

Law, Justice and the Pervasive Power of the Image

*Sionaidh Douglas-Scott*¹

Law and the image

Rescuing and redeeming law

It is not commonplace for works of legal scholarship to make use of images to aid and clarify their analysis of law.² Indeed, it has been remarked that characteristic responses from lawyers and judges to such efforts ‘range from bewilderment, disbelief and passive aggressive indifference to more open attacks and withering denunciations that dismiss work that touches on the visual aspects of law as esoteric, trivial, “not law”’ (Moran, 2012: 43). Notwithstanding, I have incorporated images in some of my work, which ranges from legal theory, through human rights law, to writing about EU law (Douglas-Scott, 2011, 2012, 2013). My use of images is grounded in the belief that the study of law is enlightened by reflection on other socio-cultural phenomena that generate legal meaning. Such socio-cultural influences are vital in the production and portrayal of law. Indeed, the use of images, far from clashing with or being irrelevant to, legal meanings, actually helps us to clarify them. Law is a cultural entity, as much an art as a science. It is rooted in images as firmly as in rules. Yet this relationship is sometimes ignored or even denied. It is more usual to affirm a strong affiliation between law and reason, science, and deduction, rather than with art and the imaginary. These latter are portrayed as imprecise, fanciful and permeated with subjective emotions that undermine law’s perceived need for certainty. Moreover, certain jurisprudential schools, such as legal positivism, assert specific connections between law and science, often claiming a corresponding separation of law from art, as well as from morality.

However, on the contrary, art may function to rescue and redeem law (Boyd White, 1973). It enriches the legal imagination. This is no anodyne, trivial function. Understanding law in this broader way, and relating it to art or literature, expands our sympathetic identification with those in very different contexts and experiences. It contributes

1 I am grateful to the editors of the special issue of this journal, two anonymous reviewers, and participants at the University of Copenhagen seminar May 2014, Hart Workshop 2014, and Critical Legal Conference in Belfast 2013 for very helpful comments on aspects of this article.

2 Notable and rare exceptions are the works of Costas Douzinas, Peter Goodrich, Desmond Manderson, Leslie Moran and a few others. However, even if legal scholarship does not warm to visual culture, it has become more and more frequent for images to be employed in lectures and powerpoint presentations – an under-observed phenomenon, which suggests that lawyers do find images to be a valuable resource in explicating the law.

an imaginative empathy, by which the self, with its all too human attributes, may be recovered from the more formal, rational language of the law. A turn to art presents a different language by which to assess the experience of law, as well as providing some resistance to law's often coercive constructions. It provides a means through which we learn to improve the law and become better lawyers.

Moreover, law is not the autonomous discipline it presents itself as, animated only by its own forms and creations. The increasing growth of interdisciplinary approaches and journals acknowledges this.³ The porosity of law to other areas of knowledge has long been acknowledged in the course of a lengthy relationship between law and the humanities, in which many of the most famous philosophers – Plato, Aristotle, Hobbes, Kant, Hegel, for example - have either been students of law, or possessed a rich knowledge of it (Douzinas, 2011) and recognized law as irrevocably tied to society and morality, as both productive of culture and shaped by it. Law is not a self-contained discipline - indeed the law is anything but a law unto itself.

The power of images

In this cultural context, the image is particularly powerful: 'In its ability of disclosing things, the image is promiscuous and forceful' (Douzinas, 2011). For John Berger, 'It is seeing which establishes our place in the surrounding world; we explain that world with words, but words can never undo the fact that we are surrounded by it' (Berger, 1972:7). Images perform a vast array of functions – they help organize our mental representations, excite our imagination, and support all types of experience, both poetic and prosaic. I interpret the concept of an image broadly in this article, as encompassing not only the 'high' art of famous artists and art galleries, but also the commonplace and the workaday - the advertisement, the photograph, the cartoon - such images as are all around us. Berger's definition might serve as a rough guide: 'An image is a sight which has been recreated or reproduced' (1972: 9). I work with the term 'image', rather than the more restrictive 'representation' (which allows less scope for the impression of the perceiver) or the more loaded, term 'art'. The philosopher, Morris Weitz, described art as an 'open' concept,⁴ namely one in which the necessary and sufficient conditions for the operation

3 For example, the following journals: *Yale Journal of Law and the Humanities*, founded in 1988; *Law, Culture and the Humanities* (Sage) founded in 2005, and *Law and Humanities* (Hart) founded in 2007. There also exists a Law and Humanities blog at <http://lawlit.blogspot.co.uk/>

4 M Weitz, 'The role of theory in aesthetics', in Neill and Ridley eds., *The Philosophy of Art: Readings Ancient and Modern* (New York: McGraw-Hill, 1995) 183-191.

of a concept cannot be given because new and unforeseen cases may arise that do not share any asserted common denominator. I prefer to avoid the philosophical and disciplinary quandaries of what might constitute art. 'Image' is sufficiently malleable to connote both imaginary and concrete phenomena, and thus takes us further than 'representation', while avoiding the value-laden quandaries of the concept of art.

