Visualizing Law and Authority

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Essays on Legal Aesthetics

Edited by

Leif Dahlberg

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Introduction. Visualising Law and Authority

The most immediate way to grasp the abstract notions of law and authority is perhaps to enter a courtroom during juridical proceedings. In the courtroom, the different actors in the legal system are present in the flesh: parties, legal counsel, prosecutor, judges, jury, and audience. Also the spatial and temporal organisation of the trial gives meaning to the terms law and authority, including the decorations of the courtroom. The social dynamics in and architecture of the courtroom also manifest differences in how law and authority is constituted in different times and places – as well as revealing cultural and historical palimpsests. For instance, in the criminal courts in England (primary instances: *Magistrate's court* and *Crown court*), the courtroom is highly compartmentalised, confining the actors to narrow and boxed-in spaces. The defendant is placed in a barred-in or glassed-in space separated from the rest of the courtroom. Likewise, the audience is also marginalised, either by being separated by a glass wall or by being placed in a gallery high above the other actors.[1] The use of elevation is a general architectural feature in the courtroom, the judge occupying an elevated position from which he or she can look down and control the proceedings. The equation of the eye and justice is indeed one of oldest (concrete) representations of justice (the "all-seeing eye"), a figure that have been paradoxically subverted by the modern image of justice as "blind".

In contrast to England, where the placement and movements of the defendant and the audience is confined and marginalised, in France the criminal courts (primary instances: *Tribunal correctionnel* and *Cour d'assises*) have a more open architecture organised around a central aisle, not confining the defendant to a barred or glassed-in space and also giving greater room and central place for the audience. The public prosecutor has an individual desk, placed perpendicular to the judge's and equally elevated. Also, in contrast to England, where the coming and going of the parties (and of the audience) are controlled and carefully monitored, in France the defendant typically waits in the courtroom itself for his or her case to come up, and the members

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[1] Cf. Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (London: Routledge, 2011).

of the audience are free to come and go as they please. Hence, in the French courtroom there is significantly more movement than in the English courtroom. In Sweden, the organisation of criminal proceedings is again different. Whereas the physical architecture of the courtroom (primary instance: *Tingsrätt*) appears open and non-hierarchical – the judges and lay judges (slightly elevated) and the parties are placed facing each other around a rectangular empty space, the audience placed on the same level as the parties – the parties and the audience are only allowed to enter the courtroom when the court (judges and lay judges) are seated.

Another concrete and visual manifestation of a legal system is how the actors are dressed. Whereas in England and in France the judges and legal counsel have special garments – and in England even wigs – in Sweden there is no such ceremonial dress. These and other differences in the physical architecture of the courtroom, the social and temporal organisation of the proceedings, and the different dress codes, are open for interpretation. Thus, the highly compartmentalised English criminal courtroom, marginalising both the defendant and the audience from the juridical process, can be seen as expressions of a legal system offering limited access to the public. This impression is enforced by the highly ritualised procedures and the ornamental dress, as well as the regulations limiting who can function as legal counsel. In comparison, the French criminal courtroom gives an impression of being more open and accessible, but also here the physical architecture and the dress code signal law and authority; and when a party or witness is questioned, he or she has to stand directly in front of the judge.[2] The criminal courtroom in Sweden could be placed at the other end of the spectrum, with less emphasis on authority (both in terms of architecture and dress) and more emphasis on functionality – but at the same time it should be remembered that the parties and the audience only are allowed to enter the courtroom when the court is seated.[3]

It is not only the interior of the courtroom and the social dynamic of the process that make tangible the abstract notions law and authority, also the

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[2] See further Antoine Garapon, *Bien juger: Essai sur le rituel judiciaire* (Paris: Odile Jacob 2010); Denis Salas, *Du procès pénal* (Paris: Presses Universitaires de France, 2010).

[3] For a historical presentation of the Swedish courtroom, see Eva Löfgren, *Rätt och rum. Tingshus som föreställning, byggnad och rum i förvandling 1734–1970* (Stockholm: Institutet för rättshistorisk forskning, 2011). See also my essay "Emotional tropes in the courtroom. On representation of affect and emotion in legal court proceedings", *Law and Humanities*, Vol. 3, No. 2 (2009), 175–205.

exterior and the location of the courthouse may be read as visualisations of the legal system. Ever since the revolution in 1789, French courthouses have been housed in palace-like buildings (often modelled after Greco-Roman temples), signalling the independence of the judiciary in relation to other state institutions. In England and Sweden the architectural style of the courthouse is less marked, and the design is typical of administrative government buildings (with notable exceptions such as the Royal Courts of Justice in London and Rådhuset in Stockholm). In certain periods, in particular around the turn of the century 1900, it was not unusual that newly built courthouses were surrounded by gardens in order to separate them (symbolically) from the urban environment.

However, the actual meaning of these and other physical and social manifestations of law and authority is not so much revealed by aesthetic contemplation as in participating in the activities and being absorbed by the environment, hence suggesting what may be called an aesthetics of distraction.[4] In other words, one should be aware of – and be critical of – the gap between physical appearance and functional meaning. It may well be that the striking physical and ceremonial differences between legal institutions in England, France and Sweden conceal an inner functional similarity, and that the differences are more apparent than real. Nevertheless, it is clear that legal systems have an aesthetics all their own, and that it manifests itself differently in different cultures and in different times. Such legal aesthetics represents ways of seeing, and the question is how we see – and also how we learn to see – legal institutions as constituting law and authority.

In an unfinished work, the French philosopher Maurice Merleau-Ponty presented the following paradox: "It is at one and the same time true that the world is *what we see* and that, all the same, it is necessary to learn to see it."[5] That is, in our everyday perception of and interaction with the world, we maintain a belief that the world is what appears to us (what Merleau-Ponty calls "the perceptual belief")[6] – both directly to our senses and indirectly through various media – and at the same time that we see and decode the world through structures and categories that we have learned through ex-

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[4] Cf Walter Benjamin, "Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit" (1936), zweite Fassung, in *Gesammelte Schriften I:2*, ed. R. Tiedemann *et al.* (Frankfurt: Suhrkamp, 1974), 504f.

