EVIDENCE AS RHETORIC: A SEMIOTIC PERSPECTIVE

Dennis R. Klinck[*]

One way of thinking about evidence is to regard it as involving the use of signs or representations in order to obtain knowledge of "facts". In this article, the author examines some aspects of evidence, and evidence law, from a "semiotic" point of view. The framework adopted is taken from C.S. Peirce's theory of signs, particularly that part of it which categorizes signs as icons, indices, or symbols, depending upon whether their relationship to their object depends upon resemblance, contiguity, or convention, respectively.

Using this framework, the author first analyses a number of typical forms in which evidence might be presented: "real" evidence, photographs, diagrams, re-enactments, and testimony. The framework seems to offer a fairly precise way of characterizing and accounting for the processes involved in these different kinds of evidence, specifying not only their inferential, but also their rhetorical dimensions. It also helps to identify salient distinctions between forms of evidence that, in traditional classifications, are sometimes conflated.

The author then applies the approach to some central issues in two areas of evidence law: hearsay and similar fact. He argues, for example, that the difference between hearsay and non-hearsay can be understood in terms of the difference between symbolic and indexical signification, and, in relation to similar fact, that the argument about when, and of what, "similarity" becomes "probative" may be re-stated as a question about when iconicity becomes indexical. The author concludes not only that this semiotic perspective offers a way of thinking about evidence that is parallel to conventional accounts, but also that is an effective critical approach which may clarify or sharpen those accounts.

On peut envisager la preuve comme une démonstration utilisant des signes et des représentations afin d'obtenir la connaissance de « faits ». Dans cet article, l'auteur examine certains aspects de la preuve, et du droit de la preuve, d'un point de vue sémiotique. Le cadre adopté est tiré de la théorie des signes de C.S. Peirce, particulièrement de cette partie de la théorie qui classe les signes en icônes, indices ou symboles, selon que la relation entre les signes et leur objet dépend d'une ressemblance, d'une contiguïté ou d'une convention, respectivement.

Au moyen de ce cadre, l'auteur analyse d'abord plusieurs formes sous lesquelles la preuve est habituellement présentée : la preuve « matérielle », les photographies, les diagrammes, les reconstitutions et les témoignages. Le cadre semble offrir un assez bon moyen de caractériser et de décrire les processus que renferment ces différents genres de preuve, tout en précisant non seulement leurs dimensions inférentielles, mais aussi leurs dimensions rhétoriques. En outre, il contribue à cerner des distinctions marquantes entre les formes de preuve qui sont parfois réunies dans les classifications traditionnelles.

L'auteur applique ensuite cette approche à des questions centrales dans deux domaines du droit de la preuve : le ouï-dire et les faits similaires. Il soutient, par exemple, qu'on peut comprendre la différence entre le ouï-dire et la preuve qui ne constitue pas du ouï-dire en l'assimilant à la différence entre la signification symbolique et la signification indiciaire. En ce qui concerne les faits similaires, il soutient que la question portant sur le moment où la « similarité » devient probante, et ce qui fait que la « similarité » devient probante, peut être reformulée comme étant la question de savoir quand l'iconicité devient indiciaire.

L'auteur conclut non seulement que cette perspective sémiotique offre une façon d'envisager la preuve qui est parallèle aux descriptions conventionnelles, mais aussi qu'elle constitue une approche critique efficace qui pourrait bien clarifier ou préciser ces descriptions.

[*] Faculty of Law, McGill University. A preliminary version of this paper was presented to a Faculty Forum at the University of New Brunswick, and a more developed version to the Legal Theory Workshop at McGill University. I am grateful to colleagues in both places for their responses and suggestions.

A representation is an object which stands for another, so that an experience of the former affords us a knowledge of the latter.[1]

I. INTRODUCTION

In a recent outline of "the nontraditional work that has been taking place in evidence scholarship", Roger C. Park identifies in particular three such areas of inquiry: the social psychology of evidence, probability theory, and forensic science.[2] One area that he omits (although aspects of it may fall within the first category[3]) is what might be called "semiotic" investigation of evidence, an approach illustrated for example by Bernard Jackson's *Law, Fact and Narrative Coherence*.[4] In this paper, I want to explore a somewhat different semiotic approach to our understanding of "evidence".[5]

The link I wish to explore is suggested by the epigraph quoted above, which is a statement about the nature of signification — that is, it is a statement about semiotics. It contemplates "representations" — things the experience of which can afford us "knowledge" of other things. Much, if not all, evidence can be thought of in similar terms: the evidence, what is actually presented to a trier of fact, consists of "things" ("chattels", documents, words, etc.) from which the trier is invited to derive knowledge about something else (say, "material facts"). Using evidence involves determining what things that are in some sense representative stand for; the rules of evidence are largely concerned with what kinds of representative things are acceptable. One might expect, therefore, that semiotics would provide some useful insights into the law of evidence.

One such insight might be how to organize the area and think about evidence generally. This will be my focus in this paper. I shall be concerned with those areas of the law that address themselves specifically to the probative effect of evidence, or, in other words, to the problem of inference. That is, I am not concerned with rules that exclude evidence on bases unrelated to its having probative effect; for example, evidence excluded because a suspect's civil liberties were violated when it was

---

[1] C.S. Peirce, *Writings of Charles S. Peirce: A Chronological Edition*, vol. 3, ed. by C.J. Kloesel *et al.* (Bloomington: Indiana University Press, 1982) at 65.

[2] R.C. Park, "Evidence Scholarship, Old and New" (1991) 75 Minn. L. Rev. 849.

[3] See *e.g.* W.M. O'Barr, *Linguistic Evidence: Language, Power, and Strategy in the Courtroom* (New York: Academic Press, 1982), and W.S. Bennett & M.S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (New Brunswick, N.J.: Rutgers University Press, 1981).

[4] B. Jackson, *Law, Fact, and Narrative Coherence* (Merseyside, U.K.: Deborah Charles, 1988). See especially Chapter 1, "An Introduction to Legal Semiotics and Narrative Models of Discourse" and Chapter 3, "The Narrative Model of Fact Construction in the Trial".

[5] I have elsewhere suggested such an approach. See D.R. Klinck, "Embedded Assertions: Linguistic Considerations in the Rule in St. Lawrence" (1987) 12 Queen's L.J. 21, and D.R. Klinck, *The Word of the Law* (Ottawa: Carleton University Press, 1992) at 70-71. In this article, I propose a more developed analysis than the tentative and summary treatments that occur in my previous work.

obtained.[6] Semiotics might have something to say about this: indeed, we exclude such evidence in order to send some "message"[7] about how our justice system works.[8] My concern here is limited to how evidence "means" — that is, relates to facts to be proved — and how the rules of evidence in this context may reflect the kinds of signification different kinds of evidence involve.

II. Structures of Signification

First, I should say something about the general structure of signs. In the popular mind, the sign relationship is probably regarded as dyadic: the sign stands for some thing in reality.

However, those who have addressed their attention to this issue have tended to arrive at more complex accounts, frequently involving a triadic structure. Thus, Tzvetan Todorov cites Aristotle, describing linguistic signification, as speaking of words as symbols of mental experience, which in turn is the image of some "thing",[9] and the Stoic Sextus Empiricus for the proposition that, in signification, "three things are linked together, the thing signified and the thing signifying and the thing existing".[10] According to John Lyons, the triad became a commonplace in the scholastic maxim "vox significat [rem] mediantibus conceptibus".[11]

More (but not very) recently, C.S. Peirce advanced the following formulation:

> A sign, or *representamen*, is something which stands to somebody for something in some respect or capacity. It addresses somebody, that is, creates in the mind of that person an equivalent sign, or perhaps a more developed sign. That sign which it creates I call the *interpretant* of the first sign. The sign stands for something, its *object*.[12]

Here again we find the triadic structure of signification: representamen-interpretant-object. Again, the mediating term, the interpretant, is psychological, a sign created in the mind of a person. Similarly, Ogden and Richards, in their "triangle of signification", insist that the relationship between the sign (in their terminology,

---

[6] I am, of course, aware that the distinction I am making here is not a simple one. Thus, for example, one rationale (not the most important one) for excluding a coerced confession is that it may not be reliable.

[7] See T.A. Sebeok, "Zoosemiotic Components of Human Communication" in R.E. Innis, ed., *Semiotics: An Introductory Anthology* (Bloomington: Indiana University Press, 1985) 294 at 295: "The subject matter of semiotics is, quite simply, messages".

[8] This is virtually explicit in the notion of "disrepute" in s. 24 (2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[9] T. Todorov, *Theories of the Symbol*, trans. C. Porter (Ithaca, N.Y.: Cornell University Press, 1982) at 16.

[10] *Ibid.* at 19. See also U. Eco, *Semiotics and the Philosophy of Language* (Bloomington: Indiana University Press, 1984) at 29.

[11] J. Lyons, *Semantics*, vol. 1 (Cambridge: Cambridge University Press, 1977) at 96.

[12] C.S. Peirce, *Philosophical Writings of Peirce*, ed. by J. Buchler (New York: Dover Publications, 1955) at 99.

"symbol") and the referent (the "thing" in reality) is indirect; the sign stands directly for a thought or a concept.[13]

These reflections are important in that they remind us that signification is generally not a process involving the mathematical precision of one-to-one relationships. Interposed between the sign and reality is always the thought of some person; thus giving rise to the possibility of misrepresentation, mistake, and misunderstanding. As we all know, this characteristic of (especially some kinds of) signification is a central preoccupation of evidence law.

Some accounts of the sign go even further, calling into question whether we can apprehend "brute reality" at all. Thus, Saussure's account sees the sign as dyadic, but in a different way from that to which I have alluded. Speaking of the linguistic sign, he says that it "unites, not a thing and a name, but a concept and a sound-image".[14] Meaning, in this view, does not depend upon some (even indirect) reference to "reality"; rather, it consists in the relationship of the sign to other signs in the sign-system. Such "structuralist" accounts give rise to the kind of semiotic analysis represented by Jackson's work: "truth" (as, for example, in the fact-establishing process) is not a matter of correspondence of a narrative with reality, but rather of internal narrative coherence.[15] The semiotic approach I take in this paper does not involve so radical an inquiry.

One point, then, that I want to make about signs is that their meanings may be unstable, and in any event they require interpretation, not simple decoding. The other point — and this will be the focus of my discussion — is that there are different kinds or categories of signs, and our identification of the different kinds of signification that are involved in various sorts of evidence should assist us in analyzing that evidence and the rules that apply.

There have been many attempts to classify signs.[16] However, taking my lead from René Thom, who says that "[a]ny discussion of symbolism must start from the classification of signs, so simple and so profound, which has been left to us by Charles Saunders Peirce",[17] I shall structure my discussion around Peirce's taxonomy, or at least a part of it.

---

[13] C.K. Ogden and I.A. Richards, *The Meaning of Meaning*, 10th ed. (London: Routledge & Kegan Paul, 1949) at 10-12.

[14] F. de Saussure, *Course in General Linguistics*, ed. by C. Bally & A. Sechehaye, trans. W. Baskin (London: Peter Owen, 1960) at 66.

