Law and Justice on The Small Screen

Edited by

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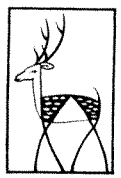

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This book is a labour of friendship, born of a mutual conviction that law, and its goal of justice, has much to learn from popular culture. We have been friends through the interdisciplinary law and film circles for many years. However, it was not until 2009 that we decided to work together to produce a collection of essays on law and TV to offset the focus on law and film. We decided to not just approach those whom we knew were interested and working in this area, but to spread the net wider to involve those who had not published in this area before. We are glad we did. As Stella Bruzzi reminded us in her December 2011 review of *Film and the Law: The Cinema of Justice* (Greenfield, Osborn and Robson) published in the journal *Law and Humanities*, TV forms a significant part of the teaching in courses on popular culture. It has, however, hitherto been underrepresented in the published law and culture scholarship. We seek to redress this imbalance. Attention needs to be paid to the 'small screen', which is, we believe, exceptionally powerful in shaping expectations and desires about law and justice. We thank the contributing authors who patiently took each step with us, from the call for papers to final submission. Thank you all for sticking to the deadlines we imposed. Your work brings the value to this book. Thanks also go to the anonymous reviewers who helped us select and guide the final versions found in this collection. We could not have finished this book without the exemplary copy-editing help from three superb Suffolk University Law Students: Daniel Morton-Bentley, Patrick McDonough and Christopher Siteman. All three will be first rate lawyers in light of their persistent efforts and acute attention to language. Thank you Dan, Patrick and Chris. Finally, we would like to thank our friends at Hart Publishing. We are grateful for your patience and support.

Peter Robson, Glasgow, Scotland
Jessica Silbey, Boston, United States
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Measuring Humanity: Rights in the 24th Century

LIEF H CARTER AND MICHAEL MCCANN*

> [W]orks of art are the most intimate and energetic means of aiding individuals to share in the arts of living. Civilization is uncivil because human beings are divided into non-communicating sects, races, nations, classes and cliques.
>
> —John Dewey, *Art as Experience* (1934)

> The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.
>
> —Martin Luther King, *Strength to Love* (1963)

I. Introduction

The ninth episode of the second season of *Star Trek: The Next Generation*, entitled 'The Measure of a Man', tackles a familiar, profound, and recurring question in politics, philosophy, and literature—who and what qualifies as 'human' or, if not human, nevertheless qualifies for the legal rights and protections granted to humans by communities and tribes?[1] In politics this question has surfaced for centuries in often xenophobic debates about race and alien status, among others. More recently, the question has been raised in debates about foetal status, gay and lesbian rights, and rights for animals. Much of the world does not yet accord equal legal status to women in meaningful ways. The US Supreme Court's extension, in January of 2010, of the right of unlimited political participation to corporations on the ground that they are,

* Lief Carter thanks his Colorado College colleagues Jonathan Lee, David Mason, and Emily Chan and psychology student Daniel Lenzen. Michael McCann thanks Lief Carter and Marilyn Vickers for inviting me to view, discuss, and eventually collaborate in writing about this extraordinary television episode.

[1] Screenplay by Melinda Snodgrass, original air date directed by Robert Scheerer, 13 February 1989, draft version at www.twiztv.com/scripts.nextgeneration/season2/tng-209.txt, transcript of final aired episode at www.chakoteya.net/NextGen/135.htm DVD Paramount Pictures, 2002. Ms Snodgrass took the title of this episode from Dr Martin Luther King's epigraph quoted above. (Email to Lief Carter, 9 February 2010.) See 'What is Man?' in Martin Luther King, Jr, *The Measure of a Man* (Philadelphia, Fortress Press, 1959).

for legal purposes, like people, also invokes the question.[2] A philosophical version of the question crystallises in the existentialism of Sartre. 'Pinocchio' poses the question for children. Shakespeare's Caliban, the 'monster' offspring of a sorceress in *The Tempest*, Mary Shelley's Frankenstein, King Kong in film, and dramas about witchcraft, eg Arthur Miller's *The Crucible*, pose the question for adults.[3]

The *Star Trek* episode's treatment of this perennial question, namely what counts as a 'life form' worthy of equal legal and moral status with humans, is recurrent in science fiction literature and film.[4] The twenty-fourth century, at least as conceived by Gene Roddenberry, the creator of the original *Star Trek* series and adviser to its reprise in 'the next generation', operates on the principle of 'sentience'. Non-human races such as Klingons and Romulans have the same legal status as those of the human race because they are sentient. But what counts as sentience? More specifically, are androids—sophisticated computer robots designed and constructed by humans so as to resemble humans and to accomplish tasks that humans cannot or will not reliably do— sentient 'life forms', or are they machines and hence property, as both slaves and women have been? And is the abstract issue of sentience sufficient to resolve this dispute?

'The Measure of a Man' applies these questions to the case of Lieutenant Commander Data, a 'one-off' sophisticated android designed by a scientist who died without leaving plans for replicating this uniquely valuable entity. Data, like Spock in the original *Star Trek* series, has superhuman strength and analytical powers, powers enhanced in Data's case by programming that prevents emotion from clouding his decision-making skills under any circumstances.[5] He has repeatedly proved his value as a crew member of the star ship *Enterprise*, captained by Jean-Luc Picard.

Headquarters has sent a robotics expert, Commander Bruce Maddox, to requisition Data from the *Enterprise*, transfer 'it' (Maddox's term) or 'him' (the crew's term) to headquarters, and disassemble Data so as to learn how to replicate him so that other star ships can benefit from his unique abilities. Commander Maddox insists that the chances that Data will not be reassembled successfully after complete analysis of his engineering and electronic circuitry are 'negligible', but Maddox cannot deny that Data may experience some degree of amnesia after his reconstruction, or that such amnesia might be permanent. Data and Picard both refuse to honour the transfer order, but a JAG officer newly arrived on board, Phillipa Luvois (with whom Picard has had a romantic and antagonistic professional relationship in the past), checks various fleet regulations about computer equipment and personnel transfers and concludes that, regardless of Data's ultimate status, he cannot refuse the order transferring him back to headquarters.

[2] *Citizens United v Federal Election Commission*, 130 S Ct 876 (2010).

[3] Other academic treatments of this episode include R George Wright, 'The Pale Cast of Thought: On the Legal Status of Sophisticated Androids' (2001) 25 *Legal Studies Forum* 297, a neo-Kantian analysis of the nature of 'personhood' that, unfortunately, relies on the original draft script that was not filmed or aired. Jeffrey Nesteruk, 'A New Narrative for Corporate Law' (1999) 23 *Legal Studies Forum* 281. Susan Lentz and Robert Chaires, 'What Color Is an Android: Some Reflections on Race and Intelligence in Star Trek' in Robert Chaires and Bradley Chilton (eds), *Star Trek Visions of Law and Justice* (Dallas, TX, Adios Press, 2003) 219–33.