[5] Maurice Merleau-Ponty, *Le visible et l'invisible* (Paris: Gallimard, 1964), 18. ["Il est vrai à la foi que le monde est *ce que nous voyons* et que, pourtant, il nous faut apprendre à le voir."]

[6] Ibid. *passim* ["la foi perceptive"].

perience and education. This is true both for everyday perception and social interaction and for the artist making the human lifeworld visible and intelligible for us. However, equally paradoxical is that in seeing and learning to see, we transform the world: the world is not unaffected by being observed and interpreted. The act of seeing produces images of the world, which then themselves become part of the lifeworld. Although it is frequently argued that the works of artists affect the way we perceive the world – for instance in Percy Bysshe Shelley's dictum that the "poets are the unacknowledged legislators of the world" (*A Defence of Poetry*, 1821) and in Martin Heidegger's essay on the origin of the artwork (*Der Ursprung des Kunstwerkes*, 1936) – it is less common to maintain that law constitutes a visual and aesthetic field of cognitive and normative world making. Such a claim calls for a phenomenological investigation of the scopic field and of regimes of visibility, and for the necessity to develop a legal aesthetics. The essays in this volume respond in various ways to such a demand to investigate both the image of law and the legal imaginary.

It could be argued – and this is the shared hypothesis of the authors to the essays collected in this volume – that law is constituted as much, if not primarily, as an aesthetics; and in order to properly understand law – and also to critically engage with law – one has to study the ways in which law as a societal institution has comprehended and constructed the human lifeworld, as this is manifested and sedimented in material and visual culture, in legal codes and in juridical praxes. Instead of considering law (as) an abstract concept, a transcendental form or an ideal, the essays consider law through the various forms of representations in which it is embodied in different cultural and social contexts. In this regard, the aesthetics of law is not contingent to the law since it is the phenomenon of law. Material and visual representations of law are the empirical frames through which law appears and functions in society. If one were to take away – to destroy – the aesthetic form of the courtroom and the courthouse, the functional efficiency of law would immediately collapse. In other words, if law as social phenomenon only can exist as law through its visual and material representations, one need to study the different relationships law maintains with them as well as the different perceptions of law that are sedimented in its various representations. This can be done by studying the visual culture found in the courtroom, the visual and material representation of law and authority in socio-political contexts, in art and in popular media.

The German art historian Hans Belting has emphasised that images are both internal and external phenomena: "An 'image' is more than a product of perception. It is created as the result of personal or collective knowledge

and intention. We live with images, we comprehend the world in images."[7] According to Belting, this calls for an anthropology of images, revealing among other things that "we are not masters of our images, but [are] rather in a sense at their mercy." Images both reflect and affect the changing course of human history and they show in an indubitable way how changeable human nature is.[8] In ordinary language and also in academic discourse, the terms *image* and *picture* are often used interchangeably, and in German the word *Bild* can mean both *image* and *picture*. In order to distinguish between the image and its physical manifestation, Belting suggests the terms *image* and *medium*, defining the picture as "the image with a medium." However, the image medium is not only external, but also consists of images existing in an individual or a collective. In fact, the image requires a spectator "who is able to animate the media as though images were living things."[9] Indeed, according to Belting image perception is a form of interpretation, a symbolic act guided by cultural patterns and pictorial technologies. In other words, our concrete and conceptual images of law and authority are both internal and external, and are mediated both through physical media – including courtroom design and courthouse architecture – and through the living and active memory of human actors. The images of law and authority are not static but are changing with evolving conceptions of law and justice.

The majority of the essays in this volume were presented at the conference *Law and the Image* at the Swedish National Library, Stockholm, 24–25 September, 2010.[10] The conference brought together scholars from Europe, America and Asia to discuss the complex relations between law, media and visual culture. The participants in the conference belonged to academic disciplines such as Art history, Cultural studies, Law, and Literary and Media studies.

One way to answer the call for a legal aesthetics consists in examining law itself as an aesthetic object. Martin Kayman (Cardiff University) and Gary Watt (University of Warwick), discuss the power of law to produce icons, in the sense of unreadable texts or textiles. In the essay "'Iconic' Texts of Law

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7 Hans Belting, *An Anthropology of Images*, trans. T. Dunlap (Princeton: Princeton University Press, 2011), 9.

8 Ibid. 10.

9 Ibid. 11.

10 The conference was organised by Leif Dahlberg, Håkan Gustafsson, and Pelle Snickars (see http://www.kb.se/Forskning/2010/Law-and-the-Image/). The conference received generous support from the Swedish National Library, the Royal Academy for the Fine Arts, the Wenner-Gren Foundations, and the Embassy of the United States of America in Stockholm.

and Religion: A Tale of Two Decalogues", Kayman discusses how an 'iconic' text – in the sense of a document whose value lies not only in its content but in its visibility as a symbol of what it stands for – asks to be read. He takes as his example how American law circumnavigates the prohibition against public display of religion by declaring certain religious texts as 'iconic' and thereby transforming a text into an illegible image.

Gary Watt analyses in his essay "Law Suits: Clothing as the Image of Law" legal argumentation as a form of dressmaking in which the primary purpose is to hide rather than uncover naked reality, and that the "textiles of law" may be considered another form of legal text. Similarly, to wear clothing is to obey a foundational unspoken law of civil society and constitutes a legally instituted and legally regulated frontier between society and self, and the uniformed guards of this frontier are the lawyers.

Several contributors to the volume focus on the way that visual art can be used to present political power, as well as to question it or even to put it into question. Paul Raffield (University of Warwick) investigates the semiotics of Medieval and Early Modern English portraiture and its capacity both to constitute and to subvert traditional perceptions of law, legality and kingship. His essay "Law and the Equivocal Image: Sacred and Profane in Royal Portraiture" studies the Wilton Diptych (c. 1395–1399) in order to enhance understanding of the complicated metaphysical notion of divine kingship. While the imagery of the interior of the diptych implies the existence of irrefutable monarchic authority of Richard II, that of the exterior suggests that the crown is restricted in its exercise of power, bound to the realm by its office and restricted in the extent of its powers. Here the crown is subject to *lex terrae* and to the unwritten constraints of the ancient constitution.

