of abstract space-time must not only be concerned with the reappropriation of physical space,’ but must also reassert ‘alternative rhythms of movement through space’ to that of the motor car. Chris Butler, “Slicing Through Space: Mobility, Rhythm and the Abstraction of Modernist Transport Planning” (2008) 17 Griffith Law Review 470 at 472 [“Slicing Through Space”]. See further John Urry, ‘The System of Automobility’ (2004) 21 Theory, Culture and Society 25 at 25, and Mimi Sheller & John Urry ‘The City and the Car’ (2000) 24 International Journal of Urban and Regional Research 737 at 738; both cited in Butler, “Slicing Through Space” at 473.

¹⁰⁴⁵ In 1967, Henri Lefebvre called the car ‘the current pilot-object in the world of commodities’ (Lefebvre, *Writings on Cities*, *supra* note 1011 at 167) and wrote that modern governments hold an absolute ideological view of the city as ‘a network of circulation and communication’ at 98.

¹⁰⁴⁶ So-called “‘second generation’ traffic calming,” a combination of traffic engineering and urban design, aspires to dismantle barriers between the road and the sidewalk, as well as between vehicles, pedestrians and cyclists, and to return streets to their ‘traditional function as civic gathering places.’ Ben Hamilton-Baillie, “Shared Space: Reconciling People, Places and Traffic” (2008) Built Environment (Alexandrine Press) available at <http://www.hamilton-baillie.co.uk/>

¹⁰⁴⁷ Holland and Denmark have removed traffic lights in some towns and cities, as well as white divider lines, sidewalks and speed limits, which led to a reduction in fatalities. David Engwicht, a shared-spaces proponent in Brisbane, Australia, recommends that standardized signage and road markings be reduced to a minimum “as they create predictability and contain no intrigue. They also reinforce that a street belongs exclusively to the motorists.” Cited in Linda Baker, “Why don’t we do it in the road?” (20 May 2004) Salon.com http://www.salon.com/technology/feature/2004/05/20/traffic_design/print.html

nevertheless saturated the surrounding walls.’¹⁰⁴⁸ The artist explains that ‘roads have a unique status in that (their) sole purpose is one of transit, of movement. One does not typically dilly-dally on the road. In this sense it is not a location at all but an ‘anti-location,’ an intermediary between points A and B.’¹⁰⁴⁹ His aim was to ‘shake people out of the everyday,’ to ‘introduce an element of surprise into an otherwise very uniform and predictable environment.’¹⁰⁵⁰ ‘You go through the city and everything is designed for you. I want to question the way space is distributed.’¹⁰⁵¹ As Roadsworth explained to a journalist shortly after his arrest,

The symbols on the street are a method of communication, but in a dry, utilitarian way, so I wanted to inject a little poetry, for lack of a better word. There's this banality and predictability to city life, and that's enhanced by urban planning and the way our movement is directed. I wanted to play with that.¹⁰⁵²

The City’s main rationale for prosecuting Roadsworth’s was that his play with signs made them less legible and therefore less effective: people might get distracted, even misinterpret markings, to dangerous effect. As Roadsworth later wrote, ‘If public safety were the main concern, then there would be bike paths on every street to prevent the many cyclist deaths and injuries that occur every year, more protection for pedestrians and a serious effort to minimize car traffic in general. And if my street art constitutes a threat to public safety, then what of all the distractions that line the road in the form of advertising?’¹⁰⁵³ Roadsworth was thus able to turn the public safety argument into an

¹⁰⁴⁸ Roadsworth, Interview with Anna Waclawek (12 October 2007) <http://roadsworth.com/home/2012/interview-with-anna-waclawek/>

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ Ryan McGreal, “Roadsworth: Art or Vandalism?” *Raise the Hammer* (26 March 2009) <http://www.raisethehammer.org/blog/1280> As explained in his artist’s statement on the website in 2007: ‘The ubiquitousness of the asphalt road and the utilitarian sterility of the “language” of road markings provided fertile ground for a form of subversion that I found irresistible. I was provoked by a desire to jolt the driver from his impassive and linear gaze and give the more slow-moving pedestrian pause for reflection.’ Roadsworth, “Artist Statement”, *supra* note 1016.

¹⁰⁵¹ Roadsworth interviewed in Dunlevy, “Artist gets his show on the road,” *supra* note 965.

¹⁰⁵² Roadsworth, Interview with Patrick Lejtenyi, “Roadsworth R.I.P.” *Montreal Mirror* (20-26 January 2005) 20(30).

¹⁰⁵³ Roadsworth & Bethany Gibson, *supra* note 970 (unpaginated).

occasion for raising questions about the distinction between sanctioned and illicit imagery.¹⁰⁵⁴ 'We aggressively pursue graffiti writers for scrawling their names on a wall across from a massive backlit billboard advertising Big Macs.'¹⁰⁵⁵ One reporter argued that advertising is more distracting and thus dangerous than Roadsworth's own 'infiniment plus discrètes'¹⁰⁵⁶ pieces Roadsworth redirected the language of security, safety and vandalism towards advertising, cars and concrete, arguing that *they* pollute and diminish the cityscape.¹⁰⁵⁷ 'Our public spaces are polluted with advertising, cars, concrete ... why focus on graffiti?'¹⁰⁵⁸ As Banksy has written,

Modern street art is the product of a generation tired of growing up with a relentless barrage of logos and images being thrown at their head every day, and much of it is an attempt to pick up these visual rocks and throw them back.¹⁰⁵⁹

Here, Roadsworth and Banksy do not defend street art on the basis that it is not pollution. Instead, they repurpose the very language of pollution that the law uses to characterize them, saying to legally sanctioned advertising: 'Yours is the illicit representation. Yours is the kind of representation which ought to be suppressed.' This is a specifically juridical argument – one which becomes available, as Butler noted, by

¹⁰⁵⁴ Cardinal, *supra* note 1021; see also Lamarche, "Le peintre poète du macadam", *supra* note 989; and art critic Leo Rosshandler, quoted in Mario Girard, "L'Art Urbain en Question" *La Presse* (13 January 2005) at 1. 'What's the difference between street art or graffiti and advertising? If you pay, you can do whatever the hell you want to.' University of Toronto professor, cited in Graeme Hamilton, "Artist arrested for painting outside lines" *National Post* (17 December 2004) A.3.

¹⁰⁵⁵ Roadsworth cited in Laura Boudreau, "A Divided Highway" (2005) *Spacing.ca* <http://spacing.ca/art-roadsworth.htm> Roadsworth suggests that the public mischief laws assume that 'any form of public expression not intended to sell something is suspect and therefore imbued with a hidden agenda.' Roadsworth, "Artist Statement" *supra* note 1016.

¹⁰⁵⁶ Cardinal, *supra* note 1021.

¹⁰⁵⁷ 'I don't think we've really resolved as a society or as a community what the role of public space is exactly and who has the right to it and what kind of imagery and what kind of message goes into that public space. Whether you think it's enhancing the city or not I think there's enough crap that's diminishing the city, in my opinion, diminishing city life, that I feel completely justified in what I did, at least morally.' *Crossing the Line*, *supra* note 964.

¹⁰⁵⁸ Roadsworth cited in Brett Bundale, "Roadsworth returns (with a permit)" *The Montreal Gazette* (31 May 2008) A3.

¹⁰⁵⁹ Banksy, "The Writing on the Wall", *supra* note 1030.

virtue of the uncontrollability of discourse and the *necessity* of law reproducing the very terms by which its purposes will be undermined.

Public Address

In the public spaces of the city, speech shaped towards communicative or instrumental ends is the norm. From the more subtle to the didactic persuasions of billboard advertising or political posters, to the more functional and utilitarian road markings, speed limits, no-parking zones and one-way street signs, each sign seeks to convey a particular message and shape behavior towards a particular end. By contrast, although there is sloganeering in street art, street artists share with the wider public a preference for art which manages to be subtle and open-ended, and not overtly didactic.¹⁰⁶⁰ Whereas traditional graffiti is often seen as 'declaratory',¹⁰⁶¹ Roadsworth's work was seen to invite a 'dialogue'.¹⁰⁶² His art was widely praised in the media for cultivating ambiguity,¹⁰⁶³ for its 'whimsical charm',¹⁰⁶⁴ for being 'originale, ludique, pleine de fraîcheur, d'intelligence, de charme et d'humour'.¹⁰⁶⁵ As he explains, 'It's not saying anything so much as raising questions'.¹⁰⁶⁶

An open-ended quality of expression would lend itself better to interpretation and dialogue than the "FUCK BUSH" or "OIL=WAR" kind of language that is

¹⁰⁶⁰ One reason Westminster City Council declared Banksy's "One Nation Under CCTV" on the side of a post office building to be graffiti and ordered it to be removed, despite the considerable financial value of the work, may be because 'it's an overt, written message rather than the more cryptic, metaphorical pieces for which the artist is known.' Farquharson, *supra* note 984. As UK street artist Dr. D said, 'hopefully, the artist knows how to make a point with a laugh rather than any righteous pondering.' *Ibid*.

¹⁰⁶¹ Mark Halsey & Alison Young, "Meanings of Graffiti and Municipal Administration" (2002) 35:2 Australian and New Zealand Journal of Criminology 165 at 169 ["Meanings of Graffiti and Municipal Administration"]

¹⁰⁶² "l'image ambiguë permet plusieurs formes d'interprétations. Il y a un dialogue qui prend place, plutôt qu'un monologue, comme avec la publicité. La plupart des images qu'on voit dans la rue sont des monologues." Roadsworth, quoted in Lamarche, "Le peintre poète du macadam", *supra* note 989.

¹⁰⁶³ « L'artiste aime cultiver l'ambiguïté. » *Ibid*.

¹⁰⁶⁴ "Roadsworth's nice graffiti" *The Montreal Gazette* (22 December 2004) at A.28

¹⁰⁶⁵ François Houde, « On ne rigole pas avec l'art » *Le Nouvelliste* (Trois-Rivières) Arts et Culture, (13 janvier 2010) p. 31

¹⁰⁶⁶ Dunlevy, "Artist gets his show on the road", *supra* note 965.

typical of a protester's placard and that I felt people had become desensitized to.¹⁰⁶⁷

His stencils invited passersby to conceive of the city as an organic living and unpredictable surface: he 'makes the urban image-scape more human,'¹⁰⁶⁸ «redonner une forme d'humanité»¹⁰⁶⁹ to urban signage. Playing with scale, perspective and even time, Roadsworth's stencils drew pedestrians into an unexpected relation of asymmetry and delighted them with surprise, the eruption of the extraordinary in the everyday.¹⁰⁷⁰

Scholars have emphasized that cities are more than places: they are lived, embodied and representational spaces of movements and flows, rhythms, and the circulation of bodies and things, constructed within a multiplicity of discourses and networks.¹⁰⁷¹ This necessitates looking beyond the material dimensions of the city and into a form of sociability, asking how users of the city are brought together and sustained by and through shared representations. Space as psychologically lived in, or what Henri Lefebvre called representational space, is implicated in the very production of space itself. How we imagine a place, space, street, or city in large part creates the conditions

¹⁰⁶⁷ Roadsworth, "Artist Statement" *supra* note 1016.

¹⁰⁶⁸ Dunlevy, "Artist gets his show on the road", *supra* note 965.

¹⁰⁶⁹ Roadsworth, quoted in Louise-Maude Rioux Soucy, "L'artiste de la rue Roadsworth est absous" *Le Devoir* (18 janvier 2006) at b8.

¹⁰⁷⁰ Urban intervention work is 'site specific [...] and generally involves an element of unpredictability. Surprise or accidental encounter is part of what constitutes the experience of work.' Kym Priesse, ed. *Accidental Audience* (Toronto, ON: offsite collective, 1992) at 2. See also Ryan Fritsch, "The Ethics of Imagination: Levinas, Aesthetics and Poiesis in uTopia" (Masters Thesis: McGill University, Montreal).

¹⁰⁷¹ For Henri Lefebvre, the *urban* is not simply a product of processes of industrial production and capital accumulation, but it is 'more or less the *oeuvre* of its citizens,' a work of art that is constantly being remade. Lefebvre, "The Right to the City" in *Writings on Cities*, *supra* note 1011 at 117. See Chris Butler, "Sydney: Aspiration, Asylum and the Denial of the 'Right to the City'" in Andreas Philippopoulos-Mihalopoulos, ed., *Law and the City* (Abingdon, UK: Routledge-Cavendish, 2007) 205 at 214. According to Tim Creswell, 'the mobilities of bodies combine in space and time to produce an existential insideness – a feeling of belonging within the rhythm of life in place.' Tim Creswell, *Place: A Short Introduction* (Malden, MA: Blackwell Publishing, 2004) at 34. See further Sharon Meagher, ed., *Philosophy and the City: Classic to Contemporary Writings* (New York: SUNY Press, 2008); Nicholas Blomley, David Delaney & Richard Ford, *The Legal Geographies Reader* (Oxford: Blackwell, 2001); Doreen Massey, *Space, Place and Gender* (Minneapolis: University of Minnesota Press, 1994); Evelyn Ruppert, *The Moral Economy of Cities: Shaping Good Citizens* (Toronto: University of Toronto Press, 2006); Alexandra Boutros & Will Straw, eds., *Circulation and the City* (Montreal: McGill / Queens, 2010).

of possibility for how we act, which itself creates the contours of that very space.¹⁰⁷² Public space is material and symbolic, lived and imagined, always in a state of emergence, never complete and always contested, constituted in agonistic social relations.¹⁰⁷³ Nicholas Blomley writes that ‘the potential of public space can only be realized if it allows for spontaneous and unprogrammed encounters with others.’¹⁰⁷⁴ Roadsworth’s work reflected and appealed to this idea of a public space which has the capacity to enable the co-presence of people different from each other, fostering a kind of connection or proximity in which each other’s difference is recognized and acknowledged.¹⁰⁷⁵ Streets are places where ‘subversive forces, forces of rupture, ludic

¹⁰⁷² Creswell writes, ‘we do not live in an abstract framework of geometrical spatial relationships, we live in a world of meaning. We exist in and are surrounded by places – centers of meaning. Places are neither totally material nor completely mental; they are combinations of the material and mental and cannot be reduced to either.’ Creswell, *supra* note 974 at 13.

¹⁰⁷³ ‘Public space is the space in which such collaborations and contestations occur. Today, a profound source of social fragmentation flows from the demand by a series of intense contenders to occupy the authoritative center. That center must itself be pluralized.’ William E. Connolly, “Rethinking the Ethos of Pluralization” (1998) 24:1 *Philosophy & Social Criticism* 93 at 93. See Rosalyn Deutsche, “The Question of ‘Public Space’” (1998) Paper presented at the 8th Annual American Photography Institute National Graduate Seminar. Available from: http://www.thephotohraphy institute.org/journals/1998/rosalyn_deutsche.html and Rosalyn Deutsche, “Reasonable Urbanism” in Joan Copjec & Michael Sorkin, eds., *Giving Ground: The Politics of Proximity* (New York: Verso, 1999) 175. For scholarship at the intersection of law, space and power, see Wesley Pue, “Wrestling with Law (Geographical) Specificity vs. (Legal) Abstraction” (1990) 11:6 *Urban Geography* 566; Nick Blomley, “Property, Pluralism and the Gentrification Frontier” (1997) 12 *Canadian Journal of Law and Society / Revue canadienne droit et société* 187; Andreas Philippopoulos-Mihalopoulos, “Introduction: In the Lawscape” in Andreas Philippopoulos-Mihalopoulos, ed., *Law and the City* (London: Routledge-Cavendish, 2007) 1. Public spaces are not given but ‘always and ever recursively related to social relations.’ Nicholas Blomley, “Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid” (2003) 92 *Annals of the Association of American Geographers* 121 at 123. Public spaces are actively produced by ‘the authoritative inscription of legal categories, or the projection of legal images and stories on to the material world of things.’ Nicholas Blomley, David Delaney & Richard T. Ford, “Preface: Where is Law?” in Nicholas Blomley, David Delaney and Richard T. Ford, *The Legal Geographies Reader: Law, Power, and Space* (Oxford: Blackwell Publishers Ltd, 2001) at xii at xvii.

