THE RETURN OF THE EVIDENCER'S EYE
Rhetoric and the visual technologies of proof

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The main argument of this piece is that evidence employs a means of persuasion which speaks to the eye and that as such cannot be said to be based on any model of scientific rationality. These oral, documentary and visual technologies of proof, in other words, belong to a rhetorical tradition in which all categories may be considered to be subsumed and governed by sight.

Introduction

There has been a tendency, in both mainstream jurisprudence and critical legal scholarship, to marginalise the place of the trial. For mainstream jurisprudence, the development of the law proceeds by supposing that legal issues are detached from questions of fact and presentation. The law exists, at least in spirit, prior to any circumstance, or event. It is the substantive law which determines the conduct of the trial, and which is then applied to a set of facts and events arranged accordingly. The substance of law derives from principles which are rooted in a theoretical and timeless *a-topia*. In common with classic religious and quasi-religious thought, the universal spirit of the law gains its legitimacy from a sacred province, a time out of mind, free from the profanities, or the mundanities, of everyday events. According to such thinking, the trial is simply adjectival and supplementary to the real issues of jurisprudence. It is surprising that critical legal studies has also been complicit in maintaining this distinction between the areas of substantive law and that of adjectival law. Perhaps this may be symptomatic of a reluctance by critical legal scholars to venture anywhere near the world of such profanities. Certainly, there is a marked tendency to focus their critical gaze upon appellate judgements. Case studies, rather like case notes, are the preferred method of entering into some level of engagement with issues.

It seems curious that academics who are interested in defining the contours and limits of legal discourse should fail to recognise the manner in which appellate court judgements are themselves discursively constituted through the exclusion of evidence in the lower courts. It seems equally curious that critical scholarship inspired by postmodern thought seems to avoid the *form* and procedure of law in order to access debates through the

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substantive issues raised by judgements. This article seeks to establish a form of inquiry into the way in which even the most mundane activity of presenting evidence, of trying to represent the everyday, to the court delegitimates the very foundation of modern law. It seeks to re-inscribe the trial back into an understanding of law as the paradigmatic place in which the values and goals of modern law are celebrated yet never achieved.

The Goals of Modern law from the Perspective of Procedure

The dominant characteristic of modern evidence scholarship may be seen in terms of an agenda to rationalise the rules of procedure in order to facilitate the presentation of evidence. For, if evidence is excluded, then the courts minimise the chances of reaching the correct decision. The exclusion of evidence from the trial entails the exclusion of justice from the legal system. According to Bentham, the rules of evidence ought, therefore, to be as 'inclusionary' as possible. All witnesses, for example, should be compelled to give evidence, irrespective of privilege. The primary purpose of these rules is ultimately the achievement of correct decisions, and the avoidance of miscarriages of justice. At issue is what Bentham called the 'sinister interests of Judge & Co.', according to which the private and arbitrary whim of judges cannot easily be supervised and kept in check. Judges should, therefore, have little discretion over which items of evidence are to be tendered or excluded. The idea of a public institution that (along with the monarchy) remains removed from the democratic conditions of accountability continues to be a problem for liberal ideologues.

There are two further points to note about these broad rationalist objectives. First, the certitude and rectitude of decision-making relies not simply upon a system of rationalised rules. The very act of presenting evidence itself ought to be based upon the techniques of the objective sciences. This is as true of contemporary debates as it is of Bentham's rational system of 'free proof'. This pursuit of scientific objectivity has fuelled all sorts of claims and proposals by 'New Evidence Scholarship' to broaden the trial process in order to take into account new technologies of recording material, mathematical arguments about probability, a greater reliance on expert witnesses and so forth.[1] The rationalisation of the trial process, based as it is

1 The following references are indicative of a growing literature in the province of 'new evidence scholarship': W Twining (1985) *Theories of Evidence: Bentham and Wigmore,* Weidenfeld & Nicholson; R Egglestone (1977) *Evidence, Proof and Probability,* Weidenfeld & Nicholson; D McBarnet (1981) *Conviction: Law, the State and the Construction of Justice,* Macmillan; G Gudjohnson (1996) *The Psychology of Interrogations, Confessions and Testimony,* Wiley; and J Cohen (1977) *The Probable and the Provable,* Oxford University Press. An attempt to map out a coherent strategy for new evidence scholarship is provided by Twining: W Twining (1990) *Rethinking Evidence Scholarship: Exploratory Essays,* Blackwell, pp 32–91. For a critical commentary, see D Nicholson, 'Truth Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *MLR* 726.

on these arguments about free proof and due process, opens up a space within the trial process for the use of technology and science as a means of guaranteeing objectivity and rectitude.