[15] Although, perhaps incongruously, he places considerable emphasis on the "integrity" of the storyteller: "I adumbrated a concept of 'integrity,' which may be viewed as an alternative to the concept of truth. The focus here is upon trust in people, not in the relationship between what they say and some external reality" (*supra* note 4 at 193).

[16] Thus, for example, Aristotle classified signs as either "natural" or "conventional"; Augustine, as either "natural" or "intentional". Susanne Langer classified signifying events as signs and symbols, subdividing the former into natural and artificial. See S.K. Langer, *Philosophy in a New Key: A Study of the Symbolism of Reason, Rite, and Art*, 3rd ed. (Cambridge: Harvard University Press, 1957).

[17] René Thom, "From the Icon to the Symbol" in R.E. Innis, ed., *Semiotics: An Introductory Anthology* (Bloomington: Indiana University Press, 1985) 275 at 275.

Contrary to Thom's assertion, Peirce's classification is not "simple." Thus, in the words of one commentator,

> The triadic character of every symbolic situation led Peirce to distinguish three divisions of signs: (1) the sign in itself, (2) the sign in relation to its object, and (3) the sign in relation to its interpretant...we obtain on further analysis the following trichotomies. Under (1) there occur the *Qualisign*, *Sinsign*, and *Legisign*; under (2) the *Icon*, *Index*, and *Symbol*; under (3) the *Rheme*, *Dicisign* or *Dicent Sign*, and *Argument*.[18]

From these three trichotomies, Peirce derived ten classes of signs, with names like "Rhematic Indexical Sinsign" and "Dicent Indexical Legisign". Later, he identified ten trichotomies and sixty-six classes of signs.[19]

Doubtless, reflection on any of Peirce's three original "trichotomies" could illuminate matters of evidence. Thus, the first trichotomy, relating to the sign in itself, tells us that a legisign (say, a word) may be embodied in a variety of sinsigns (spoken, written, typewritten, computer screen, carved in stone), all with different rhetorical potential. The law probably takes account of these differences in such doctrines as the *Statute of Frauds* writing requirement and the parol evidence rule. And, given the current prestige of theories privileging the "reader" of signs, consideration of the third trichotomy would probably yield interesting results.

However, in the present essay, I want to make use of just a part of Peirce's classification, perhaps the best-known part and the one he himself regarded as the "most fundamental division of signs"[20]: the second trichotomy of the icon, the index, and the symbol.[21]

Peirce described the three categories of sign as follows:

> A sign is either an *icon*, an *index*, or a *symbol*. An *icon* is a sign which would possess the character which renders it significant, even though its object had no existence; such as a lead-pencil streak as representing a geometrical line. An *index* is a sign which would, at once, lose the character which makes it a sign if its object were removed, but would not lose that character if there were no interpretant. Such, for instance, is a piece of mould with a bullet-hole in it as a sign of a shot; for without the shot there would have been no hole; but there is a hole there, whether anybody has the sense to attribute it to a shot or not. A *symbol* is a sign which would lose the character which renders it a sign if there were no interpretant. Such is any utterance of speech which signifies what it does only by virtue of its being understood to have that signification.[22]

The meaning of this is not completely transparent. However, it can be reduced to simpler terms. Thus, Elizabeth Traugott and Mary Louise Pratt suggest that an icon

---

[18] T.A. Goudge, *The Thought of C.S. Peirce* (New York: Dover Publications, 1969) at 139.

[19] *Ibid.* at 140.

[20] *Ibid.* at 142.

[21] Roberta Kevelson has invoked this trichotomy in analyzing judicial decisions. See *The Law as a System of Signs* (New York: Plenum Press, 1988) at 80.

[22] *Supra* note 12 at 104.

is related to what it stands for by virtue of *resemblance*, an index by virtue of physical *proximity* (or, in Peirce's terms, "contiguity"), and a symbol by virtue of some *convention*.[23]

Peirce offers some examples which may elucidate these categories. Thus, among icons, he identifies images, diagrams, and metaphors.[24] An image is an attempt to represent, by similitude, the qualities of something. A diagram is more abstract, in that it eschews "sensuous resemblance" to its object, instead displaying the relationships of the parts of its object. A metaphor is even more tenuously related to its object, since the resemblance may consist in some fairly obscure or ambiguous parallelism.

Among examples of indices we find the following: a man's rolling gait is an index that he is a sailor, "a sundial or clock *indicates* the time of day", "a low barometer with a moist air is an index of rain", "[a] weathercock is an index of the direction of the wind", "a plumb-bob...is an index of the vertical direction", a warning cry may be an index.[25] Although these indices manifest some kind of physical connection with their objects, their "meaning" is not necessarily unambiguous: a rolling gait may be caused by factors other than having spent time at sea. Moreover, it may be worth remarking at this point that several of these examples involve different sorts of processes. Thus, a sundial indicates the time of day in a way different from a clock, since the former is acted upon directly by what, in nature, makes it "day", while the latter involves more complex natural (mechanical) processes and conventions. While a weathercock is acted upon directly by the thing that it is indicating, a barometer (in Peirce's example) is being used to *predict* a future state. That is, using it as an index of coming rain involves a longer chain of inference: the barometer reading is an index of atmospheric pressure, which is in turn an index of imminent precipitation. A warning cry, as Peirce himself notes, is problematic since, in so far as it involves words, it has a conventional element.[26] That is, as is the case with icons, not all indices are "equal".[27]

"All words, sentences, books, and other conventional signs," writes Peirce, "are Symbols".[28] Unlike what Sebeok calls "sign-relations...in the natural mode",[29] icons and indices, which involve "real" connections, symbols work by virtue of some "law" or regularity of convention. Thus, what is involved in interpreting them is different from what is involved in interpreting icons or indices. Interpreting icons

---

[23] E.C. Traugott and M.L. Pratt, *Linguistics for Students of Literature* (New York: Harcourt Brace Jovanovich, 1980) at 4.

[24] *Supra* note 12 at 105.

[25] *Ibid.* at 108-09.

[26] Peirce does classify certain other kinds of words as indices — notably, the demonstrative pronouns (*ibid.* at 110).

[27] Another important feature of indices that emerges from this is that "they refer to individuals, single units, single collections of units, or single continua" (*ibid.* at 108). In this way indices are unlike icons, which may have no real referent, or symbols, which may be (and usually are) general in their reference.

[28] *Ibid.* at 112.

[29] T.A. Sebeok, "Iconicity" (1976) 91 M.L.N. 1427 at 1431.

involves recognizing similarities; interpreting indices involves identifying physical connections (for example, causal relations); interpreting symbols involves knowing the "agreements" which govern this kind of sign. Arguably, symbols are more problematic than the other kinds of signs, since their meaning is artificial, or (at least in some sense) "arbitrary".[30] Moreover, they are of massive importance, since our dominant form of communication — language — consists of them.

Although I have been discussing the categories of signs as if they are separate and distinct, it would be unusual to find a sign that was a pure icon, index, or symbol, as Paul Friedrich has observed:

> Conventional symbolism is in fact closely interconnected with the iconic and indexical sort. Since all indexical and iconic symbols are at least partly conventional, and since all conventional symbols have iconic or indexical aspects, it follows that pure symbols of any kind are only "ideal types."[31]

Peirce himself makes a similar point when he observes, for example, that

> [A] constituent of a Symbol may be an Index, and a constituent may be an Icon. A man walking with a child points his arm up into the air and says, "There is a balloon." The pointing arm is an essential part of the symbol without which the latter would convey no information. But if the child asks, "What is a balloon?" and the man replies, "It is something like a great big soap bubble," he makes the image a part of the symbol.[32]

Thus, when we describe a sign as an icon, index, or symbol, we may be simply noting its dominant character.[33]Moreover, the effectiveness of a sign may be a function of the degree to which it is able to combine iconicity and indexicality with its symbolism. For example, poetry may be a particularly "powerful" form of language use because of its imagery or its "presentational form".[34] This raises the "rhetorical" dimension of signification — that is, the issue of the relative persuasive force of different kinds of signs, or of combinations of the different sign types. I shall return to this matter later.

---

[30] Thus, "[a]nything can be used to symbolize anything else" (*supra* note 18 at 146).

[31] P. Friedrich, *Language, Context, and the Imagination*, ed. by A.S. Dil (Stanford: Stanford University Press, 1979) at 17-18. Note that Friedrich uses the word "symbol" where Peirce would use "sign".

[32] *Supra* note 12 at 112. Compare: "But it would be difficult, if not impossible, to instance an absolutely pure index, or to find any sign absolutely devoid of the indexical quality" (*ibid.* at 108).

[33] See *e.g.* J. Pelc, "Iconicity: Iconic Signs or Iconic Uses of Signs?" in P. Bouissac, M. Herzfeld & R. Posner, eds., *Iconicity: Essays on the Nature of Culture* (Tubingen: Stauffenburg-Verlag, 1986) 7.

[34] *Supra* note 16.

III. The Signs and Evidence

Having outlined Peirce's classification of signs into icons, indices, and symbols, I want now to consider, generally, how "evidence" can be described in terms of the schema. Later, I shall attempt to apply the kind of analysis that emerges to certain problematic areas of evidence law.

Kevelson has observed that Peirce regarded evidence as essentially iconic.[35] This seems to me true in two senses. One arises from Peirce's assertion that "[t]he only way of directly communicating an idea is by means of an icon....Hence, every assertion must contain an icon or set of icons, or else must contain signs whose meaning is only explicable by icons".[36] The presentation of evidence involves communication; if such communication necessarily involves icons, then iconicity is at the heart of the presentation of evidence. Further, the process of fact-finding is, as a whole, an exercise in re-construction; it is an attempt to replicate, to develop an adequate image of, what "really" happened. Past events themselves cannot be brought before the eyes of the triers of fact: they can be presented only in facsimile. In these two senses, iconicity is crucial to the fact-establishing process.

However, I prefer to begin from a somewhat different perspective — from the perspective of the fundamental issue in evidence law, namely, relevance.[37] From this perspective, the critical focus becomes indexicality, at least insofar as circumstantial evidence is concerned. For my purposes, circumstantial evidence can be thought of as evidence of fact A (which is not ultimately in issue) from which inferences can be made about fact B (a fact which is in issue, a material fact).[38] Thus, before any evidence of fact A may be admitted, the relevance of fact A to fact B must be established. The issue of relevance raises the question of the real contiguity of fact A and fact B — that is, of the indexical relationship between fact A and fact B. Does fact A, if established, point to, make more probable, fact B? A corollary question is 'In what way is fact A indexical of fact B?' or 'What is the nature of the contiguity between the two?' The issue is different, of course, if what is involved is "direct" (as opposed to circumstantial) evidence — that is, unmediated evidence of a material fact. Here, by definition, the evidence is relevant, so that the indexicality question (in the form I have just outlined) does not arise.

---

[35] *Supra* note 21.