[4] Steven Spielberg's film *AI: Artificial Intelligence* (Warner Bros. Pictures, 2001) deals explicitly with the complexities of human love for a lifelike robot, and of the robot's capacity to love a human. Stanley Kubrick had begun the project, presumably with the goal of extending the human-like qualities of the computer HAL in Kubrick's 2001 *A Space Odyssey* (MGM, 1968), but died without realising the project, which Spielberg completed in Kubrick's honour.

[5] It hardly spoils the plot for this chapter's readers to use the personal pronoun rather than the impersonal pronoun to describe Data, if for no other reason than that readers will intuit that this television episode will not kill off a valuable member of its permanent cast.

At this point, Data, who is wholly opposed to this disassembly procedure, resigns his commission in the fleet to avoid it. His decision to resign thus forces the immediate question. If he is a sophisticated computer, he is fleet property. He has no more right to resign than the *Enterprise*'s main frame computer does. The fact that he resembles a human is not legally relevant, since he could just as well be 'a box on wheels'. Indeed, Maddox argues that Data's sympathisers are duped into treating him as rights-bearing only because his outer appearance resembles a human rather than a machine. Luvios conducts further research and finds that 'the Acts of Cumberland, passed in the early 21st century' dictate that Data is a machine. She summarily rules that Data has no right to resign, saying, 'He is a toaster'. Picard, on Data's behalf, then demands a formal hearing. Lacking any staff, by regulation Data's defence falls to the Captain, Picard, and First Officer William Riker must represent Maddox. Riker initially refuses to oppose Data: 'Data's my comrade. We have served together. I not only respect him, I consider him my friend'. However, Luvois insists that without someone to represent Starfleet's position, she will reinstate her order prohibiting the resignation and order the transfer. Thus the stage is set whereby an adversarial legal proceeding focuses and resolves the tensions of plot and character created by the larger dramatic setting.

Our analysis begins with a brief rumination about the study of television entertainment as a constitutive component of legal culture. While cultural texts can be analysed in many different ways, our approach primarily analyses the substantive content of the episode for important insights about the politics of contested legal rights and claims to justice. Our approach is especially conducive to the types of engagement that teachers might undertake in a college classroom. The remainder of the chapter develops some reflections on a variety of themes related to legal processes and constructs of 'human rights' that are provocatively addressed in the episode.

II. Commercial Television and Popular Representations of Legal Practice

We ground this analysis of classic cult TV entertainment in the recognition that images of law, legal processes, and legal practices saturate contemporary popular culture. Mass-mediated narratives and images are arguably among the most pervasive and powerful social forces expressing, shaping, and transforming law and social life.[6] Indeed, a great deal, and perhaps most, of what most people know about legal institutions, discourse, and process derives from mass media news sources and

[6] Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (eds) *Law on the Screen* (Stanford, CA, Stanford University Press, 2005); Austin Sarat and Thomas R Kearns (eds) *Law in the Domain of Culture* (Ann Arbor, University of Michigan Press, 1998).

entertainment-like TV, films, novels, cartoons, and other such visual sources. As Ewick and Silbey put it,

> The law seems to have a prominent cultural presence ..., occupying a good part of our nation's popular media, providing grist for both news and entertainment.... Thus the law is experienced as both strange and familiar; an episodic event and a constant feature of our lives; deadly serious and a source of humor and entertainment; irrelevant to our daily lives and centrally implicated in the way those lives are organized and lived.[7]

Or, in Richard Sherwin's words, 'Where else can one go but the screen.... It is where people look these days for reality ...'[8]

It is not surprising that the socio-legal study of law in/and of popular culture, including television, has grown rapidly in recent decades into a serious scholarly enterprise. 'Turning our attention to the recurring images and scenarios that millions of people see daily projected on TV and silver screens across the nation, is no idle diversion', notes Sherwin.[9] Prominent law and society scholars such as Stewart Macauley and Lawrence Friedman were among the first to encourage expanding socio-legal study to include legal images, narratives, and representations in popular culture, blurring the boundary between official and unofficial law.[10] While these authors recognised that analysing such cultural texts can be intrinsically valuable, they also urged attention to the unrealistic or distorting character of such depictions.

Other socio-legal studies have investigated how popular constructions of legal issues are actually complicit in developments of official legal norms or practices, often in ways that arguably undercut social justice. For example, in the 1970s, Stuart Hall and his colleagues showed how media representations contributed to the construction of mugging as a prevalent practice and fed the demand for more vigorous policing and punitive policies.[11] Moreover, popular constructions of law in mass media can influence actual practices. Popular culture can shape the public's expectations regarding police, lawyers, judges, and jurors. Haltom and McCann, for example, have shown how news coverage and popular entertainment contributed to the perception of a litigation crisis in the US that both nurtured demands for legal reform and altered the relationships and practices of civil disputants, including at trials.[12] Other scholars have similarly focused on the production of legality in mass media, how media legality shapes legal practice, and especially how legal narratives on screen are received and made sensible.

Our focus in this chapter is motivated by a different agenda, however. We make no claims about how *The Measure of a Man*, or the Star Trek series generally, has

[7] Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998) 16.

[8] Sherwin, cited in Austin Sarat, Lawrence Douglas, and Martha Umphrey, 'On Film and Law: Broadening the Focus' in Sarat, Douglas, and Umphrey (n 6) 1.

[9] Ibid.

[10] Stewart Macauley, 'Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports' (1987) *Law & Society Review* 21, 185; Lawrence Friedman, 'Law, Lawyers, and Popular Culture' (1989) *Yale Law Journal* 98, 1580.

[11] Stuart Hall, et al, *Policing the Crisis: Mugging, the State, and Law and Order* (New York, Halmes and Meir, 1978).