The goal of the modern trial is the rectitude of an ultimate decision achieved through a rational process of presentation which puts the techniques of the objective sciences to work in its own service. The second point to note is the necessary paradox in this rather too schematic argument. In order to achieve these goals, modern law has to ultimately fall back on notions of exclusivity, exclusion and closure. In order to be rational, the trial has to draw a screen on whatever it considers to be irrational. The point may be obvious but it is one which has deeply structured both practice and a wide variety of scholarship on the subject of the law of evidence. Beginning with Bentham, we have noted his anxiety to exclude the practice of judicial discretion.[2] Written evidence should also be avoided as much as possible, for this adds to the delay in reaching the decision and therefore increases the chances that decision might be incorrect. For the same reasons, prolixity in the court should also be avoided. These exclusions of whatever happens to be defined as irrational seem to have driven Bentham to madness. The effort put into defining the limits of rationality certainly produces in his writing some sort of analytic insanity. On a different level, the rules against character, hearsay or opinion evidence are also characterised as rules against irrational forms of proof. Hearsay, in particular, is often conceived of as a method of communicating which bears little relation to the sanctified cognitive order of the modern courtroom. For not only is it prone to manufacture but it is considered to be a form of evidence in which the maker of the statement remains invisible to the sanctified procedures of oath and cross-examination in the courtroom.[3]

More recently, Pat Carlen's studies into the procedures of Magistrates courts in England and Wales have shown and criticised the levels of bureaucracy.[4] This, she suggests, produces a superordinate effect, comparable to the surreal 'theatre of the absurd', into which strays the alienated, pitiful and subordinate figure of the accused. Carlen's observations are symptomatic of a general tendency within legal thought since (at least) the 17th century to denigrate the vestiges of a theatrical and rhetorical system of law which had once pervaded pre-modern legal systems. What the exclusion of the irrationality bears testimony to, in other words, is an attempt by modern legal thought to explicitly remove this order of understanding from Western notions of legality. Classical and, to a certain extent, medieval trials were intimately linked to rhetoric; indeed, within Roman law, the concept of proof is indistinguishable from rhetoric. For those such as Honoré, the modern law of evidence 'cannot get off the ground until this orientation ...

2 J Bentham (1981) *A Treatise on Judicial Evidence*, Rothman.

3 See P Haldar (1996) 'Acoustic Justice' in L Bentley and L Flynn (eds) *Law and the Senses: Sensational Jurisprudence*, Pluto, pp 123–36.

4 P Carlen (1976) *Magistrates Justice*, Roberston.

is abandoned' and is placed in the rational context of a search for truth that is unhindered by the flowers of rhetoric.[5]

Rhetoric, it must be remembered, as a means of persuasion depends upon a dynamics through which the audience are held captive, and in thrall, by the power of the orator. The modern devaluation of rhetoric is based precisely upon this manipulative power of the orator to seduce, capture and deceive an audience who remains mere passive subordinates.[6] In terms of cognitive understanding, rhetoric is deemed to be debased and, therefore, irrational. It is also deemed to be antithetical to the values of due process and scientific rationality which seek to deny, or flatten, the power structures and thereby preserve the active dignity of individuals.

The concern here is to point out the relationship and failure between the rational agenda, the rectitude of outcome and the dignity of humanity. Irrationality is, or, in Pat Carlen's argument, ought to be, excluded because at stake is the idea that people may be imprisoned, enslaved and manipulated by false evidence.[7] The pared down and, supposedly, more economically efficient legal system currently being proposed attempts to do the same by ensuring that the provisions of the legal system are more client-demand led.[8] The move is toward a more mundane, and supposedly more democratic, system of justice, represented by a range of proposals designed to render case management more efficient and economical as well as user friendly. Evidence of this may simply be found reflected through the new, low-key style of court architecture currently being assembled, at least across Britain. What is to be hoped is that the visitor to the courtroom feels less alienated and intimidated, and more like the theoretical sovereign individual who is meant to occupy the central position within modern law.

My argument here is that the use of scientific rationality and the proliferation of different types of technology in the courtroom opens up the very wound modern law has attempted to dress. Put differently, one cannot maintain those liberal arguments which seek to safeguard the status of the defendant who is meant to be innocent-until-proven-guilty. If modern law wishes to prevent the dignity of individuals from being eroded through a process of subordination, it requires far more than ridding itself of its grand ornamentation and razing the old austere environment of the Crown Courts. Indeed, the opposite is true. It is, as I shall argue, through the technique and the very pursuit of scientific objectivity that people are sacrificed, that subjects are produced as subordinated and alienated from their environment and the world of events. This, for the simple reason that

5 T Honoré (1981) 'The Primacy of Oral Evidence' in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, Butterworths, p 175.