Sidia Fiorato (Università degli Studi di Verona) analyses the choreography of modern classical ballet, in Kenneth MacMillan's *Romeo and Juliet* (1965), as a way of reading individual resistance to patriarchal political power. In the Elizabethan period "dance" referred to the practice of courtly and popular dance and, at the same time, constituted a recurrent symbol of order and harmony in the imagery of the period's cultural production. The medium of the body and its dancing movements create images that express and reinforce the social and hierarchical order of the period. Fiorato underlines the gendered codification of movements and how dance mirrors the patriarchal structure of society. Leaving the leading roles to men, it emphasises female containment and subordination. Focusing on the Capulet's ball, Fiorato shows how the choreography turns into a meta-dance discourse, which reproduces a Renaissance political masque and its affirmation of the social order.

Leif Dahlberg (Kungliga Tekniska högskolan, Stockholm) brings into play the relationship between law and cartography in his essay "Mapping the Law of Stockholm. Reading old maps of Stockholm as representing and constituting judicial space". The essay investigates the representation and constitution of law in eighteenth century maps of Stockholm, focusing in particular on Jonas Brolin's "Grundritning Öfver Stockholms Stad" from 1771. He argues that political powers during the Modern period made use of maps to comprehend and constitute both a national political space and a national legal space.

Elina Druker (Stockholms universitet), in her contribution "Mapping absence. Maps as meta-artistic discourse in literature", discusses the use of the map as an intertextual and meta-fictional figure in literature by examining the fictional maps in Lewis Carroll's mock-epic *The Hunting of the Snark* (1876) and in Tove Jansson's novel *Moominpappa and the Sea* (1965). Both works include fictive maps that connect to cartographic traditions in different ways, but most importantly are used as symbols for adventure, power and control.

Chiara Battisti (Università degli Studi di Verona) explores the iconology of law and disorder in the American television series *Law & Order Special Victims Unit*. The essay discusses how this series offers narratives of law which may be "seen" if we are willing to question how a given legal narrative not only shapes and informs, but also represses, disguises, and displaces, through the flow of images, our desires for certainty, closure and order. Battisti argues that the series "Law & Order" ambiguously plays with the need to control the raising scepticism and disenchantment regarding law's ability to render justice.

From discussing how images and visual art may (re)present political power, as well as put it into question, the next series of contributions analyse the normative and legal structures inherent in the artwork (and the artworld) itself. In four different essays – by Ari Hirvonen (University of Helsinki), Max Liljefors (Lunds universitet), Christine Poggi (University of Pennsylvania), and Karen-Margrethe Simonsen (Aarhus Universitet) – contemporary artists and artworks are discussed in terms of disclosure and deconstruction of law. In the essay "Body Politics. Normative Gaze, Carnal Intimacy and Touching Pain in Vanessa Beecroft's Art", Ari Hirvonen discusses the Italian artist Vanessa Beecroft's provocative use of female bodies to uncover the relation between corporality and individuality, which ties the human to both the moral and the legal norm. Bodies are differences, therefore forces, not identities, placed and stretched one against the other. They cross paths, send signals, press against each other and collide with one another. Hirvonen argues that in Beecroft's works we not only confront the question of the rela-

tionship between bodies and law on multiple levels and in provocative ways, but also that the ethics of her work lies beyond this kind of moral argumentation.

Similarly, in the essay "Mirroring the Law: Michelangelo Pistoletto, Santiago Sierra, Tehching Hsieh, and Chantal Akerman", Christine Poggi discusses how the relative autonomy of the aesthetic sphere has allowed artists to transgress or blur juridical boundaries, often in ways that paradoxically reproduce the law in mirror reversal, bringing invisible individuals to hypervisibility or repositioning legitimate citizens as undocumented aliens. She analyses Michelangelo Pistoletto's 1979 mirror piece "Tables of the Law", Tehching Hsieh's one-year performances of the late 1970s and early 1980s, Santiago Sierra's use of underprivileged people in his artwork, and Chantal Akerman's video "From the Other Side" (documenting the Mexican-American border). According to Poggi, these works seek to ground assertions to citizenship or political legitimacy in nothing more than the enunciation of a common "humanity", rather than in ethnic identity or birthright, and point to the incompatibility of "local" and "universal" juridical and ethical norms.

Max Liljefors analyses how contemporary artists directly or indirectly violate laws not only in order to create art, but also to break into – and become recognised by – the artworld. In his essay "Body and Authority in Contemporary Art: Tehching Hsieh's One-Year Performances", Liljefors first discusses two much-debated Swedish artworks – Lars Norén's play *Seven Three* (1998) and Anna Odell's *Unknown, woman 2009-349701* (2009) – that have brought about confrontations between individuals and social institutions. The second part focuses on Tehching Hsieh's series of one-year art performances (1978–1986), in which the artist instated rules for himself that brought him in conflict with societal law, but at the same time reproduced some of its *modi operandi*. In the essay Liljefors discusses on the one hand what happens when the law is called upon to decide the question "what is art?" and on the other the role/rule of law in the artworld – and on connexions between the two domains.

Karen-Margrethe Simonsen, in the essay "Global Panopticism. On the Eye of Power in Modern Surveillance Society and Post-Orwellian Self-Surveillance and Sousveillance-Strategies in Modern Art", discusses images of power in modern society, focusing on artworks that thematise the idea of surveillance in reflective and ironic ways. She looks primarily at artworks by Hasan Elahi ("Tracking Transience") and at performances by the Surveillance Camera Players. According to Simonsen, the artworks expose the conception of absolute visibility in traditional surveillance as an illusion and as a misconstructed ideal that fits badly with modern mobility and political cul-

ture. Following Gilles Deleuze, she suggests that we do not any longer live within a disciplinary society with "sites of confinement" and all the disciplinary institutions, but in "control societies" ruled by codes and "modulations".