[12] William Haltom and Michal McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago, University of Chicago Press, 2004).

shaped actual legal practice or understanding, even for the subculture of devoted 'trekkies' (or 'Trekkers').[13] Nor are we interested in identifying how this entertaining fable distorts or misrepresents formal legal processes. Our goal instead is to interrogate *The Measure of a Man* as a provocative text from which we can learn interesting lessons about law, how it works, and how it shapes social interaction and disputing. For our purposes, the difference between low and high art matter little; both provide indeterminate yet rich texts for constructing meaningful reflections about law's practices and possibilities. As such, our approach fits what Douglas Goodman has called a 'semiotic' interpretation rather than either a 'transmission' or 'institutional' study of the television show.[14]

We are especially interested in two interrelated topics intrinsic to the TV narrative construction of law. One is the homology between legal form (especially the form of an adversarial courtroom trial) and narrative form. *The Measure of a Man* is but one of many TV shows that begins with an interpersonal dispute or alleged wrongdoing and culminates in a trial. Episodes of the various versions of *Law and Order* routinely climax in a courtroom confrontation. The popularity of shows such as *Judge Judy* presumably rest on the same capacity to simplify and clarify. Many analysts have recognised not just the extreme fascination with entertainment that focuses on legal trials, but the parallels between the narrative form of film dramas and trial structure. As Carol Cover put it, 'trials are already movie-like to begin with and movies are already trial-like to begin with'.[15] In his closing statement on Data's behalf, Captain Picard says, 'Your Honor, the courtroom is a crucible. In it we burn away irrelevancies until we are left with a pure product....' And such is the logic of the entire episode, which begins by exploring a conflict over a fundamental question of rights and justice in various trial-like exchanges that precede the formal trial proceeding.[16]

One interesting feature of the episode is that it works to extend the life of the twentieth century US model of 'adversarial legalism' into the distant future. The episode takes place in a completely unfamiliar and unknowable setting, the future in the twenty-fourth century. Data, the robotic machine with human-like qualities, is purely imagined; there is no equivalent in the scientific or industrial world. In the case of *Star Trek* particularly, its creator, Gene Roddenberry, conceived of a series that imagined a social world that expressed ideals of a post-racist, post-sexist, post-religious (and implicitly post-capitalist) and peaceful earth governed by a unitary government, conditions that did not exist in Roddenberry's lifetime and do not exist today. Indeed, the series' familiar infinitive-splitting tag line expressly declares its goal: 'to boldly go where no man has gone before'. One could argue that this represents a noble quest for

[13] On trekkies and Trekkers, see the Wikipedia entry for 'Trekkie', available at http://en.wikipedia.org/wiki/Trekkie.

[14] Douglas J Goodman, 'Approaches to Law and Popular Culture' (2006) *Law & Social Inquiry* 31, 757–84.

[15] Carole J Clover, 'Law and the Order of Popular Culture' in Austin Sarat and Thomas Hearns (eds), *Law in the Domains of Culture* (Ann Arbor, University of Michigan Press, 1998) 97–120. See also Jessica Silbey, 'Patterns of Courtroom Justice' in Stefan Machura and Peter Robson (eds), *Law and Film* (Oxford, Blackwell, 2001).

[16] It is also relevant that the curious US phenomenon of quiz shows and 'reality television' series, from *Jeopardy* to *Survivor* to *American Idol*, are perennially popular because they, too, are competitive games—another form of adversarial contest with rules, procedures, and enforced if often disconcerted closure.

a universalised, non-relativistic conception of human law and justice, a timely quest in an age of globalising law and 'universal human rights'. But, from another angle, the drama's central conceit represents a bold act of normalising and naturalising a current, time-bound, and contingent but familiar reality as a timeless expression of legal form, process, and substance.

It is important, however, to underline that 'The Measure of a Man' is not just about a trial. Just as law 'is more than litigation, legal movies are more than courtroom drama'.[17] Indeed, in less than 60 minutes the episode displays legally infused practices and legal themes in a variety of modes across multiple contexts. The drama opens with a friendly poker game, which shows us how Data's inherently mechanistic view of rule determination is trumped by superior players who strategically 'bluff' and tactically exploit the indeterminacy of rules. We see other figures shift in and out of distinctively legal discourses as they meditate on past intimate relations, relationships to Data, the work culture on the Enterprise, and the like. Indeed, law is 'all over' this episode, and it takes different modalities with each setting as it is mixed with and confronts other discursive or normative frameworks. In this regard, while the drama of the dispute ends up with a clean and ostensibly satisfying ending, the inquiry into law is anything but simple, neat, and complete.

This shifting in law's modalities among different contexts enriches the central development of themes relevant to the question of Data's status as a rights-bearing individual. Data's 'humanity' and debated rights-bearing status shift from informal contexts that underline personal connection to increasingly formalised, rationalistic, impersonal, and even antiseptic modes in the trial. The abstract, even ungrounded character of formal legal contestation is eventually disrupted by the key central scene with Guinan,[18] who shifts the terms of discussion from ritualistic deference to corporate prerogatives of property ownership to the legacy of slavery, once again expanding the legal frame by analogy with a social history widely accepted as profoundly unjust and inconsistent with basic legal rights.

Our analysis will give some attention to how law plays out in these different contexts, but our primary goal is to inquire into jurisprudential content, to how the episode offers complex ways of understanding law in practice, its limitations, and its possibilities for advancing justice. As such, we treat 'The Measure of a Man' as a text and aim to provide a reading of it that address how law works, constructs legal subjects, and shapes social practice. In this way, the entertaining episode provides something of a mirror for reflecting and, specifically, reflecting on the varied manifestations of legal practice in different settings. But the episode's imagining of a distant future and novel legal dispute also disrupts and challenges our expectations and invites us to think critically, even subversively, about the promises and limits of legal processes and their

[17] Anthony Chase, *Movies on Trial: The Legal System on the Silver Screen* (New York, The New Press, 2002) xii.

[18] Guinan is a survivor of a people whose homeworld had been invaded and who escaped into diaspora. Played by African American actress Whoopi Goldberg and often dressed in traditional African clothing, Guinan clearly symbolises the experiential knowledge of a colonised and racially subjugated population. She appears on numerous episodes as a wise figure whom Picard trusts. See the *Wikipedia* entry for 'Guinan', available at http://en.wikipedia.org/wiki/Guinan_(Star_Trek_character)#Guinan.

capacity for generating justice. The episode may aspire to be 'timeless', but it is also timely in many regards.

III. Law and Justice in the 24th Century

A. The Episode as Teaching Material

Films and videos can and do make the subject matter of college courses relevant and vivid for students. *12 Angry* Men, a direct response to McCarthyism, dramatises major differences between critical thinking and mob rule. *The Thin Blue Line* (a dramatised version of actual events) describes the corruption of a legal system and the conviction of an innocent man in order to punish 'someone' for the murder of 'one of our own'. *Breaker Morant* (also based on historical events) dramatises how perceived political necessities at times corrupt due process. Here, in the Boer War, Lord Kitchener ordered the conviction and execution of legally innocent soldiers accused of assassinating a German missionary in order to strip the Germans of an excuse to enter the war on the Boer side and thus threaten British access to mineral wealth in southern Africa. How useful might a teacher of an undergraduate introductory course in American legal process find 'The Measure of a Man'?

