

Power, Resistance, Knowledge
the epistemology of policing

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Midwinter
&
Oliphant

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Chapter 1 The problem of evidence

On 15 April 1991, a four year old child was rushed to Tameside Hospital, Greater Manchester. She had choked on her own vomit, and she was dying. Her name was Amanda Allman, known as Mandy, and she had been born with cerebral palsy and spastic diplegia. She had recently learned to talk, and was just learning to walk with the aid of splints, but her late development was due to her disability, not to any lack of intelligence or willpower. On the contrary, she was a bright and determined child, and was not deterred by the frequent falls, and resulting bruises, occasioned by her attempts to walk unaided. As the ambulance took her to hospital, paramedics attempted to resuscitate her, but by the time they reached the hospital, it was too late.

With her were her mother, Leslie Bridgewood and her stepfather, Kevin Callan. Callan was a long-distance truck driver by profession, who had recently been made redundant. He was at home that day, looking after Mandy and her younger sister, since their mother had a hospital appointment. On arrival at the hospital with the dying child, nursing staff asked him what had happened during the day. Mandy had seemed unwell, he told them. She was suffering from one of the headaches she had frequently complained of during the previous months, and he had put her to bed. Leslie returned home, and since Mandy was quiet, went out to fetch fish and chips for their tea. While she was out, Callan found Mandy vomiting and choking, and tried to revive her with mouth-to-mouth artificial respiration.

Once the parents had left, the consultant paediatrician, Dr Jeffrey Freeman, examined Mandy's body. Freeman was also an experienced pathologist. He noted signs of many bruises of varying ages. 'Could they be inflicted?' he wondered. He examined her eyes, and found they bore signs of retinal haemorrhage on both sides. To him this implied bleeding occurring as a result of rupture of blood vessels under the tough fibrous cover of the brain – subdural haematoma – and this could occur as a result of a direct blow, which could be accompanied by a skull fracture, or be due to vigorous shaking. When he typed up his report, he concluded:

... Amanda's body bore a large number of injuries of different ages which were consistent with serious physical abuse on several different occasions during the previous week. The assaults involved, in my opinion, shaking and punching.

Asked by hospital staff what had happened to Mandy before she fell ill, Callan mentioned two falls Mandy had suffered, one down some steps and the other off the children's garden slide. Dr Freeman reported:

[Amanda's] injuries were totally inconsistent with the explanation which I was offered i.e. that Amanda had fallen from a child's slide, (at a height of 4 steps only) onto a grassy surface.

Chapter 2 Revelatory knowledge

When Kevin Callan was asked what had happened to Mandy during the day before she fell ill and died, he mentioned she had fallen from a slide in their garden. Dr Freeman interpreted this offer of information as an explanation, but an explanation which could not account for Mandy's death, and therefore an attempt to mislead, showing that Callan was concealing the truth about what must have happened and what he had done, and also about what sort of a person he must have been. Mandy's body also concealed the explanation of why she had died. Medical staff and Callan himself could see that she had choked on her own vomit, but they did not know why she had vomited. Her outward appearance obstructed an understanding of why she died: she resisted, passively, the discovery of a reason for her death. Dr Freeman however observed signs in her eyes, which indicated to him that she had suffered trauma to her brain. To prove that Dr Freeman's interpretation of the signs he observed was correct, it was necessary to look beneath this surface resistance by cutting open and examining the interior of the head. Soon after Mandy's death, Freeman reported to the police his conclusion that Mandy had been shaken to death, and so those investigating the incident assumed that Callan must be lying, and doing so because he had murdered Mandy.

There is a standard method by which such hidden pieces of knowledge are produced, that is, brought to light. Every item of evidence in prosecution cases is produced according to this method: a thing is found (a witness, a suspect, a volunteered statement, an inanimate object) which can be precisely and accurately represented, but the meaning it brings with it, from its original context – its overt meaning, however obviously displayed, or clearly and positively expressed and intended – is never accepted as its true meaning. Openly offered meaning is normally regarded by investigators as being actively misleading – resistant to the production of the knowledge they seek – and so they close off meanings that are offered to them...

Chapter 3 Rights and the facilitation of resistance

States are not moral agents; they are vehicles of power...(Chomsky 2003: 163).