The last two contributions focus on the use of images and imagery in the juridical process, explicitly invoking the need for a legal aesthetics. Daniela Carpi (Università degli Studi di Verona) analyses in her essay "Crime Evidence: 'Simulacres et Simulations', Photography in Forensic Evidence" the use of photography in criminal trials and the problematics of contextual fragmentation. When photography was invented in the mid-nineteenth century it had a special power of persuasion and claims to mechanical objectivity, so much so that visual evidence played a central role in many legal cases: It was conceived as an objective and impartial witness of facts. People confided in its authority. However, in the course of time photography started to become a threatening art. Photographs were declared to produce distortions and law courts began to exclude certain visual proofs from trials. To exemplify the unreliability of photos as forensic evidence, Carpi analyses the photography of the police killing of a rioter in Genoa in 2001 and the picture of the slaughtered woman in P. D. James' novel *A Certain Justice* (1997).

Richard Sherwin (New York Law School) extends this discussion into the domain of moving images from CCTV and video surveillance cameras. In both cases, the presumed naivety of the legal eye should not remain unchallenged, but instead be exposed as the scopic dress of a legal aesthetics. His essay "Constitutional Purgatory: Shades and Presences Inside the Courtroom" discusses how new visual technologies are transforming the practice and theory of law. Visual evidence together with visual arguments are increasingly taking the place of words alone inside the courtroom. Sherwin argues that the visual digital turn in the current legal culture will eventually lead to a more rhetorically sophisticated response to law as image. In order for this to happen, the legal profession must attain both better understanding of images and of visual culture.

The essays in this volume attempt in different ways to understand and to question the image(s) of law and authority in society, both historical and contemporary. Images are produced and transmitted by the media technologies available in their own times. The interplay between image and technology, old and new, constitutes a symbolic act. The response, the audience's perception of the image, is also a symbolic act. This dynamic is best illustrated by pictures found in public places and spaces and in a medium chosen by some authorised institution. In analysing the aesthetics law and authority, the essays in this volume help us to come to terms with the notions of *law* and *authority* and the role and function of legal aesthetics in human society.

Part 1. Towards a Legal Aesthetics

Martin A. Kayman
(Cardiff University)

"Iconic" Texts of Law and Religion: A Tale of Two Decalogues

In late 2008, as the UK Parliament debated the detention without charge of terrorist suspects for up to forty-two days, a major exhibition entitled *Taking Liberties* was curated at the British Library by the historian Linda Colley. The exhibition translated a wealth of recent scholarship into a revisionist narrative that challenged the English myth of native liberty in favor of a history of political struggle. The display provided a documentary and visual narrative initiated by Magna Carta and culminating, in chronological terms, in the Universal Declaration of Human Rights. This narrative deliberately pointed towards an as-yet unfinished project. As Colley wrote in an essay published to accompany the exhibition: "Notoriously, the United Kingdom […] differs from most modern states in possessing no single document setting out the fundamentals of its government, the limits on executive power within its boundaries, and the rights and duties of its individual citizens."[1] Consequently, she continued, the British are not in a position to "go on pilgrimages […] to view the originals" of their foundational documents, as American citizens do.[2]

This was not merely the "personal view" indicated by the subtitle of Colley's essay. The exhibition was a purposeful contribution to a contemporary campaign for a new Bill of Rights. The campaign expressed an increasing lack of faith in the capacity of the unwritten constitution, on which British confidence in its liberties had traditionally relied, to continue to provide the necessary guarantees. The Labour Government's 2007 proposal for such a Bill was broadly endorsed by the UK Parliament Joint Committee on Human Rights.[3] After a generation of "law-and-literature" (not to mention the centuries of ideological investment in the superiority of the unwritten law), the

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[1] Linda Colley, *Taking Stock of Taking Liberties: A Personal View* (London: British Library, 2008), 9.

[2] Ibid. 10.

[3] Secretary of State for Justice, *The Governance of Britain*, Green Paper (London: HMSO, 2007); UK Parliament Joint Committee on Human Rights, *A Bill of Rights for the UK?* (London: The Stationary Office, 2008).

notion that a written law had the capacity to positively assist the cause of liberty may strike one as puzzling. But the proposed Bill of Rights is designed not to be a law like other laws, but, as Colley's language of "pilgrimage" suggests, a text of a special kind.

The key to the special nature of a foundational text like a Bill of Rights can be seen on the British Library *Taking Liberties* website where a selection of "Online exhibits" has been made available. These include digitized images of Magna Carta, the 1689 Bill of Rights, the Universal Declaration, and what are described as thirty-seven other "key icons of liberty and progress."[4] The vulgarization of the words "icon" and "iconic" has been notorious during the first years of the twenty-first century in Britain, but its use here is, I think, worth taking seriously. While a transcription is made available, the digitized copy of Magna Carta is evidently presented here not for the details of its provisions, but for what its visual image is intended to represent. Here, text is primarily symbolic display. In the popular sense, as in the religious, icons are designed not to be read critically as discursive text but to be looked at – literally, ad-mired. In the context of postmodern uncertainty, the vulgarization of the terms "icon" and "iconic" is, one might argue, a symptom of a cultural desire for recognizable objects and figures that the public can securely identify and admire as standing for certain values. Similarly, as an iconic text, the Bill of Rights would be valued not only for its content but for its role as a visible image of national values and identity that motivates and demands the allegiance of citizens.

How, then, does an iconic text ask to be read? How are we supposed to read a document that is both a text and itself a symbolic image of what it represents? There are two issues here: one of the relation between the visual image and the discursive text; the other of the relation between the secular and the religious. In the case of law, the two issues are intimately connected. That connection reformulates the initial question in terms of the relation between the command of an iconic law and a religious command.

A tale of two decalogues

The relation between the two issues – image and text, and law and religion – lies, of course, in that clearest example of an iconic text, the Ten Commandments. This foundational document and image of monotheistic religion has the relation between text and image at the center of its concerns:

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[4] See http://www.bl.uk/onlinegallery/takingliberties/staritems.html (accessed 30 January, 2011).