¹⁰⁷⁴ Blomley, “Introduction”, *supra* note 1003 at 3. As Erving Goffman wrote, public spaces are governed by norms of ‘civil inattention,’ which allow for a great number of strangers to inhabit or move through the same spaces. Erving Goffman, *Behavior in Public Places: Notes on the Social Organization of Gatherings* (New York: Free Press, 1963) at 84. See also George Simmel, *Metropolis and Mental Life* (Chicago: University of Chicago Press, 1961). As Jeff Ferrell argued, ‘spontaneity ... contributes to the threat which graffiti writing poses to those in authority.’ Ferrell, *supra* note 997 at 173.

¹⁰⁷⁵ Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998) at 11-12; Jane Jacobs, *Death and Life in American Cities*. Influential urban sociologist Richard Sennett, for instance, drawing on Arendt’s vision of the public realm as a space of encounter, values complexity, surprise and disorder as a way of creating spaces conducive to the comingling of strangers. Richard Sennett, “Reflections on the Public Realm” in Gary Bridge and Sophie Watson, eds., *A Companion to the City*

forces act and meet,¹⁰⁷⁶ where all of a city's 'inner contradictions can express and unfold themselves.'¹⁰⁷⁷

Roadsworth's work was viewed within a broader narrative of disenchantment about modernity, in which we live in rational, routinised, bureaucratized and secularized society where magic and mystery have no place.¹⁰⁷⁸ In *Metropolis and Mental Life*, George Simmel described how the modern city, with its continuous bombardment of the senses, has produced a uniquely urban consciousness that develops a protective layer against disrupting or threatening sensations or stimuli.¹⁰⁷⁹ Roadsworth's art was seen to counter this tendency:

Every day, city dwellers are bombarded with imagery they have no stake in or connection to - billboards, ad-wrapped buses, architectural blights. The human tone of Gibson's work - the playfulness and the element of surprise - was a reaction to that. It was a knowing wink, a whispered secret, a wake-up call

(Oxford: Blackwell, 2000). Sennet argues that cities are more than place in which we live but a space that engages our ethics, our sense of justice, and how we relate to difference and learn to communicate with one another: Richard Sennett, "The Civitas of Seeing" (1989) 5:4 Places 82. In his study of American cities during the last quarter of the twentieth-century, he found that neighbourhoods within cities had become increasingly homogenous ethnically as people elected to live close to people like themselves, which means they do not have to deal with those who don't share the same language and understandings, which in turn fosters more reluctance and apprehension - a vicious cycle. Richard Sennett, *The Uses of Disorder: Personal Identity and City Life* (London: Faber and Faber, 1996) at 42.

¹⁰⁷⁶ Roland Barthes, "Semiology and the Urban" in M. Gottdiener and A. Lagopoulos eds. *The City and the Sign: an introduction to urban semiotics* (Columbia University Press: New York, 1986) 87 at 96; see also Richard Sennett. *The Conscience of the Eye: The Design and Social Life of Cities* (Knopf: New York, 1990)

¹⁰⁷⁷ Marshall Berman, "Take it to the Streets: Conflict and Community in Public Space" (1986) 33:4 *Dissent* (summer) 476 at 484; see also Berman, Marshall. *All That is Solid Melts into Air: The Experience of Modernity* (New York: Simon and Shuster, 1982).

¹⁰⁷⁸ Rousseau found that the city, defined as the concentration of individuals in a limited space, destroys the social bond. 'It is [in the city] that men commit, in the midst of their kind, what no other species does among itself: they turn against themselves; they devour one another.' Jean Jacques Rousseau, *Essai sur l'origine des langues* in *Oeuvres complètes* (Paris: Gallimard, 1959) at 114 cited in Young, *Imagining Crime*, *supra* note 98 at 59. In her study of encounters in public urban space, Sophie Watson identifies two interweaving narratives of the city, one celebratory (the city is a space of surprise and living with difference) and the other threatening (the city as a space of mutual misrecognition and exclusion). Sophie Watson, *City Publics: The (Dis)Enchantments of Urban Encounters* (London: Routledge, 2006) at 1 and 7.

¹⁰⁷⁹ Simmel argues that 'the reaction of the metropolitan person to those events is removed to a sphere of mental activity which is least sensitive and which is furthest removed from the depths of personality.' Simmel, *supra* note 1074 at 325.

beckoning his fellow humans to lighten up and think outside the concrete box.¹⁰⁸⁰

Roadsworth's art became acceptable to the city more readily because it furthered the tenets of its own policies on contemporary authorized public art: the importance of attending to where the artwork is situated and allowing its location to determine its content.¹⁰⁸¹ The affective power of such art derives from unexpectedness and absorption, as opposed to the deliberate contemplative distance of art galleries. Discourses of public art place a premium on forms which ask questions rather than make statements, are human rather than concrete, dialogic rather than monologic, inviting rather than imposing, and unexpected rather than predictable. New genre public art aims 'to destabilize hegemonic discourses in public space by the introduction of dissonant aesthetic and cultural discourses.'¹⁰⁸² The power of Roadsworth's art consists in the act of public address itself, its raw assertion of aesthetic pluralism. By placing art in public places, 'we wildly multiply the possibilities for meaning, for the production of knowledge, the potential for subversion and resistance, and for concepts of community.'¹⁰⁸³ Roadsworth's incorporation into existing elements of the environment both exposes the ambiguity of the hegemonic construction of that space, and opens up the possibility of thinking the space otherwise.

Queering Semiotics

In targeting legal semiotics itself, Roadsworth potentially makes a stronger statement than outright violation of legal rules. As opposed to openly contravening or disregarding

¹⁰⁸⁰ Dunlevy, "Artistic wink", *supra* note 966.

¹⁰⁸¹ 'A work of public art is designed to be integrated into a public space, to reflect the history of the site, or to embellish it, taking into account its characteristics. Artists come up with an idea, elaborate a concept, choose the materials that will best serve their concept. The complete work expresses the talent and personality of the artist, his intent, as well as a theme and an event associated with a given period, in a given location...' Montreal City Council, "For a New Policy Framework," *Public Art Policy Framework* (April 2009).

¹⁰⁸² See Annie Gérin, "Introduction: Off Base" in Annie Gérin & James S. McLean, *Public Art in Canada: Critical Perspectives* (Toronto: University of Toronto Press, 2009) 3 at 7.

¹⁰⁸³ *Ibid.* at 19.

the legal form, Roadsworth is *queering* it. Queering refers to an uncanny deviation from the normative.¹⁰⁸⁴ For Sedgwick, writing in the context of queer theory's inquiry into sex and gender, queering is a performance which exposes and exploits 'the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone's gender [or] sexuality aren't made (or can't be made) to signify monolithically.'¹⁰⁸⁵ Queering is not simply an inversion of signification (a 'reverse-discourse' which 'reinstalls the version it seeks to overcome'¹⁰⁸⁶) but works as a kind of *différance* that oscillates in the interstitial space between binary oppositions (ie. sex/gender) and fixed categories in general. As a more general discursive and semiotic phenomenon, Butler calls queering 'a term for betraying what ought to remain concealed,' 'an exposure within language.'¹⁰⁸⁷ Queering causes things to lapse, balk and swerve: as Carolyn Dinshaw writes, 'queerness works by contiguity and displacement, knocking signifiers loose, ungrounding bodies, making them strange... Queerness articulates not a determinate thing but a relation to existent structures of power.'¹⁰⁸⁸ The more Roadsworth queers the city's own use of language, rather than infusing it with a separate distinct and immediately legible purpose, the more politically effective his work becomes. In suspending the law's normativity by repurposing its instrumental signs, he exposes law as a function of social and contextual power relations.

¹⁰⁸⁴ Butler, *Bodies that Matter*, *supra* note 172 at 176; Annamarie Jagose, "Feminism's Queer Theory" (2009) 10 *Feminism and Psychology* 157. For links between category of queer and the uncanny, see Nicholas Royle, *The Uncanny* (Manchester: Manchester University Press, 2003) at 42; Paulina Palmer, *The Queer Uncanny: New Perspectives on the Gothic* (Cardiff: University of Wales Press, 2012).

¹⁰⁸⁵ Eve Kosofsky Sedgwick, *Tendencies* (Durham, N.C.: Duke University Press, 1993) at 8. Butler links the notion of 'queering' to resignification and performativity, identifying queering as 'a contestation of the terms of sexual legitimacy' through the hyperbolic appropriation and reversal of the delegitimization signified by the term 'queer,' transforming it into a site of opposition. 'The hyperbolic gesture is crucial to the exposure of the homophobic 'law' that can no longer control the terms of its own abjecting strategies.' Butler, *Bodies that Matter*, *supra* note 172 at 232.

¹⁰⁸⁶ *Ibid.* at 21.

¹⁰⁸⁷ *Ibid.* at 176. Similarly, Jonathan Dollimore describes queering as 'the generating of internal instabilities within repressive norms.' Jonathan Dollimore, *Sexual Dissidence: Augustine to Wilde, Freud to Foucault* (Oxford: Clarendon Press, 1991) at 33.

¹⁰⁸⁸ Cited in Carla Freccero, *Queer/Early/Modern* (Durham: Duke University Press, 2006) at 19.

Butler locates the subversive possibilities of protest practices like street theatre in their resistance to easy legibility: 'subversive practices have to overwhelm the capacity to read, challenging conventions of reading, and demand new possibilities of reading.'¹⁰⁸⁹ She analyses the work of lesbian and gay activist group Act U performing Die-ins on the streets of New York: lying on the street within chalk lines like police markers for the dead. This protest was legible because it drew on the conventions developed within previous protest cultures, as well as the 'playing dead' in the civil rights movement, but, as Butler observes, 'it was a renovation... a new adumbration of a certain kind of civil disobedience.... It made people stop and *have to read* what was happening.'¹⁰⁹⁰ Protest art is subversive by demanding to be read, by holding out the possibility of legibility at the same time as withholding it. But immediate legibility does not work: the *deferral* of meaning is a crucial part of such aesthetic-political resistance:

What I worry about are those acts that are more immediately legible. Those are the ones that I think are most readily recuperable. But the ones that challenge our practices of reading, that make us uncertain about how to read, or make us think that we have to renegotiate the way in which we read public signs, these seem really important to me.¹⁰⁹¹

Such subversion cannot be entirely planned or calculated; indeed 'subversion is precisely an incalculable effect. That's what makes it subversive.'¹⁰⁹²

The political power of Roadsworth's art derives not from communicating certain political content, or from refusing to signify,¹⁰⁹³ but in refusing to signify monolithically and to

¹⁰⁸⁹ Butler, "Gender as Performance," *supra* note 182.

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ *Ibid.*

¹⁰⁹² *Ibid.*

¹⁰⁹³ According to Baudrillard, it is traditional graffiti's *refusal* to signify which allows it to 'derail the common system of designations.' Jean Baudrillard, "Kool Killer, or The Insurrection of Signs" in *Symbolic Exchange and Death* (London: Sage, 1993) [*Kool Killer*] at 77. '...like a scream, an interjection, an anti-discourse, as the waste of all syntactic, poetic and political development, as the smallest radical element that cannot be caught by any organised discourse....with neither connotation nor denotation, [graffiti] escape[s] the principle of signification and, as *empty signifiers*, erupt[s] into the sphere of the *full signs* of the city, dissolving it on contact.' *Ibid.* at 78-79.

close off meaning. His work addresses the public, the pedestrian, inviting them to re-interpret the signs that direct their mode of being in the city. If the signs of law often function as propaganda, using language as an instrument directed towards an end, Roadsworth's art emancipates a legal form from its communicative, directive ends, and thus makes it available for new use. Agamben describes 'new use'¹⁰⁹⁴ by reference to a cat playing with a ball of yarn. The cat is mimicking the form of hunting, but the end is not a predator catching its prey - it is pure means, a praxis emancipated from any necessary end. 'The freed behaviour still reproduces and mimics the forms of the activity from which it has been emancipated, but, in emptying them of their sense and of any obligatory relationship to an end, it opens them and makes them available for new use.'¹⁰⁹⁵ When the pedestrian crossing became a row of candles or bullets, or a chain-linked fence, the official markings were suspended from their everyday function, and became visible as one of an infinite number of possible configurations beyond official use and intention. By putting the authorized semiotics of the city to new use, Roadsworth questions the instrumentalization of representations - how they are forcefully made to mean - and shows that meaning as always susceptible to reframing and recalibration. Law is purposive, but its forms can be repurposed, and thus repurposing enables a thinking otherwise.

¹⁰⁹⁴ Agamben, *Profanations*, *supra* note 327 at 83. See 81-83 on the separations of capitalism.

¹⁰⁹⁵ *Ibid.* at 86.



Figure 10 Cattle Crossing. Fairmount Ave. and Jeanne-Mance St., Montreal, Quebec. May 2004; Eco-Footprint, Parc Ave., Montreal, Quebec. September 2004

III. Public Space and City-zenship

Cities are 'sites of intense cultural and aesthetic production, engaged in a continual process through which they develop and refine their self-image' through a range of 'aesthetic practices.'¹⁰⁹⁶ These practices include urban planning, design, architecture and public art (murals, community projects, memorials, sculpture, and performance) which 'shape both materially and symbolically not only the physical spaces of the city but also the ways of being a citizen of the city.'¹⁰⁹⁷ The Roadsworth case exposed a rift between the city authorities and the public on questions of public space, public speech and ways of being a citizen of the city. Montreal public officials group graffiti together with infrastructural disrepair and rubbish as part of the city's overall 'image problem,'¹⁰⁹⁸ and wanted to make an example of Roadsworth in its accelerating war against 'urban decay.'¹⁰⁹⁹ For the City, its placement made Roadsworth's work illegal,

¹⁰⁹⁶ Young, *Judging the Image*, *supra* note 18 at 99.

¹⁰⁹⁷ Ruppert, *supra* note 1071 at 5.

¹⁰⁹⁸ Rene Bruemmer, "Mayor told to clean up or risk losing tourists" *The Montreal Gazette* (31 January 2007) A.6

¹⁰⁹⁹ Desmarais said: 'I'm going to try to see with the city what their goal is in pushing this so hard.' Dunlevy, "Artistic wink", *supra* note 966. He later explained to Kohl, 'for the city, the problem of graffiti has been bothersome for a long time, and they decided that Mr. Gibson's art on the street would be grouped with these graffiti artists, so to them, this is one issue.' *Crossing the Line*, *supra* note 964. Just prior to his arrest, Montreal had mounted a clean-up campaign to improve its image: Unnati Gandhi, "Montreal goes on the offensive against graffiti" *The Montreal Gazette* (25 August 2004) A.6. In the year between his arrest

but for the public, his art was distinguishable from the object of laws that had been formulated to deal with vandalism. Roadsworth's art seemed to evade all the traditional justifications underpinning the criminal regulatory response to graffiti (protecting property, ensuring security, combating pollution, maintaining appearances). He never touched private property, working only on the roads and footpaths.¹¹⁰⁰ His work was non-threatening, attractive and popular. The City was forced to accept Roadsworth because he had subverted the City's authority in a way which supported the city's image of itself as human, artistic and culturally vibrant: he 'transformed'¹¹⁰¹ the city and made it interesting, bringing 'some life onto Montreal's otherwise drab and potholed Plateau streets.'¹¹⁰² The debate over Roadsworth reveals how cities become important, emotional, human or aesthetic for people, and reflects a corresponding tension between instrumental and non-instrumental views of the city: as a means to economic prosperity, or as a place to discover and experience.