'The Measure of a Man' seems enthralled with the basic elements of the adversary system and shows, as does *12 Angry Men*, the virtues of conversation, adversarial debate, and the exchange of multiple viewpoints over summary judgment in decision making. The episode, however, is more nuanced and penetrating than the typical crime show trial that reveals the lies and deceits of a wrongdoer. This episode, by contrast, describes the more common cases where well grounded, defensible values conflict, where 'people of good conscience', as Luvois observes, find themselves deadlocked in a seemingly zero-sum game. Each side presents persuasive arguments; arguments which, particularly for teaching purposes, square neatly with the elements of legal reasoning, ie arguments made cogent because they integrate and harmonise relevant rules, acknowledged facts, and widespread values.[19]

On Maddox's side, military rules authorise superiors to put military personnel 'in harm's way', to risk death for the greater good of the societies and institutions they represent, and members of the military accept these risks. (Picard admits privately that 'I've had to send people on far more dangerous missions'.) During the hearing, Riker shows that Data is a machine by detaching one of his arms and presenting it, its wiring clearly visible, to the Court. Riker then flips a switch on the back of Data's neck, shuts off Data's power supply, and Data slumps motionless in the witness chair. 'Pinocchio is broken. Its strings have been cut', he says. The parties agree that the ship's mainframe computer, which, like Data, is designed and programmed by humans, is a machine, is fleet property, and is regularly retrofitted and updated.

[19] Lief Carter and Thomas Burke, *Reason in Law*, 8th edn (New York, Pearson Education, 2008) 10–11.

But Data's case also rests on arguments grounded in established law. Through case law, 'The Federation' has developed the standard of 'sentience' to determine which newly-encountered life forms are 'rights-bearing'. Sentience, as Maddox the protagonist himself agrees, consists of intelligence, self awareness, and consciousness, and Data, on the witness stand, demonstrates each of these capacities during the hearing. For example:

> Picard: Commander Data, what are you doing now?
>
> Data: I am taking part in a legal hearing to determine my rights and status. Am I a person or property?
>
> Picard: And what is at stake?
>
> Data: My right to choose. Perhaps my very life.

Picard then analogises the problem to the evils of slave-based labour. On the stand, Maddox says he would like to construct 'thousands' of Datas 'if necessary' for the benefit of the fleet, but Picard, in his summation, argues that a ruling that Data is property:

> [W]ill reach far beyond this courtroom and this one android. It could significantly redefine the boundaries of personal liberty and freedom, expanding them for some, savagely curtailing them for others. Are you prepared to condemn him and all who come after him to servitude and slavery? Your Honor, Starfleet was founded to seek out new life. Well, there it sits. Waiting.

Luvois justifies her ruling that Data has the right to resign his commission in Sartrean language:

> This case has dealt with metaphysics, with questions best left to saints and philosophers. I'm neither competent nor qualified to answer those. I've got to make a ruling, to try to speak to the future. Is Data a machine? Yes. Is he the property of Starfleet? No. We have all been dancing around the basic issue. Does Data have a soul? I don't know that he has. I don't know that I have. But I have got to give him the freedom to explore that question himself. It is the ruling of this court that Lieutenant Commander Data has the freedom to choose.

'The Measure of a Man' thus portrays a legal proceeding where the result meets standards of impartiality and persuasive reasoning struggling to make sense amidst conflicting, indeterminate rules. Luvois bases her decision on the legal elements presented to her 'on the record'. As do the jurors in *12 Angry Men*, she changes her mind. She deliberately avoids any essentialist determination of what Data 'really' is or what 'property' and 'sentient life forms' really are. Data has demonstrated sentience and the capacity to choose according to the criteria Maddox himself has accepted.

While the episode vastly simplifies the complexities and tedium of actual litigation, it offers vivid representations of law in action. For example, neither rules nor precedents decide the case, and certainly general principles of fairness and justice do not.[20] Nor does 'rights talk', for all its documented capacity to mobilise people to support

[20] *Cf* Robert Burns: 'It is not just, as Kant reminds us, that there are no rules for the correct application of rules (in this case empirical generalizations); it's that there are no rules at all.' *A Theory of the Trial* (Princeton, Princeton University Press, 1999) 170.

and participate in political action, do any heavy lifting at the point of decision, as in this exchange leading up to the demand for a full hearing:

> Maddox: Data must not be permitted to resign.
>
> Picard: Data is a Starfleet officer. He still has certain rights.
>
> Maddox: Rights! Rights! I'm sick to death of hearing about rights! What about my right not to have my life work subverted by blind ignorance?

The opening scene of the episode makes the same point. It shows Data, having learned the rules of poker, playing his first actual round of poker, a game of five-card stud, with his crewmates. Data finds the game extremely simple because all one need do is calculate the odds based on one's down card and the other cards showing. This is something that Data instantly does. Data faces Riker, who bets aggressively on a possible flush showing. Data, possessing three queens, folds. But Riker was only bluffing, an act of deception that Data struggles to master. That 'the rules of the game' do not determine the game describes the episode's legal proceedings that follow. The case could go either way, and it goes via Luvois' discretionary judgment. That judgment reflects the rhetoric, familiar in 1989, of the abortion debate between the value of choice and the value of foetal life in the first trimester of pregnancy, although here 'choice' and 'life' align. The realistic point, then, is that law is never just about 'law', it is always about 'something else', and often that something else is up for grabs.

The episode also realistically describes how law, to reach closure, must socially construct realities and create simplistic fictions. The binary quality of a legal decision—Data may or not legally resign from Starfleet and avoid disassembly—requires vastly simplifying the issues in the case. Nothing like a utilitarian calculation shapes the decision. Data's proven ability to solve dilemmas that save the ship and the lives aboard it make a strong case for replicating him. But his defence counters with a very different utilitarian calculation—legally deciding that Data and many more to be made like him are machines that lack rights will lead to the social disruptions which were seen during the enslavement of African-American people and the racism that followed abolition. Luvois must 'make a ruling that speaks to the future', but because law demands a binary decision under severe time constraints, she does not and cannot evaluate the potential costs (that Data will not be successfully reconstructed and lost to his own crew in the process) against the benefits to other ships if the project succeeds against the costs of replicating the horrors of slavery. The adversarial proceeding forecloses any ability to engineer a compromise.

The episode realistically portrays law's 'thinness' in other ways. Luvois never responds to the argument that Data's status as a sentient being is irrelevant because all military personnel accept the risk of dying for the larger sake of their mission. She never addresses the heart of Picard's argument that a decision against Data could set a precedent permitting the replication of slavery. She never returns to 'The Acts of Cumberland'. She never addresses the intractable problem of pinning down the nature of 'consciousness'.[21] Indeed, her justification is, logically, entirely circular.

[21] See, eg Steven Pinker, 'The Mystery of Consciousness' (*Time.com*, 19 Jan 2007), available at www.time.com/time/magazine/article/0,9171,1580394,00.html. Pinker argues that, with specific reference to the case of Lt Commander Data, the nature of consciousness is probably unknowable.