The power of images is no passive, inert phenomenon. Images are objects that speak back to us, as did the cake that urged Alice to 'Eat Me' in *Alice in Wonderland*. Most vigorous are the images in film, that animate law in representing it, that literally speak back to us, even if more ephemerally than solid objects such as paintings. Society has been disturbed, perplexed and provoked to violence by images.⁵ Plato wished to banish painters and poets from his ideal Republic, believing the influence of art to be potentially subversive. Actions such as bans on tobacco advertising, the toppling of statues of former dictators, or the slashing by suffragette Mary Richardson, of Velazquez's *Rokeby Venus*, illustrate the power of images, and for that reason, society has over time sought to use, misuse or ban images altogether.



Member of the Fraternity of S. Giovanni
Decollato in Rome with tavoletta

5 For example, on the opening day of a notable exhibition of 'Young British Art', titled *Sensation*, at the Royal Academy in London, a portrait of the notorious child murderer, Myra Hindley, entirely compiled in paint using the handprints of small children, was attacked and a can of paint thrown at it, and had to be removed from the display.

One of the most striking examples of the power of images is that given by Freedberg (1989, 7) of the *tavoletta*, a small painted image, part of an institutionalised practice offered as an instrument of consolation to the condemned in the last moments before their execution in 14th – 17th century Italy – indeed held very closely to their faces up to the moment of their death (*Fig 1*). These devotional images were painted on one side with scenes of the Passion of Christ and on the other with a depiction of martyrdom akin to that which the prisoner was likely to face. As Freedberg (1989: 5) writes, ‘What comfort could anyone conceivably offer to a man condemned to death in the moments prior to his execution?’ - any attempt at consolation might seem futile. Yet records suggest that this practice did provide solace and spiritual comfort to at least some condemned – evidence of the extraordinary power images may possess.

Therefore, notwithstanding that western law has tended to oppose reason and emotion, it is the case that images, often strongly grounded in our emotions, provide very powerful arguments for action – regardless of whether these images are in fact trustworthy, or form the basis of a sound argument, as the power of advertising illustrates. The ubiquitous, pervasive, presence of images provides a particularly powerful cultural reference for law.

Law’s institutionalization of images

But the role of images clearly exceeds that of the rescue and redemption of law. For law is itself a ‘deeply aesthetic practice’ (Douzinas and Nead, 1999). Law institutionalizes images as official ways of seeing (Berger, 1972) bringing into being or affirming particular ways of living. Indeed, it has been argued that ‘Law’s force depends partly on the inscription on the soul of a regime of images . . .’ (Douzinas and Nead, 9). As much as the violence and power that underpin law, images play their part in enforcing and maintaining the law. Through history, the practice of law has been manifested in images, by way of custom, usage, practice or precedent. This point is surely uncontroversial and is clearly illustrated through more specific examples. Law’s passion for images has been expressed through an iconography of justice (Resnik and Curtis, 2011), by the architecture of the law, in the courts and their organization and design, and by official representations of Justice itself (see further below) that construct and reinforce the appearance of official authority, and draw on an aesthetic of harmony and order. A further artillery of images imposes legal authority - wigs, robes, sword and scales of justice, gavel, black cap, prison bars, judicial portraiture, all constitutive of a particular sensory perception of the world which law itself has created, and embellished, to ensure esteem and respect for itself. Those familiar concepts of the law – the ‘reasonable man’, or ‘the officious bystander’, impress themselves as images by and upon the legal consciousness. Law determines what images we will

consider pornographic, and what fecund, image-laden actions, such as cross burning, flag burning or poppy burning, will be classified as ‘symbolic speech’ and thus protected as freedom of expression. Therefore, should law deny any explicit connection with images, or with art more generally, such a denial is undermined by the pervasiveness of law’s own aesthetic. This legal aesthetic is a form of cultural experience that shapes and enforces our cognitive and emotive understandings of law.