Spatial Governance and Social Control

As Evelyn Ruppert argues, city-making practices define and pursue a vision of the 'good city,' which is a secure, consumer and aesthetic city,¹¹⁰³ against images of the bad city, as a place of disorder, decay, poverty, social malaise and civil unrest.¹¹⁰⁴ Visions of the good city are underwritten by the moralization of conduct, and 'what constitutes good

and his trial the city spent \$1.3 million cleaning up graffiti, erasing 48,000 square metres compared with 12,000 the year before. James Mennie, "Mayor and brother are like a tag team grappling with litter bugs and graffiti artists" *The Montreal Gazette* (21 September 2006) A.6.

¹¹⁰⁰ 'Les interventions sont toujours réalisées sur le trottoir ou dans la rue, jamais sur une propriété privée ou un bâtiment.' Nicolas Bérubé, « Peindre des fermetures éclair est-il un crime? » *La Presse* (15 décembre 2004) p. A6

¹¹⁰¹ 'son art transforme la ville,' Chris Zeke, quoted in Bernard Lamarche, "Roadsworth, l'artiste de la rue, est arrêté » *Le Devoir* (14 December 2004) B.8 [« Roadsworth arrête »]; 'il a transformé une place de stationnement en commutateur ouvert à la position ', Bérubé, *supra* note 1100; 'Roadsworth... rendent la ville intéressante.' Chris Zeke cited in *Ibid.*; 'Il n'est pas question de destruction de la propriété publique. Il s'agit au contraire d'un embellissement de l'environnement urbain, d'une geste artistique.' Cardinal, *supra* note 1021.

¹¹⁰² Lejtenyi, "Roadsworth busted", *supra* note 966.

¹¹⁰³ Ruppert, *supra* note 1071 at 11.

¹¹⁰⁴ Jon Bannister & Nick Fyfe "Introduction: Fear and the City" (2001) 38:5-6 *Urban Studies* 807.

conduct is brought into being through processes of constructing and shaping ways of being a good citizen in the city.¹¹⁰⁵ Montreal City Council exhorts its residents to work toward making their community safer, more vibrant and more welcoming: 'Caring people will not let any aspect of their town decline.'¹¹⁰⁶ Graffiti is frequently talked about in terms of dirt and (bodily) waste.¹¹⁰⁷ Dirt, as matter out of place, is deeply 'culturally and psychically troubling.'¹¹⁰⁸ Part of its disturbing power lies in its persistence, 'in its audacity to keep turning up in places we thought were clean.'¹¹⁰⁹ It contaminates and spreads: as one Montreal reporter comments, 'All that black paint just made the bus, and by extension the passengers, feel dirty.'¹¹¹⁰ She quotes a passenger on the bus: 'It's like they pissed all over everything, except there's no smell.'¹¹¹¹ The news media frequently describes graffiti as 'defacing'¹¹¹² the city: 'there's no ignoring the graffiti, litter and overflowing trash cans that mar the city's public face.'¹¹¹³ The word *defacement* conjures up an injury that goes beyond the idea of 'damage to property' implicit in the term 'vandalism,' constructing the surfaces of the city as an outward 'face' which has been spoiled or altered - literally de-faced.¹¹¹⁴ In a related

¹¹⁰⁵ Ruppert, *supra* note 1071 at 5.

¹¹⁰⁶ Avi Friedman, «Montrealers should all pitch in – and pick up» *The Montreal Gazette* (19 February 2007) A.16; "All must cooperate to clean up city" *The Montreal Gazette* (21 February 2007) A.24

¹¹⁰⁷ 'Linked to the dirty, the animal, the uncivilized, and the profane, contemporary urban graffiti signify an interruption of the boundaries of public and private space, an eruption of creativity and movement outside and through the claims of the street, façade, exterior, and interior by which the city is articulated.' Stewart, *Crimes of Writing*, *supra* note 67 at 217.

¹¹⁰⁸ Young, *Judging the Image*, *supra* note 18 at 54.

¹¹⁰⁹ Creswell, *supra* note 974 at 38.

¹¹¹⁰ Janet Bagnall, "Stomp out graffiti: It's time the 'artists' were made to clean up their own mess" *The Montreal Gazette* (16 June 2006).

¹¹¹¹ Male bus passenger, cited in *Ibid.* Young's study of media discourse found that urine is 'by far the most common device to configure graffiti with dirt.' Young, *Judging the Image*, *supra* note 18 at 53.

¹¹¹² Henry Aubin, "Urban blight: The mayor has a good idea: make graffiti 'artists' clean up their mess" *The Montreal Gazette* (7 October 2006) B.7.

¹¹¹³ "All must cooperate to clean up city", *supra* note 1106. When allocating funds to a community group to remove graffiti from the downtown area, *The Montreal Gazette* announced that the city was getting 'a good face-scrubbing.' Gandhi, "Montreal goes on the offensive against graffiti" *The Montreal Gazette* (August 25, 2004) A.6; see further Stewart, *Crimes of Writing*, *supra* note 67 at 216.

¹¹¹⁴ See further Michael Taussig, *Defacement: Public Secrecy and the Labor of the Negative* (Stanford: Stanford University Press, 1999).

corporeal metaphor, graffiti is often likened to disease in the body of the city: 'the epidemic of spray-paint vandalism' is 'a scourge that defaces cities,'¹¹¹⁵ the city is 'plagued by graffiti tags and vandalism.'¹¹¹⁶ The disease may even be incurable: 'Nothing seems to hold back the infestation of tags, as practitioners call their eyesores.'¹¹¹⁷ The crucial effect of joining graffiti with dirt, disease and contamination is an implicit imperative to remove it: 'The public response to graffiti is represented as always already one of disgust, awaiting the cleansing and purifying actions of criminal justice and municipal regulation.'¹¹¹⁸

As Tim Creswell writes, 'Beliefs about dirt and pollution relate to power relations in society as they delineate, in an ideological fashion, what is out of place. Those who can define what is out of place are those with the most power in society.'¹¹¹⁹ When city officials speak of quality of life and security, they speak only of certain citizens who fit into an official image. Announcing the city's clean-up campaign, Mayor Helen Fotopoulos stated: '(w)hat we're saying is that this is our territory. This city belongs to the citizens of Montreal and not to graffiti taggers.'¹¹²⁰ These are fighting words, as if the city itself is under siege, recalling the origin of the word 'vandal,' the name for the Germanic 'barbaric' people who mounted raids on the cities of the Roman Empire.¹¹²¹ Taggers are the barbaric invaders of our modern cities: '(t)he young vandals have no mercy when it comes to choosing their targets. Almost everything gets hit - mail boxes, bus shelters, lampposts and storefronts.'¹¹²² The Mayor clearly interprets taggers as claiming ownership over territory, and responds by reclaiming ownership over the space and expelling taggers from the citizenry.

¹¹¹⁵ "Stop scrawling, start painting" *The Montreal Gazette* (12 November 2007) A.18

¹¹¹⁶ Gandhi, *supra* note 1099.

¹¹¹⁷ Aubin, *supra* note 1112.

¹¹¹⁸ Young, *Judging the Image*, *supra* note 18 at 55.

¹¹¹⁹ Creswell, *supra* note 974 at 39.

¹¹²⁰ *Crossing the Line*, *supra* note 964.

¹¹²¹ See Young, *Judging the Image*, *supra* note 18 at 57-58.

¹¹²² Katherine Wilton, "Combating urban scrawl" *The Montreal Gazette* (26 July 2009) A.3.

Scholars of modern cities have analyzed how municipalities, private interests, and the courts seek to control and regulate how streets are used and how people behave in streets. Bylaws aimed at taming sidewalk behavior include zoning laws, anti-loitering laws,¹¹²³ prohibiting stationary behavior like sitting and sleeping,¹¹²⁴ regulating panhandling¹¹²⁵ and 'squeegee kids',¹¹²⁶ and requiring permits for activities like parades and special events.¹¹²⁷ In recent years, for instance, the regulation of prostitution has shifted from the direct coercion of criminal law to more diffuse regulatory control of the spaces in which prostitution takes place, employing community public health and amenity standards found in planning laws.¹¹²⁸ Don Mitchell has argued that 'anti-homeless' regulations which make it illegal to sleep or urinate in public enforce a 'highly exclusionary sense of modern citizenship' by effectively 'criminalizing survival' for those without access to other spaces.¹¹²⁹ But while the ideal of a public space may function as an important 'rallying point' for struggles for inclusion,¹¹³⁰ as Kurt Iveson reminds us, mere access to a material public space, such as a street, footpath, park or square, has

¹¹²³ Ron Levi, "Loitering in the City that Works: On Circulation, Activity, and Police in Governing Urban Space" in Markus D. Dubber & Mariana Valverde, *Police and the Liberal State* (Stanford: Stanford University Press, 2008) 178.

¹¹²⁴ Joe Hermer, "Keeping Oshawa Beautiful: Policing the Loiterer in Public Nuisance Bylaws" (1997) 12 *Canadian Journal of Law and Society* / *Revue canadienne droit et societe*.

¹¹²⁵ Joe Hermer, "Diverted Giving on the Winchester High Street" in Hartley Dean, ed., *Begging Questions: Street-Level Economic Activity and Social Policy Failure* (Bristol: Polity Press, 1999) 203-216.

¹¹²⁶ Patrick Parnaby, "Disaster Through Dirty Windshields: Law, Order and Toronto's Squeegee Kids" (2003) 28:3 *Canadian Journal of Sociology/Cahiers canadiens de sociologie* 281; Bill O'Grady & Carolyn Greene, "A Social and Economic Impact Study of the Ontario Safe Streets Act on Toronto Squeegee Workers" (2003) 1:1 *Online Journal of Justice Studies*.

¹¹²⁷ See further Louikaitou-Sideris, Blumenberg & Ehrenfeucht, *supra* note 1002.

¹¹²⁸ See Lee Godden, "The Bounding of Vice: Prostitution and the Planning Law." (2001) 10 *Griffith Law Review* 77. For an account of zoning laws by which prostitution has been segregated to red light districts where it is largely contained in brothels or massage parlors, see Phillip Howell "A Private Contagious Diseases Act: Prostitution and Public Space in Victorian Cambridge" (2000) 26:3 *Journal of Historical Geography* 376; Ronald Weitzer, "Prostitution Control in America: Rethinking Public Policy" (1999) 32 *Crime, Law & Social Change* 83; Penny Crofts, "Brothels and Disorderly Acts" (2007) 1:1 *Public Space: The Journal of Law and Social Justice* 1.

¹¹²⁹ Don Mitchell, "The annihilation of space by law: the roots and implications of anti-homeless laws in the United States" (1997) 29:3 *Antipode* 303 at 306; Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in Joe Hermer & Janet Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Press, 2002) 41.

¹¹³⁰ Mitchell, "The End of Public Space?" *supra* note 1009 at 115, 117.

‘no fixed or privileged relationship to acts of ‘public address’ or to one’s status as a member ‘of the public.’¹¹³¹

Law is not simply an external instrument for regulating space (and thereby maintaining public safety, containing or excluding marginalized groups, attracting investment, privileging the motor vehicle, and so forth). Law is actually *constituted by and through* its construction, organization and legitimization of spaces, places and boundaries, invested in the construction of a particular kind of space. For Lefebvre, the modern capitalist state is geared towards the production of ‘abstract space,’ fragmented, homogenous and hierarchical space that subsumes all difference within its midst: ‘The city street loses its local character and becomes more like an airport.’¹¹³² As Chris Butler observes, ‘abstract space’ is buttressed by what Lefebvre calls the ‘logic of visualisation’¹¹³³ which ‘flattens the depth of social reality to a readable surface while paradoxically rendering taken-for-granted spatial structures (such as roads and motorways) as invisible and beyond critique.’¹¹³⁴ Lefebvre’s formulation of the right to the city constituted a struggle away from the abstract space propounded by the state and the market towards the contradictory representational spaces established through creative moments within everyday life and struggles for the development of counter-spaces.¹¹³⁵

¹¹³¹ Iveson, *supra* note 988 at 8.

¹¹³² Henri Lefebvre, *The Production of Space*, trans. by Donald Nicholson-Smith (Oxford: Blackwell, 1991) at 373 [*Production of Space*]. Jean Baudrillard too called the urban city ‘a neutralized, homogenized space,’ ‘an immense centre for marshalling and enclosure where the system reproduces itself not only economically and spatially, but also in depth by the ramifications of signs and codes, by the symbolic destruction of human relations. Baudrillard, “Kool Killer,” *supra* note 1093 at 77. Drawing on Lefebvre, Halsey and Young observe that ‘the modern state has sought to transform smooth and nomadic territories into places where everything is ordered, numbered, monitored and controlled.’ Halsey & Young, “Our Desires are Ungovernable,” *supra* note 976 at 295.

¹¹³³ Lefebvre, *Production of Space*, *supra* note 1132 at 98.

¹¹³⁴ Butler, “Slicing Through Space,” *supra* note 1044 at 472.

¹¹³⁵ See Chris Butler, ‘Reading the Production of Suburbia in Post-War Australia’ (2005) 9 Law Text Culture 11 at 27.

Graffiti is frequently conceived of as a misappropriation of public space, a claiming of public space for one's own. Since signature or hip-hop graffiti is based on the 'art of the autograph',¹¹³⁶ it is easily conceived of as an imprint of individual subjectivity on the face of the city, as a claim to space or a territorial marking, and thus as a violation of property: 'a violation by the marker of a space that belongs not to him but to another.'¹¹³⁷ Such graffiti writers who mark their individual 'places' 'have put their subjectivity in the wrong place; it must be properly reassigned by disciplinary measures.'¹¹³⁸ Roadsworth's few detractors did indeed characterize his work as an act of entitlement to or appropriation of public space.¹¹³⁹ But for many residents of Montreal, Roadsworth's art was not a claim to territory that derogated from public space, but a reclaiming of that space *as* public space. Roadsworth's art 'actively redistributes' public space, 'reconfiguring but never disfiguring.'¹¹⁴⁰ He was described as enhancing the cityscape, as 'un «embellisseur» qui éveille des consciences,' 'il utilise des signes urbains existants, qu'il enjolive, qu'il ornemente',¹¹⁴¹ 'il avait enluminé les artères du Plateau Mont-Royal.'¹¹⁴² The *Gazette* story which first introduced Roadsworth to the public, a month before his arrest, presented him as an 'urban anti-hero,' 'a particularly

¹¹³⁶ Stewart, *Crimes of Writing*, *supra* note 67 at 214-5.

¹¹³⁷ Krauss, *supra* note 40 at 14.