It assumes its conclusion that Data is a rights-bearing entity. Her justification's very circularity reminds us that adversarial legal proceedings function primarily to resolve conflicts, not determine 'the correct', or 'the just', decision. As Morse Peckham wrote of art, law resolves the conflict by *selecting and imposing* one of many possible definitions of concepts like 'sentience', and this imposition of 'order, meaning, and value' must happen in order to reach closure and move on. This 'illusion' is 'essential to maintaining life'.

The clever, appealing TV fantasy provides an accessible yet provocative opportunity for critical reflection about law, rights, and justice. Other dramatic treatments of law equally well describe law functioning badly. In either case, these fictionalising dramas succeed because they replicate law's own fictions. The legal hearing confirms Robert Burns' analysis of trials when they function well: '[T]he theatrical nature of the trial proceeding serves to communicate nonverbal information, redirect aggression, encourage impartiality, and induce creativity in judgment.'[22] But nothing guarantees that they will work well. In the episode's last scene, First Officer Riker, unsure that Data can remain his friend, apologetically tells Data, 'I came that close to winning', as indeed he did. However, to limit the analysis of this episode to its accurate description of official law as a 'thin', fictionalising activity would miss the thicker issues that the episode (and not the law within it) raises. The drama is about the problematic relationship of law to conceptions of rights and justice; our remaining reflections are devoted to this theme.

B. Justice, Solidarity, and Loyalty

> What we are interpreting is ourselves, and the past and present social worlds that make us what we are....[23]

Imagine the following two philosophical models that apply to the central problem posed by this episode, that is, the problem of how to determine what beings are and are not 'rights-bearing'. The first model, labeled for simplification purposes as the Kantian/Rawlsian model, identifies two components of justice. The first component entails recognising common essences in the nature of 'humanness', and the second, extending from the first, notes that one such essence is the human capacity for reason and rationality. Recognising a common 'humanity', in this model, leads people to pay costs and incur risks to protect others from cruelty. Behind the Rawlsian veil of ignorance, humans in this model have the capacity to generate reasoned ways of optimising the spread of social benefits as equally as possible to all members of the human community.

The alternative model—which one could label the postmodern 'anti-essentialist' model—pits such thinkers as Richard Rorty and Michael Walzer against Kant and

[22] Burns, *A Theory of the Trial* (n 20) 137. Screenplay author Melinda Snodgrass earned a law degree at the New Mexico School of Law, specialising in constitutional law, jurisprudence, and legal history. She practiced law for three years before turning to science fiction writing as her career. Website of Melinda Snodgrass, 'About', available at www.melindasnodgrass.com/about.html.

[23] Ronald Beiner, *Political Judgment* (University of Chicago Press, 1984).

Rawls. This position rejects the premises of the first as philosophically and empirically unsupportable. Yes, people socially construct essences, but these essences quickly collapse in the face of counter examples and mutually incompatible starting premises.[24] The mental dichotomy or opposition between 'reason' and 'feeling' presumed by the first model has no empirical basis, either in personal experiences or in the findings of cognitive psychologists and neuroscientists. In the second model, humans extend protection to whatever 'others' their own communities come to define as 'one of us'. This is an organic process and it is highly contingent, that is dependent on cultural 'givens' combined with changing situational conditions. Thus, as Rorty noted, the Danes and Italians who sometimes took extraordinary measures to hide their Jewish neighbours from the Nazis did not do so from a superior sense of justice or a sense of common humanity. Rather, they lived in a social world that defined these Jewish neighbours as 'one of us', as 'fellow members of the same union or profession, or a fellow bocce player, or a fellow parent of small children', and not as 'Jews' in the first place.[25] The Belgians who turned their backs on their Jewish neighbours did not act inhumanly or cruelly; they just lived in a different, but equally contingent world that did not socially construct a neighbour simply by virtue of humanness or proximity, as 'one of us' unionists or bocce players or parents.[26]

Does the legal drama described in 'The Measure of a Man' seem more consistent with one model or the other? It is of course possible for a Kantian to say that Data was granted 'the freedom to choose' because he sufficiently demonstrated the qualities of human rationality, or 'sentience', as defined in his case. Yet he is at the same time admittedly a machine whose engineering may differ only in its superficial human-like appearance from that of an intelligent main-frame computer—or any 'box on wheels'—of the twenty-fourth century. Thus the episode makes a far stronger case for the contingent, anti-essentialist, and indeterminate model, a model that embraces the possibility of including animals, trees, and planets as 'others' whom those in power may come to spend costs and incur risks to protect.[27] Following Bernard Williams, Rorty describes how rooting obligations to others in rational morality inevitably entails the creation of qualitative distinctions between deserving ('rational') and undeserving ('irrational') humans, and that those distinctions reinforce in turn those feelings of moral purity that trigger, not reduce, human brutality.[28]

'Reason' plays a constructive role in 'The Measure of a Man', but not in any deductive or rationalist sense. Instead, the argumentative acts of adversaries, which include

[24] For a definition of essentialism and a summary of some of the reasons why answers to questions are contingent, context-dependent, and never objectively and universally 'correct', see Lief Carter, 'Law and Politics as Play' (2008) 83 *Chicago-Kent Law Review* 1333, 1340–42. In his recent book *The Idea of Justice* (Cambridge, Harvard University Press, 2009), Amartya Sen categorically rejects the feasibility and utility of grand abstract theories of justice.

[25] See Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge and New York, Cambridge University Press, 1989) 190–91.

[26] Ibid 191.

[27] *Cf* ibid 192: 'There is natural cut in the spectrum of similarities and differences which spans the difference between you and a dog, or you and one of Asimov's robots—a cut which marks the end of the rational beings and the beginning of the nonrational ones, the end of moral obligation and the beginning of benevolence'.

[28] See generally Barrington Moore, *Moral Purity and Persecution in History* (Princeton, Princeton University Press, 2000) and discussion in Carter, 'Law and Politics as Play' (n 24) 1356–58.

not only Picard/Data against Maddox but also Picard and Luvois, who bait each other and spat, based on past mutual affronts, throughout the episode, create an interactive setting in which people develop bonds of connectedness and solidarity in such a way that the 'other' becomes 'one of us'.[29] The episode, in other words, describes one contingent set of circumstances in which a group expands its sense of who/what is 'one of us'. The episode thus reminds us of John Dewey's epigraphic quote at the beginning of this chapter, and of the point that Dewey made in many contexts that there is more than an etymological connection between the words 'common', 'community', and 'communication'. Arguably, the extension of recognition of Data's rights occurs *because* the process does not maintain the distinction between reason and feeling in Western philosophy from Plato to Kant but, instead, describes bonding that comes as acts of reasoned argumentation interweave with feelings, in this case feelings generated by Data's confession, while on the witness stand, of affection for his comrades and for a woman, now absent, with whom he was once 'intimate'.[30]