6 P Goodrich (1990) *Languages of Law: From the Logics of Memory to Nomadic Masks*, Weidenfeld & Nicholson.

7 Carlen (1976). See also the concerns voiced by the House of Lords in *R v Kearley* (1992) 2 AC 228 at 228–336.

8 Although, as the largest fee paying, note that the biggest and most demanding client of the legal system is perceived to be the government.

scientific rationality, both in theory and in practice, cannot escape being structured by rhetoric. The predominant modalities (or technologies) of proof — oral and documentary — are not limp forms whose probative weight may be easily objectified. They form an essential part of the overall complex of power which separates and alienates the legal subject.

Moreover, these rational techniques have to be understood in a broad sense in which they remain firmly rooted in a tradition of rhetoric in which facts are presented 'to the eye'. According to classical rhetoric, the *moderatio oculorum* and *mutatio oculorum* were techniques recommended to Roman orators as particular methods of speaking in images, exciting the eyes of an audience as well as delighting their ears, thereby capturing their attention.[9] As Walter Ong has argued, the Renaissance humanists understood the formal logic of description to be sensorially apprehended in terms of sight. Even if human knowledge is to be represented through enunciation, such utterances rely upon surrendering orality and aurality to visualist analogies.[10] The ultimate aim of this discussion is to return to an understanding of evidence, and ultimately the law, a form of thinking which relies upon the sense of vision and to suggest that both oral and documentary testimony are subsumed under the category of visual evidence.

Oral Testimony

Historically, legal procedure has sought to privilege the oral tradition of testimony. The reason for this may be explained by a Platonic preference for what is present both in space and time as the ideal vehicle of representation. According to this metaphysics, truth is to be determined as that which is ideally transmitted through the self presence of the voice. Truth must prevail and so the ideal medium of truth, the 'speaking animal', prevails over a simulated transaction such as writing.[11] The voice articulates and delivers a truth embodied and generated by a living presence, by a physical corporeality inhaling and exhaling breath: 'for the letter killeth, but the spirit giveth life'.[12]

In legal terms, however, the preference for oral testimony cannot be said to be based on such metaphysical assumptions. Although on one level, however, this may appear to be the case. For oral testimony takes part in the structure of response and counter-response, delivery and reply. It sets up a theatre of representation based upon the immediate transmission and reception of knowledge. According to Justinian, the doctrine was formulated in

9 See Quintilian (1922) *Institute Oratoria*, trans H Butler, Heinemann. For commentary on these passages, see P Haldar (1999) 'Edifice Lex: The Function of the Ornament in Quintilian, Alberti and Court Architecture' in C Douzinas and L Nead (eds) *Law and the Image: The Authority of Art and the Aesthetics of Law*, University of Chicago Press.

10 See WJ Ong (1983) *Ramus: Method, and the Decay of Dialogue*, Harvard University Press, pp 104–8.

11 Justinian, *Digest*, 4.29.17.

12 2 Cor 3: 3,6, quoted in MT Clanchy (1993) *From Memory to Written Record: England 1066–1307*, Blackwell, p 262.

the following terms: 'that which is said vocally and is supported by an oath is more worthy of credence than writing alone'.[13] That the written word consumes pneumatic life was a common place idea in the medieval reception of Roman law where the preference of the oral over the written would be considered to be analogous to the hierarchy of the living over the dead. Witnesses who can be seen to speak are, obviously, living and present entities as opposed to the *vox mortua instrumentorum.* For it is the living voice, and not the dead letter of the text, that conveys the *ictus intelligentiae*; or, thought as it leaps from the mind.[14]

This hierarchy of proof does not entirely disappear after the Middle Ages. In evidential terms, and notwithstanding the peculiarities of the common law tradition, the general rule was that witnesses were worth more than letters. Matthew Hale notes of the common law that:

> evidence should be in *ore tenus*, personally and not in writing... Many times the very manner of a witness delivering testimony will give a possible indication [of] whether he speaks truly or falsely; and by this means also has the opportunity to correct or amend or explain his testimony upon further questioning with him which he can never have after a deposition is set down in writing... Great opportunities are gained for the true and clear discovery of the truth.[15]

This preference for orality persists even in contemporary debates about the adversarial trial. Honoré, amongst others, has pointed out the primacy of oral evidence in the trial process, reminding us that Bentham had once asserted that witnesses are 'the eyes and ears of justice'. For Honoré, it seems 'obvious that oral testimony has a greater superiority over written testimony'.[16] An introduction to a student textbook betrays the fact that, despite the redundancy of the best evidence rule, there is nevertheless an assumption that orality is the preferred option.

> [T]he plaintiff or prosecutor has to prove a great variety of facts. The law of evidence tells him how he may do this. Cast in simplest terms,

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13 Justinian, *Novella*, 73c III.

14 'One of the greatest advantages which we posses is that of speech, or the power of expressing the conceptions of the mind by articulate sounds': J Burnett, Lord Monboddo (1789) *Of the Origins and Progress of Writing*, Cadell, p B.