Readers of this text may draw certain conclusions from the notions that the apparent meanings offered by the surface of things or of discourse are routinely rejected by investigators; that all possibility of reinvestigation is removed by the process of the original investigation itself; that all items of evidence in criminal cases have their meanings transformed, or have other meanings given them, or are invented by investigators; that the resistance of suspects, witnesses and objects to these semantic transformations, substitutions and inventions is used to add meaning to the evidence to be used against them. Readers may conclude that the power of the police is overwhelming and the power of suspects and witnesses is reduced to nothing; they may view with scepticism conventional claims that the power of agents of the state is in some (however inadequate) way *balanced* by the provision of rights and protections, rules, the self-restraint of police investigators, and supervision which might steer inquiries in the direction of seeking objective truth, as well as checking that regulations and law are observed: these provisions all may seem ineffective, because the discourse of cases complete with all the meaning it will ever be permitted to bear is already formed in initial investigation at a low level in the police hierarchy, in conditions of low visibility, and even before suspects can realise what is being done to them. All the balancing mechanisms provided by the state in order to give suspects power to offset that of the state would appear to be worthless, no more than ideological constructions, together creating a pretence that the criminal investigatory and legal processes are (or aim to be) fair and applied equally to all citizens, and further the interests of all, in other words, that they act as legitimating devices for the state, fooling suspects and other citizens into believing that they need not fear that the operation of the criminal justice system presents any threat to them if they have not broken laws and committed crimes.

If these were the kinds of conclusions to be drawn from the concept of knowledge formation in criminal cases as revelatory, then close analysis of cases might be expected to show that either suspects are routinely denied their rights, or are offered rights in substance while in practice these rights are subverted and prevented from having any practical effect; that the system of protections for suspects is operated formalistically, to cover police officers in case they are accused of malpractice, or as a mask for other activity – the secretive construction of knowledge which is later to be revealed as truth; that what happens in criminal investigations is case construction – something other than searches for truth guided by rules and respect for rights of suspects, which are used to form a smokescreen to obscure secretive activity of evidence manufacture (thus case outcomes are

Chapter 4 The elimination of error

Suspects' and defendants' rights both assist the production of knowledge and serve to purge this knowledge of error (as if they were designed to answer Popper's question, 'How can we hope to detect and eliminate error?' (Popper 2002: 33)). Investigators of crime do not simply accept knowledge that they find, or that they reveal, but operate a system which removes all taint of error from that knowledge. But miscarriages of justice such as that from which Callan suffered are usually regarded as errors. They are explained through a process of identifying specific causes of error in individual cases, typifying them and then listing the types: eyewitness identification errors, mistakes by experts, lies by informers or grasses, corruption of officials, false confessions, and so forth (Brandon and Davies 1973; Scheck, Dwyer and Neufeld 2003: 318; Leo 2005; Naughton 2007: 60). These types are then assigned to more general or structural explanations according to one or other of the conventional and dominant theories.¹

According to the conventional theory, the criminal process adjusts its own rules and methods in response to external demands and impositions. In response to problems thrown up by the case material it processes, it modifies the methods by which it excludes irrelevant and misleading information and refines evidence into truth. In response to external pressures which are aimed at distorting its work of identifying truth and isolating it from the prejudicial information which would cause truth to be misinterpreted, it reinforces the mechanisms by which it excludes external influence or prevents it taking effect. The system is conventionally self-referential, self-perfecting, autopoietic², and idealist.

In this view, the problems of the criminal justice system arise from the intrusions of the shifting, chaotic world outside the system which distort truth and so induce error. In contrast to the outside world, the institutions of law are also institutions of order, with highly-developed systems for defining truth and excluding error, so the errors detected in cases are not instances of widespread faults, but occasional mistakes of strictly localised contextual significance. But they are also instances or signs of external and threatening chaos on which the criminal justice system imposes a fragile ...

¹ Michael Naughton has reached a similar conclusion (Naughton 2007, chapter 3). He refers to my earlier analysis of this topic, which I have subsequently simplified.