[36] *Supra* note 12 at 105. Thus, of "[a]ny ordinary word, as 'give,' 'bird,' 'marriage,'" he says it is a symbol, but further, "[i]t does not show us a bird, nor enact before our eyes a giving or a marriage, but supposes that we are able to imagine those things" (*ibid.* at 114).

[37] For a fairly standard definition of "relevance" see J. Stephen, *A Digest of the Law of Evidence*, 12th ed. by H.L. Stephen and L.F. Sturge (London: Macmillan and Co., 1948) at 4: "'Relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other".

[38] See *e.g.* W.N. Hohfeld, *Fundamental Legal Conceptions*, ed. by W.W. Cook (New Haven: Yale University Press, 1919) at 34: "An evidential fact is one which, on being ascertained, affords some logical basis — not conclusive — for inferring some other fact. The latter may be either a constitutive fact or an intermediate evidential fact".

From this it is clear that two foci of inquiry are germane to my analysis. First is the question of relevance, which involves a consideration of indexicality. Here, the mode of interpretation is what might be called "scientific", aimed at determining whether there is a real nexus between fact A and fact B.[39] We will recall that Peirce said that indices involve a relationship between the representamen and the object even in the absence of an interpretant. Or, as Georges Mounin has put it:

> Dans le cas du sang et de la blessure il s'agit d'un *indice*, il peut être perçu ou non en tant que tel, interprété exactement ou non. La signification linguistique est manifestée par un code; la signification non linguistique d'un indice n'est pas manifestée par un code, mais interprétée par une science.[40]

Second, assuming that fact A is relevant, or that it is itself a material fact, the question is 'What evidence is presented to prove that fact?' Such evidence (that is, its form) may be iconic, indexical, or symbolic; or, more likely, some combination of these. How effective or persuasive the evidence is will in large part be a function of its relevance (the degree of indexicality between fact A and fact B[41]) coupled with how it is presented (iconically, indexically, or symbolically, or two or all of these).

I want to take time now to say more about the second inquiry. I do not propose to embark on an extensive survey of what kinds of evidence might be employed to prove a given fact A. Rather, I shall look at a few only, for the purpose of highlighting certain salient distinctions. Thus, I shall consider "real" evidence, photographs, "demonstrations", diagrams, and testimony. In looking at these kinds of evidence, I shall be concerned with two matters, beyond simply describing their semiotic character: (1) the "reliability" of a particular type of evidence, as a function of the semiotic processes that characterize it, and (2) the persuasive or rhetorical force of different sorts of evidence.

"Real evidence" has been described as including "any variety of evidence which appeals to the senses of the trier of fact".[42] Such a description is misleadingly broad, obscuring distinctions which are important: for example, even testimony given by a witness "appeals to the senses of the trier of fact". And, certainly, photographs and re-enactments do. For my purposes, I will consider as "real evidence" any evidence, whether direct or circumstantial, of a fact that does not depend on mediation by some objective form of representation. Thus, if the fact A to be proved is that there is blood on a particular knife, the blood-stained knife itself

---

[39] Given the possiblity of such nexus, the mode of interpretation is also aimed at determining its likelihood. Hence, for example, the application of probability theory to the question of inference. See G. Shafer, "The Construction of Probability Arguments" (1986) 66 B.U.L. Rev. 799.

[40] G. Mounin, "La linguistique comme science auxiliaire dans les disciplines juridiques" (1974) 19 Archives de Philosophie du Droit 7 at 16.

[41] For example, of how many other facts, besides fact B, fact A may be an index. Recall, too, that there may be many intermediate facts between the fact being proved and the material fact.

[42] A.F. Sheppard, *Evidence* (Toronto: Carswell, 1988) at 341. R.J. Delisle, citing Wigmore, appears to accept a similar definition: "The types or kinds of real evidence are infinitely variable

will be the form in which the evidence is presented. "Real evidence" in this sense might involve what has been called "immediacy and nonsemiotic presence".[43] But even describing "real evidence" in the narrow sense in these terms is an oversimplification. The evidence always involves the "interpretant", the sign in the mind of the observer. And that sign, as commentators like Jackson insist, is itself culturally determined, so that there is no such thing as "pure" perception.

But, leaving aside such complexities, we can say that, at least with respect to how fact A is proved, "real evidence" (in the narrow sense) involves (relatively speaking) a one-step semiotic process. Thus, on a semiotic view, it is the "best" evidence — because it involves little mediation, and each intermediate step in a semiotic sequence probably multiplies the possibility of "ambiguity".[44] At the more purely rhetorical level, it may also be the best because of some culturally-determined belief that "ocular proof" is virtually infallible.[45] We tend to trust what we can "see with our own eyes".[46] Such evidence probably has greater rhetorical force as well because its appeal is primarily sensual, as opposed to cognitive. At the same time, it may be more *or less* persuasive because it leaves nothing to the imagination.

Let us turn now to the second example: a photograph. Again, what we are concerned with is the form of the evidence used to prove a given fact A. Thus, if fact A is that there is blood on a certain knife, we are trying to prove this by introducing a photograph of the bloody knife. The first thing to note about this is that, more explicitly than the "real evidence" I have just been discussing, it involves representation or mediation through some kind of sign between the object and the observer. This is in addition to the semiotic processes that I have described as inherent in any act of perception. What this means, generally, is that there is more "distance" between the fact and the fact-finder. Thus, one's inclination would be to

---

and may affect any of the senses" (*Evidence: Principles and Problems*, 3rd ed. (Toronto: Carswell, 1993) at 268). The kind of uncertainty involved in characterizing various things as real evidence is illustrated by the section of Delisle's book that deals with this topic. For example, he classifies "documents" as real evidence: but surely one must distinguish the document from the statement it contains. Further, he quotes Wigmore as characterizing maps, diagrams and photographs as being the same (i.e., not "real evidence") in this regard. The semiotic approach I take here, I would argue, provides a fairly precise instrument for identifying features salient to the classification. Thus, a document is normally the embodiment of a statement, which is the evidence. The statement is words, which, as such, are symbols. Their material media, whether sound waves or ink on paper, are equally apprehended by the senses. The difference is in terms of Peirce's first trichotomy — that is, at the level of sinsign. I discuss photographs and diagrams below.

[43] P. Steiner, "In Defense of Semiotics: The Dual Asymmetry of Cultural Signs" (1981) 12 New Literary History 415 at 431.

[44] I am using this word broadly here, to include not only misunderstanding, but misrepresentation.

[45] That it is not infallible, that (at least in combination with other forms of signification) it has the potential to mislead, is illustrated in the play from which the epithet I quote is taken. Incidentally, note the similarity of the epithet to Wigmore's proposed term, "autoptic proference" (Delisle, *supra* note 42).

[46] Thus, for example, one comes across articles such as the following: M. Houts, "Augmenting Damages: Show the Jury the Device of Torture" (1981) 23:3 Trauma 1.

say that this form of evidence is not as good (in the sense of reliable) as "real evidence", although, for reasons I shall mention, it may be better (again in the sense of more reliable) than, say, testimony. Determining whether it is more or less effective "rhetorically" involves other considerations, similar to those I have already mentioned in connection with "real" evidence.[47]

What kind of sign is a photograph? One's immediate impulse is to say that it is an image, a likeness; thus, it is an icon. However, as Peirce points out, there is more to photographs than this:

> ...they are in certain respects exactly like the objects they represent. But this resemblance is due to the photographs having been produced under such circumstances that they were physically forced to correspond point by point to nature. In that aspect, then, they belong to the second class of signs, those by physical connection.[48]

That is, in addition to being icons, photographs are indices. Indeed, their iconic character is determined by what might be called an indexical process. Thus, they are like fingerprints, which are icons of the actual patterns on a person's fingers, but in addition were *caused* by the thing of which they are the likeness. And they are unlike paintings, which, however like their original, are not (at least in the same sense) caused by it. Thus, one way of explaining why a photograph is good evidence is to say that it has physical contiguity with its object.

Of course, this is not the whole story. Although unlike a painting in some respects, a photograph is like a painting in others. That is, a photograph is not exclusively the result of natural processes — or, if it is, it is the product of natural forces that can be manipulated to create icons of something not like the real fact. As Peirce says, "[a]n *Icon* is a sign which refers to the Object that it denotes merely by virtue of characters of its own, and which it possesses, just the same, whether any such Object actually exists or not".[49] And see further: "The weakness of this kind of sign is that 'a pure icon alone can convey no positive or factual information; for it affords no assurance that there is any such thing in nature'....In order to ensure that the icon is brought into 'a dynamical relation' with the actual world, it must be supplemented by an *index*".[50] An icon, because it can represent something inaccurately, or, indeed, something that does not exist, can be a misrepresentation. The potential for distortion in photographs is increased by the possibility of introducing such arguably symbolic or conventional elements as "frames".[51] Thus, as the law recognizes, a photograph is not necessarily an impartial witness. This is because its iconic potential may not accord with its ostensible indexical provenance.

---

[47] See *e.g.* M.T. Cawley, "North Carolina's 'Test for Excess': The Prejudicial Use of Photographic Evidence in Criminal Prosecutions after *State* v. *Hennis*" (1989) 67 N.C.L. Rev. 1367: "A photograph stands as a 'silent witness' to the past. When the State offers a photograph in a criminal prosecution, the reality conveyed can be powerful — sometimes too powerful. The 'vital, mirror-like appearance of a photograph makes it capable of inciting passions and prejudices of a jury'".

[48] *Supra* note 12 at 106.

[49] *Ibid.* at 102.

[50] *Supra* note 18 at 143.

The next type of evidence that I want to mention is what might be called "demonstrations". Again, this expression conceals an ambiguity.[52] There are different kinds of demonstrations, as our semiotic analytical framework makes clear.

One kind of demonstration is the experiment. This involves an attempt to duplicate, in the courtroom, some process alleged to have occurred in the course of the events in question. Thus, to take an example suggested by my readings of the adventures of Horace Rumpole, there might be a question about how bloodstains having a certain configuration came to be on some thing. One might want to demonstrate what kind of mark an analogous fluid, coming from a certain direction, distance, etc., might leave.

The terms in which I have set out this hypothetical suggest the kinds of signification that the experiment would involve. Words like "duplicate" and "analogous" suggest that we are in the realm of icons here. What we are trying to do is to produce an image of something else. But this is only part of the story. Words like "how [something] came to be" and "mark" suggest that our concern is with indices as well. Unlike the photograph, however, in which the icon is what might be described as the direct result of an indexical process, here the connections are rather more remote. The mark left by the experimental fluid will be an index of the source and conditions of production of the sample used. But there is no direct (indexical) connection of this mark with the factual issue of the source of the blood. The process of reasoning is something like this: the bloodstain is an index of something (unknown); the mark created by the experimental fluid is also an index — but of something known; the mark is like (that is, is an icon of) the bloodstain; because of certain regularities of nature, we infer that the unknown object of which the bloodstain is the index must be like the known object of which the mark is the index, or, in other words, the known object must be an icon of the unknown one.