> Thou shalt have no other gods before me. Thou shalt not make unto thee a graven image, nor any manner of likeness, of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; Thou shalt not bow down thyself to them, nor serve them.[5]

As Costas Douzinas has shown, modern secular law inherits the bar on representation as the source of its own power. As theorized in Kant and Burke, Douzinas argues, "The modern sublime is abstract and negative; its proper form is that of law and its proper content the proscription on representation […]. The immanence of the divine in history, exemplified by the economy of the holy icon, becomes the immanence of law."[6]

If the first commandment of the Biblical Decalogue founds the distinction between monotheism and paganism, the first of the ten constitutional Amendments that make up the American Bill of Rights (1791) fulfills the secularization of the sublime by linking liberty from the start to the law's separation of itself from religion:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[7]

As we have already seen from Colley's allusions, the American Bill of Rights is itself displayed and popularly regarded as an iconic document. At around the same time as a postmodern Bill of Rights was becoming an object of desire in the UK, the relationship between the two decalogues, and hence between religion and law, became the object of intense debate in the American Supreme Court. The debate was provoked, moreover, by iconic representations of the Decalogue seeking accommodation within the visual space of the law and therefore within the verbal terms of the opening clause of the equally iconic foundational document of American modernity.

The distant source of the dispute lies in 1951, when retired Judge E. J. Ruegemer, a member of the Fraternal Order of Eagles, began a campaign to distribute thousands of posters of the Commandments across America. The project was to promote to the youth of America "the original program presented by God" that was the basis for "All the laws of the Country dealing

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[5] *Exodus* 32: 3–5.

[6] Costas Douzinas, "Prosopon and Antiprosopon: Prolegomena for a Legal Iconography", *Law and the Image: The Authority of Art and the Aesthetics of Law*, eds. Costas Douzinas and Lynda Nead (Chicago: University of Chicago Press, 1999), 57.

[7] First Amendment to the United States Constitution (1791).

with human relations."[8] Five years later, Cecil B. DeMille, who was about to launch his 1956 epic, *The Ten Commandments*,[9] joined the campaign, adding the film's Cold War politics to Ruegemer's concern with juvenile delinquency – a pairing paralleled today by the feared "radicalization" of Muslim youths and "global terror" that was a major motivation in New Labour's pursuit of a new Bill of Rights.[10]

In place of the original framed posters, the Ruegemer-DeMille program took the much more impressive visual form of large stone monoliths in what is described as "the traditional shape of the biblical stones."[11] To understand this gesture, we need to recall that the Commandments do not simply oppose words to images. The *logos* that founds itself in its opposition to idolatry is itself a visual icon: "And the tables were the work of God, and the writing was the writing of God, graven upon the tables."[12] Rather than a ban on images, the founding prohibition can be read as an opposition between graven likenesses of sensuous objects and the graven writing of the *logos*. However, it is equally important to recall that the founding graphic icon was lost with the destruction of the Temple. Its loss gave rise thenceforth to a multiplication of narratives, versions, translations, interpretations and commentaries, in which the iconic is constantly threatened by the uncertainties, obscurities, debates and deferrals of the textual. In contrast, by imitating not only the content but also the form and material of the original image of the *logos*, the Ten Commandments project seeks to restore their dogmatic stature, fixing the textual in the iconic – writing the Law again, literally, in stone.

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[8] E. J. Ruegemer, *The Ten Commandments*, Jefferson Madison Center for Religious Liberty website (1953); at http://www.jmcenter.org/UserDocs/FOE_10C_poster_back.pdf (accessed 30 January, 2011).

[9] Cecil B. DeMille (director), *The Ten Commandments* (Paramount, 1956).

[10] A Senate sub-committee held hearings into juvenile delinquency in 1954; the stage version of Leonard Bernstein's *West Side Story* premiered in 1957.

[11] An image of one of the monuments can be found at http://www.tspb.state.tx.us/SPB/Gallery/MonuList/10.htm (accessed 30 January, 2010). Sue Hoffman reports that "There is documentation and verification of 145 monoliths located in 34 states plus one in Canada," although she notes that these are "in various states of being," owing to lawsuits. See Sue A. Hoffman, *The Real History of the Ten Commandments Project of the Fraternal Order of Eagles* (2005); at http://www.religioustolerance.org/hoffman01.htm, last accessed 30 January, 2011). For another well-documented account, see Robert V. Ritter, "Supreme Scandal" (2009), Jefferson Madison Center for Religious Liberty; at http://www.jmcenter.org/ (accessed 30 January, 2011).

[12] *Exodus* 32: 16.

The example set up outside the Texas State Legislature, which was to become an object of litigation, consists of a six-foot slab of "Sunset Red" granite shaped as twin tablets in ostensible likeness of the "original," set on a small rock-like plinth, and with a translation of the commandments engraved on its rectangular face.[13] The Greek characters commonly used to denote Christ and two Stars of David sit below the text. The four-leaf clover frame around the text is interrupted at the top by the American Eagle and the national flag, above which sits the Eye of Providence featured on the reverse of the Great Seal of the USA. Crucially, the two rounded portions above the framed text are occupied by a second iteration of the Commandments: each portion contains a tablet reproducing the two stones inscribed in abbreviated Canaanite script that are the abiding image of the tablets used in DeMille's film.[14] The visual force of the monument derives from the fractal relation between the image of the Canaanite "originals" and the form of the tablets as a whole, on which the English translation of the unreadable original is inscribed. The two iterations redouble each other and, linked by the symbols of the USA, constitute an iconic assertion of the foundational role of the Bible in American law. The representation of the Decalogue is placed besides the entry to the state legislature as an icon of the original law whose very monumentality is intended to impress itself upon, and be the touchstone for, the lawmaking within.

A tale of two cases

The Fraternal Order of Eagles' project provoked little controversy for nearly half a century. But following 9/11 and the new life it gave to debates regarding the role of religion in American politics, at least ten legal cases were heard by local or federal courts for the removal of the monuments that had been located during the 1950s and 1960s. These culminated in two cases heard by the American Supreme Court in 2005.

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[13] According to the Fraternal Order, the version of the text was agreed between representatives of various Churches and a Rabbi – along with Edgar Hoover. In fact, the text corresponds to the Lutheran/ Catholic version that amalgamates the first six verses into one initial commandment.

[14] Henry S. Noerdlinger, *Moses and Egypt: The Documentation to the Motion Picture The Ten Commandments* (Los Angeles: University of Southern California Press, 1956), 40. The Canaanite script for the inscription was suggested by Ralph Marcus of the Institute for Oriental Studies at the University of Chicago, to give the tablets historical authenticity.