² Autopoiesis: 'a system of self-referential communications' (David Schiff and Richard Nobles 'Miscarriages of Justice – a Systems Approach' in *Modern Law Review* 58 no.3: 300

Chapter 5 The application of revelatory knowledge

Revelatory knowledge has evolved and ousted all competitors within criminal cases because of the effects that can be achieved through its use. The product of the application of the revelatory method is discourse. The text of which it is composed includes written records of core evidence (the words of confessions, of witnesses who identify suspects, etc.), things (called ‘real evidence’: weapons, clothing, fingerprint impressions, bloodstains, etc.), people who are fixed in the text of cases in which they feature as witnesses or defendants by the statements they are required to repeat, as well as the mass of authenticating documents which accompany them (the core evidential items are what are under consideration here, rather than their accompanying authentication, which is of equal importance and which will be considered in a separate work). As text they are made up of signs, or syntagmatic chains.

The superficial, reduced trace left by the selection and initial purgative closure of revelatory knowledge production is a kind of sign, but an incomplete one: it is only a signifier, separated from any signified it might have had, a floating signifier. All signs are, since Saussure (1983), conventionally divided into the signifier, which is the sound, or the mark on a page or screen, or on occasion the thing represented (see below), and the signified, which is the concept produced by the signifier. Saussure regarded signifier and signified as indissolubly joined, like two sides of a piece of paper, but others, including Barthes, have come to see the two as separable. The signifier is not a sign in itself, but is a material object which is not necessarily related to any particular signified or referent. ‘The signified is not “a thing” but a mental representation of the “thing”’ (Barthes 1967: 42). Signification is the joining together of signifier and signified, and its product is the sign. The sign is the relationship of the two, which is a relationship of equivalence between objects from two different categories: physical objects such as sound or mark, and mental concepts (*ibid.*: 48; Barthes 2000 [1957]: 112-3). The referent is the absent thing for which the sign stands, which may be something real or unreal, true or false, material thing or idea. But a sign does not *refer* to an object: ‘*People* use words to refer to things in complex ways ... but the *words* do not refer...’ (Chomsky 1996: 22).¹

The signifiers under consideration here, such as Amanda’s eyes, Tomlinson’s and Bea’s answers, Metcalf’s alleged attempt at flight, and so forth – are complex, signifying chains rather than isolated words or symbols. Their signification, that is their joining to a signified, the mental concept they produce, is frequently contested, and the contestants are not

¹ This explanation is necessarily an oversimplification of a highly complex subject (see Lyons 1968: 404).

Chapter 6 Structure of revelatory knowledge

Revelatory knowledge is brought to light by policing, but it comes from outside policing, it precedes investigation, it is from beyond the boundary of already existing police knowledge; it is separate from power, revealed by the exercise of power but not created by it; it is knowledge of things which are clearly visible, made known through denotative signs and discourse; and it is no longer confused and obscured by the noise of authenticity¹ which surrounded it in the circumstances or context in which its first trace was originally found. These qualities can only exist in knowledge which has a certain structure.

The structure could be represented diagrammatically: a plane or veil of superficial knowledge torn away or penetrated to show the truer truth unmasked behind it. 'The immediate being of things is here [i.e. in *The Encyclopedia Logia*] represented as a sort of rind or curtain behind which the essence is concealed' (Hegel 1991 [1830]). It is a common enough image (adopted, for example, by Popper (2000: 7)), but the frequency with which this image occurs should not be taken to imply that knowledge necessarily has such a structure, or that we must construct true knowledge according to this image. The structure of revelatory knowledge does not occur spontaneously, as if truth in criminal cases always already had such a structure when investigators came across it. Revelatory knowledge is *structured*, by the process of investigation itself.

This claim of revelatory knowledge to be the only true knowledge of criminal evidence is invariably successful within and beyond the criminal justice system, because it is the product of the only valid way of knowing, according to the criteria for assessing the validity of knowledge used within the system. The claim is constructed within revelatory knowledge itself, as it defeats competitors by transforming them into adjuncts of itself. If the truth is to be known as a consequence of police investigations, this can only happen if knowledge of the truth has the structure I describe. Thus revelatory knowledge presents itself as not only true knowledge but as necessarily structured, as if its structure preceded itself and the investigations which construct it: as if police investigations necessarily conform to what is required by the essential structure of true knowledge. There exists, then, a narrative, reproduced each time an item of knowledge is constructed, in which structure comes first, followed by investigation, which, as long as it conforms to the structure, can produce truth. The narrative of course has more detailed elements, including the finding of a surface trace, the testing which finds resistance, the overcoming of resistance and the interpretation of what is revealed. Such stories both order information and persuade, and it is impossible to resist this particular