Another kind of "demonstration" might be the "re-enactment". Our semiotic framework provides a way of specifying how this differs from the "experiment", which I have just discussed. For purposes of simplicity, I will assume that a re-enactment is no more than a dramatic re-presentation of what happened, that is, a showing, rather than a telling, of past events. In fact, such a re-enactment will almost inevitably be accompanied by narrative, and in addition may have "experimental" components.

But in its "pure" form, such a re-enactment will be essentially iconic — it will be an image or likeness of what allegedly transpired. Like the photograph (and unlike the kinds of signs which require the communicant to create his or her own mental picture), it will present an actual image to the observer. Unlike the image in a photograph, this image will not have been caused or "really affected" by its object; it will be "merely" iconic. Therefore, it may be purely imaginary, in the sense of having been fabricated by the sign-user. Recall, again, that an icon does not depend

---

[51] See M. Schapiro, "On Some Problems in the Semiotics of the Visual Arts: Field and Vehicle in Image-Signs" in R.E. Innis, ed., *Sémiotics: An Introductory Anthology* (Bloomington: Indiana University Press, 1985) 208.

[52] As, indeed, does the term "demonstrative evidence".

upon the actual existence of its object — an observation that we made in connection with photographs. Unlike photographic misrepresentation, which has to accommodate the fact that the photograph is physically contiguous with its object, misrepresentation by re-enactment is not so constrained by indexicality. This is not to say, however, that a photograph is necessarily more reliable than a re-enactment. Indeed, the conventions governing our apprehension of photographs (they "don't lie") may lead us to be more readily deceived by them than by re-enactments, whose apprehension is governed by different conventions ("this is only play-acting"). This last point serves to remind us of the conventional or "symbolic" element in all our readings of signs.

Another form in which evidence might be presented is some version of the "diagram". We have already encountered the diagram in Peirce's discussion of icons, and will recall that its distinguishing characteristic is that it represents "the relations...of the parts of one thing by analogous relations in...[its] own parts".[53] Like the photograph and the demonstration, the diagram involves semiotic mediation between any fact A and the trier; unlike the photograph, but like the re-enactment, the diagram is not really affected by its object. Thus, some of my comments about the re-enactment are equally applicable to the diagram, since, in their essential character as signs, they are similar.

There are, however, notable differences. Perhaps the critical one lies in the abstract nature of the diagram — in the fact that it represents not so much the qualities of an individual thing as its formal structure. This is not to say that a re-enactment is not in some sense abstract as well: it is an attempt to identify and re-present the salient features of an event. But it incarnates these features in what might be called "solid" figures. Indeed, one might remark in the sequence photograph/re-enactment/diagram an increasing decontextualization of the information sought to be conveyed. A photograph shows the real event, in its "actual" context;[54] a re-enactment in a sense re-contextualizes the event, by selecting how it is to be re-presented; a diagram reduces context to a minimum.

These observations lead us to consider the rhetorical nature of the diagram. In the first place, it lacks the verisimilitude that contextualization provides. Thus, while it leaves out elements that are present in a photograph, say, no one is likely to mistake it for reality. Another effect of the abstraction that characterizes the diagram is that, unlike the other forms of evidence that we have noticed, it tends to have little emotional appeal. "Diagrammaticality" does not arouse passion. Rather, the rhetorical appeal of the diagram lies in its ostensible pure cognitivity. It is "clear", it has divested itself of affective contaminants and other superfluities, it manifests rational form. The other side of this coin, however, is that it may over-simplify: it may arbitrarily exclude complicating factors, suggest that relations are perspicuous, suggest that an event is rationally structured, or appeal to the "comfort of certainty".

---

[53] *Supra* note 12 at 105.

[54] As we have already seen, this point is problematic. In a photograph, the context is selected — through lighting, camera angle, "frame", and so on.

This brings me to the last form of evidence that I want to mention in this general discussion: testimony. Since it is the typical form of evidence, even occuring inevitably in conjunction with all the other kinds, and therefore probably the most important, one might ask why I place it last. I do so simply because the progression I am developing is from the less to the more highly mediated forms of signification.

Testimony involves the use of language, of words, of assertions and of propositions. These, as we have seen, Peirce regards as exemplary of symbols, of conventional signs. But, again, as I have tried to emphasize, it is difficult to imagine an instance of signification in one kind only.

What are the processes of signification involved in testimonial evidence? Again, recall that what is in issue is how we prove some fact A. Generally, our rules of evidence require that the witness actually have observed the fact A about which he or she is giving testimony. So, the first step in the semiotic process is the formation of an impression of fact A upon the senses of the witness. This first stage is, thus, in a significant way indexical. There is a real connection between the fact and its effect upon the observer. But what the observer attends to, recognizes, etc., will be determined by other factors: expectations, cultural conventions, and so on. So, even at this stage, the matter is not one of simple indexicality. The observer-witness is at this point in a position roughly analogous to that of the trier of fact confronted with "real" evidence—although the context of apprehension of the latter (the courtroom) will mean that different, and very powerful, conventions will be operating. And, certainly, by the time these sense impressions give rise to a mental image (an icon, but analogous to a photograph), conventional factors will have become even more important. Thereafter, each time the "event" is called to mind, a new icon will be created. And each icon will have been modified in ways that have been elaborated by those learned in the processes of recollection.

The processes I have just adumbrated apply, generally, to those who present evidence in the form of re-enactments and diagrams as well. These depend upon the perception and recollection of some observer. In the case of real evidence, as I have said, these processes are obviated. In the case of photographs, the "perception" is that of the (presumably impartial) film, and recollection takes the form of the fixed image.

Coming to the actual presentation of the evidence by the witness, it involves, first, the finding of a sign to stand for the image (icon) of the event in the witness's mind. If the witness were to draw a picture, offer a re-enactment, or construct a diagram, he or she would be using another icon. Arguably, this would reveal more adequately the mental icon than would some sign that could not be tested for resemblance. However, at this stage of the inquiry, we are assuming that the witness will be simply testifying, using words. Since words, as conventional signs, are related to what is in the witness's mind neither by contiguity nor by similitude, their signification depends upon the witness's having assimilated the relevant conventions. More radically than this, their significance will be limited by the fact that the conventions cannot be adequate to reality. Another way of putting this would be to

say that language itself, apart from being conventional, is at best diagrammatic of reality.[55]

The evidence, then, with which the trier of fact is presented consists of words — conventional signs. If Peirce is correct that all communication has an iconic element, then these words act (indexically?) by stimulating a mental image in the trier's mind. Again, the form of this image depends partly on the trier's having assimilated and accepted the conventions of the language. Again, even if he or she has, those conventions will almost inevitably be ambiguous or vague in some degree. The icon in the trier's mind will not correspond exactly to that in the witness's mind — which, as we have seen, will not be an adequate icon of what actually happened.

Thus — and I have merely sketched the process, not described it in its perhaps infinite complexity — it is clear that testimonial evidence involves greater semiotic mediation than the other kinds of evidence I have mentioned. To take just one aspect of the process, whereas a photograph, a re-enactment, or a diagram proffers a prefabricated image to the trier, a word requires the trier to create his or her own image. This does not mean that these prefabricated icons will necessarily be more vivid or powerful rhetorically than the word. The imagination, responding to verbal signs, may create icons that are much more compelling than anything that can be committed to material media. We are all familiar with the connotative power of language. Thus, testimony as evidence is problematic not only because of the disjunctures that I have mentioned, but also because of its rhetorical potential.[56]

The rules relating to testimony can be conceived of as directed towards buttressing the inherent instability of symbols by introducing larger elements of indexicality into the evidence-presenting situation. Thus, the general requirement that the witness actually come before the trier of fact means that the latter can search the former's demeanour for indices of credibility — physiognomy, eye contact, evasiveness, etc.[57] That some of these — for example, physiognomy — are of dubious value as indices, and that some of them — for example, eye contact — may be conventional signs mistakenly regarded as indices[58] does not alter the fact that their value lies in their perceived indexicality. Similarly, the provision for cross-examination permits the trier of fact to observe not only the witness's demeanour, but also his or her consistency. Consistency is again taken as both iconic and indexical of the truth of what is said and as indexical of the credibility of the

---

[55] In the sense that reality is a complex continuum, from which language abstracts "salient" features by naming them, thereby creating structures of apprehension.

[56] For an interesting case study, see B. Danet, "'Baby' or 'fetus'?: Language and the construction of reality in a manslaughter trial" (1980) 32-33 Semiotica 187. And, for a comment in semiotic terms on how the connotative ambiguities inherent in the language used in that case were resolved by iconic (or indexical) evidence (a photograph), see *supra* note 29.

[57] Although he does not explicitly adopt the framework I am using here, O'Barr's work (*supra* note 3) is a study of the perceived indexicality of witnesses' manner of speech.

[58] I am grateful to Richard Evans, one of my students at the University of New Brunswick, for drawing my attention to the fact that, at least in some North American native cultures, avoidance of direct eye contact is a sign of respect, and not of insincerity.

witness.[59] The oath (and to some extent its contemporary surrogates) is probably another illustration of this phenomenon. It is rather complex, since it consists of words, and might for that reason be regarded as essentially symbolic. However, the fact of acknowledging that there is something at stake in telling the truth, that the form of speech is morally constrained, suggests a dimension of indexicality.[60] The oath, metaphorically, is a kind of giving of security for the truth.

Again, what I have tried to do in this part of my essay is to consider, in a general way, how we might think about evidence in terms of a semiotic account such as Peirce's second trichotomy. What this reveals is that indexicality, iconicity, and "symbolicity" operate in different combinations, and with differing prominence, in different kinds of evidence. Generally, it appears that the reliability of evidence varies directly with the degree of indexicality and inversely with the degree of mediation involved. But, as we have seen, such a generalization must be qualified by a consideration of "rhetorical" factors, which suggest that forms of evidence that are less indexical and more highly mediated may have great persuasive power.

IV. Semiotic Dimensions of Two Evidence Doctrines

Having suggested how Peircean semiotics might provide a framework for thinking about evidence generally, I want now to consider how this framework might be invoked in reflecting upon two doctrines (or problems, depending on one's perspective) in evidence law: hearsay and similar fact. These are not the only areas to which the framework might apply, although in some ways they are the most obvious ones. Further, of course, to suggest that one is going to discuss "hearsay" and "similar fact evidence" in the compass of one article appears ridiculously ambitious or pretentious. I have no illusions about discussing these topics extensively or conclusively. What I want to do is to suggest, using a few illustrations, how the semiotic perspective might add a dimension to our thinking about certain cruxes in these areas.

A. *Hearsay/Non-hearsay*

A classic statement of the hearsay doctrine appears in the case of *Subramaniam* v. *Public Prosecutor*:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay

---

[59] Again, of course, we are not in the realm of "pure" indexicality. The very notion of consistency, as well as conceptions of what it involves, are cultural constructs or conventions, at least in some measure. And, in setting the witnesses' narrative against these prototypes, we are engaging in iconic processes.

[60] For a serious, thoughtful and perceptive discussion of the role of the oath in the trial setting, see M. Gochnauer, "Oaths, Witnesses and Modern Law" (1991) 4 Can. J. Law & Jur. 67.