15 M Hale (1971) *The History of the Common Law of England*, University of Chicago Press, p 163.

16 Honoré (1981) p 174. See also Home Office (1989) *The Report of the Advisory Group on Video Evidence*, Home Office Publications:

> [i]t is notable that when the [*Criminal Justice Act* 1988] was introduced the government sought to extend the readier admissibility of documentary evidence... A narrower provision passed into law largely because of fears expressed in Parliament about the erosion of the oral tradition of the English trial. (p 13)

> the answer is by calling witnesses who have perceived the facts in question.[17]

On another level, however, what needs to be stressed is that this preference for the principle of orality is not based on the metaphysics of speech *per se*. The adversarial trial centres on the cross-examination of witnesses. In fact, the speaking subject is shrouded in suspicion, and thus needs to be regulated by the techniques of examination and subject to cross examination. A closer analysis of oral testimony reveals that far from being valued for its ideal proximity to an objective truth, what matters is indeed the spectacle, or theatrical performance, which provides a symbolic space and through which witnesses may be assessed on their appearance.

> The convincing quality of the living voice moves more strongly and more effectively the mind of the hearer. It has in itself something which touches the intelligence by reason of the truth which nature gives it. As Saint Jerome has said, it has no limit to its latent energy. We blush to say many things which we do not blush to write. All the same one must see in a witness with what trembling he speaks, what there is in the voice and the visage, if he hesitates (*vacillat*).[18]

More recently, Nokes, in attempting to rationalise and asses the weight attached to the demeanour of witnesses during oral testimony, states that: '[t]he blush of nervousness or occasionally shame, the gape of stupidity, the gesture of annoyance, the hesitation to answer ... are not material objects but it is clear they have evidentiary value'.[19]

The language used by both Baldus and Nokes to describe the mode of orality is itself rich in semiotic detail and visual description.[20] These details describe more than the pneumatic characteristics of orality. These are visual signs of recognition, posture and clothing, that may well belong to the notorious English preoccupation of defining everything in accordance with one's position in the community whilst simultaneously denying such prejudice. What is important to note here, however, is that the voice needs a further guarantee of signification. The concern for a living presence can only be

17 C Tapper (1986) *Cross and Wilkins Outline of the Law of Evidence,* Butterworths, p 1.

18 Cited in GD Nokes, 'Real Evidence' (1949) 65 *Law QR* 62, p 62. See also *The Times* 2 July 1997, in which lawyers are accused of applying inappropriate criteria to witnesses in order to determine whether or not they are deceiving the court. In an experiment where various subjects were shown videotaped interviews with children purporting to describe sexual abuse, lawyers were seen to stress irrelevant criteria such as spontaneity and confidence placing little credibility on non verbal behaviour such as fidgeting and child play. They were seen to be irritated by hesitant or ambiguous statements. Note that doctrinally, the demeanour of the witness is now considered to be 'real evidence'.

19 Nokes (1990) p 67.

20 For example, David Baldus et al (1990) *Equal Justice and the Death Penalty: A legal and empirical analysis,* Northeastern University Press; and Nokes (1949).

measured through visual indicia. Hence within modern legal procedure, oral testimony is regulated through the visual techniques of adversarial confrontation and cross examination, of making the witness *appear* to be lying, or telling the truth. Speech is subsumed by vision. But in being visible signs *of* life, or *of* truth, are they not also something other than that life, or that truth? Are they not a substitute, a deferral of a life-content which has been put into place and effected by the very desire for (control over) life itself?

Documentary Evidence

Given that oral testimony is of a type shrouded in suspicion, it is easy to see how documentary evidence may be used as another form of making up for the vagaries of speech. The technologisation of the word through print was in no sense unrelated to the conscious move away from what were considered to be the inconsistencies and vagaries associated with the oral-aural culture of rhetoricians, or with the laborious work of chirographers. In contrast to the latter practice, the speed and economy of the printing process better provided opportunities for rectifying a text. Errors which could not easily be rectified in manuscript form could be now corrected. Moreover, recourse to graphic inscription fixes the world-in-flux, and essentially gives that world a visible and manageable definition. As has previously been noted by a number of scholars, the print revolution bore radical significance in establishing completely new frameworks for communication and for the understanding of previously inaccessible texts.[21] The order of rectitude implied by typography set the stage for the scientific revolution. The shift from the oral-aural culture of memory, and from the scholastic culture of manual inscription to a culture of printed record, not only made classical works of science available to all. It also meant that once information was fixed in print, it was subject to new forms of reading which demanded closer scrutiny, sharper analysis and theoretically more accurate methods of interpretation.