However, any relationship openly acknowledged by law with the image is one of *control* and manipulation. We can draw comparisons with religion, which has manipulated images – by banning them (as have Judaism, Islam, Protestant Reformation and Catholic Counter-Reformation at various points) or strictly controlling them, as in medieval Christian art (through an iconography in which every element has a specific permitted meaning, every saint an allotted ‘attribute’⁶). Likewise, law polices its own image by filtering it through its own iconography – the forms of authority, justice, sovereignty, rationalism, legality and order, precedent and *res judicata*, bar and bench, and so on. Law manipulates its images, rather than permitting a dialogue with them. Yet why should we allow law to dominate the relationship in this way?

‘Co-implication’

To sum up then: Law’s relationship to the image is therefore complicated. Law may itself be interpreted as an art form, one of the liberal arts, but that is not all that it is. Law makes use of images, but is not reducible to images. Nor can art be straightforwardly compared to law. There exists no unambiguous analogy between art and law, and there are of course many points of difference between them. Peter Fitzpatrick (2005: 2) suggested the relationship between law and culture was an uneasy one, with an ‘edgy quality’, and the same might be said of the relationship of law and image. To be sure, one should not make inordinate claims for an approach that seeks to understand law in terms of a relationship between law and the humanities, culture and art. We cannot equate the creative process for judges, who write judgements, with that of literary authors, who write fiction, or artists who paint legal scenes. Rhetoric and cultural issues bestride these two domains, but artists are not practising law, nor are great judgements literary novels.

6 Even if Art has sometimes resisted this control, as, for example, in Caravaggio’s use of realism in the depiction of biblical subjects. Caravaggio’s original painting of *St Matthew and the Angel* for the church of S Luigi dei Francesi in Rome was rejected by the religious establishment for portraying a peasant-like St Matthew, with dirty feet.

Alison Young has asserted that the relationship between art and law is one of *co-implication*, 'in which law and image are enfolded within each other, their contours and substance passing through and around each other,' a relationship that 'interrupts any straightforward story of legal governance'. This relationship is one of entanglement and implication, 'a responsive dance' (Young 2005: 14). In this article, I adopt the notion of co-implication as the basis on which law and the image interact, the argument being that, while law's own management of images must be scrutinised with care, law itself may be illuminated, enhanced or undermined by the work that images do, and our own understanding of law thus enriched, or even destabilised. To understand it through the medium of images adds a density and a complexity to our comprehension of law, and reveals tacit assumptions, incongruities and solecisms in the workings of the law.

Using images to understand law

There are many ways in which one can write about law and image. In those rare cases in which it has acknowledged the significance of images, legal theory has tended to focus on law's relationship to visual culture generally, investigating the role that the visual can play in our understanding of law – and, as such, these studies are part of a broader theorizing about law. However, in my work, I have tended to focus on specific legal concepts – for example, aspects of human rights and EU law - and used images to enhance understanding of them, without overtly interrogating the nature of this relationship, partly because the images are capable of doing their own work without further pedagogic treatment.

In this article, I look at one particular and very familiar legal concept – the rule of law – to illustrate the work that images may achieve in furthering and enriching our understanding of law, but I also take a step back and look at the relationship of law to image more generally. Indeed, I believe the rule of law to be particularly apposite for investigation through visual resources, as it is a concept assumed by many – laypersons and lawyers - to be at the heart of legal aspirations, often venerated, sometimes seen as so basic and familiar as to need little explanation. As a recent commentary states: 'If celebratory rhetoric is to be believed, or money devoted to a cause regarded as a sign of its success, ours is the era of the rule of law. No one will be heard to denounce it, leaders of countries all round the world claim to have it, vast sums are spent to spread it' (Krygier, 2008). For many people, the rule of law *is* simply law. Everyone has some sort of image of it in their mind. One need not be a legal specialist to have at least some sense of its import.

The rule of law as a particular aesthetic of law

The image below, or something like it, should be familiar to anyone reading this article. Such images abound, usually in the vicinity of law courts. The figure of Justice, carrying the scales aloft - sometimes blindfolded to suggest it is fair and uncorrupted by bias - is usually portrayed in classical mode as is this one, which has its origins deep in the canon of western sculpture, a lofty canon which the law is keen to embrace. The figure is emblematic, easily read as Justice, often taken to be synonymous with law. It connotes the very values of the rule of law – a domain of law and not despotism and bias.