The displays of the Ten Commandments in the space of the law radically disturbed the Court's reading of its own foundational document. Although the two cases were considered together and arguments cross-referenced each other, and although both were decided by the slimmest majority of five to four, each ruling was in the contrary direction. Consistent with precedent Supreme Court decisions in 1971 and 1981 against the display of posters containing the Commandments in state schools, the Court ruled by the narrowest of majorities against McCreary County in Kentucky for exhibiting a printed copy of the Commandments in its courthouse.[15] Remarkably, however, in the case concerning the monument we have been describing, *Van Orden v. Perry*, the same Court found by the same margin in favor of Texas's right to maintain the monolith next to the State capitol.[16] Given everything we have said about it, how was it, then, that the Court ultimately found that this most substantially iconic of texts could be accommodated within the textual and physical space of the law and the paper version not?

As I have been suggesting, what is at issue in these cases is how the iconic texts – both the Commandments and the Bill of Rights – ask to be read. In relation to the images of the Commandments, what was known as the "Lemon test" determined that the state may be associated with religious organizations or artifacts only if it can be shown that these serve a predominantly secular purpose.[17] On the contrary, in the view of the majority, by including a printed copy of the Commandments in an exhibition in the courthouse entitled "Foundations of American Law and Government," McCreary County clearly intended that it be understood as an assertion of the religious grounds of the law.[18]

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[15] *McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky et al.* 545 U. S. 844 (2005), subsequent references will be abbreviated as "McCreary". The major earlier cases were those decided in 1971 and 1981 (*Lemon v. Kurtzman* 403 U.S. 602 [1971]; *Stone v. Graham* 449 U. S. 39 [1981]). Although written ahead of the Court's ruling, Paul Finkelman provides a clear account of the legal issues in these cases in Paul Finkelman, "The Ten Commandments on the Courthouse Lawn and Elsewhere", *Fordham Law Review*, 73 (2005), 1477–1520.

[16] *Van Orden v. Perry* 545 U. S. 677 (2005), subsequent references will be abbreviated as "Van Orden."

[17] *Lemon v. Kurtzman* 403 U.S. 602 (1971).

[18] The Ten Commandments took their place in the McCreary exhibition alongside the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star Spangled Banner, the Mayflower Compact of 1620, the National Motto of the United States ("In God We Trust"), the Preamble to the Kentucky Constitution, and a picture of Lady Justice.

However, the rejection of the validity of the Lemon test by the conservative judges threw the Court, even more intensely than was the practice at the time, back onto radical disputes regarding how its own foundational text should be read. On the one hand, the conservatives argued for a restrictive originalist interpretation in accord with a fundamentalist attitude to text. They defended a national narrative in which religion had been and continued closely entwined with the constitution. On the other hand, the more liberal Justices argued for a "living Constitution" that adapts to historical circumstance. In their view, this reading "mandated government neutrality between religion and religion, and between religion and nonreligion" (*McCreary*: 860). The conservative minority in *McCreary* saw absolutely no judicial grounds for such a view, attacking the liberals in the following fierce terms: "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that – thumbs up or thumbs down – as their personal preferences dictate" (*McCreary*: 890–891).

If the contrary outcomes of two such apparently similar cases as *McCreary* and *Van Orden* are one indicator of how much the Court was disturbed by this confrontation between legal and religious icons of law, then the second signal is that the difference in the outcomes was the result of the swing vote of the same member of the Court. What, then, made Justice Stephen Breyer change his position between two cases that all his fellow Justices saw as leading to the same outcome?

Having supported the majority against the County in *McCreary*, Breyer took pains in *Van Orden* to establish that, although he was voting with the conservatives to preserve the Texas monument, he did not share their reasons (*Van Orden*: 704). The "shifting majority" cannot thus be explained by a conflict of "legal principle" and we will do Breyer the honor of recognizing that he did not alter his vote on grounds of "personal preference." My sense is that Breyer's position was driven precisely by the need to preserve the difference between the Bill of Rights and the Biblical Decalogue as different sorts of fundamental, iconic documents precisely in the terms we have been using: how each asks to be read.

In Breyer's argument, what distinguishes the First Amendment from the Commandment is that the former is read *flexibly* – as objectively evidenced by his changing vote. The implication of his argument is that to treat the Bill of Rights as a set of settled principles to be "consistently applied," as the conservatives would wish, threatens law with a collapse into dogma. "Borderline" cases, of which *Van Orden* was, for him, exemplary, are resistant to

resolution by any fixed principle: "In such cases," Breyer argued, "I see no test-related substitute for the exercise of legal judgment […] no exact formula can dictate a resolution to such fact-intensive cases" (*Van Orden*: 677). It is hence not a matter of dispute over the interpretation of the text of the law but of its "purpose." The First Amendment is iconic precisely because it is the image of the law's attitude towards freedom – flexibility rather than dogmatism.

Notably, this flexibility manifests itself through the recognition that such issues cannot, ultimately, be determined as a matter of law at all, but only as a judgment on the facts in individual cases. The fact in question is precisely how icons are read. Notwithstanding the evidently religious content of the monument, the relation between the Bill of Rights and the religious law passes here through a consideration of how the latter asks to be read. As Breyer put it: "focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display" (*Van Orden*: 701).

From the point of view of the majority in *McCreary*, including Breyer, the display of the Ten Commandments in the same printed format, material and narrative and visual context as other iconic documents like Magna Carta, the Declaration of Independence, and the Bill of Rights itself could not be ignored. Situated on the same terrain, the written icon of the secular law was obliged to expel the religious other from its visible and narrative space. Given the features of the monument described above, one might have expected an even stronger reaction in relation to the Texas case – and, in a sense, Breyer did take a more radical position. Rather than expel the monument from the space of the legislature as in *McCreary*, he expelled both its symbolic content and its visual force from the monument itself.

These were of course the very qualities that made the image iconic. Breyer's judgment transformed the monument in practice into an ineffectual historical ornament. The placement of the Ten Commandments in the park of the Texas Capitol among a disparate collection of secular monuments, he maintained, satisfied Lemon by subordinating its religious import to a predominantly "moral message reflecting the historical 'ideals' of Texans" (*Van Orden*: 702). The Ten Commandments had the same status as the monument to the Heroes of the Alamo, for example. Breyer's other argument struck even harder against its force as an icon of religious law. This was the fact that the monument had stood for forty years without anyone bringing a complaint. No one, before Thomas Van Orden, had raised the issue. This silence is taken by the Justice as evidence of the invisibility of any fundamental dif-

ference between the Ten Commandments and, say, the imitation of the Statue of Liberty, also to be found in the park.