¹¹³⁸ Stewart, *Crimes of Writing*, *supra* note 67 at 223. As Karl Marx noted: "The exclusive concentration of artistic talent in particular individuals and its suppression in the broad mass which is bound up with this, is a consequence of the division of labor." *The German Ideology* in Lee Baxandall & Stefan Morawski, eds. *Marx, Engels, on Literature and Art* (New York: International General, 1977) at 71. Ella Chmielewska argues that any alteration articulates a claim to a physical space, thus re-identifying and re-indexing local geography. An individually marked place stands in opposition to, contests, or subverts public space. Located in public spaces, graffiti mark the sites as personally defined 'places.' Ella Chmielewska, "Framing Temporality: Montreal Graffiti in Photography" in Anne Gérin and James S. McLean, *Public Art in Canada: Critical Perspectives* (Toronto, 2009) 271 at 284.

¹¹³⁹ 'Having interesting ideas about art or life does not bestow the right to appropriate the public space, however benign the message. No doubt the people who scribble meaninglessly on any blank wall think themselves to be artists, too. Let them buy their own walls.' "Roadsworth's nice graffiti", *supra* note 1064. Radio caller: "City property or private property should not be used as an artist's canvas. I don't care what anyone thinks because I have to pay for that in the end. I'm a taxpayer, I love the city of Montreal and if he's such a good artist, give him a canvas to paint." *Crossing the Line*, *supra* note 964.

¹¹⁴⁰ Dunlevy, "Artist gets his show on the road," *supra* note 965.

¹¹⁴¹ Lamarche, "Le peintre poète du macadam", *supra* note 989.

¹¹⁴² Ariane Krol, « Rues à sens multiples » *La Presse* (20 janvier 2006) at A18

creative, persistent, unassuming and anonymous individual – a community art vigilante,’ and ‘a Robin Hood – taking space from the city and giving it back to the people.’¹¹⁴³

Roadsworth’s art was frequently distinguished from graffiti vandalism on the basis of its skill.¹¹⁴⁴ An editorial in *The Gazette* stated that Roadsworth ‘shows more wit and imagination than most of the talent-free spray-can wielders who call themselves ‘taggers.’¹¹⁴⁵ Unlike the ‘aggressive’¹¹⁴⁶ work of graffiti artists, he pursued a ‘more wholesome and approachable form of street art.’¹¹⁴⁷ Even those few opposed to his work readily conceded it had artistic value.¹¹⁴⁸ Tagging is commonly perceived as requiring less skill than other forms of graffiti art,¹¹⁴⁹ and is frequently viewed as evidence of a ‘writing *ineptitude*’¹¹⁵⁰ or a lack of ability. ‘Many spray-painters merely repeat the same banal squiggles over and over again.’¹¹⁵¹ The appellation ‘artist’ is

¹¹⁴³ Dunlevy, “Artist gets his show on the road,” *supra* note 965.

¹¹⁴⁴ Lamarche, «Roadsworth arrête», *supra* note 1101 “il se démarque des graffiteurs habituels.” Lamarche, “Le peintre poète du macadam”, *supra* note 989; “Entre le «scratchiti» de graffiteurs et le pochoir stylisé de Roadsworth, il y a un monde” Rioux Soucy, “Roadsworth est absous”, *supra* note 1069; “son art urbain n’a aucun rapport avec les tags des graffiteurs.” “Peter Gibson a contrevenu aux règlements municipaux, mais avec une intention et un résultat qui n’ont rien à voir avec le vandalisme.” Krol, «Rues à sens multiples», *supra* note 1142. Ric Petersen at CJAD did a show about the Roadsworth case because he witnessed it ‘getting confused with the tagging that goes on in the city, the anger that comes as a result of some of that, the cost to some of the people who have suffered that kind of graffiti on their buildings, on their property, and I could see pretty quickly that this wasn’t the same thing.’ *Crossing the Line*, *supra* note 964. The Director of Toronto’s Museum of Contemporary Canadian Art said: “They should be a little more lenient in the sense that this guy is creating art. He’s not vandalizing.” Cited in Hamilton, “Artist arrested for painting outside lines”, *supra* note 1054. Marc Meyer, director of the Montreal Contemporary Art Museum, said: “I really hope they don’t punish this guy beyond all measure. An arbitrary judgment is not what we want. It’s not vandalism. You can see the public outcry, and not just from students and youth groups.” Marc Meyer cited in Dunlevy, “Artistic wink”, *supra* note 966.

¹¹⁴⁵ “Roadsworth’s nice graffiti”, *supra* note 1064.

¹¹⁴⁶ “Roadsworth se démarque des graffitis habituels, qui sont autrement plus agressifs.” Lamarche, “Le peintre poète du macadam”, *supra* note 989.

¹¹⁴⁷ Farquharson, *supra* note 984.

¹¹⁴⁸ ‘I can’t condone it. It may be artistic and it may look good, but I have my doubts.’ Caller to CJAD radio, in *Crossing the Line*, *supra* note 964.

¹¹⁴⁹ Halsey & Young, “Our Desires are Ungovernable,” *supra* note 976 at 284; Kaltenhäuser, *supra* note 973 at 45.

¹¹⁵⁰ Young, *Judging the Image*, *supra* note 18 at 55.

¹¹⁵¹ “Stop scrawling, start painting”, *supra* note 1115.

normally withheld from the writer, or else employed sarcastically.¹¹⁵² They are frequently described as ‘scrawlers’¹¹⁵³ who leave ‘incoherent splashes of black,’ ‘inarticulate strokes,’¹¹⁵⁴ ‘lingering, mindless doodles [which] wreck the cityscape.’¹¹⁵⁵ The speech of graffiti artists is rhetorically evacuated of expressive worth: it is banal, incoherent, inarticulate, and they are enjoined to ‘Stop scrawling, start painting.’¹¹⁵⁶ As Montreal graffiti artist Omen argues, ‘People have preconceived notions that graffiti is juvenile and ugly.’¹¹⁵⁷ Graffiti artists themselves use the term ‘vandal’ to distinguish their own art from ‘mindless’ tagging: ‘When there are acts of vandalism it ruins it for us graffiti artists.’¹¹⁵⁸ Roadsworth’s lawyer played into this polarization between graffiti as aggressive, hateful and destructive, and public art as an expression of community values: ‘On ne parle pas ici d’un jeune rebelle qui fait des graffitis sur les murs. Lui, il utilise la chaussée comme support pour son art.’¹¹⁵⁹ Roadsworth is enhancing the community as a citizen, rather than challenging it as a criminal. Prior to his arrest, he tells Kohl’s camera: ‘basically I’m launching an attack on the street, and everyone’s welcome.’¹¹⁶⁰ After his arrest, Roadsworth was obliged to emphasize his work’s populist rather than combative elements, framing his actions not as oppositional but as love: ‘I don’t think

¹¹⁵² Bagnall, “Stomp out graffiti”, *supra* note 1110; Aubin, *supra* note 1112.

¹¹⁵³ Wilton, “Combating urban scrawl”, *supra* note 1122.

¹¹⁵⁴ Bagnall, “Stomp out graffiti”, *supra* note 1110.

¹¹⁵⁵ “All must cooperate to clean up city”, *supra* note 1106.

¹¹⁵⁶ “Stop scrawling, start painting”, *supra* note 1115.

¹¹⁵⁷ Omen cited in Bundale, *supra* note 1058.

¹¹⁵⁸ Octopus, cited in Jen Young, “Finding a place for spray-painted art” *Record*, Sherbrooke (20 July 2007) at 5. ‘One formerly active graffiti artist, who goes by the name Flow, said it’s annoying when people confuse those who vandalize property with artists who paint spectacular murals. “(The vandals) are socially retarded and don’t realize they’re destroying people’s property.”’ in Kristin Morency, “City councillor to see writing on the wall” *The Montreal Gazette* (August 12, 2006) A.7. Regulatory regimes frequently leverage the graffiti writing community’s own hierarchy from toys (beginner taggers) to kings (masters of sophisticated street art ‘pieces’) in seeking to encourage graffiti taggers to graduate to more acceptable forms. See further Halsey & Young, “Our Desires are Ungovernable,” *supra* note 976 at 287.

¹¹⁵⁹ Nicolas Bérubé, “Peindre des fermetures éclair est-il un crime?” *La Presse* (15 décembre 2004) at A6.

¹¹⁶⁰ *Crossing the Line*, *supra* note 964.

I'm hurting anybody. This wasn't an act of hatred. I love this city.'¹¹⁶¹ 'What I do is clean and safe and humorous and pretty inoffensive.'¹¹⁶²

From Prosecution to Permission

The decision to take Roadsworth to court was described in the media as 'bizarrely extreme'¹¹⁶³ and 'a serious mistake.'¹¹⁶⁴ Yves Sheriff, artistic consultant to the Cirque du Soleil, wrote a letter to Mayor Gerald Tremblay characterizing the arrest as 'un geste exagéré, nuit à l'image de la ville.'¹¹⁶⁵

The police are committing a grave error in judgment in arresting Roadsworth for vandalism. ... If I were you, who wish to make Montreal a cultural capital, I would jump to his defence, as he offers a pleasant form of cultural expression that is unique and sympathetic to the urban environment.¹¹⁶⁶

Letters to *The Gazette* accused the authorities of being 'disconnected from the people who routinely see Roadsworth's art and consider it part of the culture of Montreal.'¹¹⁶⁷ A Toronto resident asked: 'What's happened to your city?... Does Montreal's administration have no sense of humour, taste or proportion?'¹¹⁶⁸ A letter to *Le Devoir* referred to the absurdity of the city arresting an artist for adorning the sidewalks while leaving those sidewalks neglected.¹¹⁶⁹ The City's attitude towards Roadsworth's art was seen to echo the 'l'étroitesse d'esprit'¹¹⁷⁰ of the 1976 *Corridart* scandal, in which the

¹¹⁶¹ Cited in Hamilton, "Artist arrested for painting outside lines", *supra* note 1054.

¹¹⁶² Roadsworth, quoted in Jesse Ship, "Roadsworth" (28 September 2009). <http://www.formatmag.com/features/roadsworth/>

¹¹⁶³ Leigh Davidson, "Roadsworth prosecution looks bad on Montreal" (19 January 2005) at A.20.

¹¹⁶⁴ Cooper, "When the stencil hits the road", *supra* note 971.

¹¹⁶⁵ Bernard Lamarche, "Un appui de taille pour Roadsworth" (16 décembre 2004) at B.7

¹¹⁶⁶ Dunlevy, "Artistic wink", *supra* note 966.

¹¹⁶⁷ James Boddie, "City is persecuting artist" *The Montreal Gazette* (December 19, 2004) at A.22.

¹¹⁶⁸ Davidson, "Roadsworth prosecution looks bad on Montreal", *supra* note 1163.

¹¹⁶⁹ 'Dans quelle ville absurde vit-on où on arrête un artiste qui, par ses dessins, nous fait oublier la grisaille des rues et des trottoirs montréalais trop souvent mal entretenus..?' Diane Miljours, « Lettres: Histoires de trottoirs » *Le Devoir* (17 décembre 2004) at A.8

¹¹⁷⁰ Girard, "L'Art Urbain en Question", *supra* note 1054.

mayor Jean Drapeau ordered the dismantling of 22 large-scale public works by Quebec artists on Sherbrooke Street several nights before the Olympic Games.¹¹⁷¹ Reporters also made links between Roadsworth and Cyrille the Spoonman,¹¹⁷² whose long-term practice of clicking spoons on a downtown corner had become the target of city by-laws in 2004. Like the street artists who turn accusations of pollution against the city, Spoonman responded to complaints of noise pollution by asserting that traffic noises, car radios and sirens were more disruptive than his clicking wooden spoons.¹¹⁷³

A few months before the trial, the reporter who had first tracked Roadsworth down wrote an editorial urging that 'there is time to negotiate a more appropriate response:'

The closely watched outcome will send a big message about how art, culture and public opinion are viewed in North America's most European city. Will bureaucracy and by-the-book rules prevail? Will a truly original, civic-minded artist have a chance to flower amid all the concrete and controversy? Will l'affaire Roadsworth become another public relations fiasco? Or will Montreal seize the opportunity to celebrate one more thing that makes our society distinct?¹¹⁷⁴

In the stark alternatives presented here, legal regulation is taken to mean – inherently – precisely the impossibility of creative flowering. This journalist cannot imagine a legal regime that would allow someone like Roadsworth to flourish. So the problem is framed as a choice between the two: law or art, not both.

¹¹⁷¹ Dunlevy, "Artistic wink", *supra* note 966. Lamarche, «Roadsworth arrête», *supra* note 1101. See *À propos de l'affaire Corridart* (Montreal: Cinémalibre, Productions Multi-monde, 2002) dir. Bob McKenna.

¹¹⁷² Dunlevy, "Artistic wink", *supra* note 966; Rima Elkouri, « La vie, la ville » *La Presse* (21 mars 2005) 3. Davidson, "Roadsworth prosecution looks bad on Montreal", *supra* note 1163. Visit the artist's website: <http://www.cyrillethespoonman.qc.tc/>

¹¹⁷³ In December 2004, the same month Roadsworth was arrested, a petition with 2,000 signatures in support of Esteve was presented to Ville-Marie city councillor Louise O'Sullivan-Boyne, who granted Esteve temporary immunity from the by-law and negotiated a compromise allowing Esteve to play his spoons in front of Ogilvy's during the holiday season, but forcing him to relocate to the front of Christ Church Cathedral on St Catherine for the rest of the year. "Montrealers rally behind Spoonman" CBC news (December 15, 2004) <http://www.cbc.ca/canada/story/2004/12/15/spoonman-041215.html>.

¹¹⁷⁴ Dunlevy, "Artistic wink", *supra* note 966.

From the beginning of the wave of public support for Roadsworth, police and city officials characterized his crime in terms of a failure to gain prior authorization.¹¹⁷⁵ Citing the example of an artist who wished to set fire to a building as part of his art, Public Art Commissioner Francine Lord said: 'We recognize the value of artists like Roadsworth, but we need a plan that makes sure public security and order are respected.'¹¹⁷⁶ She even told *La Presse* that it was a shame that Roadsworth had not contacted them to ask for prior authorization for his work, because no doubt a permit would have been issued.¹¹⁷⁷ As the Mayor's assistant explained: 'Les tags ne sont pas acceptés et, dans la mesure du possible, on les enlève. Mais le travail de Roadsworth est un travail qui a été "commissionné" et il est très différent.'¹¹⁷⁸ Roadsworth's lawyer did not dispute that his client's activities were illegal,¹¹⁷⁹ but argued that they were not *criminal*, because they did not involve a real or wrongful destruction of property.¹¹⁸⁰ This argument was strengthened in the summer of 2005, when, with his trial pending,

¹¹⁷⁵ 'À première vue, il semblerait qu'il s'agisse d'un cas de graffitis sur des biens publics. C'est clair qu'il est interdit de faire cela si on ne possède pas l'autorisation nécessaire.' Police spokesperson cited in Nicolas Bérubé, « Peindre des fermetures éclair est-il un crime? » *La Presse* (15 décembre 2004) p. A6. A city spokesperson denied any connection between Roadsworth's approved work and his illegal stenciling simply by asserting that: 'The city has certain laws and they must be respected.' Jason Gondziola, "Roadsworth's reprieve" *Montreal Mirror* January 2006 Vol.21 No.31 <http://www.montrealmirror.com/2006/012606/news2.html>

¹¹⁷⁶ Bundale, *supra* note 1058; Girard, "L'Art Urbain en Question", *supra* note 1054.