¹ See p. 149 below

Chapter 7 Authenticity: the visible surface of revelatory knowledge

On Day Eight, Thursday 22 January, there was a chilling period during the testimony of Scene Investigator Victor Booth when [prosecuting counsel] Anthony Glass asked him to produce the clothes of Mrs Florence Jackson. One by one the artefacts were drawn out of their brown paper bags. The right slipper was handed to the jurors who passed it round, visibly recoiling as they balanced it gingerly on top of its brown envelope.... Next Booth showed the jury the paper tissue retrieved from the deceased's hand, in a transparent plastic wallet. Then came the buff coloured coat, crumpled and with a jagged tear; then the shrunken cardigan, sky-blue and incongruously childlike; and finally and most pathetically, an oyster pink girdle with tan coloured stockings still attached to the front suspenders. A hush fell as Anthony Glass paused for the exhibits to take their full effect. However Florence Jackson met her death, she was present there for a moment in that silent courtroom. (Devlin 1998: 335)

The late Florence Jackson's clothing was evidence in a prosecution case, yet it is not mentioned in any summary of the evidence against the defendant, Sheila Bowler, because it is not core evidence: it proves nothing. Nor could it be directly claimed that it supported any item of core evidence. For the jury who had to decide whether Sheila Bowler pushed Florence Jackson into the water in which she drowned, what Mrs Jackson was wearing at the time was irrelevant.¹ Every case includes such evidence which is neither core evidence, produced according to the revelatory method, nor authentication, which attests to the truth of core evidence. It is evidence which simply displays *authenticity*. *Authenticity* is a term normally used in two very different ways. It is defined in dictionaries as the quality of genuineness, the quality of a painting that is not a copy or a forgery, or the quality of expressions which come from a person's essential character. But it is also commonly used to refer to the quality given to an object by its messy and unpredictable surface appearance, and it is this latter use that I adopt here. The authenticity of a crime scene is nothing to do with its origins or inner characteristics, but with its confused and confusing appearance. It is the latter which is preserved and photographed, its immediate (unmediated) appearance, as Hegel (1991 [1830]: 200) puts it. This kind of authenticity is not the product of authentication, which is the collection of records which support the core of evidence (the knowledge...

¹ Sheila Bowler was found not guilty of the murder of Florence Jackson at a retrial in 1998 following a second appeal at which her original conviction was overturned (Devlin and Devlin 1998).

Chapter 8 Context and source of the revelatory method

The analysis of authenticity shows that revelatory knowledge is more complex than chapter 6 may have suggested, and the complexity of revelatory knowledge is extended by all the other authenticating records that are attached to each item of revealed core evidence. Another book will be necessary if I am to explain how such authentication enables the construction of cases from revealed evidence. Revelatory knowledge is however useful to the police from the moment it is produced, not just when a case is put together, and the revelatory method of producing knowledge is an important policing tool. Yet nowhere can be found instruction manuals for this tool, and classes on how to reveal true knowledge do not feature in police training courses. Where does this sophisticated, highly refined tool, essential for modern policing, come from? How do police officers know about it when they have never been shown it (other than by example) or taught about it?

The reasons (given at the end of chapter 2) why revelatory knowledge has been adopted by the criminal justice system suggest how the revelatory method of producing evidence may have been developed. Rather than through the abrupt installation of a predesigned method and a desired product, the revelatory method and its product have been developed together piecemeal, according to both demands from courts and legislators and lessons learned from the successes and failures of trials and errors, and passed on from more experienced officers to their juniors in the course of practical work, as craft skills. When research was conducted into police training before 1993 (when the last royal commission into the criminal justice system reported), the results reflected the importance of these two sources of the knowledge production method. More than 50% of officers' training was concerned with law and producing evidence (Morgan 1990: 39, Maguire and Norris 1993: 22, RCCJ 1993), and formal training was supplemented by on-the-job (or 'craft') training (Baldwin and Moloney 1993: 70), and in particular training in the skill of taking statements from witnesses (Maguire and Norris 1993: 50) and interrogation techniques which produce admissions (McConville et al. 1991: 74). 'Most British police officers typically receive no interview training whatsoever,' Moston *et al.* wrote in 1992, 'Interviewing has traditionally been viewed as a skill that can only be learned through experience' (Moston *et al.* 1992: 38). Officers who were interviewed 'constantly referred to the importance of their "practical experience" which they contrasted, often perjoratively, with what they termed "theoretical" training' (Baldwin and Moloney 1993: 70; see also Maguire and Norris 1993: 22). Ericson (1994b: 133) argues that craft knowledge may be improvised, but this does not mean that it lacks 'systemic qualities: it is the system of the occupational culture and the