Rorty proposed that reasoned argument can build bonds of solidarity (which Rorty called, borrowing from Wilfred Sellers, 'we intentions') when argument generates 'overlapping consensus', but the episode suggests, both in the poker game and in the trial, that competition itself can generate such bonds. Towards the end of the hearing, Maddox vehemently maintains that he is correct and Data is a machine. Yet once Luvois announces her decision, Maddox the loser cancels the transfer order so that Data need not resign. He says simply, using the gendered pronoun for the first time, 'He's remarkable'.[31] 'The Measure of a Man' thus confirms the anti-essentialist model of justice in which justice equates with expanding loyalties and pragmatic rationality.[32] The episode does describe a fascinating and hyper-fictionalised instance of courtroom law at work, but this is not where the episode touches on the profound. Rather, it is the episode's substituting for a familiar, classical, but increasingly untenable understanding of justice, a newer postmodern sense of how justice happens—this is where the television episode arguably rises to an authentically profound level.

[29] George Orwell's *1984* describes a system of social control that succeeds because it prevents the formation of groups at all levels in which such bonding and solidarity can develop. See Rorty, *Contingency, Irony, and Solidarity* (n 25) 169–88.

[30] Skeptics may doubt the frequency with which interpersonal bonding between and among strangers comes about through the process of arguing differences through a combination of reasons and feelings. However, a remarkable 'law on the small screen' episode of *Frontline* captures this dynamic in a film of an actual jury deliberation. The 12 jurors' initial divisions and disagreements was transformed, by discussion, into uncoerced 'overlapping consensus'. As the anti-essentialist model would predict, when the final holdout for conviction said he would change his vote so as to avoid a mistrial but said, keeping back some tears, 'I will never feel good about it', the remaining jurors, sensing his obvious pain, insisted on continuing to talk about it until the holdout found a way to change his vote and stay true to his feelings and his conscience. 'Inside the Jury Room' (New York and other Cities: *Frontline*, Public Broadcasting System, FRON-410T (1992).

[31] In spite of the history of antagonisms between Picard and Luvois, never fully explicated in this episode, their relationship survives and appears to strengthen as their disagreements during the episode progress. When they first meet, in the episode's second scene, they joke about their past love-hate relationship. She says 'It brings a sense of order and stability to my universe to know that you're still a pompous ass. And a damn sexy man.' After the hearing ends, they arrange a dinner date.

[32] See Rorty, 'Justice as Larger Loyalty' in Stepanaints Bontekoe (ed), *Justice and Democracy: Cross-Cultural Perspectives* (Oahu, University of Hawaii Press, 1997) 9–22.

The argument in this section may well defeat itself, for it implies that academic writing by its very nature cannot recreate the experience of viewing the episode's artfulness. Acknowledging that limitation, however, we provide two further snapshots of how the episode embodies the postmodern and contingent model of justice as solidarity and larger loyalty.

First, in section III A above, we noted the thinness of Acting Judge Luvois's decision. She eschews 'philosophy and metaphysics'. She makes no essentialist attempt to determine whether Data has a soul, nor does she respond to Picard's argument against recreating slavery, or evaluate whether the criteria for sentience provides a 'correct' definition of sentience, or determine what is or is not truly a machine. The episode does, however, repeatedly dramatise the dynamics of solidarity. The agonistic poker game at the beginning of the episode only confirms that Data the android is, in the community of his shipmates, already 'one of us'. Riker at first refuses to represent Maddox's side in the hearing because 'I consider [Data] my friend'. Perhaps most telling—and her expression communicates it on screen in ways which her words do not—Acting Judge Luvois prefaces her judgment, quoted above, with 'It sits there looking at me, and I don't know what it is'. But of course she does know that 'it' deserves her protection because they have already 'personally' engaged.

Second, Maddox attempts to persuade Data that the probabilities of successfully reassembling Data are very high. Data, accepting at least for the sake of argument that his physical reassembly will succeed, responds by rejecting, as the episode itself does, the classical dichotomy between reason and feeling. Data analogises to the surprising lesson he learned in the poker game at the beginning of the episode, namely that mechanical logic—the basis on which Maddox is confident that he can reassemble Data—does not fully capture reality or experience:

> Maddox: ...Your memories and knowledge will remain intact.
>
> Data: Reduced to the mere facts of the events, the substance, the flavor of the moment, could be lost. Take games of chance.
>
> Maddox: Games of chance?
>
> Data: Yes, I had read and absorbed every treatise and textbook on the subject, and felt myself ready and prepared for the experience. Yet, when I finally played poker, I discovered that the reality bore little resemblance to the rules.
>
> Maddox: And the point being?
>
> Data: That while I believe it is possible to download the information contained in the positronic brain, I do not think you have acquired the expertise necessary to preserve the essence of those experiences. There is an ineffable quality to memory which I do not believe can survive your procedure.

Data, the supremely rational entity, thus argues that the very process of thinking rationally will require developing corresponding flavours and feelings—emotions—in order to fully understand and analyse reality; it is these very flavours and feelings that either expand or contract the spheres of solidarity, loyalty, and justice.

The episode confirms the anti-essentialist sense of how justice does and does not operate in human affairs, but it also raises and suggests answers to a range of

empirical questions. To take one example—what are the specific psychodynamic processes that generate an expanded definition of 'who is one of us', and hence justice? The episode's answer centres on visualisation. We and the characters see Data's physical similarity to humans. The fact that his same skills and talents might just as well be built into 'a box on wheels' is irrelevant. We and they see his pain in losing his relationship with a former lover. We and they see his fondness for his crewmates expressed through the medals and gifts that he packs to take with him believing that, whether or not he wins or loses in the hearing, he will have to leave his friends.

This facet of the drama finds support in many research quarters, including Frans de Waal's extensive work with primates. De Waal suggests that facial expressions are critical to the development of empathy, as they are to other emotions:

> With impoverished facial expression comes impoverished empathic understanding, and a bland interaction devoid of the bodily echoing that humans constantly engage in. As French philosopher Maurice Merleau-Ponty put it, 'I live in the facial expression of the other, as I feel him living in mine'.[33]

De Waal proceeds to describe the pioneering work of the Russian primatologist Nadia Kohts with the chimpanzee Yoni, who read and responded to Kohts' facial expressions with 'extreme concern and compassion'.[34]

The persistent referencing to the theme of 'empathy' provides an interesting pathway to reflections on a more contemporary legal drama—the confirmation hearing of Supreme Court Justice Sonia Sotomayor. The most controversial part of her record was Sotomayor's claim that 'a wise Latina woman, with the richness of her experiences, would more often than not reach a better conclusion than a white male who hasn't lived that life'. This claim set off a surprising and animated public debate about the role of experience and appropriateness of 'empathy' in legal decision making. Was the nominee violating legal conventions or, as we have suggested, expressing the logic of practice in clear ways that violated only formalised decorum, the rituals and myths that sustain the processes to which she eventually deferred?[35] Is it surprising that Judge Luvois's impersonal, even cold, adjudicatory style resists both connecting Data's situation to the experiential history of denying rights to women and displaying the virtues of empathy toward marginalised others? The episode provides a rich source of parallels about the rituals of legal practice and dynamics of legal contestation and judicial performance.