¹¹⁷⁷ « Je trouve dommage que Roadsworth ne nous ait pas contactés. Il aurait sans doute obtenu les autorisations pour réaliser son travail. " Interview by Girard, "L'Art Urbain en Question", *supra* note 1054 at 1.

¹¹⁷⁸ Louise-Maude Rioux Soucy, Roadsworth sévit de nouveau... en toute légalité *Le Devoir* (6 juillet 2006) at b8.

¹¹⁷⁹ As Desmarais noted, the fact that Roadsworth had already received a ticket for his stencils early on in his career established that he knew his work was illegal. *Crossing the Line*, *supra* note 964. In public mischief cases it is also necessary for the accused to be aware that his acts would cause obstruction or interference: 'the Crown must establish that the accused was either consciously aware that his acts would cause the obstruction, interrupting or interference with the complainant's use, enjoyment or operation of property or, alternatively, that the accused knew that his acts would have such an effect.' *R v Starlight* [1980] 4 W.W.R. 310

¹¹⁸⁰ The courts have determined that it is necessary for the conduct subject to a public mischief charge to be not only illegal but *wrongful*: 'the conduct complained of must be wrongful in order to bring it from non-criminal to criminal.' *R. v. Osborne*, 2007 NBPC 3 (CanLII) at para 16 <http://www.canlii.org/en/nb/nbpc/doc/2007/2007nbpc3/2007nbpc3.html>, citing *R. v. Hnatick* [2000] A.J. No. 545 (Q.B.) at 46 and *R. v. Link* [2004] A.J. No 1405 (A.P.C.) @ para 37 et seq As Roadsworth told his lawyer, 'I definitely don't feel like I had any criminal intent at any point. I never felt immoral about it. I always sort of justified it somehow in my mind anyway.' *Crossing the Line*, *supra* note 964.

Roadsworth was invited by local art collective *Quartier éphémère* to collaborate on an 'artistic bike path' on Queen St in the Old Port. Although the Public Art Bureau of Montreal initially rejected the proposal, it was approved once the stenciled markings were reframed as 'a temporary installation in a public space.'¹¹⁸¹ For Roadsworth's lawyer, the city's authorization confirmed that his client's art was not criminal, 'since the city permits it when it goes through channels.'¹¹⁸² Kohl's footage of the artist at work on this bike path records Roadsworth's entirely different sense of his working conditions, as he comments: 'I can't believe I'm doing this without having to look over my shoulder. I almost want a police officer to come by so I can flash my permit.'¹¹⁸³

The City's eventual plea bargain with Roadsworth was widely praised.¹¹⁸⁴ Mayor Helen Fotopulos told the media that the city had sought a settlement striking a balance between artistic expression and respect for public property. 'This issue has been resolved in a civilized fashion that recognizes the artistic contributions of Roadsworth to the community. It's one where everybody wins.'¹¹⁸⁵ While she proudly called the Plateau a neighborhood renowned for incubating artistic talent, Fotopulos warned that Roadsworth's plea deal did not mean open season for graffiti. 'Vandalism is vandalism and it's going to be prosecuted and it's going to be erased.'¹¹⁸⁶ One city official

¹¹⁸¹ Francine Lord described the City's approach: 'we try to get to 'yes' with an artist.' *Crossing the Line*, *supra* note 964.

¹¹⁸² Desmarais, quoted in *Crossing the Line*, *supra* note 964. The police had also cited safety concerns (in particular, the zipper on Ave du Parc above Bernard was said to be a potential distraction to motorists), so as the trial date approached, Desmarais advised Roadsworth to take photographs of his faded markings as evidence, firstly, that the city had not bothered to clean up the apparent 'threat' posed by his stencils, and secondly, that the clean-up costs which were the ostensible justification for his hefty fines were in fact negligible. In deciding whether posting political stickers (constitutionally protected speech) on city property amounted to public mischief, the Quebec Court of Appeal found that 'in the absence of any real abuse or damage to public property, and the relatively insignificant clean-up costs' [\$163.96], the accused was not guilty of mischief. *R. v. Kealey*, 1996 CanLII 6371 (QC C.A.) <http://www.canlii.org/en/qc/qcca/doc/1996/1996canlii6371/1996canlii6371.html>

¹¹⁸³ *Crossing the Line*, *supra* note 964.

¹¹⁸⁴ « Montréal évite quant à elle l'odieux d'une image bornée et tatillonne qui lui aurait collé longtemps à la peau. » Krol, «Rues à sens multiples», *supra* note 1142.

¹¹⁸⁵ Allison Hanes, "Graffiti artist free to paint – but he has to ask first" *The Montreal Gazette* (19 January 2006) A.6.

¹¹⁸⁶ Mayor Helen Fotopoulous, cited in *Ibid.*

suggested that the necessity of regulating the form of graffiti rested on its potential for bad content:

The problem is not him, now. It's the next one, and the next one. When do you stop it? He is doing things everybody considers urban art. I agree. I lived in Mile End until recently. I smiled myself when I saw (his work). It's pretty. But if the next pieces somebody does are racist or sexist, maybe public opinion will be different.¹¹⁸⁷

This official here conjures up two visions of the city using the familiar narratives identified by Watson: a sense of community (he lived in the part of the city where Roadsworth did most of his work) and shared affective reaction ('I smiled myself... it's pretty') alongside the spectre of racist, sexist or otherwise offensive signs. As well as assuming that speech which is racist or sexist cannot be removed or prosecuted through other legal mechanisms, this kind of reasoning misconceives the nature of the 'problem' Roadsworth's art poses for law. It tries to justify regulating a form by reference to the possibility of bad content, and so sidesteps the need to address the justifications for regulating the form itself: the justifications which Roadsworth's artistic practice is busy dismantling.

The problem for law is its desire to distinguish in advance between good and bad aesthetic interventions in the city. The law must distinguish what is legal from illegal in the only language it has available – formal language – and yet that distinction can only ever be a political one. As *The Gazette* wryly noted, the outcome of Roadsworth's case suggests that the distinguishing factor between vandalism and art will be 'whether a permit was awarded by the borough beforehand.'¹¹⁸⁸ If prior authorization is the only thing that distinguishes legal from illegal acts, that distinction is a matter not of criminality but bureaucracy. If the crime of public mischief can be rewritten as a mere

¹¹⁸⁷ Richard Cote, political aide to Plateau Mont Royal borough mayor Helen Fotopoulos, quoted in Dunlevy, "Artistic wink", *supra* note 966. A caller to CJAD explained: 'Not that it's not attractive. The problem is not him. It's that if we allow him to do it, one person's art is another person's graffiti, and you just open the door for every schmoe to do what he thinks is art, and then you've got anarchy.' Caller to CJAD radio, *Crossing the Line*, *supra* note 964.

¹¹⁸⁸ ., "Graffiti artist free to paint – but he has to ask first", *supra* note 1185.

failure to obtain a permit, the justification for criminalizing such activity in the first place is hollowed out. The outcome of Roadsworth's case suggests that the line between criminal and non-criminal behavior is 'purely' a question of form and thus reveals law's formal emptiness: as political, context-bound, fragmentary and responsive to social pressures.

IV. Regulating Aesthetics

Roadsworth's work can be seen in relation to a range of outlaw artistic practices which challenge both real and intellectual property, such as appropriation art, culture jamming, ad jamming, shopdropping, and the work of Adbusters, Ron English, Yes Men and Label This.¹¹⁸⁹ Such acts of 'semiotic disobedience'¹¹⁹⁰ are never legitimated or protected by the laws of intellectual property or freedom of expression, but are viewed exclusively through the lens of criminal conduct as an offence against property or public order, devoid of symbolic or expressive value. Alan DeSousa, a member of Montreal's executive committee, told the press: '(t)here is a fine line between freedom of expression and causing damage to public property. We expect people who want to express themselves to try to stick to ways that are accepted within society.'¹¹⁹¹ As Mariana Valverde has noted, constitutional rights like freedom of expression are rarely coordinated or harmonized with low-level regulations governing specific urban spaces,

¹¹⁸⁹ See Paul Baines, "A Pie in the Face: Culture Jammers Re-Code, Hijack, Subvert, Un-Cool, De-Myth and Reclaim the Public Sphere" (2001) *Alternatives Journal* 14 at 14-15 (describing cultural jamming). David Darts, "Visual Culture Jam: Art, Pedagogy and Creative Resistance" (2004) *Student Art Education* 313 at 319 (describing how culture jammers and socially engaged artists help to undermine and expose cultural, political, social and religious mechanisms that inform the actions of individuals); Christine Harold, "Pranking Rhetoric: "Culture-Jamming" as Media Activism" (2004) 21 *Critical Studies Media Communications* 189 at 190; Robert V. Kozinets and Jay M. Handelman, "Adversaries of Consumption: Consumer Movements, Activism and Ideology" (2004) 31 *Journal of Consumer Research* 691 at 693-4 (describing methodology and findings of consumer movements that look to transform the ideology and culture of consumerism); Denis Harvey, "Popaganda: The Art and Crimes of Ron English" *Variety* (11-15 July 2005) at 31 (reviewing a documentary detailing the billboard exploits of culture jammer and artist Ron English).

¹¹⁹⁰ Sonia K. Katyal, "Semiotic Disobedience" (2006) 84 *Washington University Law Review* 489.

¹¹⁹¹ Cited in Hamilton, "Artist arrested for painting outside lines", *supra* note 1054.

like mischief, nuisance or public order offences:¹¹⁹² ‘police power typically works not only locally but, more specifically, at a qualitatively distinct scale that is the urban scale. Citizenship and constitutional rights, by contrast, exist at a different scale.’¹¹⁹³ In Canadian cases of public mischief, the courts have disregarded freedom of expression arguments in circumstances where it can be plausibly argued that the behavior served as a distraction for motorists.¹¹⁹⁴

Since 2006, Montreal has spent over 3 million dollars a year removing graffiti, mostly on private property.¹¹⁹⁵ Its removal program aims at ‘improving the city’s image and creating a better sense of safety among residents.’¹¹⁹⁶ In that same time, it has spent around \$500,000 on prevention and education,¹¹⁹⁷ and has designated very few walls where graffiti artists and taggers can paint legally.¹¹⁹⁸ Omen observes that the city that embraced Roadsworth is ‘the same city that spends insane amounts of money going

¹¹⁹² Mariana Valverde, “Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory” (2009) 18:2 Social and Legal Studies 139 at 142.

¹¹⁹³ *Ibid.* at 151.

¹¹⁹⁴ In a 2006 case, a man dressed as a comic book superhero climbed to the top of the Pattullo Bridge near Surrey, British Columbia, a ‘notorious accident spot’ (at 28) harnessed himself to the structure and unfurled a banner for “Fathers 4 Justice”, remaining on the bridge for about six hours before finally agreeing to come down. His arrest for mischief was confirmed by the British Columbia Supreme Court, as ‘his actions were deliberately designed to evoke a response and his invitation to honk for the rights of children was an explicit invitation to motorists to take their eyes off the road.’ *R. v. Legere*, 2006 BCSC 1745 (CanLII) at 38 <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc1745/2006bcsc1745.html>. In a similar 2007 case, where a man attached himself to a pedestrian overpass with a sign protesting the unfairness of the family court system, causing the drivers below to slow down and notice him, the danger to traffic meant that his argument for freedom of expression argument failed. *R. v. Osborne*, 2007 NBPC 3 (CanLII) at para 16 <http://www.canlii.org/en/nb/nbpc/doc/2007/2007nbpc3/2007nbpc3.html>

¹¹⁹⁵ In 2006, the budget for graffiti removal was 3.46 million dollars, with 65,100 square metres of graffiti cleaned in the public domain, and 111,834 square metres in the private domain. In 2009, the budget was 3.20 million dollars, with 60,000 square metres of graffiti cleaned in the public domain, and 100,000 in the private domain. Source: Raymond Carrier, Conseiller en planification, Université de la propreté et du déneigement, Ville de Montréal.

¹¹⁹⁶ “City to spend more to erase graffiti” *The Montreal Gazette* (18 March 2005) A.7. As Vancouver Graffiti Management Program coordinator observed of their program’s success, “It all goes back to how the city wants to portray itself: clean and welcoming or broken-windowed and graffitied.” Gandhi, *supra* note 1099.

¹¹⁹⁷ The amounts are 13, 39 M\$ and \$544 300 respectively (2006-2009) Source: Raymond Carrier, Conseiller en planification, Université de la propreté et du déneigement, Ville de Montréal.

¹¹⁹⁸ Around 5 walls. Nick Say, “War on urban scrawl misguided, artists say” (27 May 2007) A.1.

after my work.’¹¹⁹⁹ These developments reflect the deepening nexus between aestheticization and security in neo-liberal urban governance and policing.¹²⁰⁰ Contemporary regulation of graffiti is bolstered by the broken windows theory of disorder and crime in which litter on sidewalks, broken-down cars, and buildings in disrepair are reliable indicators of urban decay even if they do not cause any actual harm.¹²⁰¹ Unaddressed disorder is read as a *sign* that no one cares, and invites further disorder. The theory calls for greater attention by the authorities to minor forms of disorder, more effective policing, and sharper overall surveillance. Mariana Valverde has shown how the word ‘blight’ in public nuisance cases facilitates the slippage from the physical disrepair of buildings to the moral risks posed by citizens, joining present harm to future risk.¹²⁰² Even if there is no actual, present harm, it does not matter, since these non-harms are sure indicators of future risks, of future decay. The discourse of risk manages to deploy the utilitarian rational prestige of the Mill harm principle to support often-speculative claims about the (future) risks associated with certain activities.¹²⁰³ In Nicholas Rose’s account of the new forms of urban governance, risk

¹¹⁹⁹ Omen cited in Bundale, *supra* note 1058.

¹²⁰⁰ In her study of the practices of aestheticization at the Yonge-Dundas development in Toronto, Ruppert writes, ‘The same rationality that connects appearance to crime and to the control of territory (eg. graffiti) also underpins strategies of aestheticization to improve city space. The flip side of the graffiti-begets-crime rationalization was that the problems of disorderly presences and conduct could be solved by erasing these markings and replacing them with other signs. Aestheticization was in this way tightly linked to security.’ Ruppert, *supra* note 1071 at 142. For an interdisciplinary account of the scope and function of police as governing forces in urban spaces, see: Markus Dubber & Mariana Valverde, eds., *Police and the Liberal State* (Stanford: Stanford University Press, 2008).

¹²⁰¹ James Q. Wilson, & George Kelling, “Broken Windows” (1982) 249 *Atlantic Monthly* 29; B.E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing*. (Harvard: Harvard University Press, 2001) [*Illusion of Order*]; Steve Herbert, “Policing the Contemporary City: Fixing Broken Windows or Shoring up Neo-liberalism?” (2001) 5 *Theoretical Criminology* 445; G.L. Kelling and C. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (Martin Kessler Books, 1996); W. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* (New York: Free Press, 1990).

¹²⁰² Mariana Valverde, “Authorizing the Production of Urban Moral Order: Appellate Courts and their Knowledge Games” (2005) 39:2 *Law and Society Review* 419. See further Mariana Valverde, “Targeted Governance and the Problem of Desire” in Richard V. Ericson & Aaron Doyle, eds. *Risk and Morality* (Toronto: University of Toronto Press, 2003) 438 and Mariana Valverde, “Taking ‘Land Use’ Seriously: Toward an Ontology of Municipal Law” (2005) 9:1 *Law Text Culture* 34.