> and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[61]

In terms of my present framework, this might be translated: 'an out-of-court statement is hearsay and inadmissible if it is being used symbolically; it is non-hearsay and admissible if it is being used indexically'.[62]

This requires elaboration. For one thing, as we have noticed, all relevant evidence is indexical. So the distinction I am getting at relates more to the point at which indexicality occurs. Thus, the statement, "There was blood on the knife", involves the assertion of a fact which is an index (of, say, the use of the knife to stab someone). On the other hand, my making the statement is a direct index of, say, my ability to speak English. In this latter case, no intervening "symbolicity" is involved in what might be called the statement's "probativeness".

Again, this is an oversimplification, as the situation in *Subramaniam* illustrates. There, it may be recalled, the accused was charged with being in unlawful possession of ammunition; his defence was duress. The problematic item of evidence was his testimony that someone had pointed a pistol at him and said (in Malay), "I am a communist". The Privy Council decided that this was not hearsay, because it was not being adduced to prove the fact asserted (that is, that the declarant was a communist), but rather for the fact that it was made and the effect its being made would have on the mind of the accused. To say that "symbolicity" does not play a part here is misleading: clearly, the conventional meaning of the words is critical. What is not critical is that the words should correspond to an "object" (that is, the objective fact that the accoster was a communist) but only to an "interpretant" (that is, a sign in the relevant person's mind). The reasoning here is: given the likelihood that the symbols in question (the words allegedly spoken) would have stimulated the conventionally-determined interpretant in the accused's mind, it is probable that that interpretant (itself a sign) would have caused the relevant emotional condition (fear). This latter, manifesting as it does a "real" connection, involves indexicality. Note that here, the index is the cause and not, as might be the more paradigmatic case, the effect. Thus, we are not asked to infer the fear from indices such as shaking and heavy perspiration; rather, we are asked to infer the likelihood of fear from something occurring before it. Arguably, this is a less powerful kind of index than the post facto variety. In the case of the latter, we know that *something* has given rise to the symptom; in the case of the former, we have nothing to tell us that any effect actually occurred.

This framework also helps to explain why certain kinds of evidence sometimes dealt with under the hearsay rubric are not "hearsay". Here I am referring to various kinds of measuring devices, like clocks, speedometers, polygraphs, and so on. In terms of one kind of analysis, the measurements made by such devices are "out of court statements, adduced to prove the fact asserted". However, one could again say

---

[61] *Subramaniam* v. *Public Prosecutor*, [1956] 1 W.L.R. 965 at 970, 100 Sol. J. 566 (P.C.).

[62] Of course, a non-hearsay utterance need not be indexical of some other fact; it may itself constitute a fact in issue — as, for example, in the case of an utterance which creates a contract.

that these "assertions" should not be considered hearsay because of the high degree of indexicality involved in their production. As I have noted, such devices do involve conventional signs — the numerical scales that typify many of them are the product of convention, although the relativity they display is "real". But the processes giving rise to the measure all involve indexicality. Thus, the relevant inquiry is not whether the device understands the conventions or is sincere in using them, but rather whether the science on which they are based is valid, whether they provide indices of what they purport to.

Before proceeding to a more detailed discussion of some illustrative cases and particular problems, I want to mention one more preliminary point — namely, the role of iconicity in the the hearsay context. In some situations, iconicity will be a factor in our analysis of out-of-court statements as non-hearsay. Here, I am thinking for example of prior consistent and prior inconsistent statements. Until recently,[63] neither of these was, in Canada, admissible to prove the fact asserted, but only as non-hearsay to, say, rebut the allegation of recent fabrication (in the case of the former) or to impeach a witness's credibility (in the case of the latter). Clearly, what is at least partly at issue in this context is a question of resemblance (or non-resemblance). It is questionable, however, whether the previous statement in either sort of case is correctly described as a sign of the later, or vice versa. That is, in neither case is one of the statements being adduced as representing the other. Rather, in each case there are two separate instances being brought together for comparison; the resulting congruity or incongruity is an index of "credibility".

I turn now to some examples, taken (essentially arbitrarily) from a recent casebook on evidence law[64] and presumably included because the author regarded them as giving rise to interesting problems. Similarly useful illustrations might be found in many places in other casebooks, texts, and the law reports of various jurisdictions.

R. v. *Blastland*[65] illustrates the not-uncommon situation of the use of a declarant's out-of-court statement as evidence of that person's knowledge. Here, the proffered evidence was testimony that a person other than the accused had told the witness, before the victim's body was found, that a boy had been murdered. Sometimes, such examples are included with hearsay exceptions ("declarations as to mental or emotional state"),[66] but, at least in the circumstances in *Blastland*, this is non-hearsay. The statement is not being adduced to prove the fact stated; it has been established otherwise that the victim was murdered. What is important is that the statement was made.

---

[63] See *R.* v. *B. (K.G.)*, [1993] 1 S.C.R. 740, 19 C.R. (4th) 1.

[64] Delisle, *supra* note 42.

[65] *R.* v. *Blastland* (1985), [1986] A.C. 41, [1985] 2 All E.R. 1095 (H.L.) [hereinafter *Blastland* cited to All E.R.].

[66] See *e.g.* Delisle, *supra* note 42 at 532.

[67] They may be indexical of other things, such as fantasy, divination, or belief, but these are improbable — and become more improbable the greater the iconicity.

In terms of our analysis, we can say that the evidence again contains elements of symbolicity, iconicity, and indexicality. Again, the words of the statement are important; what is said is crucial. Thus, all the relevant conventions must be invoked. Moreover, the facts described must bear a resemblance to the facts as otherwise found; they must be iconic of what actually happened. If they are, then the coincidence of the assertion with the facts is indexical of knowledge or awareness on the part of the speaker of those facts.[67] Having knowledge is in turn indexical of having acquired knowledge. The time of the knowledge here excludes certain possibilities, but, as the House of Lords says, not all. However, in dealing with this point, Lord Bridge of Harwich collapses two issues into one:

> The statements which it was sought to prove that Mark made, indicating his knowledge of the murder, provided no rational basis whatever on which the jury could be invited to draw an inference as to the source of that knowledge....Thus, to allow this evidence of what Mark said to be put before the jury as supporting the conclusion that he, rather than the appellant, may have been the murderer seems to me, in the light of the principles on which the exclusion of hearsay depends, to be open to still graver objection.[68]

Note that Lord Bridge considers himself to be applying the principles that relate to the exclusion of hearsay. In this, he is mistaken. The fact that the third party made the statement is potentially indexical of a relevant matter in the trial. Lord Bridge's concern is not that this is hearsay, but that it is not sufficiently probative because it might be indexical of facts other than the relevant one.

Blastland can usefully be compared with *R.* v. *Burnett and Ruthbern Holdings Ltd.*[69] Here, on a charge of tax evasion, the defendant took the position that not he, but a deceased person named Pullman, had earned the fees in question. The Crown, in reply, sought to adduce statements by Pullman to the effect that he did not remember or did not know matters which someone engaged in the transactions giving rise to the earnings would have had to know. That is, the Crown was arguing that Pullman's lack of knowledge was indexical of his non-involvement in the scheme. So it would be. But the question here is how that lack of knowledge is established. It can be established only symbolically, on the basis of Pullman's use of the conventions of language (including "sincerity"). Unlike the *Blastland* situation, in which knowledge can be tested by comparing the facts as stated with objective facts, no such "iconic" process is available here. Moreover, while positively stating something otherwise established is indexical of knowledge of that fact, saying "I don't know" may be indexical of lack of knowledge, but it may equally be indexical

---

[68] *Supra* note 65 at 1099-1100.

[69] *R.* v. *Burnett and Ruthbern Holdings Ltd.* (1986), 54 O.R. (2d) 65, 25 C.C.C. (3d) 111 (H.C.J.).

[70] *Barnes* v. *R.* (1985), 52 Nfld. & P.E.I.R. 186, 44 C.R. (3d) 67 (Nfld. C.A.).

of a desire not to reveal one's knowledge. That is, it is only indexical of what it is being used for if it is true. Thus, not only is the declarant's statement in *Burnett* hearsay, but the absence of elements of iconicity and strong indexicality that characterize the *Blastland* statement justify its exclusion.

A third example is *Barnes* v. *R.*,[70] an arson case. One witness, Crocker, testified that the accused had told him and another person, Snook, to burn down the building in question. Snook testified, denying this, and also denying that she had told the accused's sister that the accused had told her and Crocker to burn down the building. The sister testified that Snook *had* previously told her this. The Court of Appeal (correctly) ruled that the sister's testimony was admissible as going to Snook's credibility as a witness. That is, the fact that Snook previously made a statement contradictory of her testimony was indexical of her insincerity, forgetfulness, etc.

More problematic is the question whether the sister's testimony as to what Snook told her might be used for anything more than this. The trial judge accepted it as "confirmatory" of Crocker's story; the Court of Appeal rejected this.

On the face of it, one might agree with the Court of Appeal. But the case is rather more complicated, and in some ways analogous to *Blastland*. In *Blastland*, we saw an out-of-court statement which corresponded with established facts, and noted that it was indexical of the declarant's knowledge of those facts. Here, we have an out-of-court statement that corresponds to (is iconic of) not established facts, but another's statement. Of what is the fact that two people are saying the same thing indexical? Of their knowledge of the same thing? Of one's having imparted the information to the other?[71] Of their having concocted it together? Does not the fact that somebody else once said the same thing diminish the likelihood that the person (Crocker) who is saying it now has fabricated it? On this view, evidence of the sister's having said this might be indexical of Crocker's credibility — and therefore objectionable not as hearsay, but on some other ground (the rule against buttressing one's own witness's credibility).

The last example I want to mention involves a couple of "easy cases", although the judge got one of them wrong, and did not give a very lucid account of the one he got right. In *R.* v. *Bastien*[72], the question was how to connect one of the accused, Cote, with a package, intercepted by the police, containing stolen goods. The two problematic items of evidence were a return address corresponding to Cote's residence on the outside of the package and a paper pad, found at Cote's residence, with the impression of a note contained in the package. In admitting both items of evidence, the judge said that "each constitutes original, circumstantial, evidence tending to link, connect or *identify* Cote with possession of [the package]".[73]

What these items of evidence *do* is similar: if admitted, they indicate the source from which the package emanated. *How* they do this is, however, quite different. The return address is, if it is taken to state the source of the package, hearsay. Its value

---

[71] Probably excluded here on the basis of the contents of the story.

[72] *R.* v. *Bastien* (1968), 20 C.C.C. (2d) 562 (B.C.Co.Ct).

[73] *Ibid.* at 568.

depends on its truth. It involves the use of conventional signs, and contains within it the possibility that those signs might be misused. There is an iconic element here, of course, because the address on the package corresponds to the address in issue. But, to go back to Peirce, mere iconicity establishes nothing. The impression on the pad is quite another matter. It is an icon of the note contained in the package, linked to it by likeness. Moreover, like a photograph, it is more than an icon: it was caused by the writing of the note. Thus, it is an index as well. It is not hearsay, because what is important is the fact that it exists and corresponds to the note; its contents — apart from the resemblance — are inconsequential. Moreover, it is reliable[74] because of its iconic and indexical character.