A Familiar Image of Justice

The rule of law is what many theorists understand by the concept of ‘legal justice’, thus asserting the possibility of justice *within* the law, a promise of the law to do justice, rather than separating law from justice. The rule of law is not merely one set of legal rules but instead could be seen as constituting the legal self-understanding of communities (Kahn, 1999). It is a pervasive concept. It has been described as a ‘meta rule’ about the importance and priority of legal rules (Palombella and Walker, 2009). Yet what exactly is the relationship of the rule of law to law, and to justice? What do we understand by this vague, overused term?

This discussion will of necessity be brief and I have written at much greater length about the rule of law elsewhere (Douglas-Scott, 2013). However, most would agree that the rule of law has traditionally required state action to rest on legal norms that are general in character, relatively clear, certain, public, prospective, and stable, as well as recognizing the equality of subjects before the law (Raz 1997, Fuller 1958). It stresses the fixed and stable enforcement of general principles - legitimate expectations, formal rights of access to the courts, equality before the law - a predictable mapping of the world in legal terms. Its benefits can be stated simply. It restricts the abuse of power. Observance of the rule of law enhances certainty, predictability and security both among individuals and between both citizens and government, as well as restricting governmental discretion. Thus it has both private and public law functions – an attraction in the world of growing legal pluralism.

Citizens are able to interact together, knowing in advance which actions are permitted and which prohibited, and what rules will regulate conflicts, should there be any.

These are perceived to be formal requirements of law, rather than substantive content which might derive from a particular theory of justice.⁷ Max Weber believed that what he termed ‘formally rational’, i.e. modern law, derived its legitimacy not from any substantive morality (a shared, common morality being hard to achieve in times of contested moral pluralism) but formally rational propositions. The rule of law, which presents itself as impartial, is appropriate in today’s landscape of moral and legal pluralism. Adherence to the rule of law is perceived as necessary to ensure the legitimacy of law. Legitimacy thus overtakes morality as a significant benchmark of law.

In sum, we might say that these features (generality, clarity, neutrality, publicity etc.), together with the common official image of Justice with the scales, contribute to and affirm an official *aesthetic* of the rule of law.

The ‘dark side’ of the rule of law?

Yet the rule of law is clearly not without its detractors. There is what Tamanaha has described as ‘a dark side to the rule of law’ (Tamanaha 2008, 516). Earlier in his career, Alan Hutchinson attacked it in the following words: ‘The rule of law is a sham; the esoteric and convoluted nature of legal discourse is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice . . . legal discourse is only a stylised element of political discourse’ (Hutchinson, 1988 at 40). Hutchinson’s critique interprets law as a function of power and politics, and warns us not to be beguiled by the apparently ‘neutral’ objective nature of the formal rule of law. Indeed, jurists have tended to take polarized views of the nature of the rule of law, viewing it either as ideal or ideology, good or bad. The rule of law undoubtedly has a powerful legitimating function. As such, it may be manipulated by cynical governments, who play lip service to its tenets while in fact flouting them. Such cynicism ‘tarnishes’ the rule of law, debases its value and undermines the official aesthetic of the rule of law.

It is also undeniable that the rule of law has a connection with a certain type of liberalism, and this connection also renders it amenable to criticism. As Judith Shklar has suggested, the rule of law has tended to be seen as ‘a football in a game between friends and enemies

7 Although some theorists, such as John Finnis, argue for a substantive understanding of the rule of law. For further on this, see Douglas-Scott 2013, chapter 7.

of free market liberalism' (Shklar 1987, 40). A trajectory can be mapped out from John Locke through Karl Marx and Max Weber to Friedrich von Hayek, which posits an 'elective affinity' between the rule of law and capitalism (Scheuerman 1999, 208). (And capitalism of course has its dark side too.) In the case of English law, this link can be dated back to the 17th century, and the connection drawn between law, government and property.⁸ The rule of law has played a historical role in protecting private property and freedom of contract (Ferguson, 2012), especially when it was used to support a fundamental right to accumulate private wealth.

Both liberal and critical accounts highlight certain features as indicative of this connection between capitalism and the rule of law. For example, it might seem that capitalism and economic development require certainty, predictability and security in order to flourish.⁹



Gerard de Lairesse, *Allegory of the Freedom of Trade*, 1672, Ceiling painting, Peace Palace, The Hague

-
- 8 The English common law courts have a long tradition of protecting property. Sir Edward Coke appealed to the common law as a traditional barrier to the interference by government with the economic and other 'freedoms' of the individual (Jacob Viner, 'The Intellectual History of Laissez Faire', (1959) *J. L. & Econ* 45, 55). The willingness of the common law courts to protect freedom of enterprise, and the development of the rule of law in this way, may also go some of the way toward explaining Weber's 'England problem' – namely, the question of how the stability and clarity in law necessary for the progress of capitalism could be provided by the uncoded common law system.
- 9 But for a somewhat different account see Scheuermann 1999 and 2008, Douglas-Scott 2013, chapters 7 and 8.