¹²⁰³ Bernard Harcourt, “The Collapse of the Harm Principle” (1999) 90:1 *J. of Criminal Law and Criminology* 109.

reduction becomes part of the moral responsibility of urban citizens.¹²⁰⁴ City and police authorities deploy risk discourses to legitimate interventions in public space that are in fact motivated by other considerations.¹²⁰⁵

An illustrative counterpoint to the regulatory context in Montreal can be found in the Australian city of Melbourne, where street art has been a significant aspect of that city's identity for more than a decade. Like Montreal, Melbourne pursues a policy of criminalization and eradication, but also seeks to capitalize on the cultural cache of its worldwide reputation for graffiti and street art, particularly stenciling.¹²⁰⁶ Like Roadsworth's art, stencil art in Melbourne addresses a broad public and has a reputation for political commentary, humor and whimsy.¹²⁰⁷ It is conferred institutional artistic legitimacy through local businesses, private galleries, and interest from the National Gallery of Victoria (which ran tours of stencil art) and the National Gallery of Australia.¹²⁰⁸ The *Melbourne Design Guide*, which 'celebrates graffiti from a design perspective' was 'proudly sponsored' by the Victorian State government.¹²⁰⁹ The State government's attitude towards graffiti is often criticized for being inconsistent and contradictory, introducing new harsh penalties for graffiti artists¹²¹⁰ at the same time as

¹²⁰⁴ Nikolas Rose, "Governing Cities, Governing Citizens" in Engin Isin, ed., *Democracy, Citizenship and the Global City* (London: Routledge, 2000) 95 at 103.

¹²⁰⁵ Watson, *supra* note 1078 at 170.

¹²⁰⁶ Patrick Donovan, "Write Here, Right Now" *The Age* (17 November 2004); Bill Craske, "Street Scene" (2005) 10 *The Age Magazine* 35; National Gallery of Australia (which recently exhibited videos of stencil art in the City of Melbourne), the National Gallery of Victoria and the Australian Centre for the Moving Image (which have both exhibited photographs of stencils in Melbourne). Melbourne's stencil graffiti has circulated via a popular website (www.stencilrevolution.com), a documentary film, *Rash*, and a number of photographic collections, including one which dubbed Melbourne a 'Stencil Graffiti Capital': Smallman & Nyman, *supra* note 980; Matthew Lunn, *Street Art Uncut* (Melbourne: Craftsman House, 2006). Editorials praising the diverse street art scene regularly appear in *The Age*: Gabriella Coslovich, "World's most colourful underbelly" *Sunday Age* (4 December 2005); Craig Shutt and Martin Boulton, "Street art or vandalism? Graffiti artists go to the wall for their cause" *The Age* (10 March, 2005).

¹²⁰⁷ Dew, *supra* note 980.

¹²⁰⁸ Lonely Planet's *Facebook Bluelist* declared that Melbourne's top cultural attraction is its laneways. See further Bird, *supra* note 999 at 9.

¹²⁰⁹ Suzy Freeman-Greene, 'Urban Scrawl: Shades of Grey' *The Age* (12 January 2008).

¹²¹⁰ The *Graffiti Prevention Act* 2008 (Vic) was designed to facilitate the prosecution of graffiti writers, increase penalties for relevant offences and increase the powers of Councils to remove graffiti from private

using street art in much of its advertising materials through Tourism Victoria.¹²¹¹ While one part of the state gains both cultural cache and economic profits from the work of the graffiti writers, another part of the state seeks to prosecute them as symbols of the demise of law and order, and these two parts frequently get their wires crossed.¹²¹² Melbourne Council has created a permit system allowing property owners to seek authorization for new graffiti works on their property, or authorize a pre-existing work which they wish to keep.¹²¹³ When Council accidentally ordered a cleaning crew to

property. There were already provisions dealing with graffiti in the *Crimes Act* s 197 and the *Summary Offences Act* ss9 and 10, as well as the *Transport Act*. The Act granted new search powers to police (s 13) and reversed the onus proof for the offence of possessing a prescribed graffiti implement - a person caught with a graffiti implement must then convince police that they have the implement for a 'legitimate' purpose. See Youth Affairs Council of Victoria, *YACVic's Response to the Graffiti Prevention Bill Exposure Draft* January 2007' http://www.yacvic.org.au/includes/pdfs_wordfiles/YACVic%27s%20response%20to%20Graffiti%20Prevention%20Bill.pdf. Critics raised concerns over the increased possibilities for imprisonment and the criminalization of youth. The Law Institute of Victoria found the bill 'a disproportionate response to the community problem of graffiti. The bill fails to address the main causes of graffiti-marking behaviour, and in fact threatens to damage current constructive programs that aim to engage graffiti vandals in restorative justice initiatives. Such tough laws are a blunt tool in community problem solving and in all likelihood will fail to adequately address the issue of graffiti.' Cited by Ms. Pennicuik (Member for Green Party) Legislative Council 20 November 2007 at 3471. See also Alison Young, *The Graffiti Prevention Act 2007: Criminalising Young People for Street Art and Graffiti* <http://blogs.unimelb.edu.au/musse/?p=2358>; Bird, *supra* note 999 at 16-17.

¹²¹¹ The Visit Victoria website ([http:// www.visitvictoria.com](http://www.visitvictoria.com)) includes images of stencils and pieces, and organizes walking tours of Melbourne's laneways to view its street art: tours promoting street art include the 'Hidden Secrets' and 'Walk to Art' tours.

¹²¹² Victorian Premier John Brumby publicly criticized the Department of Tourism for including graffitied lanes in a recreated cityscape of Melbourne at Florida's Epcot Food and Wine Festival at Disneyworld in September 2008: 'The department made a mistake. They've apologized to the minister and they'll be withdrawing the display.' *The Age* reported: 'The Premier said that the 'nice part' of Melbourne's lanes was the 'European-type' style, not the graffiti. "It's the openness, it's the little restaurants, it's the flower pots, window pots, all of those things. I don't think graffiti is what we want to be displaying overseas. We've put through very tough laws to discourage graffiti - it's a blight on the city.' Jewel Topsfield, 'Brumby Slams Tourism Victoria over Graffiti Promotion' *The Age* (1 October 2008) <http://www.theage.com.au/articles/2008/10/01/1222651140951.html> See further Bird, *supra* note 999 at 13.

¹²¹³ *Activities Local Law Amendment (Street Art) Local Law* 2006. The applicants had to be the property owner, to provide the street address, a 'sketch map' and colour photos (where the exact position of the art has been marked out in chalk or masking tape) showing the location of the proposed art. Melbourne City Council *Street Art Permit Fact Sheet* (no longer online), cited Bird, *supra* note 999 at 12. The permit system has now been modified by the *Activities (Street Art) Local Law 2009* to 'ensure consistency with the *Graffiti Prevention Act 2008*'. The amendment does allow street art which is executed 'in accordance with a permit.' However, only 'murals' can be street art, not stand alone stencils. *Ibid.* at 18. The website at 2010 reads: 'Within the City of Melbourne, property owners and occupiers can apply for a permit to have street art on their buildings. This applies to: work which already exists, which the owner wants to keep, and any new work which is commissioned by a property owner'

remove one of Banksy's iconic rats from a wall in Hosier Lane, in a costly bungle that was immediately reported in local and international media,¹²¹⁴ the Council stressed that this was a regrettable accident, stating that 'we should have acted sooner to formally approve and protect all known Banksy works.'¹²¹⁵ The Council's expression of regret for removing this one piece (which it carefully described in terms of popularity rather than monetary worth) stands incongruously with its widespread policy of eradication, demonstrating the City's willingness to grant permission in ways which maximize its cultural and economic profit.

Aesthetic Pluralism

Melbourne-based criminologists Alison Young and Mark Halsey have long suggested a regulatory approach to graffiti that does not attempt to eradicate all graffiti, but promote the considered placement of certain types of graffiti while minimizing other types.¹²¹⁶ When Young was approached by the City of Melbourne to develop a set of initiatives for dealing with graffiti, she adopted the framework of aesthetic pluralism, reasoning that 'graffiti art has a place within the municipality and that in any case it is not possible to totally eradicate graffiti from the municipality. Therefore a policy of

<http://www.melbourne.vic.gov.au/ForResidents/StreetCleaningandGraffiti/GraffitiStreetArt/Pages/Whatisstreetart.aspx> See *City of Melbourne Protocol on Artworks* Approved by Council 26 August 2008.

¹²¹⁴ The mistake occurred less than a week after Melbourne Lord Mayor Robert Doyle was pictured in *The Age* under a stencil of himself in Hosier Lane as he praised its street art as a "legitimate expression of artistic intent." Raymond Gill, "City does give a rat's for Banksy's wiped-out art" *The Age* (28 April 2008) <http://www.theage.com.au/entertainment/art-and-design/city-does-give-a-rats-for-banksys-wipedout-art-20100427-tq3c.html> ; "Banksy's art welcome in Melbourne, says Lord Mayor Robert Doyle" (27 April 2010) <http://www.heraldsun.com.au/news/citys-anti-graffiti-crews-paint-over-priceless-stencil-from-uk-artist/story-e6frf7jo-1225858921828>; "Banksy Rat Painted Over" 3AW Breakfast (28 April, 2010) <http://www.3aw.com.au/blogs/3aw-breakfast-blog/banksy-rat-painted-over/20100428-trpu.html> ; "Cleaners paint over priceless art" *Reuters* (28 April 2010) <http://www.reuters.com/article/idUSTRE63R09F20100428> Dave Itzkoff, "Cleanup Crew Eradicates Banksy Rat" *New York Times* (28 April 2010) <http://artsbeat.blogs.nytimes.com/2010/04/28/cleanup-crew-eradicates-banksy-rat/>

¹²¹⁵ "Cleaners paint over priceless art", *supra* note 1214. See further Alison Young, "Art, Value and Banksy's Rats in Melbourne" *Hyperallegic: Sensitive to Arts & Its Discontents* (10 May 2010) <http://hyperallegic.com/6076/banksy-rat-melbourne/>

¹²¹⁶ Halsey & Young, "Meanings of Graffiti and Municipal Administration," *supra* note 1061 at 167.

‘zero tolerance’ across the municipality has no credibility.’¹²¹⁷ While working within the constraints of the regulatory template provided by the Victorian State Government, centered on ‘eradication’, ‘education’ and ‘enforcement,’ the *Strategy* emphasized that ‘graffiti writers as a group are able to contribute diversity and value to the social fabric of the city,’¹²¹⁸ and recommended that ‘tolerance towards the presence of graffiti vary according to where it is located.’¹²¹⁹ Graffiti writers were to be directed towards legitimate spaces like free walls,¹²²⁰ and encouraged to ‘graduate’ from tagging to more acceptable forms of street art such as stencils, and to develop principles for graffiti artists ‘interested in high quality street art.’¹²²¹ The *Strategy* thus attempted to leverage the aesthetic hierarchies already at work among graffiti artists, many of whom eschew tagging, and proposed to instill in graffiti writers a sense of ‘considered placement.’¹²²² The *Strategy* proposed to establish ‘high tolerance’ zones in nominated laneways where street art has flourished, which would largely be allowed to self-regulate, but banned graffiti in high-pedestrian areas.¹²²³ It sought to engage a variety of stakeholders in the management of graffiti, including graffiti writers and artists, residents, traders, community groups, galleries, transport companies, utilities providers, the Victoria Police, construction companies and hoarding manufacturers.¹²²⁴ The *Strategy* thus sought to regulate graffiti as a legitimate form of art, at the necessary cost of downplaying it as a potential form of protest.

The *Strategy* also attempted to break the pervasive cultural view of graffiti as a sign of crime. Instead of only directing its efforts towards re-educating graffiti writers, it

¹²¹⁷ *City of Melbourne Draft Graffiti Strategy* (City of Melbourne, 2005) at 4.

¹²¹⁸ *Ibid.* at 3.

¹²¹⁹ *Ibid.* at 4.

¹²²⁰ *Ibid.* at 23.

¹²²¹ *Ibid.*

¹²²² *Ibid.*

¹²²³ Specifically, "high tolerance" zones would be established in nominated laneways where street art has flourished. But graffiti would be banned in high-pedestrian areas such as the CBD core, Lygon, Rathdowne and Errol streets, Domain Rd, and Macaulay Rd in Kensington.

¹²²⁴ Young, “Negotiated Consent or Zero Tolerance?,” *supra* note 972 at 102.

assumes an educational mandate towards the Council and the broader community, arguing for the need to counter cultural misconceptions about graffiti including 'Simplistic associations between the presence of graffiti and the likelihood of being the victim of a crime of violence' and 'Stereotypical assumptions about who writes graffiti and why.'¹²²⁵ Studies suggest that the causal link between anti-social behaviour and economic and social decline is not straightforward or uni-directional, and does not apply well to heavily-trafficked urban places.¹²²⁶ There is also a very poor correlation between people's expressed levels of worry about crime and their actual levels of 'objective' risk.¹²²⁷ The *Strategy* acknowledges that broken windows theory and zero-tolerance are mutually sustaining approaches: the idea of crime as a spread or contagion transmitted aesthetically as well as physically buttresses the case for enforcing and policing space and aesthetics as a way to combat more crime.

The *Strategy* was released for public consultation in March 2005, but despite initially 'positive and optimistic'¹²²⁸ responses from the Council, community, and graffiti artists, the policy was abandoned and rewritten by the Council's Engineering Department, a decision taken 'at the highest level' within the Council.¹²²⁹ The new *Graffiti*

¹²²⁵ *City of Melbourne Draft Graffiti Strategy* (City of Melbourne, 2005) at 15.

¹²²⁶ Areas with transient populations flowing through the area (as commuters, students, tourists, clubbers and so on) will often see relatively high levels of anti-social behaviour, without experiencing the decline predicted by exponents of the 'broken windows' theory, which seems to apply better in areas with a relatively stable population and a relatively unified character (e.g. suburbs, small towns). See R.B. Taylor, *Breaking Away from Broken Windows* (Westview Press, 2001), Harcourt, *Illusion of Order*, *supra* note 1201.

¹²²⁷ Richard Sparks, Evi Girling & Ian Loader, "Fear and Everyday Urban Lives" (2001) 38:5-6 *Urban Studies* 885 at 895.

¹²²⁸ Young, "Negotiated Consent or Zero Tolerance?," *supra* note 972 at 103. The response by the city's major news media outlets were split along predictable lines: *The Age* reported the *Strategy*'s statement that 'graffiti writers as a group are able to contribute... to the social fabric of the city' - Martin Boulton, "The writing's on the wall for city's graffiti zone" *The Age* (4 March 2005) - but the *Herald Sun* only reported in alarmist tones on the proposed 'high tolerance zones,' and the suggestion of pairing 'young graffiti vandals' with 'experienced mentors' to teach them better techniques - Fiona Hudson, "New lines drawn in graffiti war" *Herald Sun* (4 March 2005) - and later decried the research interviews with 'graffiti vandals' as a waste of ratepayer money. 'City Council has paid thousands of dollars to interview 41 graffiti vandals and compile a wish list on what ratepayers can do for them.' Jen Kelly, "Vandals ask for wish list: Council quizzes graffiti fans" *Herald Sun* (17 November 2005)

¹²²⁹ Young, "Negotiated Consent or Zero Tolerance?," *supra* note 972 at 106.