Conclusion

My argument is not that these cases are instructive because Breyer is right or wrong but that the "shifting majority" of which he happens to be the protagonist is symptomatic of the disturbance to which an iconic document of national law is exposed when an icon of religious law disrupts its space; how it throws the fundamental law back onto questions of jurisdiction – of how it is read, how it can be made to speak justice.

On one level, the cases may of course be seen as merely symptomatic of the banal point that the interpretations any Supreme Court makes of its textual foundations are likely to be contingent on the ideological positions of its justices. On the other hand, what makes these two cases so interesting is that they are not that regular and predictable. We therefore need to take seriously Breyer's presentation of this contingency as a function not of ideology or whim but as a function of what he refers to as the "facts." By foregrounding the facts as responsible for the different rulings on apparently similar questions, Breyer's claim that the Bill of Rights does not prevent iconic texts being read flexibly in relation to context is purchased only at the very high cost of his adjudication of the facts of how the image at issue is perceived. These "facts" constitute what Jacques Rivière calls a "regime of visibility" and are constructed through what, in an essay dedicated to a dispute over an artwork that was also a religious object, Douzinas (drawing on Lacan) refers to as "a 'legal screen'" that determines what we are given to see.[19]

On the one hand, with the printed image that makes all iconic texts likenesses of each other, the law simply expels the religious text from its narrative space. But, as I hope to have suggested, the visual economy of the Texas icon requires a more radical strategy if it is to be kept from contaminating the space of the legal icon. As we have seen, that strategy is simply to render the religious and iconic qualities of the monument effectively invisible.

Is it a necessary condition, then, also for a postmodern Bill of Rights, that it can only preserve its position as the clear and visible icon of liberty it as-

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[19] Costas Douzinas, "Sublime Law: On Legal and Aesthetic Judgements", *Parallax*, Vol. 14, No. 4 (2008), 18. Douzinas's discussion here focuses on *Re St Stephen Walbrook*, concerning an altar table commissioned from the sculptor Henry Moore, which was heard in the British ecclesiastical courts during 1986. See also Jacques Rancière, *The Future of the Image* (London: Verso, 2007).

pires to be by denying visibility to the icons of religion that insist on their inclusion in the space of the law? Decisions taken in 2010 in bastions of written constitutions such as France and Belgium to outlaw the visible signs of Islamic law as embodied in the religious screen that adorns the face of many Muslim women would suggest that this is indeed the case.

Gary Watt
(University of Warwick)

Law Suits: Clothing as the Image of Law

The image of a thing is usually contrasted with the thing itself; the image of a thing is said to be reflective, representative, reproductive or mimetic of the thing, rather than identical to it. And yet the image of a thing can sometimes be the most reliable knowledge we have of a thing. Sometimes we lack capacity to see the thing itself because the thing itself is too profound or too abstract or too remote. In such cases we might have to settle for a flame-cast shadow on the wall of a cave[1] or an image reflected in a mirror in the dark.[2] The idea of law in human society is so primal and so pervasive, so innate and inescapable, that we struggle in vain to perceive what law is apart from the cultural forms in which it is expressed. One of those forms is clothing. In this essay, I will demonstrate that clothing is an image of law, and also that it is one of those species of image that is not merely a reflection of the thing but as close as one can get to an expression of the identity of the thing. I will argue that the nature of law as a social and cultural idea is expressed as well in clothing as in any written text, so that clothing is a material substantiation of law's nature as social and cultural fact.

In cold countries, and also for the conduct of certain perilous activities, clothing performs the practical function of conferring physical protection; but there are other reasons for dress, including display and decency. A barrister once claimed that the tax deductable expenses of her professional self-employment should include the cost of purchasing her court attire. There is no doubt that a barrister has to be appropriately attired for appearances in court, indeed it is said that "[w]ithout gown and bands, the barrister is officially 'invisible' to the judge in court",[3] and, one might add, in-

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1 Plato, *The Republic*, Book VII.

2 This is one interpretation of St Paul's phrase in his first letter to the Church at Corinth, see: 1 Corinthians 13:12.

3 James Derriman, *Pageantry of the Law* (London: Eyre & Spottiswoode, 1955), 38. Consider the following exchange between Mr Justice Croom-Johnson (C-J) and Mr Fearnley-Whittingstall (F-W). J-C: "I cannot see you, Mr Fearnley-Whittingstall."; F-W: "My Lord, I am before you wigged and gowned."; J-C: "I still cannot see you, Mr Fearnley-Whittingstall."; F-W: "My Lord, is it my yellow waistcoat

audible.[4] The House of Lords nevertheless rejected her claim because, in addition to satisfying the court rules, it accepted a finding that her clothes conferred "warmth and decency".[5] Despite this set-back, that barrister eventually had the fitting satisfaction of becoming "a silk."[6] The notion of "decency", and the corresponding criminal offence of "indecent exposure"[7] is not merely a matter of law, it is something made by law and culture. It is an almost universal feature of human societies to have a code or convention for the dressing or adornment of bare human flesh. This, if one reflects upon it, is a remarkable thing. Very few animals adorn themselves artificially, and perhaps none does so for reasons of dress, but adult humans invariably do. In his recent book on *Social Conventions,* Andrei Marmor reminds us that the social convention of dress does not always take the form of clothing:

> Suppose that the reasons, or needs, functions, etc., for having dress code norms in our society are P […]. Now, it shouldn't be difficult to imagine a different society where P is instantiated by a different kind of social practice, for instance, that people paint their faces in various colors in comparable circumstances.[8]

Another instance of cloth-less dress, and a particularly potent instance, is the tattoo. The celebrated anthropologist Claude Lévi-Strauss observed that "[t]he purpose of Maori tattooing is not only to imprint a drawing onto the flesh but also to stamp onto the mind all the traditions and philosophy of the

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that you cannot see?"; C-J: "Yes, it is."; F-W: "Well, my Lord, you can see me."; C-J: "Oh, very well, let's get on with the case." (John Pugh, *Goodbye for Ever – The Victim of a System* (London: Barry Rose, 1981), 27–28, reproduced in M. Gilbert ed., *The Oxford Book of Legal Anecdotes* (Oxford: Oxford University Press, 1986), 119.