By securing these measures, it is possible to ensure the stability of contract law and predict the costs and benefits of particular transactions. The origins of the EU can at least partially be explained in this way. Ordo-liberals justified the creation and existence of the EU by its capacity to support free market rights, guaranteeing private property and exchange of goods, based around the economic nexus, or even ‘constitution’, of the Treaty of Rome (Ipsen, 1987). The rule of law offers protective functions for business, sheltering trade against political arbitrariness, or expropriation of property rights, and has sometimes served as an ideal partner for market capitalism. Thus capitalism is able to focus on commerce rather than on shielding its existing efforts from capricious conduct.

The *Allegory of the Freedom of Trade* painted by the 17th century Netherlands artist, Gerard de Lairesse, captures these links very aptly. De Lairesse’s painting, illustrated in Fig 3 above, is intriguing, because the figure of trade it depicts employs much of the iconography of justice and the rule of law. The female figure, representing trade, sits on high, in much the glorious way in which justice is usually portrayed, in one hand a merchant’s hat balanced on a stick in sceptre-like fashion, in the other a baton held up like a torch of freedom. Winged cherubs rush to place a naval crown (symbolizing the freedom of the seas, very important to Dutch trade at the time) on the figure. Interestingly, this painting, once displayed in a wealthy Dutch burgomaster’s house, is now located in the Peace Palace in The Hague, thus identifying international trade not only with justice but now also with peace – indeed, security is a theme in the other two panels of the ceiling of which this work forms a part.¹⁰ So capitalism, the freedom of trade, is portrayed as an allegory of the just society, bringing with it security and peace. However, the mercantilism that brought so much trade and prosperity to Holland in its Golden Age - a global commerce that was one of the earliest examples of modern capitalism, and whose produce was so ably illustrated in the still life paintings of the Dutch Golden Age - also had its dark side. Investment in the Dutch West Indies company fuelled the slave trade. Arguably, it was exploitation that propelled this Dutch commerce, and Karl Marx reproved the Dutch Republic as an example of early capitalism much as he was later to castigate England for the full-blown version. De Lairesse’s picture is a form of ‘pictorial capitalism’ (Hochstrasser, 2008) intended to glorify free trade and link it to peace, liberty and justice through its iconography. But a closer look undermines this reading.

10 Lairesse named the triptych: *Allegory of Concord, Freedom and Security*. The triptych has been known for some time as the *Triumph of Peace*, although actually represents an allegory of the city of Amsterdam as a protector of freedom. Further information available at <http://www.triomfderivrede.nl/>

Yet the capacity of trade to function as an allegory of freedom continues to this day – for example, the Twin Towers of the World Trade centre destroyed on 11th September were sited next to ‘Liberty Plaza,’ and One World Trade Center, the building which replaces the twin towers in New York, and now the tallest building in the western hemisphere, is colloquially known as the ‘Freedom tower’. However our contemporary free trade has its dark side too.

From the Rule of Law to the Survival of the Fattest

The rule of law is certainly not without its detractors in the contemporary international setting. The Marxist critique of the rule of law sees law as underpinning the ideology of capitalism. This critique finds close allies among those who argue that global injustice results from the manipulation of law applied globally by the capitalist ‘Washington consensus.’¹¹ The last half century has witnessed the spread of neoliberal reforms across the world, in what has been described as an ‘economic constitutionalism’. Loans to developing countries from the IMF or World Bank have been conditional on those countries undertaking reforms linked to so-called ‘good governance’, such as reducing market and trade barriers, undergoing privatisation, the protection of property and enforcement of contracts, as well as ensuring the free flow of capital. Indeed, ‘Rule of Law’ is often used as a general term to describe such programmes. These ‘reforms’ supposedly reproduce the economic and legal conditions of the developed world. Yet this has not been the result, and most of the countries undergoing these programmes have generally not flourished. As has been pithily remarked, ‘You buy habeas corpus and end up with Habitat Corporation’ (Nicolaidis, 2008: 143).