Management Plan, adopted by Council in November 2005, cited the need for a clear strategy ‘which states that graffiti is unwanted, unwelcome and will not be tolerated’ and that ‘demonstrates Council’s get tough on graffiti approach.’¹²³⁰ The term ‘graffiti vandals’ appears throughout the *Plan*, which is based on ‘the principles of rapid removal, education, prevention and enforcement.’¹²³¹ The introduction reiterates the idea that ‘vandalism in the form of graffiti’ leads to ‘diminishing perceptions of the city’s cleanliness and safety,’ ‘the majority of people would agree that graffiti is unattractive’; and ‘unchecked graffiti... can send a signal that the authorities ... are not managing the environment properly.’¹²³² The anti-graffiti budget was doubled from \$250,000 to \$500,000.¹²³³ Although she wasn’t given an explanation, Young identifies two factors underlying ‘the dramatic turnaround:’ the influence of the Victoria Police who favored zero tolerance of graffiti in the central business district (which includes the famous laneways),¹²³⁴ and the influence of the Victorian State Government, who announced it would provide \$1 million for the creation of a specialist police taskforce to target graffiti hot spots around the city and push for convictions against graffitists in the lead-up to the Commonwealth Games.¹²³⁵

Cultural events that project an image of a city to a worldwide audience of visitors and onlookers bring unique economic pressures to bear on the sustainability of a blanket criminalization approach to graffiti. In the lead up to the Commonwealth Games,

¹²³⁰ Melbourne City Council, *Graffiti Management Plan* 2006 http://www.melbourne.vic.gov.au/rsrc/PDFs/Graffiti/graffiti_management_plan_2006.pdf at 1.

¹²³¹ *Ibid.* at 2.

¹²³² *Ibid.* at 1.

¹²³³ See Melbourne City Council Graffiti Management Plan 2009-2013, available here: <http://www.melbourne.vic.gov.au/AboutCouncil/PlansandPublications/strategies/Pages/GraffitiManagementPlan.aspx> at paragraph 12 (last accessed February 29, 2012).

¹²³⁴ Victoria Police working with local and state government representatives, business and local media on the “Love Melbourne” clean-up campaign to erase graffiti tags, to be launched in October 2005, had began drafting legislation for the State Government to consider, giving council staff the right to remove graffiti from private property without permission, and increasing penalties for graffiti attacks. Liz Minchin, “Police seek powers to answer scrawl of the wild” *The Age* (12 September 2005).

¹²³⁵ “Inspector welcomes graffiti taskforce” *Bayside Leader* 28 November 2005; Kate Hagan, “\$1m blitz to scrub city: Crackdown on graffiti for Games” *Port Philip Leader* (5 December 2005)

Melbourne City Council was caught between the valuation of (inner-city) graffiti as a cultural attraction, and pressure from other municipalities and infrastructure holders who spend millions of dollars removing graffiti each year.¹²³⁶ Police Minister Tim Holding said: 'The blitz on graffiti will make sure Melbourne is looking its very best in the lead-up to the Commonwealth Games.'¹²³⁷ Introducing the *Plan*, Melbourne Lord Mayor John So said:

Tags are a blight on our streetscape and tagging is vandalism that is not welcome in our city. With visitor numbers increasing at such a rapid rate, I want the city to be an inviting and welcoming place for all residents, workers and tourists. During the Commonwealth Games, our city will be on show to the world and I am sure everyone wants our city to look its best.¹²³⁸

London has adopted a similar approach in the lead up to the 2012 Olympic Games, with the City Mayor launching an 'assault' on 'grime-crime,' including litter and graffiti, and spearheading a Love Clean London initiative, while at the same time organizing an exhibition of street art in Olympic Park for the Cultural Olympiad, set to adorn walls which are already covered with unauthorized street art.¹²³⁹

¹²³⁶ In September 2005 alone, a panel of eight city chiefs and community leaders cited graffiti as an urgent priority for clean-up. Jen Kelly, "Graffiti, signs head fix-it list" *Herald Sun* (10 September 2005); Kingston Council appealed to the State government to accept responsibility for removing graffiti along Melbourne's 'high-profile rail corridors,' *Ibid.*; a Melbourne City Council sought to appeal to the State Government by taking a hard stance in serving notice on VicTrack and VicRoads to remove graffiti from public infrastructure in advance of the Games' influx of tourists, a council planning spokesperson stating: 'it's important for the Government to know Melbourne City Council is no longer putting up with it.' Jen Kelly, "Graffiti mess cops a spray" *Herald Sun* (30 September 2005).

¹²³⁷ Hagan, "\$1m blitz to scrub city", *supra* note 1235.

¹²³⁸ "New City Graffiti Plan takes Zero Tolerance Approach," (10 November 2005) City of Melbourne website <http://www.melbourne.vic.gov.au/info.cfm?top=228&pg=715&st=508>; Geraldine Mitchell, "Games war on graffiti" *Herald Sun* (11 November 2005)

¹²³⁹ Matt Brown, "Street Art of the Olympic Park" *Londonist* (2 August 2011) <http://londonist.com/2011/08/street-art-of-the-olympic-park.php>. This was predicted by Banksy in an editorial in the Guardian published in March 2006, towards the end of the 11-day Commonwealth Games, criticizing the cleanup in Melbourne and warning that it did not bode well for the Olympic Games. Invoking the scene of council workers covering miles of continuous artwork along the main railway line from the city centre to the game venue with grey paint, he quoted Alison Young: 'The clean-up is an imposition of a supposedly mainstream, or dominant, cultural view, in denial of the diversity of cultural styles that actually exist within a city space.' Banksy, "The Writing on the Wall", *supra* note 1030.

The *Strategy* and the *Plan* reflect two different understandings of who the law is responsible to, and how the law relates to culture and transformation. They are both aimed at changing attitudes, but in opposing ways. The *Strategy* wants to change attitudes of both graffiti artists as well as the broader community, urging a better understanding of the false link of graffiti with crime. It called upon the Council 'to recognize the heterogeneous nature of its own constituency.'¹²⁴⁰ As co-author Halsey stated, 'We have to think about tipping the culture towards the higher end of the art form as opposed to the tagging form because you're never going to eliminate graffiti - that's impossible.'¹²⁴¹ The *Plan* too wants to 'generate lasting change in attitudes and behaviour towards graffiti'¹²⁴² - but only among 'graffiti vandals,' not the wider community. For the *Strategy*, ideas of art and value are socially constructed and divergent, and law is a site where aesthetic values differ. For the council, aesthetics is unified, and law is the way in which we impose it. The strategy takes into account the motivations, desires, and expression of graffiti writers in doing what they do. The Council does not care about their motives, it just wants to stop their action. This will not work. The Council assumes the authority to legislate upon exceptions, which places the graffiti writer, the street artist, and the individual who enjoys looking at graffiti and street art in the position either of the outlaw, who carries out illegal vandalism, or of the plaintiff, the one who must ask for permission to be different. Thus the law continues as a hegemonic force, flattening differences and thus limiting the ability to think and construct public space differently.

Beyond Criminalization

Like many other modern cities, both Montreal and Melbourne adopt an approach of criminalization and eradication, but also seek out ways to retain and control certain forms of graffiti, as there is a growing acknowledgment that 'repression does not

¹²⁴⁰ Young, "Negotiated Consent or Zero Tolerance?," *supra* note 972 at 101.

¹²⁴¹ Cited in Ben Haywood, "Drawing a Line on Art" *The Age* 21 March 2005.

¹²⁴² Melbourne City Council, *Graffiti Management Plan 2006* http://www.melbourne.vic.gov.au/rsr/PDFs/Graffiti/graffiti_management_plan_2006.pdf at 1.

work.¹²⁴³ Both municipalities have tried to devise more creative ways of working with the traditions and values of graffiti artists, in the spirit of cooperation. For instance, Montreal has adopted the common practice of commissioning graffiti artists to paint murals on graffiti hot spots, which are then left alone by other artists out of respect.¹²⁴⁴ The Melbourne *Strategy* initially carved out high-tolerance zones for graffiti ‘hot-spots’ against the backdrop of criminalization, reflecting a locational and site-specific approach to graffiti, and offering a way to maintain the official contradictory view of graffiti as desirable in some forms or places, and unwanted in others - and yet, ironically, the Council’s *Plan* didn’t take the opportunity it presented. The police, Melbourne city officials, and the Victorian government used a bigger lens, flattening different kinds of spaces and the specificities of location under the state-wide blanket of criminal law. Criminalization is an absolute response that precludes a dialogue or conversation, pitting the interests of the ‘citizenry’ against a ‘minority.’¹²⁴⁵ It is dictated by expediency: a one-size-fits-all approach that ignores differences in site, form and placement.

Criminal law and zero-tolerance constructs graffiti as an imposition in an otherwise non-coercive visual field. Advertisements, political posters, and authorized signage are taken as the normal condition of the city, the ‘invisible’ background against which the graffiti tag or slogan becomes ‘hypervisible.’¹²⁴⁶ When a Victorian magistrate accused graffiti writer Renks of having ‘unilaterally imposed his notions of art and decoration on the rest

¹²⁴³ Raymond Carrier, Conseiller en planification, Université de la propreté et du déneigement, Ville de Montréal.

¹²⁴⁴ Gandhi, *supra* note 1099; Wilton, “Combating urban scrawl”, *supra* note 1122; Fiona Hudson, “Are Victorian Authorities Fighting Graffiti with Graffiti?” *The Punch* (7 September 2009) <http://www.thepunch.com.au/articles/are-victorian-authorities-fighting-graffiti-with-graffiti/> In Montreal, a number of Omen’s pieces were destroyed shortly after they were put up. See C. Savard, ‘Vandals Vandalized! Under Pressure Graf Works Targeted by Snubbed Artists?’ *Hour* (2 September 1999) at 11 cited in Chmielewska, *supra* note 1138 at 291.

¹²⁴⁵ ‘The strategy of criminalising graffiti results from opposing the desires of the local council (to eradicate graffiti) and the writers (to write graffiti) in a manner whereby the interests of the former outweigh utterly the interests of the latter.’ Halsey & Young, “Meanings of Graffiti and Municipal Administration,” *supra* note 1061 at 175.

¹²⁴⁶ See Young, *Judging the Image*, *supra* note 18 at 73.

of the world,'¹²⁴⁷ his concern was not with graffiti's affront to property, but with maintaining an aesthetic hegemony: the City gets to determine what will count as art and decoration (advertising gets a free pass) and what will not (graffiti and unauthorised street art). In passing harsh new penalties for graffiti writers, the Legislative Assembly of Victoria recited the usual litany of visceral metaphors that characterize graffiti as a visual obscenity, and link it to crime, dirt, disease and contagion: 'unsightly and ugly,'¹²⁴⁸ 'a blight on the community,' 'something that makes people in the community feel worse about their environment... [and] feel less safe than they would otherwise feel,' 'an ugly blight,'¹²⁴⁹ the object of 'disgust,' 'appalling,' 'unsightly,' 'unwarranted,' 'a significant eyesore,'¹²⁵⁰ 'a very antisocial issue,' 'an absolute curse,' causing 'an enormous amount of pain, suffering and cost to so many, and particularly to private individuals,'¹²⁵¹ 'an ugly blight on our urban and rural landscapes,'¹²⁵² and 'a scourge on our suburbs.'¹²⁵³ This discourse of disgust makes it clear that the regulation of graffiti is not about property but about aesthetics, *visual* pollution, and the threat of unbounded and unregulated space: 'we see it everywhere.'¹²⁵⁴

The prosecution of reverse graffiti further demonstrates the nature of graffiti's threat to the aesthetic hegemony. Unlike traditional graffiti, reverse-graffiti does not add materials to the cityscape, but uses non-prohibited materials (ie. cloth, water, cleaning products, and sometimes stencils) to erase the soot, dust and dirt already present in the city to form detailed compositions. Alexandre Orion's series of interventions named

¹²⁴⁷ *DPP v Shoan* [2007] VSCA 220 [28] per Buchanan J. For discussion of this case, see Bird, *supra* note 999.

¹²⁴⁸ Mr Hodgett (Kilsyth), Graffiti Prevention Bill, Second Reading, Victorian Legislative Assembly, 10 October 2007 at 3431.

¹²⁴⁹ Mr Hudson (Bentleigh), *Ibid.* at 3433.

¹²⁵⁰ Ms Asher (Brighton), *Ibid.* at 3434-5

¹²⁵¹ Dr Harkness (Frankston), *Ibid.* at 3436.

¹²⁵² Dr. Naphthine (South-West Coast), *Ibid.* at 3437.

¹²⁵³ Mr Lim (Clayton), *Ibid.* at 3447

¹²⁵⁴ Mr Hodgett (Kilsyth), *Ibid.* at 3431. Only Ms. Pennicuik (Southern Metropolitan) offered a critical perspective: *Ibid.* at 3472

Ossário, which scraped off soot and car exhaust filth in the tunnels of São Paulo to depict a great number of skulls, was so aesthetically powerful and politically subversive that the City felt compelled to clean all the tunnels – exactly what the artist had intended.¹²⁵⁵ Some practitioners of reverse-graffiti have been prosecuted for ‘environmental damage.’¹²⁵⁶ Such unsanctioned works directly threaten law’s prerogative to control the visual culture of a city, to impose its visual order, to decide the meaning of representations, and to control their circulation.

At stake is the power of law to frame and control not just the actions of graffiti writers, but an entire discourse, an ideological edifice which separates rightful claims to property from theft, and which distinguishes between the legitimacy of advertising and the illegitimacy of graffiti. Graffiti provokes disgust because it threatens all the distinctions which underpin and stabilize our ideological commitments: our regime of property, consumerism, advertising and abstract space. Graffiti functions as a sign or symbol of law’s failure to maintain these distinctions, and its regulation becomes a symbolic crusade – an itch or irritant that people need to scratch. The fact that the Melbourne Council did not follow the *Strategy* and went back to a flat definition of graffiti that needs to be eradicated, re-emphasizes the law’s desire to fix meaning and impose a hegemonic space which carefully distinguishes lawful and unlawful practices. The case of Roadsworth makes explicit the ambiguity and uncertainty of such a vision of public space. The political project is not necessarily carve out authorized spaces that allows graffiti, but to support graffiti as a form that questions the very notions of the authorised space – which is what Roadworth’s work achieves. Roadworth’s art was neither strictly illegal nor authorized, and this space of ambiguity is what enables us to think public spaces otherwise.