These, then, are a few illustrations of how the semiotic framework I have been using might contribute to the analysis of some randomly-chosen, but typical, hearsay problems. Before leaving the question of hearsay, I want to mention two other matters.

The first is the conundrum of "implied assertions", classically raised by the case of *Wright* v. *Tatham*.[75] Another case that involved the issue is *R.* v. *Wysochan*,[76] in which the problematic evidence consisted of words spoken by a homicide victim, just before she died, to her husband, the only person other than the accused who could have shot her. Her words were: "Stanley, help me out because there is a bullet in my body", and, "Stanley, help me, I am too hot".

The first thing to observe about these statements is that they involve, as language always does, symbols — conventional signs. What these conventional signs here (in so far as they are "referential", or assert facts) mean, literally, is irrelevant. That the victim had a bullet in her body was no doubt proven otherwise; that she was "hot" was insignificant. At the same time, her utterances contained, in terms of speech act theory, "directives" — requests, in the form, "help me". These aspects of her utterances involved no assertion of fact, but constituted a kind of conduct, say, pleading. In fact, it was in their character as conduct that the Crown sought to introduce these utterances, on the theory that one does not ask help from the person who has just shot her.[77]

Superficially, then, one might want to say that this evidence is not hearsay, because it is not being adduced to prove any fact asserted, but only for the fact that the utterances were made. But we have to go further and ask: of what is the fact that these utterances were made indexical? The answer lies in the theory of the Crown, mentioned above. The further question arises: are we dealing with pure indexicality here? For one thing, our interpretation of the signs (her utterance) may depend on our understanding of and assumptions about social conventions — that is, how we would expect someone to behave in these circumstances. It may be that the operative convention is to turn to one's spouse in adversity, no matter what the circumstances.

---

[74] Not absolutely, of course, because it could have been manufactured by somebody who wanted to "frame" (note the conventionality that this suggests) Cote.

[75] *Wright* v. *Doe d. Tatham* (1837), 7 Ad. & E. 313, 7 L.J. Ex. 340 (Ex. Ch.).

[76] *R.* v. *Wysochan* (1930), 54 C.C.C. 172 (Sask. C.A.).

[77] *Ibid.* at 173.

Or, if this is a genuinely spontaneous reaction, based on an instinctive reaching out to the nearest person, it may not represent the conventions we attribute to it. More fundamentally, whatever we make of it, its very existence depends on how the victim has assessed the situation. She may have made the assumption, "Stanley is my husband. It is unthinkable that Stanley could have done this". That is, her interpretation of the situation may have been governed by convention or presupposition, rather than observation or "science". In any event, we are using her reaction as a sign of her *assessment* of what happened, and the meaning which we attribute to it is only as good as her observation of what happened. This is clearly hearsay.

Another point — and this is suggested by the situation in *Wysochan* — has to do with the bases on which we make exceptions to the hearsay rule. If we characterize the evidence in *Wysochan* as hearsay, it still arguably falls within an exception — dying declaration, "spontaneous utterance", or (perhaps) as the court suggests, "statement of mental condition".[78] This last is problematic, and I will say a little more about it anon.

I do not propose to say much about the hearsay exceptions (whose status in any event may be problematic, given the Supreme Court's new "principled" approach), only to make a very general point. As a broad proposition, in recognizing exceptions, courts have sought, and are now explicitly told to seek, "circumstantial guarantees of trustworthiness", something in the context in which the declaration was made which acts as a surrogate for the testing that presence in court, cross-examination, etc. (which, as we have seen, introduce elements of indexicality into the testimonial situation) are thought to provide. Sometimes, these circumstantial guarantees relate essentially to symbolicity — to the use of the conventions. Probably dying declarations fit here: the solemnity associated with a "settled, hopeless expectation of death" ostensibly overrides any motivation to misrepresent. Again, the situation is not straightforward: the inference that the prospect of death affects sincerity involves (probably in questionable form) indexicality. Similarly, the business records exception is based on the notion that the circumstances (routine operations in which the declarant has no personal interest other than a duty pursuant to contract) render the declarant well-qualified to make the statements and obviate any motive to misrepresent.[79]

On the other hand, some of the exceptions can be explained by the greater indexicality of certain kinds of utterances. This point is suggested by Peirce's observation, to which I have already alluded, that a warning cry is a kind of index:

> When a driver to attract the attention of a foot passenger and cause him to save himself, calls out "Hi!" so far as this is a significant word, it is, as will be seen below, something more than an index; but so far as it is simply intended to act upon the hearer's nervous system and to rouse him to get out of the way, it is an index, because it is meant to put

---

[78] *Ibid.*

[79] This general kind of rationale applies as well to such exceptions as admissions, statements against interest, and, to some extent, previous testimony.

> him in real connection with the object, which is his situation relative to the approaching horse.[80]

This exclamation is "something more than an index" because it is a word — that is, a symbol. And, indeed, its conventionality is suggested by the fact that very few people would use this particular word today. Peirce sees this as an index *vis-à-vis* the hearer: rather than involving (only) a mental process of interpreting the convention, it directly shocks him into a response. However, arguably with respect to the utterer as well it is indexical because of its spontaneity — a kind of automatic response to a perception.

The exception with which this kind of rationale seems most applicable is what used to be called *res gestae*, but which now more probably goes by names such as "spontaneous exclamation" or "excited utterance". One aspect of the explanation for this exception is that the circumstances tend to obviate the misuse of symbols: because of the immediacy of the event to the utterance, there is no time for concoction. But the requirements of immediacy and spontaneity also suggest another rationale — that the response is "automatic", unmediated by deliberate use of symbols. Thus, we see courts using language such as the following: the mind of the declarant must be "still dominated by the event"; the event must have provided "the trigger mechanism for the statement".[81] Thus, indexicality — the utterance having been almost directly caused by the event — is an important part of the rationale for the exception.

If this account is accurate, then it provides a kind of validation for the approach taken by McLachlin J. in *R.* v. *Khan*,[82] a sexual assault case in which the statement in question was made by the child victim about 30 minutes after the event. The issue, in the courts below, had been formulated in terms of the "spontaneous utterance" exception, and McLachlin J. alluded to American authorities[83] suggesting that, where children are involved, the "simultaneity" requirement of the exception should be relaxed. She correctly noted, however, that the facts of the case did not sit very comfortably with the spontaneous utterance exception. In terms of the rationales I have been mentioning, her position makes sense. The element of indexicality (in the sense of the event triggering an exclamation) is absent here. But what is present are circumstances likely to guarantee the quality of the victim's symbol use: the facts that she was a small child, that the event involved occurrences otherwise outside her experience, etc. Indeed, one could almost analogize to *Blastland*: the child's making of the statement was indexical of her conceiving of the acts described; the conception could have arisen from imagination or second-hand information, but

---

[80] *Supra* note 12 at 109.

[81] *R.* v. *Andrews*, [1987] A.C. 281 at 301, [1987] 1 All E.R. 513 at 520 (H.L.).

[82] *R.* v. *Khan*, [1990] 2 S.C.R. 531, 113 N.R. 53.

[83] E.W. Cleary, ed., *McCormick on Evidence*, 3d ed. (St. Paul, Minn.: West Publishing Co., 1984) at 859; C.E. Torcia, ed., *Wharton's Criminal Evidence*, 13th ed. (Rochester: Lawyers Co-operative Publishing, 1972) vol. 2 at 84.

these are unlikely; thus, her conception appears to have arisen from her having experienced the facts.[84]

The last observations I want to make about hearsay have to do with the exception for statements relating to the declarant's subjective state, to which I have already adverted. The exception calls into play a wide range of circumstances, involving physical, emotional, and mental states. Within each category, there will be a range of situations. Thus, a declarant may make utterances about his or her physical state ranging from "Ouch!" to "I have a tenderness in the area of my acromioclavicular joint". In terms of the analysis I have been developing, the former might be regarded as better evidence because of its greater indexicality: normally, such an exclamation is a reflexive indication of pain.[85] This might even be taken to suggest that such expressions are not hearsay. In any case, an expression like "Ouch!" may be "natural" but it is also conventional. Thus, it can be used to fake or exaggerate pain. The latter, on the other hand, is a reflective statement: the relationship between the sensation and the expression is more elaborately mediated, more conventionalized. Therefore, different considerations might be involved in making an exception for it: for example, it might be the only way to get at relevant information, and the declarant's contemporaneous statement of his or her feelings might be as reliable as his or her recollection of them on the witness stand.

Respecting utterances as evidence of psychological states, the paradigm case is probably still *Mutual Life Insurance Co.* v. *Hillmon*.[86] There, it will be recalled, the evidence in question consisted of letters in which one Walters stated his plan to accompany Hillmon. The mental state of which these letters purported to be evidence was intention. First, it might be worth identifying the kind of utterances involved. Again to revert to speech act theory, these utterances were not really representatives — that is, descriptive statements of belief about a state of fact. Thus, they differ from the usual hearsay utterance, which is similarly revelatory of the declarant's state of mind (belief or knowledge[87]) but which is a representative. A statement of intention is a commissive, a weaker version of a promise. Some

---

[84] This case should be distinguished from the more recent case of *R.* v. *Smith*, [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257 [hereinafter *Smith* cited to S.C.R.], which purports to apply it, but arguably extends it. In *Smith*, the Supreme Court of Canada required nothing positive in the way of indexicality to admit what had all the appearance of ordinary hearsay. The Court seems almost to have taken the position that hearsay is *prima facie* admissible, unless the contrary party can show why it should not be admitted. Thus, for example, Lamer C.J.C. says of the out-of-court declarant that "there is no reason to doubt...[her] veracity" and that "[s]he had no known reason to lie" and that the statement was made "under circumstances which do not give rise to apprehensions about its reliability" (*ibid.* at 935).

[85] Thus, one finds judicial observations such as the following: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feeling are original and competent evidence. Those expressions are the natural reflexes of what might be impossible to show by other testimony", *Traveler's Ins. Co.* v. *Mosley* 75 U.S. (8 Wall.) 437 at 440.

[86] *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285.

[87] See J.M. Maguire, "The Hillmon Case — Thirty-Three Years After" (1925) 38 Harv. L. Rev. 709 at 711.

commissives (for example, contractual promises), whether they are "sincere" or "true", make things happen (for example, create contracts). Thus, evidence of their having been made is "original" evidence of the formation of the contract. However, a simple statement of intention, if it is being used as evidence that the thing ostensibly intended was actually done, does depend for its value on the speaker's sincerity, on his or her not being mistaken, etc. In other words, it depends on all the factors we have identified as being involved in the symbolic use of language. Thus, the usual hearsay dangers exist, and if its reception is to be justified, it cannot be so much on the basis of indexical factors as on circumstances of "necessity".