4 On one occasion, Mr Justice Kekewich interrupted a new QC who was not dressed in the proper form: "I can't hear you, Mr. Carson", he said, "But I don't propose to send you home to put on your knee-breeches, as perhaps I should". "I should hope *not*," retorted Carson, and this elicited a petulant response from the judge: "I warn you I shall tolerate no impertinence." Carson had the last word: "I thought your lordship could not hear me" (based on the account in H. Montgomery Hyde, *Carson* (London: Heinemann, 1953)).

5 *Mallalieu v. Drummond* [1983] 2 A.C. 861, 875.

6 Senior barristers who have been conferred with the status of Counsel of the Crown (called Queen's or King's Counsel according to the gender of the reigning monarch) are commonly known as "silks" on account of the silk gowns they wear in court.

7 Genital nudity is a statutory crime if it is aggravated by intent to cause alarm or distress (e.g. Sexual Offences Act 2003 s.66).

8 Andrei Marmor, *Social conventions* (Princeton: Princeton University Press, 2009), 75.

group."[9] A tattoo is more fleshy and fundamental than text and textile, and since it is sub-textile it is subtle in the most literal and beguiling sense. Tattoo, and other forms of dermal scarification, are the ultimate form of dress and the ultimate reduction of the boundary between the individual and the group. Hence the observation that tattoos and body painting have been "variously used to mark outlaw status and nobility, insiders and outsiders."[10] The cultural history of this practice is truly primeval, for according to the Biblical narrative, a tattoo or some other marking, was God's response to the first murder of man by man. When Cain killed his brother Abel, God "set a mark upon Cain, so that no one who found him would kill him" (Genesis 4:15). According to the same narrative, the first human infringement of a divine command, the transgression of Adam and Eve, was also punished by physical exclusion from the enclosed bounds of God's ordered domain, and humans have ever since gone forth marked out from zoological nature by the coverings of dress:

> The LORD God made garments of skin for Adam and his wife and clothed them. And the LORD God said, "The man has now become like one of us, knowing good and evil. He must not be allowed to reach out his hand and take also from the tree of life and eat, and live forever." So the LORD God banished him from the Garden of Eden to work the ground from which he had been taken. After he drove the man out, he placed on the east side of the Garden of Eden cherubim and a flaming sword flashing back and forth to guard the way to the tree of life. (Genesis 3: 21–24)

The gird of the loin became a memento and vestige of the garden of God. The mark of Cain is not a fantasy, it is a story that states a clear and present reality. We no longer brand criminals, as once we did, but we uniform them, number them, tag them, photograph and ink their prints.[11] Giorgio Agamben urges us to resist the means, including fingerprints and retina scans, by which modern states attempt to mark out non-criminals as if they were criminals, a process he refers to as "biopolitical tattooing":

> What is at stake here is none other than the new and "normal" biopolitical relation between citizens and the State. This relation no longer has to do with free and active participation in the public sphere, but instead concerns the routine inscription and registration of the most private and most incommunicable element of subjectivity the biopolitical life of the body […].

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[9] Claude Lévi-Strauss, *Structural Anthropology* (New York: Basic Books, 1963), 257.

[10] Enid Schildkrout, "Inscribing the Body", *Annual Review of Anthropology* 33 (2004), 325.

[11] The playwright Ben Jonson may be the most famous prisoner to receive the mark of a felon's brand.

> A few years ago, I wrote that the political paradigm of the West was no longer the city-state, but the concentration camp, and that we had crossed from Athens to Auschwitz. This was obviously a philosophical claim, not a historical account, since one could not confuse phenomena that must, on the contrary, be distinguished. I would like to suggest that at Auschwitz, tattooing undoubtedly became the most routine and most economical means of regulating the inscription and registration of deportees arriving at concentration camps. The biopolitical tattooing that the United States is now imposing in order to enter its territory could very well be the harbinger of future demands to accept as routine the inscription of the good citizen into the gears and mechanisms of the State. This is why we must oppose it.[12]

The idea of the tattoo as an institutional ideological stamp or imprint (tattoo as brand) is combined with the notion of tattoo as marker of social status (tattoo as boundary) in Franz Kafka's 1914 short story "In der Strafkolonie" ("In The Penal Colony").[13] This chilling tale relates the final days of a penal colony that houses a machine which dispenses a form of institutionalised justice by executing prisoners and simultaneously inscribing the text of its "judicial" judgment on the prisoners' skin. Jeanne Gaakeer describes it thus:

> Starting as a kind of tattooing, the process soon turns into torture. When the condemned person finally deciphers the sentence, six hours after the infliction of pain has begun, it takes another six hours to bring about death as the needles keep piercing the body more deeply. In short, the machine makes an imprint of the crime of which the condemned person is guilty, and thus executes the sentence.[14]

The greater part of the present chapter is concerned with dress in the form of clothes, but at the conclusion, when we have stripped all the layers of clothing away, we will at last return to the subtleties of the final frontier, the skin, and with it the signification of the law of tattoo.

If we accept that dress is not limited to cloth cladding of the sort that is universal in human societies in cold climates, we can proceed to observe that dress and adornment are as pervasive in human societies as laws. It can also be observed that dress and adornment mediate between the bare human individual and the social group in a way that parallels law's function as a mediator between the individual and society. It is then plausible to argue that dress is an image of law's functions of social communication and social regulation, and might even occupy a cultural locus identical with law, so that dress becomes not merely correspondent with law but potentially competitive

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12 Giorgio Agamben, "No to Biopolitical Tattooing", trans. S. J. Murray, *Communication and Critical/Cultural Studies*, Vol. 5, No. 2 (2008), 201, 202.

13 Franz Kafka, *In der Strafkolonie* (Berlin: Klaus Wagenbach, 1985).

14 Jeanne Gaakeer, "The Legal Hermeneutics of Suffering", *Law and Humanities*, Vol. 3, No. 2 (2009), 139.