¹²⁵⁵ Alexandre Orion, website: <http://www.alexandreorion.com/ossario/>; see further Nicholaus Guitierrez, “Street Art Intervention: Alexandre Orion’s “Ossário” in São Paulo, Brazil” (2011) 3 *Sensate Journal* <http://www.sensatejournal.com/2011/03/review-nicholaus-gutierrez-on-%E2%80%99Cossario%E2%80%99D-a-mural-by-alexandre-orion/>

¹²⁵⁶ Eco-tagger and originator of the reverse-graffiti project, British artist Paul ‘Moose’ Curtis, has been threatened with legal action: Helen Carter, “Graffiti artist’s new form of street art under fire” *The Guardian* (15 October 2004) <http://www.guardian.co.uk/uk/2004/oct/15/ukcrime.prisonsandprobation>

Conclusion: Reclaiming Form

This chapter has explored the notion of repurposing as a way to open up the possibilities for thinking public spaces and a way of re-thinking law's meaning. The core of Roadworth's work is a repurposing of instrumental legal forms, queering their blank objectivity, opening up their inconsistency and ambiguity, to enable the possibility of thinking cities and public spaces otherwise. The risk of being repurposed is a *necessary* risk that law runs, and arises because law must be repeated, articulated, made explicit, and connected to material places. The irony whereby Roadworth is arrested and then sentenced to do the very thing he was arrested for arises by virtue of law's desire to legitimize or authorize practices within a flattened, bounded space. Yet the site-specific and locational nature of Roadworth's street art gestures towards an understanding of modern cities not as homogenous hermetic spaces but as constellations of sites of multiple intersecting normative orders. The law may seek to reincorporate street art's opposition or protest to the law in a way which reintroduces fixity of meaning – by authorizing, containing or commodifying it – but the law's own practices can always be repurposed in turn. The transformative potential of street art, its challenge to the assumptions of property and instrumental meaning, consists in the event of public address itself, which necessarily raises the question of who gets to lay claim to a public space. What took place in previous chapters as a discussion of the more nebulous public sphere or public discourse or viewing public manifests in this chapter in relation to public places. Graffiti's challenge to law is therefore profoundly local, taking it out of the realm of the book, theatre, or gallery, and into the public street, as the trace that remains, still observable, of the politics of otherness, another politics.

Law through the Looking Glass

What is it, then, that is so alarming (this is Borges's term) about the plays on words, images and bodies that art offers as if through the looking-glass?¹²⁵⁷

This dissertation has pursued an account of the relationship between law and art as mirror-like. A mirror does not just reflect, but reflects *on*: it does not offer a copy but an encounter, an oscillating regard, an uncanny doubling, a radical non-relation (the impossibility of being here, and there too). Jorge Luis Borges uses the word 'alarming' to describe the classificatory system of a Chinese encyclopaedia which divides animals according to 'those that belong to the Emperor,' 'embalmed ones,' 'suckling pigs,' mermaids,' 'fabulous ones,' 'stray dogs,' 'those included in the present classification' and so forth.¹²⁵⁸ Foucault famously began the *Order of Things* by reflecting on how the heterogenous nature of this classification - 'the stark impossibility of thinking *that*' - gave rise to a laughter that 'shattered... all the familiar landmarks of my thought.'¹²⁵⁹ The rupture of established frames of reference is an effect of the incongruity, disconnect or radical non-relation between encyclopedia entries which are supposed to form some sort of sequence, or occupy the one scene of intelligibility. Legendre, in turn, links this experience of difference to the challenge posed by art. The differential account of art does not tie its force or effects to its communication of meaning, but to its capacity to produce difference: its resonance as sign, its affective power which registers pre-critically. In these encounters between art and law, we can glimpse an ironic doubling,

¹²⁵⁷ Legendre, "Dogmatic Value of Aesthetics", *supra* note 33 at 12.

¹²⁵⁸ Jorge Luis Borges, "The Analytical Language of John Wilkins" in Eliot Weinberger, ed. *Jorge Luis Borges Selected Non-Fictions* trans. by Esther Allen, Suzanne Jill Levine, and Eliot Weinberger (Viking: New York, 1999 [1942]) 229-232.

¹²⁵⁹ Foucault, *Order of Things*, *supra* note 362 at xvi.

where law is shown to be *beside* itself, pulled through the looking glass into a scene it cannot master: the scene of art.

In order to develop a map of this ironic doubling which accords it more than an epiphenomenal significance, it was necessary to examine a breadth of case studies, spanning a range of representational practices (writing, speaking, making and viewing images and signs), modes (written words, spoken words, visual, experiential), sites (the courtroom, the theatre, the gallery, the internet, the street) and forms (legal judgments, authoritative performances, media representations, and popular discourses). The criterion for selecting my case studies was the sense of irony attached to them, and I proceeded by analyzing each encounter between law and art as an ironic doubling. The limitations of current censorship studies arise by virtue of a focus on its moral, political or institutional justifications (the *why*) rather than its forms and functions (the *how*). Controversial texts are often read through and even reduced to their surrounding context, rather than the other way around. More recently, scholarly interest has turned to the productive power of censorship – how that censorship has in fact produced different kinds of writing, speaking or images, spurred new forms of artistic production. Taking form and affect seriously means pursuing transversal inquiries which do not presume the integrity of either law or text. Insisting on looking at the law through the text, instead of the text through the law, is not a mere reversal of a hierarchical gaze – it is a doubling which dissolves the formal distinction between the two. Rather than treat law from the point of view of art, maintaining their difference, I have sought to bring to bear terms of analysis which have been most developed by art theory – framing, context, form, affect – into my analysis of law. I have done this by treating law *as* art – as a practice of writing, speech, images, and signs - as if the forces which work through art already and always operate within law as a textual, communicative, affective enterprise.

Beginning with the affective power of irony allowed theoretical questions to arise out of these encounters; and I went where they led me, in pursuit of legal research that is

‘disciplinary-critical, site-specific, engaged and constitutive.’¹²⁶⁰ The wide-angled approach meant I could draw insights from the critical resources of transdisciplinary inquiries into law and discourse, legal theatricality, law and the image, and legal spaces. In his crosscutting of cinema and philosophy, Deleuze proposes that ‘the encounter’ between disciplines does not take place simply when ‘one begins to reflect on the other’ but rather when ‘one discipline realizes that it has to resolve, for itself and by its own means, a problem similar to one confronted by the other.’¹²⁶¹ By drawing on a range of disciplines, I have traced a connection between the threat of literariness, the embarrassment of overt theatricality, the vulnerability of explicit censorship, and the threatening polysemy of images: each poses a challenge to law in its capacity as representation. Transdisciplinary methods invite different ways of seeing, moving beyond the modes of apprehending and organizing knowledge that stymie our imaginations, our affective responses, and ultimately our ethical judgment.

Chapter 1, ‘Repeating Law: Power, Performativity, and Psychoanalysis,’ connected the question of repetition to the question of law’s authority. Law is already discursive, a field of relations of power, not relations of meaning. It is a particular kind of authoritative, performative, and institutional discourse. It is also an affective force that attaches itself to the mind and body of legal subjects, whose desiring gazes and normative interactions in turn constitute the law’s authority. The differential event of art can form the occasion of a misstep in law’s own repetition, its performative self-instantiation and constitutive re-repression. This chapter examined ironic doubling, parody’s exposure of mediality, mournful protest speech which escapes the symbolic network of the sovereign, and copying unmoored from reference, to identify a common striving for a different account of repetition, one of radical *non*-relation, and connected this to a differential account of art’s power.

¹²⁶⁰ Desmond Manderson & Rick Mohr, “From Oxymoron to Intersection: An Epidemiology of Legal Research” (2003) 6 Law Text Culture 165 at 174

¹²⁶¹ Gilles Deleuze, “The Brain is the Screen: An Interview with Gilles Deleuze” in Gregory Flaxman, ed., *The Brain is the Screen: Deleuze and the Philosophy of Cinema* (Minneapolis: University of Minnesota Press, 2000) 365 at 367.

Chapter 2, 'Resignifying Words: Public Law, Private Judgment, and Obscene Repetition' examined key cases from the history of obscenity law in the nineteenth and early twentieth-centuries as sites for tracing out the implications and effects of law's textual practices of resignification. Law must resignify obscene speech as part of its institutional practice of prosecution, but the law's texts must be canonized and not pornographic. Faced with the idea of obscenity as addictive and corrupting to a new mass reading public, censors shored up the mechanisms of private judgment. The public record of the court tried to contain the pernicious effects of obscene repetition through euphemism, circumlocution, and the deferral of judgment. But these judicial techniques were mirrored in the elliptical devices employed by pornographic texts: both rely on techniques of absence, deferral or withholding in order to gesture towards the beyond of representation, to the Real of power or sex. Instead of remaining within this mimetic view of language, literary modernists like Joyce and Lawrence employed obscene words in ways which unmoored them from their referential constraints, simultaneously asserting and rejoicing in the artificiality of language, its capacity for excess, and its differential power: the power of repetition with a critical difference.

Chapter 3, 'Restaging Speech: Theatrical Cursing, Police Performance, and Obscene Repression' examined a case when law restaged art as criminal speech, but was in turn restaged as farce. As a viewing experience in which the backstage devices that sustain the onstage spectacle are revealed to the audience, theatricality provides a way of understanding the vulnerability of explicit censorship, which loses legitimacy when its sleight-of-hand is rendered incomplete. Theatre is an art form of risk, and performances can always fail to convince, persuade or enthrall their audience. So too with law, and while its performances need to be repeated and consolidated to maintain their effects, each repetition necessarily runs the risk of revealing law's backstage and reframing the force of law as farce. When the police crossed the limit dividing the stage from the spectators, inserting their actual presence into the imaginative world of the play, the theatrical frame, the distinction between art and life began to unravel. In trying to

censor the political power of theatre, the law exposed the racist ideological foundations of its own claim to legitimacy.

Chapter 4, 'Reframing Images: Photographing Children and Desiring Law,' examined the different gazes or structures of vision brought to bear upon the Henson photograph in order to reveal law's investment in remaining outside the image (not implicated or desirous). The political gaze overlooks its own imbrication within the affective regime of the image. By attempting to stand outside the viewing relationship and predetermine the 'meaning' of the photograph by reference to an overdetermined ideological framework, it ironically maintains our innocence about the complicity of our neoliberal, patriarchal and heteronormative sexual economy in the facilitation and perpetuation of child exploitation. The aesthetic gaze, drawing on the cultural capital of the art institution, also found itself unable to account for the challenge affect poses to the supposedly disinterested exercise of aesthetic judgment. As legal judgments of child pornography demonstrate, the criminality of an obscene image – its affective force – depends on the image's mode of address to the spectator. The condemnatory gaze of public law rests on a disgust that is about our image of the image of another's desirous responses – to feel disgust is to see ourselves mirrored in the pedophilic fantasy. The public law is redoubled in, and sustained by, its obscene superego underside: our complicity in socially-constructed desire. Henson's work and the discomfort it generates points to a certain perversity at the core of our imaging practices, and provides an occasion in which politics and aesthetics play out on the terrain of law.

Chapter 5, 'Repurposing Signs: Street Art, Public Space, and Legal Semiotics,' examined the regulation of unauthorized public markings – graffiti – in order to reveal law's own regime of representation as signs (communicating, not questioning) in space (bounded and designated not 'free'). In converting authoritative, didactic signs into questioning, dialogic, open-ended art, Roadsworth queered legal semiotics, suspending law's legal functioning, symbolic efficiency, and sovereign conceit, its capacity to mean what it says, its ability to be purposively and instrumentally deployed. Roadsworth's incorporation

into existing elements of the environment both exposes the ambiguity of the hegemonic construction of that space, and opens up the possibility of thinking the space otherwise. In exposing the materiality or textuality of its object, its particular mode or way of being, parody opens a space for a different political relation, for things to be other than they are. The irony whereby Roadsworth is arrested and then sentenced to do the very thing he was arrested for arises by virtue of the way in which law has to legitimize or authorise practices within its space. The law may seek to reincorporate street art's opposition or protest to the law in a way which reintroduces fixity of meaning – by authorizing, containing or commodifying it – but the law's own practices can always be repurposed in turn. The transformative potential of street art, its challenge to the assumptions of property and instrumental meaning, consists in the event of public address itself, in particular site-specific and locational contexts, which remind us that cities are places of aesthetic pluralism.

This wide-angled approach has allowed me to connect questions about the meaning, force and effects of representations to discussions of law and social control, and to a broader historical socio-legal project organized around the body of abject desire. The case studies I have examined form part of a larger neoliberal narrative of criminality in modernity, in which disgust functions as a mechanism for externalizing and concentrating socially-constructed desires in distinct singular individuals (pornographers, racists, pedophiles, vandals) who can then be policed and contained by controlling the representations to which they give rise and by which they are determined. All crimes challenge law's authority: as Julia Kristeva observed, '(a)ny crime, because it draws attention to the fragility of the law, is abject,'¹²⁶² drawing us towards 'the place where meaning collapses.'¹²⁶³ The criminal pamphlets, novels, paintings, photographs, theatrical performances and street art examined in this

¹²⁶² Julia Kristeva, *Powers of Horror: An Essay in Abjection* trans. by Leon S. Roudiez (New York: Columbia Uni Press 1982) at 4. 'Abjection is immoral, sinister, scheming and shady: a terror that disassembles, a hatred that smiles, a passion that uses the body for barter instead of inflaming it, a debtor who sells you up, a friend who stabs you.' *Ibid.*

¹²⁶³ *Ibid.* at 2.

dissertation not only reflected law, but set in motion a complex and affective process of entanglement and co-implication. When responding to law through the lens of its parodic doubles, we glimpse law alongside and in relation to the representational dynamics it tries to keep at bay. As discourse, law is performative, as theatre, serious, as image, authoritative, and as sign, purposive. Yet its performatives can be infelicitous, its gestures can be farcical, its censored images can elicit desire, and its instrumental signs can be put to new use. This is an immanent critique of law, one that remains skeptical about its formal self-presentation, and attuned to the investments and precariousness of its sovereign performances.

Language, culture, and law depend on repetition: on the linguistic condition of iterability (the workings of *différance*) and the cultural conditions of reproducibility (the dissemination of artifacts which survive their makers). As a set of institutions and practices, law must be repeated through time, articulated, performed, displayed, and connected to bodies and places. And the risk of being resignified, restaged, reframed or repurposed is a *necessary* risk that law runs. In the judge's concerns about the chastity of the record, we saw law unable to escape its own textuality, its own necessary signification, as it is held hostage to language's own effects, the very effects it is trying to distance itself from and regulate. In the theatrical performance and the arrest, we saw law unmasked, drawn into the play which explodes its pretensions to neutrality and liberal tolerance. In the photograph made more sexual through censorship, the law that purports to judge the image is pulled inside the image's frame, into the erotics of looking and the social circulation of desire. In the repurposed street signs, the semiotics of law were queered, their normative efficacy suspended, and their spatial hegemony questioned.

Understanding exactly how the institution of law can come undone when it seeks to regulate art, literature, speech and other forms of expression, open up possibilities for further connection between cultural legal theory and radical or emancipatory politics. Repetition with a critical difference forms a focus of politically engaged scholarship that seeks to determine when and how existing power structures can be subverted through

or by law. Political theorists have located cracks and potential subversion in the need for performances – of heteronormative genders and sexualities, of hate speech – to repeat themselves to gain traction. In such analyses, emancipatory political (anti-racist, anti-homophobic, etc.) hopes are pinned upon the possibility of repeating differently. The question then for those subject to the law (to the institutions of patriarchal heteronormative neoliberalism) becomes how *best* to repeat – what way will ensure the best results. But attempts to co-opt this repetition for a particular political agenda *in advance* misconceives the nature of this irony and its differential power. Irony works to decentre authority by placing it within a scene larger than or outside itself. When the law attempts to control and police the meaning, dissemination, and effects of representations, it is frequently pulled through the looking glass into the scene of art: judgment becomes a pornographic text, the police are obscene, the public law is pedophilic, and the city does graffiti. The moments of doubling in these encounters between law and art point suggests an immanent critique of law that is both structural and emancipatory. The law that is created culturally is also un-created and re-created, culturally. By viewing the relationship between law and culture as co-implicated, constitutive and dialogic, we can better understand the nature of art's challenge to law's authority and mastery over meaning, and open up a space for the possibility that things are only 'a' 'way,' and might be otherwise.

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