One could, of course, say much more about hearsay in the present context. I can only repeat my caveat that what I have presented are to some extent random illustrations. What they suggest is that a criterion for distinguishing hearsay from non-hearsay, or for making some kinds of hearsay admissible, is the degree of indexicality involved in the situation at issue.

B. *Similar Fact*

The classic statement of the similar fact rule in Anglo-Commonwealth law, which one judge has said has been repeated "ad nauseum",[88] occurred in *Makin* v. *A.G.*[89] There, Lord Herschell stated what is essentially the basic "character evidence rule", that evidence of other criminal acts may not be used for the purpose of showing that the accused is the sort of person likely to have committed the offence charged. On the other hand, the evidence may be admissible "if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."[90] Rule 404(b) of the U.S. Federal Rules of Evidence seems to adopt this approach:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[91]

Of these classic formulations, it might be said that they emphasize indexicality. That is, they seem to say that, at least as a beginning proposition, the crucial issue is "of what is the extrinsic act indexical?" If it is indexical of some relevant matter other than disposition or propensity, then it is admissible. On this view, the similarity

---

[88] *R.* v. *B. (C.R.)*, [1990] 1 S.C.R. 717 at 740, 107 N.R. 241 at 263 (Sopinka J. (dissenting)) [hereinafter *B. (C.R.)* cited to S.C.R.].

[89] *Makin* v. *A-G for New South Wales* (1893), [1894] A.C. 57, [1891-94] All E.R. Rep. 24 (P.C.) [hereinafter *Makin* cited to A.C.].

[90] *Ibid.* at 65.

[91] See W.A. Craig, "Similar Act Evidence" (1988) 46 Advocate 895 at 900. See also G. Weissenberger, "Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404 (b)" (1985) 70 Iowa L. Rev. 579.

of the extrinsic act to the act charged is not inevitably the central concern, although in some cases the similarity will be the index.

The traditional approach has, in recent years, come under attack. Thus, for example, McLachlin J., speaking for the majority in *R.* v. *B. (C.R.)*, observed that the tendency of courts (at least in Canada) was to "loosen the formalistic strictures" of "[t]he old category approach" and to adopt "a more general test which balances the probative value of the evidence against its prejudice."[92] One implication of this new approach is, apparently, that "evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice."[93] This might suggest that the first branch of the *Makin* test, as an absolute rule, has been attenuated.[94]

On this view, the emphasis is not so much on the *kind* of indexicality (relevance to a particular issue) as on the *degree* of indexicality (probative force with respect to whatever issue). In gauging the degree of indexicality, iconicity becomes the crucial factor — as suggested, for example, by McLachlin J. in *R.* v. *C. (M.H.)*: "probative value usually arises from the fact that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence".[95] Another way of characterizing this new approach might be to say that it moves directly to the rhetorical issue — how persuasive is the evidence — without much attention to the (arguably prior) analytical issue.

The kinds of epithets invoked in discussions of this sort of evidence indicate the range of things that might be involved. I have used the expression "similar fact"; one commonly sees as well "similar act". But one also encounters, especially in the American context, expressions such as "uncharged misconduct" and "extrinsic acts". The former expressions suggest that similarity (or iconicity) is of the essence;

---

[92] *Supra* note 88 at 723 (McLachlin J.). Sopinka J., speaking in dissent for himself and Lamer J., insisted on the importance of the first branch of the *Makin* test: "The evidence must be susceptible of an inference relevant to the issues in the case other than the inference that the accused committed the offence because he or she has a disposition to the type of conduct charged" (*ibid.* at 743).

[93] *Ibid.* at 732 (McLachlin J.).

[94] Although McLachlin J.'s assertion in the later case of *R.* v. *C. (M.H.)*, [1991] 1 S.C.R. 763 at 771, 123 N.R. 63 at 70 [hereinafter *C. (M.H.)* cited to S.C.R.] that "[t]here will be occasions, however, where the similar act evidence will go to more than disposition, and will be considered to have real probative value" leaves the position a little ambiguous. And, in *B. (F.F.)* v. *R.*, [1993] 1 S.C.R. 697, 79 C.C.C. (3d) 112, the Supreme Court seems to have returned to the traditional approach. See also P. Mirfield, "'Similar Facts' in the High Court of Australia" (1990) 106 L.Q. Rev. 199 at 201:

> A continuing difficulty with the High Court cases since *Markby*...has been the existence of a tension between those judges who take the view that the first part of Lord Herschell's famous statement in *Makin*...has unqualified force even after *Boardman* and those who do not. For the former, the disposition chain or mode of reasoning is forbidden...while, for the latter, it may permissibly be relied upon, but only where the probative value of the evidence in question exceeds its prejudicial effect.

[95] *Supra* note 94 at 771.

the latter are more ambiguous in this regard, apparently capable of embracing "acts" that bear little resemblance to the act charged.

This takes us back to the point alluded to above: just what are the semiotic processes involved in the use of evidence of "other acts, wrongs, or crimes" of the accused? The short answer is that these processes will vary from case to case. One paradigmatic process is the following: the accused did X on a previous occasion. What a person does is an index of the sort of person he or she is. The sort of person one is, in turn, is indexical of what one likely will do. Y, the act charged, is the sort of thing that sort of person would do. Thus, the accused is more likely than a person who would not have done X to have done Y. This, at least in the traditional view, is the forbidden semiotic process, or, in conventional terms, mode of inference. There are good reasons for this. For one thing, this reasoning involves the kind of prospectivity that we have elsewhere seen to be problematic: knowing the cause (disposition, propensity, or character) we are assuming that the effect ensued. Moreover, the validity of character as an index of conduct on a particular occasion is doubtful. Further, there are those dangers which have frequently been recognized; for example, that a jury will convict an accused because he or she is "bad", irrespective of whether they are persuaded that the accused committed the offence in issue.

However, extrinsic act evidence may involve other kinds of semiotic processes. Thus, for example, we have a case like *Balcerczyk* v. *R.*,[96] in which the evidence in question was the accused's manner of driving immediately after a fatal accident. Note the iconic element here: the manner of driving at time 2 is useful only on the assumption that it is an image or icon of the not otherwise known manner of driving at time 1. But using the icon involves some kind of indexical process as well. One form that this might take involves the prohibited mode of inference: at time 2, X was driving in a particular way; X is the sort of person who drives this way; thus, he was probably driving this way at time 1. The analysis would be different, however, if it were a question not of X's disposition to drive in a certain way, but of his inability to drive in any other way. Now, his driving at time 2 would be indexical of his driving ability; and ability or capacity is much more compellingly indexical of performance than is disposition or propensity. A third kind of analysis would involve simply saying that, because of the close temporal contiguity, the driving at time 2 *is* the driving at time 1. Here, arguably, the semiotic process is simply truncated, reduced to a process of identification.

Another case that illustrates some of the semiotic complexities of "other acts" is *Morris* v. *R.*[97] The charge was conspiracy to import heroin (from Hong Kong), and the disputed evidence was a newspaper clipping, found in Morris's apartment, concerning the heroin trade in Pakistan. Whether this case is one of "similar facts" is doubtful: at the same time, the question arises only because there is an element of iconicity (if the subject of the clipping had borne no resemblance to the acts charged,

---

[96] *Balcerczyk* v. *R.*, [1957] S.C.R. 20, 117 C.C.C. 71.

[97] *R.* v. *Morris*, [1983] 2 S.C.R. 190, 48 N.R. 341.

nothing would have been made of it). Again, characterization of this evidence as index may vary, as the majority and dissenting judgments demonstrate. On the one hand, as the dissent claimed, the clipping[98] could be taken as an index of the accused's interest in the heroin trade; in turn, a person interested in the heroin trade is "likely" to have participated in the alleged conspiracy. McIntyre J., on the other hand, saw the clipping as possibly evidencing "preparatory steps". The fact that one makes preparations to do something is an index of the person's intention to do that thing; it does not depend on reasoning about the person's character. Another way of seeing this is to assimilate it to the conspiracy: the clipping of the article was part of the continuous conduct constituting the subject-matter of the charge.

On the *Makin* test, one could say, therefore, that because the clipping is indexical not only of disposition, it passes the first hurdle of admissibility. However, one might then argue the rhetorical point: the evidence is so much more obviously indexical of disposition than of anything else, that there is a real danger of its being taken in this way. Though arguably indexical of other relevant matters, it is only weakly so, and is potentially indexical of such a range of irrelevant matters that it should be excluded. In other words, its possible prejudicial effect outweighs its probative value.

Having made these comments relating to "other acts" generally, I want now to consider a few examples involving what might be thought of as more specifically "similar fact" evidence. What these examples reveal is that the semiotic processes are highly variable from case to case and, although what is ultimately at stake may be probative value versus prejudicial effect, there are criteria of analysis that can be specified. Again, these examples are intended to be illustrative only, and do not pretend to be exhaustive of the many situations in which the issue of similar facts arises.

The first example is the use of similar fact evidence to prove the *actus reus*. As we shall see, this general description conceals various ambiguities. But the issue I am contemplating at the moment is whether the conduct complained of in fact occurred. This was the situation in *R.* v. *C. (M.H.)*: the allegation was that the accused forced his wife to have intercourse with a dog; the evidence in question included testimony by the accused's subsequent common-law partner that he requested her to have intercourse with a dog. How, semiotically, might this evidence be characterized?

Clearly, iconicity is critical here: it is the apparently close resemblance between the two stories that strikes us. But, as we have seen, an icon does not need a real object. Thus, even if the trier of fact accepts that the common-law spouse's story is iconic of what actually happened to her, it does not mean that something similar happened to the first wife. For this evidence to be indexical, or probative, we have to find some other account. What we would have to do is ask, of what is the *coincidence* of the stories indexical? This would involve first determining how coincidental they are and how closely they resemble each other—an iconic inquiry.

---

[98] More accurately, the act of cutting out and keeping the article.

Then, having determined the degree of coincidence or iconicity, it is necessary to ask "What does this degree of iconicity indicate?" If the facts related are otherwise unheard of, we might conclude either that the stories are true, or that the tellers collaborated in creating them. If the latter can be ruled out, then the coincidence strongly points to the former. If the facts related are a matter of common practice or knowledge, then the coincidence may be indexical of a greater range of objects (for example, independent fabrication). That is, they will be less probative. One implication of this analysis is that to make an adequate decision about this kind of evidence, some meaningful information (other than the trier's intuition) about probabilities must be provided.[99]

There is, of course, another way to analyse the indexicality of this kind of similar fact evidence. That is to say: the accused did X on a particular occasion; he is the sort of person who has a propensity to do X; therefore, he is likely to have done X on other occasions, and if someone says he did X on another occasion, then he probably did. This, according to the traditional test, is the forbidden line of reasoning. On the modified approach with which the Supreme Court of Canada seems recently to have been wrestling, it may be acceptable, as long as "the acts compared are so unusual and strikingly similar". This approach strikes me as problematic where the question is whether something actually happened. And it is especially problematic where the only evidence of either act is testimony which, in addition to the concerns I have been outlining, is affected by all the shortcomings of symbolicity.