Fig 4 presents the work of the Danish sculptor Jens Galschiøt. This piece is entitled ‘Survival of the Fattest’,¹² and it was displayed in Copenhagen harbour in December 2009 at the time of the G15 climate change summit, along with several other large cast iron sculptures by Galschiøt (it was also earlier displayed in London, during the European Social Forum in protest against the evils of free trade and globalization).

11 ‘The Washington Consensus’ was an economic plan proposed by the World Bank and IMF in 1990, supposedly as a template for economic reform in Latin America and elsewhere. See, for a general account David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).

12 To be accurate, ‘Survival of the fattest’ was jointly created by Galschiøt and fellow artist Lars Calmar in 1992.



'Survival of the fattest' by Jens Galschiøt - An allegory of free trade for our times? (Courtesy of www.aidoh.dk)

It depicts a grossly obese western *Justitia*, bearing the scales of justice, borne on the shoulders of an emaciated African boy. The sculpture is accompanied by this text: 'I'm sitting on the back of a man. He is sinking under the burden. I would do anything to help him. Except stepping down from his back.' According to Galschiøt, the sculpture represents the 'self-righteousness of the rich world,'¹³ which sits on the backs of

the poor while pretending to do justice. Galschiøt deliberately positioned 'Survival of the Fattest' beside Edvard Eriksen's statue of 'The Little Mermaid' (Copenhagen's prime tourist attraction) in Copenhagen harbour, so as to ensure maximum attention, both in Denmark and internationally. In doing this, Galschiøt contrasted Hans Christian Anderson's fairy tale with the shameful but indisputable actuality of his own work, as if perhaps to suggest that the objectives of the wealthy nations at the G15 climate change conference might be little more than fantasies and make-believe. 'Survival of the Fattest' is a striking work, beautiful in its way, but borne out of a compulsion to change things, to shock people into doing justice. The chimneys at the other side of the harbour, billowing out smoke, also add to the irony, conveying an image of a duplicitous west, profiting off the backs of the poor, and polluting the environment at the same time, while appearing to work hard to prevent global warming.

This work provides a poignant contrast to the earlier allegory of trade by de Laïresse. It also confronts our beliefs as to the value of the rule of law, justice, and 'free' trade, raising the prospect of the smug assumption of a western 'Justitia,' or rule of law, as positively damaging to other communities and parts of the world. This work has none of the positive (and perhaps unjustified) optimism of de Laïresse. This modern *Justitia* brings not 'freedom' with trade but harm, not peace and security but profit for the already rich, at the expense of the very poor.

Galschiøt has used this figure of *Justitia*, the 'Survival of the Fattest,' on a number of occasions. In this next illustration (Fig 5), we see the work close up, away from its location in Copenhagen harbour.

13 Galschiøt's comments are available at <http://www.aidoh.dk/new-struct/About-Jens-Galschiot/CV.pdf>

At the centre is the same obese 'Justitia', her eyes closed, rather than blindfolded, illustrating a degraded justice that refuses to notice obvious injustice at her very feet, holding up the diminutive scales as a meagre mockery of justice. Behind her, this time, stand an oversized set of scales, 8 metres high. On one side of these scales hangs a dead cow, suspended by its legs, and on the other a number of emaciated developing world people, outweighed by the ponderous, corpulent, dead cow. Galschiøt's point here is, as he writes, 'the grotesque fact that each cow in the EU receives a subvention of 800 US dollars to block the poor countries from selling their products on the European market . . . In the rich part of the world our main scourge is obesity due to overconsumption while people in the third world are dying of hunger. The misery is creating floods of immigrants. In a desperate attempt to entrench ourselves and preserve our privileges we resort to measures so harsh that we betray our ideals of humanism and democracy.'¹⁴ This sculpture confronts our notions of justice and rule of law head on, and reveals their hypocrisy.

I employ these works to illustrate how visual perception has an important role to play, how images can inspire and engage us, in our understanding of law. Galschiøt uses his sculptures to fight injustice in the world, to provoke strong emotion, and to motivate the



Survival of Fattest – again (Courtesy of www.aidoh.dk)

14 See 'Jens Galschiøt, Portrait of a Sculptor' available at <http://www.aidoh.dk/?categoryID=1>

apathetic, or disengaged, to action. He encourages viewers to use their own imagination to work with the art works, as part of a fight against injustice, writing ‘In my work with sculptures and happenings, I try to ask why and how our ethical and moral self understanding is connected to global and local reality. I leave it to the spectators to work out the answers for themselves.’¹⁵ This is a good example of the capacity of the image to challenge or expand our ideas.