The implications for legal culture may well have been a little more complex. At one level, the print revolution threatened to break up the hermetic culture of the professions which had hitherto implied clerical intervention, elite apprenticeship and select apostolic succession. The drafting of wills, motions and opinions, for example, consequently continued according to the criteria set by chirography. At stake was the classical distinction between the spirit and the letter of the law. By making available what had previously been hidden, Print threatened, to surrender the spirit completely to the mere fabric of the page. For, as classical jurisprudence strongly asserts; to know the words of the law is not to know the law itself.[22] There was a strong sense that the 'erotic' mystery of the law

21 E Eisenstein (1978) *The Printing Press as an Agent of Change*, Oxford University Press. See also Clanchy (1993).

22 See, for example, Cicero, *De Legibus* ii.5.11–6.14: 'If all those who knew the words of laws knew the law, then all Roman boys were once jurists': cited in I Maclean (1992) *Interpretation and Meaning in the Renaissance: The Case of Law*, Cambridge University Press, p 87.

needed to be maintained beneath the veils, or held within the breasts, of men.[23] Hence, we are told that well into the late 16th century access to the *corpus iuris civilis* required a pilgrimage to Pisa in order to view a closely guarded manuscript through a metal grate. Within common law England, print influenced legal culture from the outside and largely for political reasons. John Rastell, dramatist, printer and brother-in-law to Thomas More, sought to use the printing press in order to Anglicise the law, and render those laws in English so that every 'common man' may read them.[24] In general terms, print meant that the practice of reading became a silent private affair.[25] The implications for lawyers, however, meant that the law became more public, more available, more visible and apparently less esoteric.

This argument extended to the use of documentary evidence. As Clanchy illustrates, the rise in literacy earlier in the 13th century eroded the use of memory in courts unless supported by written evidence. Once technology made print more widely available, the use of business records for the practical purposes of administration and proof increased. Of modern law, it may be fair to suggest that its procedure relies upon the theoretical certitude afforded by the technology of print to the exclusion of oral proof. Certain transactions such as the sale of real estate or the disposition of beneficial interests under trust settlements can only be proven in writing.[26] Two commentators have gone so far as to say that:

> [c]ontemporaneous documents are of the greatest probative value ... advice founded on oral testimony alone is less reliable. A witness at a trial may fail to come up to proof. The account given by the lawyer may be coloured by subsequent events. A memo may have independent authorship: It is in any event likely to have been created been created before battle lines were drawn on the issue ... if evidence relative to the issues can be reduced to that in written form during preparation for the trial, so much the better.[27]

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23 That the Emperor and his judges held the law in their breasts is an aphorism much analysed by Peter Goodrich: P Goodrich (1995) *Oedipus Lex: Psycholanalysis, History, Law*, University of California Press.

24 See J Rastell (1563) *The Nature of the Four Elements*, Totell; and J Lilburne (1645) *England's Birth Right Justified*, Society of Stationers.

25 P Saenger, 'Silent Reading: Its Impact upon Late Medieval Script and Society' (1982) 13 *Viator: Medieval & Renaissance Stud* 45.

26 'S 53.1. (c), A disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised by writing or by will': *The Law of Property Act* 1925 (UK).

27 C Style and C Hollander (1993) *Documentary Evidence*, 4th edn, Longman. See also J Salmond, 'The Superiority of Written Evidence' (1890) 21 *Law QR* 71, pp 75–85.

My argument here is that the written word as a form of representation is also subsumed by the conceptual category of vision. There are two reasons. First, and most generally, is the idea that 'writing is the eye of speech'[28] or, as one 18th-century text puts it:

> The desire of communicating ideas, seems to be implanted in every human breast. The two most usual methods of gratifying this desire, are by *sounds* addressed to the ear; or, by *representations* or *marks* exhibited to the eye; or, in other words by *speech* and *writing*. The first method was rendered more complete by the invention of the second, because it opened a door for communicating information, through the sense of *sight* as well as that of *hearing*.[29]

Writing, is conceived of only as figural, or figurable, speech; as the alphabetic, pictogramic, or the ideogramic 'figuration of language'.[30] John of Salisbury, in the *Metalogicon,* thus observes that [f]undamentally letters are shapes indicating voices. Hence they represent things which they bring to mind through the windows of the eyes. Frequently they speak voicelessly the utterances of the absent'.[31]

Secondly, in terms of proof, a suspicion always attaches itself to written documentary evidence which entails the use of visual insignia as a supplementary gesture of consolation. According to those such as Honoré, the obligation to speak the truth cannot be extinguished by a fiction.[32] Written evidence is corrupted by a range of phantasmatic absences; the identity of the scrivener, the veracity of the transaction recorded, the dry parchment of dead skin. The written text as a general rule is subjected to the same Platonic exclusion of the simulated in so far as it might be considered to be a valid form of proof. Writing, as it is understood in this sense, corrupts living speech. It is that form of language which exhausts and consumes life. It is a scratched and torn language (*writan*: 'to scratch'; *reissan*: 'to tear') in which the dead letter murders the living voice, so to speak. Thus, the parchment of a document is no more than the skin of a dead beast, *'charte animalis mortui'*, upon which the scrivener's pen might scratch anything.[33] The