[33] Frans de Waal, *The Age of Empathy* (New York, Harmony Books, 2009) 83.

[34] Ibid 84–88. Recent but controversial research into the function of 'mirror neurons' in the development of empathy in both animals and humans is of course consistent with the visualisation hypothesis. In this particular case it might be argued that Judge Luvois rules for Data by mirroring his unbroken display—which is of course in his character's 'nature'—of trust and civility throughout the proceedings.

[35] See Rachel Sanders, 'Justice at Trial: Dramatic Ironies of the Postracial State' *Journal of Law, Culture, and Humanities*, published online first on May 25, 2011, http://lch.sagepub.com/content/early/recent. Print version forthcoming 2012.

IV. From Legal Philosophy to Social History and Back: Guinan's Slavery Analogy

Justice Sotomayor's controversial claim and disavowal about being 'a wise Latina' capable of empathy connects with yet another powerful and potentially subversive element of 'The Measure of a Man'—that of law's historical complicity in racial subordination. We have noted that the philosophical debate over the essential elements of human-ness that qualify for rights, and over sentience in particular, is the central focus of most of the episode, both leading up to and especially during the trial. The turning point in the drama, however, comes in a very short scene in Act Five, during a recess in the trial, when Guinan offers an entirely new angle to the frustrated and seemingly resigned Picard. 'I've lost, and I'm not even sure I mind', confesses Picard. 'Data is a machine. But there is something bothering me. Something I'm missing.' In the dimly lit Ten Forward lounge, Guinan, performed by African American actress Whoopi Goldberg, dramatically shifts the discussion from questions of personal history between Picard and Maddox to the social history of racial domination. 'Unfortunately the past always resonates in the present, and decisions made today reach into the future', the script has her philosophising. If Riker wins the case and Maddox is permitted to disassemble Data, she surmises, thousands of droids will be constructed to do the bidding of their owners.

> Guinan: Consider that in the history of many worlds there always have been disposable creatures. They do the dirty work. They do the work that no one else wants to do, because it's too difficult or too hazardous. And an army of Datas, all disposable? You don't have to think about their welfare; you don't have to think about how they feel. Whole generations of disposable people.
>
> Picard: You're talking about slavery…
>
> Guinan: I think that's a little harsh.
>
> Picard: I don't think that's a little harsh. I think that's the truth. But that's a truth that we have obscured behind a … comfortable, easy euphemism. 'Property.' But that's not the issue at all, is it?

Picard uses this new legal and ethical angle to win the case in the final minutes of the show. The synthesis of his earlier frame about Data's sentience, now as a 'self conscious' creature, with the new politically charged argument about slavery, is awkward but effective. Picard defiantly puts forward the following argument:

> A single Data is a curiosity, a wonder, but a thousand Datas, doesn't that become a new race? And aren't we going to be judged as a species about how we treat these creations? If they're expendable, disposable, aren't we? What is Data?

Nothing in the episode suggests that this argument convinces Luvois, but it clearly transforms the substantive trajectory and intensifies the drama of the episode. The invocation of a consensus about the evils of slavery works, specifically, in reconstructing a sense about the relevant community of who 'we' are and our fundamental constitutional values.

It is tempting and productive to connect this episode to an obvious historical parallel (which the episode's script writer credits)[36]—Martin Luther King's essay 'What is Man?' in his little read tome, *The Measure of a Man*.[37] King's meditation likewise proceeds through a litany of reflections on the essential qualities that define humanity, before concluding with a more political point about democratic governance and the lessons of history. King quickly shifts from recognition that we are all equal as sinners before God to the Founding Declaration of Independence's stipulation that 'all men are created equal and endowed with their inalienable rights'. King then charges America with trampling over 'sixteen million of [its] brothers'. King continues: 'You have deprived them of the basic good of life. You have treated them as if they were things rather than persons.' He ends with a prayer that America returns to its first principles. The *Star Trek* episode diverges dramatically, however, in that its indulgence in metaphysics bypasses serious engagement with Christianity or God at all, which is at the heart of King's solemn meditation. However its conclusion is close to King's: 'This case has dealt with metaphysics, with questions best left to saints and philosophers. I am neither competent, nor qualified, to answer those', confesses Luvois as she renders her judgment in defiance of abstract argument.

We find the most interesting and provocative point of theoretical engagement not King, however, but the important critical race theorist Patricia Williams. Her very powerful essay collection, *The Alchemy of Race and Rights*,[38] offers a profound set of narrative accounts that ponder the legacy of rights in the US from the era of slavery until the present post-civil rights period. We invite readers of this chapter to view the Star Trek episode and read Williams, especially her essay 'The Pain of Word Bondage' (chapter eight). Williams' narrative accounts are complex, subtle, provocative, and not easily reduced to simple points, but one enduring theme is the tension between the American proprietarian tradition of rights grounded in domination of things and people treated as things, on the one hand, and a more inclusive, egalitarian, transformative if submerged rights tradition, on the other. Like King, Williams offers a deeply tragic but hopeful reflection that can add gravity to the brief intervention of Guinan on the TV show. As Williams defines it, rights are at once elusive, ephemeral, and potentially transformative when joined to political struggle. The key is not to just mimic existing rights traditions but to transform and recreate their very meaning with every struggle, small or large:

> The task ... is not to discard rights but to see through or past them so that they reflect a larger definition of privacy or property: so that privacy is turned from exclusion based on self-regard into regard for another's fragile, mysterious autonomy; and so that property regains its ancient connotation of being a reflection of the universal self.[39]

In many ways, this is exactly the transformation in the debate over rights that develops in 'The Measure of a Man'.

[36] See n 1.
[37] See King, 'What is Man?' in *The Measure of a Man* (n 1).
[38] Patricia J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, Harvard University Press, 1991).
[39] Ibid 164.