Such art works, by engaging our sympathy in lives very different from our own, force us to confront these ideas through powerful, passionate, inspiring images, thereby countering Weber’s dismal characterization of modern times – ‘rationalization and intellectualization and, above all . . . the disenchantment of the world’ (Weber 1946, 155). They increase our imaginative capacity, better equipping us to make the judgements that public life requires of us, forcing us through imaginative reception to change our attitudes in radical ways.

Works such as Galschiøt’s force us to confront our assumptions about certain fundamental concepts, such as the rule of law, freedom of trade, or justice. If we take a standard image of justice, such as that above in Fig 2, in traditional form, and readily associated with the rule of law, we see an image that the law itself is happy to acknowledge, one that it has made its own. An image of harmony, authority and order. But why should we allow law to control our visual perceptions of justice? Why should justice always be associated with idealised Caucasian looks deriving from ancient sculptural canons in any case? Why should we allow an unrealistic ideal of harmony and order to dominate our perceptions of justice when law fails to deliver them? In contrast, in works such as the *Survival of the Fattest*, ‘Art subverts the dominant consciousness, the ordinary experience’ (Marcuse 1979, ix). For justice as it exists in the world is not just a matter of harmony, authority and order. Law, and its institutions and personnel, perpetuate injustice as often as justice. The rule of law is often the mis-rule of law, even in those contexts which present themselves as the very haven of justice and order, as where the US administration used its own lawyers to devise a definition of ‘torture’ that would not include waterboarding.¹⁶ Galschiøt’s works highlight this mis-rule and hypocrisy all too effectively, undermining our assumptions about law and justice, while at the same time captivating our imagination and motivating us for something better than lies, fairy tales or official ways of seeing.

15 ‘Jens Galschiøt, Portrait of a Sculptor’.

16 Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogation-memo20020801.pdf>

There is a broader significance in the pairing of law and images here. If the rule of law is to endure, then it must be valued and have some resonance over and above the anaemic, spiritless, familiar representations of justice. There is a blandness and impersonality in too many understandings of law and justice. They fail to motivate, leaving us disaffected and estranged. If the rule of law and justice are to be meaningful then they must animate and rouse citizens, so that we care if they are being undermined in practice and we strive to recover and amend them. Images of law and justice provide the necessary motivation to reimagine and transform our perceptions, and thus are crucial assets, not to be ignored (see also Manderson, 2012) - contrary to the popular reactions to the pairings of law and images cited at the outset of this article.

Enriching the legal imagination

I conclude by recapitulating in a more general form the argument already made for the relevance of art, and the image, to law, to stress the role that cultural influences play in fashioning law and the ways in which we understand it.

Law may be interpreted as a symbolic form (Kahn 1999, Cassirer 1965) that attempts to construct its own domain of meaning. It asserts its intrinsic ways of seeing, and in so doing, aims to structure our consciousness, and create specific ways of being in the world. I have argued that, while it is crucial to comprehend law in a broader cultural context, law's own aesthetic should not simply be taken at face value. Law should not always control the interpretation of its images. In this context, academics have a particularly important role, given that they can write about law without regard for the constraints that practitioners and judges face - such as client pressures and demands, and the burden of legal forms and precedents - and thus academics can be alert to the sometimes pernicious nature of the legal aesthetic, without fear of compromising professional standing.

It is often said that the postmodern condition is one in which there exists a crisis of values, and a loss of faith (Lyotard, 1979), created by the dissipation of traditional forms of value and traditions. In this situation, an economic, instrumentalist logic, a creature of capitalism, has tended to dominate and function as a place marker for legitimacy. Law has frequently adopted this logic, as well as its technical reason, its reliance on contract and property (the attributes of commerce) and its belief in the 'rational actor' of the law and economics doctrine, and, as I have tried to show above, all of these often come together in that most foundational of legal concepts, the rule of law. Although a well functioning economy may help create the prosperity necessary for human freedom and well-being, there are many types of human flourishing and other understandings of

law that do not rely on market relations, and this reductionist (albeit far from neutral) model, limiting complex human behaviour to the maximisation of preferences, must be rejected. There has too often existed an unhappy alliance between law and capitalism. An interdisciplinary approach, looking to law's undeniable relationship with a broader culture, is a way of resisting this reductionist approach to law and also the acontextual and unhistorical view of law as doctrinal science.