28 J Derrida (1976) *Of Grammatology,* trans G Chakravorty-Spivak, John Hopkins University Press, p 238.

29 Burnett (1789) p 1.

30 Derrida (1976) p 33.

31 [*Littere autem, id est figure, primo vocum indices sunt; deinde rerum, quas anime per oculorum fenestras oppununtur, et frequenter absentium dicta sine voce loquuntur*]: John of Salisbury, *Metalogicon,* I.13, cited in Clanchy (1993) p 251.

32 Justinian, *Digest,* 8.42.13.

33 Saint Isidore of Seville notes that 'the word "skins" (*membrana*) is also used [as well as the word "parchment"] because these are drawn off from the members (*membra*) of cattle': *Etymologiae* VI. X. 1–2, cited in Hugh of Saint Victor (1968) *The Didascalion,* Columbia University Press, IV.XVI. Clanchy illustrates the argument well.

> During the investiture struggle between St Anselm and Henry I, Henry's supporters objected to the fact that Pope Pascal II's support for Anselm

practical problems thus associated with the written text are obvious. The problem of writing carries with it the possibility of material forgery and necessitates further proof that the document was really written by the person whom it indicates to have been the author. Secondly, the examination of writing must find some way of attesting to the degree of sincerity and veracity of the declarations contained in the instrument in order to detect the possibility of lies or intellectual falsehood forged by the scrivener (notwithstanding the issue of that scrivener's identity).

The written document must, if it is to be 'admissible' as evidence, bear some (theoretically) unalterable visible guarantee. This theme may be seen to be inherent in Jean-Phillipe Lévy's analysis of the evolution of written proof.[34] For Levy, what connects the licit forms of written proof — the Babylonian brick, a Roman triptych of wooden tablets covered with wax, a charter under seal, parchments of Asiatic leather — and what is missing from other forms of writing is the presence of visible guarantees fixed upon the very physical surface of the document itself. These visible signs might vary from a wax seal (*signum*) to a more or less extensive piece of handwriting.

> Just as letters 'speak voicelessly the utterances of the absent', seals regulate that speech... The signs attached to documents, whether they took the form of inscribed knives or impressed wax or even ink crosses made by the witnesses, all helped to bridge the gulf between the traditional and the literate ways of recording transactions.[35]

Even within the debates surrounding modern forensics, handwriting analysis which focuses on pictorial impressions (slope, size, margins, space etc) and letter construction may be used to identify the individuality of a subject, for 'by adulthood most people will have adopted a writing style which will remain more or less consistent for the remainder of their lives'.[36] It is these visible signs which are still demanded by modern law, in the form of proofs of due execution and attestation, which distinguish between an official record and a casual memorandum, between an anonymous text and an onymous structure.

It is possible, therefore, to place the technology of print within the structural context of the rhetoric of ocular management. The application of

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was evidenced by Papal letters, sealed with the leaden bull (*scriptis sigillo pape signatis*), bearing the symbols and monograms of curial officials. Such a document was to be treated as nothing more than a physical object, or merely 'the skins of wethers blackened with ink and weighted with a little lump of lead.

Clanchy (1993) p 261.

34 J-P Lévy (1939) *La Hièrarchie des Preuves dans le Droit Savant du Moyen Ages*, Annales de l'Université de Lyon, pp 137–67.

35 Clanchy (1993) p 260.

36 B Robertson and GA Vignaux (1995) *Interpreting Evidence: Evaluating Forensic Science in the Court Room*, Wiley, p 183.

Ciceronian rhetoric to writing systems in the late Middle Ages gave rise to the development of the *ars dictaminis* and *ars notaria*. The dictaminal arts concerned more than the business of communicating over distances in order to overcome the difficulties in oral transmission.[37] These epistolary arts took administrative correspondences, initially from the dictamen of the papal chancellery, and judged them by the criteria of fluidity, accentuation and rhythm. Similarly, the notarial arts concerned, more explicitly, the physical forms of writing documents, the visible shapes of letters, of obelisks and other punctuation marks. This relationship between vision and textuality raises the Horation doctrine of *ut pictura poesis*. The question, in other words, is not a technical one about how representation corresponds to an objective, or probable reality, but a poetic one about how the form of words *makes* that reality possible.

Visual Evidence

Technologies of proof are thus structured according to a specific rhetorical method of persuasion that attempts to 'open the eye'. Once seen in this way, the question of visual (photographic or video) evidence is not simply one about the doctrinal foundations which lie beneath questions of admissibility. Neither is it a question of probative weight based upon the order of certitude guaranteed by visual evidence. The moderation of the gaze implicit in visual evidence is based upon the principles of clarity and lucidity. These luminous qualities lead us to assume the proximity between the mechanical record and the event contained therein.