The situation is somewhat different in a case like *R.* v. *Ball*,[100] involving a charge of incest between brother and sister. There was evidence that, at the relevant time, the two occupied the same bedroom and slept in the same bed. The "similar fact" evidence in question was that "these persons had previously carnally known each other and had a child".

One thing interesting about this is that we do not have "similar facts" in the same sense as in cases such as *Boardman* or *C. (M.H.)*. In those cases, the evidence took the form of two corresponding stories. Here, however, it is not a question of evidence of what happened in 1908 paralleling evidence of what happened in 1910. In fact, the crucial similarity — the occurrence of intercourse — is missing from evidence about what happened in 1910. So "striking similarity" and its variants seem an inappropriate approach to a case like *Ball*.

The previous "carnal knowledge" was an index of the siblings' sexual interest (or, as Lord Loreburn put it, "passion") at that time. The fact that two people have a sexual interest in each other at a particular time does not mean that it persists. Moreover, one might say that the use of the evidence here violates the prohibited chain of reasoning: it shows only that the two have a disposition to engage in incest.

---

[99] The dilemma is suggested by the following, from Lord Salmon's speech in *D.P.P.* v. *Boardman*, [1975] A.C. 421 at 463, [1974] 3 W.L.R. 673 at 708 (H.L.): "Whenever these unnatural practices are indulged in, someone ex hypothesi is in the active and someone in the passive role. It may be that it is most unusual for the older man to be in the passive role....For all I know, however, the one may be as usual as the other".

[100] *R.* v. *Ball*, [1911] A.C. 47 at 71, 103 L.T. 738 at 739 (H.L.) [hereinafter *Ball*].

On this characterization, the evidence should, on the traditional approach, be excluded. And, because there is no striking similarity, it should be excluded on the modern approach.

However, on another analysis, as the House of Lords' decision demonstrates, it is admissible in terms of the traditional approach. The semiotics here are somewhat complicated. By convention in "our" culture, adults (particularly of opposite sexes) do not normally share a bed, unless there is a sexual involvement. So "reading" the meaning of this conduct involves symbolicity — understanding the conventions. At the same time, the conduct may be "unconventional" — that is, it may not mean what convention suggests that it means. Or, to use Peircean terms, the representamen (sharing a bed) does not necessarily point to the object (sexual intercourse) in the absence of somebody attributing this meaning to it. It could signify other things or nothing much — for example, "innocent living together". To exclude such other "objects", evidence of motive for sharing the bed is relevant, and sexual passion is indicative or perhaps constitutive of such motive. In terms of the modern approach, a court might admit this evidence by saying that "the probative value outweighs the prejudicial effect". My point is that more detailed analysis is required.

Another example, calling for a different analysis again, is the "brides in the bath"[101] sort of case. Here, we are still in the realm of *actus reus*, but, whereas in *C. (M.H.)* and *Ball* there is no "real" evidence of the *actus* having occurred, here we do know at least that the accused's third wife did drown in the bathtub. Thus, what is at issue is characterizing the death.

Presumably, the "modified" approach to the similar fact evidence here would be something like the following. There were *two* other occurrences (not, say, one); moreover, each of the other occurrences had several features in common with the situation forming the basis of the charge. In terms of the framework I have been using, there is multiple and strong iconicity. The multiple occurrences and striking similarity make this highly probative (of what is being de-emphasized[102]) no doubt probative enough to outweigh any possible prejudice.

A more precise analysis would begin by focusing on the purpose of the evidence. Is it to prove that "Smith murdered his wife"? Such a description of purpose is too broad, comprehending several issues. Moreover, the previous events do not tell us that Smith killed his other wives. What we do know is that Smith had a possible motive (he was the beneficiary of his wife's will and her life insurance policy) and he had opportunity. The question, really, is: was his wife murdered? In other words, was her death intentional or accidental? At this point, we look at the similar facts (including the fact that each woman was married to the same man) and assess the degree of iconicity. As I mentioned above, the resemblances are strong. Then, one asks again: "Of what is this coincidence of elements indicative?" This,

---

[101] *R.* v. *Smith* (1915), [1914-15] All E.R. Rep. 262, [1916] 114 L.T. 239 (C.C.A.).

[102] I have taken this to be the thrust of McLachlin J.'s remark in *B.(C.R.)*, *supra* note 88 at 726 that "[t]he categories focussed attention on the *purpose* for which the similar fact evidence was adduced, rather than the real question — its relevance". There is, of course, an ambiguity here, "purpose" and "relevance" in this context being somewhat congruent terms.

ideally, demands hard information about the statistical probability of a man losing three wives in essentially the same circumstances, accidentally. The statistics would, I am sure, confirm our common sense intuition that the coincidence was inconsistent with accident, and indexical of calculation. Thus, the death was deliberate, and the question becomes: "Who caused this deliberate death?" The answer: the person who had a motive and opportunity, and probably the person who was similarly placed with respect to the previous deaths.

This analysis, we should note, avoids the line of reasoning prohibited by the traditional rule. The similar facts are used only to characterize the death; no reliance need be placed on inferences about Smith's propensities. More important, this analysis attempts to specify the processes of signification involved in coming to a conclusion.

The last example I want to deal with involves similar facts as evidence of identity. Here, the *actus reus* is established, and the question is, "Who did it?" The evidence is of similar acts done by a known person, the accused. The reasoning, broadly, is as follows. An act (the *actus reus* in question) is an index of the actor; that is, there is a physical contiguity between the act (effect) and the actor (cause). We know of another act of the same type, and, with respect to that act, we know the actor. The person who created the effect then is probably the same person who created a similar effect now. In other words, whatever that previous act is an index of, this present act is similarly an index of. Or, diagrammatically:

a:b::c:x (where x is unknown)
a=c
therefore, x=b

A problem, of course, is that, although the act is indexical of the actor, the act is frequently so common that it does not point to anyone in particular. It is an unreadable index.

It is at this point that iconicity comes into play, for it refines the pointing process. Suppose we know that A previously committed a murder, and A is now charged with another murder. One way of reasoning to A is the old forbidden route: A committed murder before; A is the sort of person who murders; A is more likely than a non-murderer to have committed the present murder. But another line of reasoning is to say: look at murder 1, and look at murder 2; what is the probability that murder 2 is indexical of the same thing as murder 1? Note that this does not (at least explicitly) involve "propensity". If both murders are "common, garden-variety" murders, the answer to the question is: "The probability is very low". However, as iconicity (or resemblance) increases, so does the probability. Thus, in a case like *R.* v. *Straffen*,[103] the fact that the murders were by manual strangulation increases the probability; the fact that the method of strangulation was "precise" increases it even more, as do other distinctive features of the acts.

[103] *R.* v. *Straffen*, [1952] 2 Q.B. 911, [1952] 2 All E.R. 657 (C.C.A.) [hereinafter *Straffen* cited to Q.B.].

Sopinka J., referring to the *Makin* criteria, makes the claim that a certain degree of iconicity gives rise to a difference in kind:

> There is, in my view, a distinction between evidence of general character and *modus operandi*...a highly individualized *modus operandi* is tantamount to evidence that the accused left his or her calling card. The process of reasoning which connects the accused to the crime charged is the same as in the case of other evidence of identification and is distinguishable from the prohibited line of reasoning.[104]

He gives the example of the safecracker who has virtually unique expertise: the fact that he is a safecracker is a matter of general character or propensity; the special expertise, on the other hand, is a distinctive identifying feature. Similarly, Slade J. in *Straffen* said: "I think one cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification".[105] These are interesting examples,because they involve fairly "pure" forms of indexicality. The special expertise goes to ability: doing the job in a certain way means that the actor must possess the requisite skill. A person lacking the skill could not have left the index. Similarly, behaviour is symptomatic (indexical) of abnormal conditions, the way such conditions "automatically" express themselves. In this sense, it may be true to say that such things, manifested in other acts, go beyond "propensity" and are akin to fingerprints or hair samples.

However, not all similar fact evidence of identity is of this order. Indeed, the metaphors that both Sopinka J. and Slade J. use suggest the conventional or symbolic element in much of the conduct arising under this rubric: "calling card", "hall mark". In so far as conduct is chosen, directed, it may be expressive of propensity (albeit very specific propensity). Thus, the judicial examples mentioned may not be adequately representative, and it may be that *modus operandi* is indicative of propensity.

As I suggested above, however, although most similar fact evidence of identity may involve reasoning through propensity, there is another way of characterizing it: given a particular degree of iconicity, what is the probability that the two (or more) events are indexical of the same thing? There are at least two problems with this distinction. For one thing, it may be very hard to make to a trier of fact. For another, it involves questions of degree and thus may involve essentially the same inquiry as the "probative value versus prejudicial effect" approach. That is, it may lead to the position recently favoured by, among others, the Supreme Court of Canada.

What this discussion of similar fact suggests is, again, that the semiotic processes involved in the operation of any item of evidence require scrutiny. In each case, indexicality and iconicity, and probably symbolicity, interact in different ways. With respect to similar facts, perhaps the main concern is to guard against the rhetorical power of icons (which in themselves prove nothing) by being constantly aware of the indexical processes they support. Beyond this, the discussion may

---

104 *B.(C.R.), supra* note 88 at 748 (Sopinka J.).

105 *Supra* note 103 at 916.

engender queries as to whether there is a definable category of "similar fact" (as opposed, say, to "extrinsic act") evidence.

V. Conclusion

I have attempted to elaborate a framework, based on one semiotic account, for thinking about evidence and some rules of evidence. A question might arise as to the usefulness of such an exercise. I hope that its uses are at least implicit in the analyses I have developed, but a moment of explicit reflection on this issue may be appropriate.

It may be that such an enterprise is no more than an intellectual exercise — a stating in different words, or in terms of something else, of what is already known. There is indeed some of this in my essay: for example, I sometimes use the word "iconicity" virtually synonymously with "similarity". If this paper is no more than this, it may still be worthwhile. Reformulating what is already known can lead to seeing it differently, approaching it from a slightly different angle.

I hope, however, that the framework outlined in this essay is more than that. It may be regarded as a kind of template, which can be placed over evidence law, revealing points of congruence and points of incongruence. This may give rise to reflection about correspondence between different kinds of inquiry and lead to some interdisciplinary insights.

Beyond this, I would like to think that the analysis offered here constitutes a useful critical perspective in more ways than one. It may have something to say about the "rhetorical" force of various kinds of evidence, for example. And it may be a means of raising questions about how existing doctrines deal with certain issues.

There has, I think, recently been a tendency to characterize evidence issues in rhetorical terms. The move away from "rules", probably themselves constitutive of one kind of rhetorical practice, to judicial measuring of "probative value versus prejudicial effect" crucially acknowledges and promotes this tendency. A feature of this process is the breaking of old lines of demarcation, a calling into question of the "old categories". In some ways, this essay contributes to the process. At the same time, although it regards the use of evidence as a significantly rhetorical practice, it suggests that the practice is based on principles that can be ascertained, or at least on processes that can be described.