Chapter 9 Uses and limitations of the revelatory method and developments in knowledge production

The revelatory method, its epistemology, its product, and its compact and familiar structure: this is the basic tool of modern policing. Like any tool, it requires a source of power (the institutional resources of the criminal justice system), but its operatives just have to plug it in. It is a distinct object, not an extension of something else. At its moment of application, it is not restricted by laws or rules, which it is incapable of recognising. Those who have access to this tool and use it in their work can have a variety of purposes for which they apply it. They can use it to confirm and authenticate that which everyone believes to be true, or they can use it to produce knowledge whose truth is strongly contested. What it produces is simply official knowledge. In policing, this knowledge is used for three purposes, and any single item of knowledge can be used for any or all of them. It can be combined with other revealed and authenticated knowledge to build cases; it can be added to an archive (in the Foucauldian sense) as an example, guide and precedent for future revelatory development; and it can be used to extend policing itself.

Items of evidence in criminal cases are produced always as if destined for a place in a constructed case, whether or not they are actually likely to end up as part of such a case. They can be viewed as discourse which is ... an asset – finite, limited, desirable useful – that has its own rules of appearance, but also its own conditions of appropriation and operation; an asset that consequently from the moment of its existence (and not only in its ‘practical applications’), poses the question of power; an asset that is, by nature, the object of a struggle, a political struggle (Foucault 1972: 120).

Such assets are produced for specific purposes, some discursive (the construction of cases), some extra-discursive (as a tool in the exercise of power). Such purposes (not immediate or specific, but general) encourage and limit the development of the discursive formation and also specify ‘*the rules and processes of appropriation of discourse*’ (ibid.: 68, original emphasis).

For those not involved in policing, either as investigators or other experts, or as complainants, witnesses, suspects and defendants, revelatory knowledge appears as evidence assembled in cases. On this role depends any other use of the method in policing and criminal justice. Cases which are successful (in the sense that they result in a conviction) show that the method can lead to the imposition of serious sanctions, and at the same time register the acceptance of applications of the method: once fingerprint identification evidence had been used successfully to prove someone guilty of a crime, then the whole system of comparison methods, training of experts, collecting impressions and creating banks to store such impressions and make comparisons with prints from scenes of crime could be developed (Cole 2001). The same pattern applies to DNA identification

Appendix: case information

The appendix includes extracts of documents referred to in the text, and aims assist readers with understanding cases used as illustrations and examples, when the information about the case appears in more than one place in the text.

The cases are all ones which have been contested and which continue to be contested, that is, the person or persons convicted claim to be innocent. I use these cases to illustrate my arguments because full (although never complete) documentation is available in all of them. Some names have been changed.

Bea

Interview of Bea

- 1] Time and date interview commenced 17.21hrs
Time and date interview finished 18.00hrs
[Her legal adviser was present but said nothing.]
- 2] QI'm DS Tighe. This officer is DC Green. You've been arrested for assault on your child. Let me tell you that you don't have to say anything unless you wish to do so but what you do say may be given in evidence. Do you understand that?
R Yes
...
- 3] Q And is [Kate] your child?
R Yes
Q Who is her father?
R I don't know. I do but I'm not telling.
Q Does the father live with you?
R No
- 4] Q Apart from you and your child, does anyone else live with you?
R No
Q Does the child visit a nursery?
R Yes
...
- 5] Q Your child has been admitted to hospital today. Can you tell me why she has been admitted?
R Because somebody has burnt her.
Q Have you burnt her?
R No
- 6] Q Who do you think has?
R People who looked after her last night.
- 7] Q Did you go out somewhere?
R Yes