Williams' book is filled with painful, tragic incidents that connect an enduring legacy of racial subordination from the past to the present and the future. It is often dark and disturbing, but it is also at various points wistful and optimistic. Williams' plea is to 'expand private property rights into a conception of civil rights, the right to expect civility from others'. In our reading, Williams beckons us to accord respect, the respect that rights confer, on all persons and things on which our lives are interdependent. We must 'give' rights away, she implores:

> Unlock them from reification by giving them to slaves. Give them to trees. Give them to cows. Give them to history. Give them to rivers and rocks. Give to all of society's objects and untouchables the rights of privacy, integrity, and self-assertion; give them distance and respect.[40]

And thus give rights to Data, and to all other androids, the television episode seems to add in hearty agreement. But would Williams agree? We expect so. In any case, the television drama is a powerful invitation to reflect on the continuing relevance of the historical role of legal rights in both supporting and challenging the social hierarchy that Williams interrogates.[41]

V. Some Implications

Some applications to contemporary events in the early twenty-first century may follow from and further confirm this episode's jurisprudential framework. Why, after the most destructive earthquakes ever recorded in the Western hemisphere, did the massive amounts of contributions from utter strangers, people of different races and nationalities and languages, pour in to aid agencies to relieve the pain and suffering of Haitians in Port au Prince? Why did President GW Bush's apparent indifference to the televised suffering in New Orleans after Hurricane Katrina so damage his political status? It is plausible that the small screen medium of television, just as it did after the Indonesian tsunami and the earthquake in the remote hills of northern Pakistan, made viewers see the victims as 'one of us' because, just as Data resembles a human and not 'a box on wheels', their faces and their pain and suffering seem more like our own?

On 5 November 2008, Thomas Friedman was moved to write in *The New York Times* that the previous evening, with the election of Barack Obama, 'the Civil War ended'. Here, too, television presumably expanded the sense that Obama, in spite of his mixed-race background and his suspiciously Islamic middle name and his transnational upbringing—all of which are familiar sources of xenophobic rejection—was instead 'one of us' because he looked and talked and expressed feelings as we do. Viewers of early 2010's blockbuster movie *Avatar* (a movie whose success is built on state-of-the-art three dimensional visual effects) frequently reported that they

[40] Ibid 165.
[41] For another more recent, profound, and even darker meditation on the linkages between the legacy of slavery and law's continuing rituals of making and unmaking of persons as in/eligible for full rights status, see Colin Dayan, *The Law is A White Dog* (Princeton, Princeton University Press, 2011).

abandoned their loyalty to the human characters in the film and instead developed their primary loyalties to the Pandorans, a race that the film's human characters try to exploit.[42]

Television may, by allowing us to visualise 'them' as 'us', reduce opposition to the extension of rights to gays and lesbians. It is not so clear that the US Supreme Court's extension of First Amendment free speech rights to corporations in *Citizens United v Federal Election Commission* has such a strong psychological basis. As Justice Stevens wrote in dissent: 'Corporations have no consciences, no beliefs, no feelings, no thoughts, no desires ... they are not themselves members of "We the People" by whom and for whom our constitution was established.'[43] And of course the very dynamic noted in the episode may equally well explain political phenomena that many find dysfunctional. The ability of interpersonal interaction to generate bonds of trust may explain the extraordinary effectiveness of face-to-face lobbying in the hammering out of legislative details, details that seem so frequently to include 'pork' for small interests rather than serve the collective good. The bonds of solidarity built among those united in opposition to the expansion of gay and lesbian rights and other forms of expanding the definition of who is 'one of us' may, because of these same psychodynamics, be very strong.

Viewers of 'The Measure of a Man' can find a powerful resource for reflecting on all these issues. And if this is so, it confronts academic writers with a disturbing corollary—academic analyses of social justice (including that of the authors of this chapter) may never significantly steer people in the direction of larger solidarities, loyalties, and therefore justice. This is due to the abstract character of academic writing and because all such writing lacks the visual and tactile elements that connect reason and feeling. The more visual and public media of theatre, film and television, for all their capacity to reinforce xenophobia, hatred, and cultural shallowness, can also contribute to the work of promoting social justice. The text is rich, indeterminate, provocative, and redolent with images and words that speak to the fragile relationship between law, justice, and humanity.

[42] The very fact that the extension of rights to non-humans depends in part on situational and contingent variables means that under different contingencies those rights will be contracted or withdrawn. Thus Rorty wrote, in 'Justice as Larger Loyalty' (n 32) 9–10, that 'Most of us today are at least half-convinced that the vegetarians have a point, and that animals do have some sort of rights.' But a sense of loyalty to an animal species will contract to the degree that preventing cruelty to animals in turn threatens our narrower and more primary loyalties. Suppose that the cows, or the kangaroos, turn out to be carriers of a newly mutated virus, which, though harmless to them, is invariably fatal to humans. I suspect that we would then shrug off accusations of 'speciesism' and participate in the necessary massacre. Rorty, 'Justice as Larger Loyalty' (n 32) 9–10.

[43] *Citizens United v Federal Election Commission* 130 S Ct 876, 972 (2010) (Stevens, J, dissenting).

2

Television, Pleasure and the Empire of Force: Interrogating Law and Affect in *Deadwood**

REBECCA JOHNSON

> ... derided as simple, dismissed as inferior to film, famously characterized as a vast wasteland, television nonetheless exerts an undeniable, apparently inescapable power in our culture.[1]

I love television. I really do. I rarely say that so boldly. I have spent many years teaching a seminar in legal theory using film as the primary text, and when asked, I will truthfully respond that, 'I love film'. Yet if pressed, my confession would be that my deep affections are not tied to the big screen, but to the small one. Many of the powerful affect-laden memories of my childhood circulate around television. The sounds and music of television are deeply imprinted in my psyche. In less than four notes, I can be pulled back in time and space, and situate myself in front of an episode of *Sesame Street*, *Bugs Bunny/Roadrunner*, *Gilligan's Island*, *Bonanza*, or *The Twilight Zone*. It is not just a question of the particular programmes watched (or the ones forbidden, the ones which became objects of desire), but also of the times and places where I watched—at home or a friend's house. Friendships were built around TV programmes shared, and I continue to feel a deep affection not only for the friends with whom I watched, but also with the TV characters we came to know so intimately. Because TV was both a matter of weekly programming, and of Friday night movies,

* I am deeply grateful to Jessica Silbey and Peter Robson for first encouraging and then enabling me to return to *Deadwood*, which I had first talked about in R Johnson, 'Living *Deadwood*: Imagination, Affect, and the Persistence of the Past' (2009) *Suffolk University Law Review* 62(4): 809–22. I have benefited from their insights and suggestions. I have also been the beneficiary of supportive provocations from colleagues and fellow TV addicts at the University of Victoria and elsewhere, and particularly John Borrows, Ruth Buchanan, Gillian Calder, Stacy Chappel, Arta Johnson, Orit Kamir, Freya Kodar, Maxine Matilpi, Jim Tully, and Jeremy Webber. Many thanks.

[1] Kristin Thompson, *Storytelling in Film and Television* (Boston, Harvard University Press, 2003) back cover.