In order to suggest that technology only serves, again, to establish further distance between the viewer and the event, it is instructive to turn to an analysis of court procedure in the Rodney King case. The case revolves around the use of excessive force by four police officers on Rodney King after a chase through the streets of Los Angeles in 1991. Unbeknownst to the four police officers, the incident was videotaped by a neighbouring resident and sold to the local television station. The same video recording was also tendered as evidence during the trial in order to prove or disprove the charge of excessive or unnecessary force used by the police. Given that the police officers were under the false illusion that Rodney King was on the drug PCP, it is as if the video becomes the ultimate arbiter, a corrective mechanism, for a scene in which the logic of vision itself is shown to be flawed.

It is unsurprising that video has been considered admissible as a technological aide in the storage and reproduction of information for the purposes of proof. Such admissibility of video evidence is based on a certain set of epistemological assumptions. On a general level, it is assumed that the video camera and recorder has reached the competence of the witness.[38] As a

37 H Kantorowicz (1938) *Studies in the Glossators of the Roman Law*, Cambridge University Press.

38 See *Alcock v Chief Constable of South Yorkshire* (1991) 2 All ER 15 at 54.

camera, the video is nomadic, a roaming vigilante, whose purpose is merely to record and document. It sets itself up as a perceptual supplement to aid the viewer's own senses. The reality of an event which the viewer has not directly witnessed nevertheless may be imaged and made present again and again through replay. The video thus assumes a direct link to an objective reality. What is to be hoped is that the surface of the screen will guide the observer towards an inner meaning and, will give the observer an 'insight' into the truth of the event on trial made more proximate through technology. Put differently, the event can not emerge without such technology. Meaning which emerges swollen from the body becomes legible only when skin has been traded for screen. Individual subjectivity, interior motives or conscience is always then judged through the dividing and distancing screen.[40]

What the jury view in both the state and the federal trial of the four police officers is the behaviour of a body in an attempt to justify the brutality of police force. It is interesting to note how the images presented on a video screen are gridded. Ten squares numbered across the horizontal axis of the screen, seven squares in alphabetic order from A to G running down the vertical axis, are provided in order to ease the cognitive process of reading and locating the now fragmentary minutiae of the images. In the geometricization that results from these co-ordinates, and with the additional technology of the freeze frame, these images of Rodney King are rendered susceptible to a reading that crowds out the dimensions and language of the other's experience. Hence, when both Officers Koons and Powell provide their readings of the images, standing next to the video in court, they do so by attempting to define King's body through a particular language that is specifically theirs. This is the language of police talk which employs such terms as 'compliance mode'. The beating that Rodney King takes is thus justified by the police as a measure taken in order to both physically flatten a potentially dangerous body, and, more importantly, to render silent the voice or text of a body language in order to comply with the language of police control.

What is to be hoped is that the screen only provides and articulates the colours and visual dimensions of that which has been. Yet, the action which may constitute the whole incident will always be left uncaptured by the camera. What is to be seen is only a construction, an artifice which lends itself to a number of interpretations which are far removed from any sense of objective reality claimed by the use of technology. What is being perceived in the close attention a court pays to the screen is only that which obstructs the body of reference, a body which is always already elsewhere.

40 Compare Goodrich's point that '[t]he Law is now resident not in the mouth of God but in the contemporary system of simulation .... the faithful kneel before the monitor, the screen that relays...': Goodrich (1995) p 303.

Conclusion

The main argument of this piece has been that evidence employs a means of persuasion which speaks to the eye and that as such cannot be said to be based on any model of scientific rationality. These oral, documentary and visual technologies of proof, in other words, belong to a rhetorical tradition in which all categories may be considered to be subsumed and governed by sight. In order to persuade, an advocate needs to speak to and open the conceptual eyes of his audience. For the court, the question is one of having one's gaze moderated by this technological light. Such rhetorical technique already takes us well away from the abstract vicinity of the objective sciences and provides us with new forms of understanding the question of subjectivity. According to the scientific rationalist argument, the primary purpose of technology would be to ensure that information from an event may be fixed and recorded with certitude upon some instrument: voice, text or camera. Surveillance equipment, computer records, the technique of cross examination enable moments to be played and experienced again and again. Indeed, we might suggest that visual technology is what makes the event an event.[41]

Yet, in supposing that the event is brought closer to the court through the use of technology, what is obscured is the artificiality of the product. For, if events rely upon a technological replaying, if events have no existence beyond the medium through which they are recorded and relayed, then events can only be the product of artifice. Technology has to be prioritised over the event itself. There can be no occurrence of a natural event unless it is recorded through technology (*techné*) in order for them to be presented before the eyes of the court. In providing the visual plenitude of surfaces, of speaking bodies, sealed documents and video, evidential techniques provide us with something other than an objective reality. They create more distance between the subject and the event-as-event itself. What needs to be proven actually moves further away and withdraws from any recognised process of cognition. So that, in conclusion, what is ultimately produced by rationalised legal procedure is far from the sovereign individual who reigns over his environment, but a subject further alienated and detached from the world of events.