Therefore, in conclusion, I argue that an interdisciplinary, contextual approach, one that shapes our understanding of law in its cultural context, and one alert to the huge significance of images as a critical and highly relevant cultural asset, furnishes not only an important form of resistance against a contemporary drift, but also provides a richer understanding of law – indeed, one that aids us in our search for justice.

References

Berger, John (1972): *Ways of Seeing*. Penguin Books.

Cassirer, Ernst (1965): *The Philosophy of Symbolic Forms*. Yale University Press.

Douglas-Scott, Sionaidh (2011): 'Europe's Constitutional Mosaic: Human Rights in the European Legal Space,' in Shaw, Tierney, Walker eds., *Europe's Constitutional Mosaic* (Hart Publishing).

Douglas-Scott, Sionaidh (2012): 'Pluralism and Justice in the EU,' *Current Legal Problems*.

Douglas-Scott, Sionaidh (2013): *Law After Modernity*, Hart Publishing.

Douzinas, Costas (2011): 'A Legal Phenomenology of Images,' in *Law and Art*, ed. O Ben-Dor, Routledge, 248.

Douzinas, Costas and Nead, Lynda (eds.) (1999): *Law and the Image: The Authority of Art and the Aesthetics of Law*, University of Chicago Press.

Ferguson, Niall (2012): 'The Rule of Law and its Enemies,' BBC Reith Lectures.

Fitzpatrick, Peter (2005): 'The damned word': Culture and Its (In)compatibility with Law', *Law, Culture and the Humanities*, 2.

Freedberg, David (1989): *The Power of Images*. University of Chicago Press.

Fuller, Lon (1958): 'Positivism and Fidelity to Law — A Reply to Professor Hart', 71 *Harvard Law Review*, 630

Hochstrasser, Julie (2007): *Still Life and Trade in the Dutch Golden Age*. Yale University Press.

Hutchinson, Allan (1988): *Dwelling on the Threshold*. Toronto: Carswell.

Ipsen, H-P (1987): 'Europäische Verfassung - Nationale Verfassung' *EuR* 195.

Kahn, Paul (1999): *The Cultural Study of Law: Reconstructing Legal Scholarship*. University of Chicago Press.

Krygier, Martin (2008): 'Philip Selznick: Incipient Law, State Law and the Rule of Law,' in J. van Schooten & J.M. Verschuuren (eds.), *The State Legislature and Non-State Law*, Cheltenham: Elgar.

Liotard, Jean-Paul (1984): *The Postmodern Condition 1979* (English ed. Manchester University Press.

Manderson, Desmond (2012): 'The Law of the Image and the Image of the Law: Colonial Representations of the Rule of Law' 57 *N.Y.L. Sch. L. Rev.* 153.

Marcuse, H. (1979): *The Aesthetic Dimension: Toward a Critique of Marxist Aesthetics*, London: Macmillan.

Moran, Leslie (2012): 'Visual Justice: a review essay' *International Journal of Law in Society*

Nicolaidis, Kalypso (2008): 'Can a Post-Colonial Power Export the Rule of Law? Element of a General Framework', in G Walker, Palombella and N (eds.): *Relocating the Rule of Law*, Hart Publishing.

Palombella, G. and Walker, N. (eds.) (2009): *Relocating the Rule of Law*, Oxford: Hart Publishing.

Raz, Joseph (1997): 'The Rule of Law and its Virtue', 93 LQR 195.

Resnik, Judith & Curtis, Dennis (2011): *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*. Yale University Press.

Scheuerman, William (1999): 'Economic Globalization and the Rule of Law,' 6 *Constellations*.

Scheuerman, William (2008): *Frankfurt School Perspectives on Globalization, Democracy, and the Law*. New York: Routledge.

Shklar, Judith N. (1987): 'Political Theory and the Rule of Law', in Hutchinson and Monahan eds. *The Rule of Law: Ideal or Ideology*. Toronto: Carswell.

Sionaidh Douglas-Scott, (2013) *Law After Modernity*, Hart Publishing.

Tamanaha, Brian (2008): 'The Dark Side of the Relationship between the Rule of Law and Liberalism,' 3 *NYU Journal of Law & Liberty*.

Weber, Max (1946): 'Science as a vocation', in H. Gerth, and C.W. Mills eds., *From Max Weber: Essays in sociology*, New York: Oxford University Press.

White, James Boyd (1973): *The Legal Imagination*. University of Chicago Press.

Young, Alison (2005): *Judging the Image*. Psychology Press.