References

Books and Articles

2 Corinthians 3.

Baldus, David et al (1990) *Equal Justice and the Death Penalty: A legal and empirical analysis*, Northeastern University Press.

Bentham, J (1981) *A Treatise on Judicial Evidence*, Rothman.

Burnett, J Lord Monboddo (1789) *Of the Origins and Progress of Writing*, Cadell.

41 E Cadava (1997) *Words of Light: Theses on the Photographing of History*, Princeton University Press.

Cadava, E (1997) *Words of Light: Theses on the Photographing of History*, Princeton University Press.
Carlen, P (1976) *Magistrates Justice*, Roberston.
Clanchy, MT (1993) *From Memory to Written Record: England 1066-1307*, Blackwell.
Cohen, J (1977) *The Probable and the Provable*, Oxford University Press.
Derrida, J (1976) *Of Grammatology*, trans G Chakravorty-Spivak, John Hopkins University Press.
Egglestone, R (1977) *Evidence, Proof and Probability*, Weidenfeld & Nicholson.
Eisenstein, E (1978) *The Printing Press as an Agent of Change*, Oxford University Press.
Goodrich, P (1990) *Languages of Law: From the Logics of Memory to Nomadic Masks*, Weidenfeld & Nicholson.
Goodrich, P (1995) *Oedipus Lex: Psycholanalysis, History, Law*, University of California Press.
Gudjohnson, G (1996) *The Psychology of Interrogations, Confessions and Testimony*, Wiley.
Haldar, P (1996) 'Acoustic Justice' in L Bentley and L Flynn (eds) *Law and the Senses: Sensational Jurisprudence*, Pluto.
Haldar, P (1999) 'Edifice Lex: The Function of the Ornament in Quintilian, Alberti and Court Architecture' in C Douzinas and L Nead (eds) *Law and the Image: The Authority of Art and the Aesthetics of Law*, University of Chicago Press.
Hale, M (1971) *The History of the Common Law of England*, University of Chicago Press.
Home Office (1989) *The Report of the Advisory Group on Video Evidence*, Home Office Publications.
Honoré, T (1981) 'The Primacy of Oral Evidence' in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, Butterworths.
Hugh of Saint Victor (1968) *The Didascalion*, Columbia University Press.
Justinian, *Digest of Roman Law.*
Justinian, *Novella.*
Kantorowicz, H (1938) *Studies in the Glossators of the Roman Law*, Cambridge University Press.
Lévy, J-P (1939) *La Hièrarchie des Preuves dans le Droit Savant du Moyen Ages*, Annales de l'Université de Lyon.
Lilburne, J (1645) *England's Birth Right Justified*, Society of Stationers.
Maclean, I (1992) *Interpretation and Meaning in the Renaissance: The Case of Law*, Cambridge University Press.
McBarnet, D (1981) *Conviction: Law, the State and the Construction of Justice*, Macmillan.
Nicholson, D, 'Truth Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *MLR* 726.
Nokes, GD, 'Real Evidence' (1949) 65 *Law QR* 62.
Ong, WJ (1983) *Ramus: Method, and the Decay of Dialogue*, Harvard University Press.
Quintilian (1922) *Institute Oratoria*, trans H Butler, Heinemann.
Rastell, J (1563) *The Nature of the Four Elements*, Totell.
Robertson, B and GA Vignaux (1995) *Interpreting Evidence: Evaluating Forensic Science in the Court Room*, Wiley.
Saenger, P, 'Silent Reading: Its Impact upon Late Medieval Script and Society' (1982) 13 *Viator: Medieval & Renaissance Stud* 45.
Salmond, J, 'The Superiority of Written Evidence' (1890) 21 *Law QR* 71.
Style, C and C Hollander (1993) *Documentary Evidence*, 4th edn, Longman.

Tapper, C (1986) *Cross and Wilkins Outline of the Law of Evidence,* Butterworths.
The Times, 2 July 1997.
Twining, W (1985) *Theories of Evidence: Bentham and Wigmore,* Weidenfeld & Nicholson.
Twining, W (1990) *Rethinking Evidence Scholarship: Exploratory Essays,* Blackwell.

Cases and Statutes

Alcock v Chief Constable of South Yorkshire (1991) 2 All ER 15.
The Law of Property Act 1925 (UK).
R v Kearley (1992) 2 AC 228.