Reading judgment and case law is a typical exercise within common law scholarship. Yet, although the interpretation of judgment forms a central mode of legal science in the common law tradition, a theoretical account of the authority that attaches to the aesthetic of judgment within this tradition remains more marginal. This article argues that the authority of judgment can be assessed less productively through an attention to its outcomes, reasons and rationalisations than through the technological problems of jurisdiction and with what one can call its 'procedural forms'. While the jurisdiction of federal courts to issue 'interim control orders' against persons for the purpose of preventing a terrorist act in Australia was affirmed in the High Court case of *Thomas v Mowbray*, one question remaining from this case is how the procedure of 'control' itself might shape the legal authority of adjudication.

**Introduction**

Common law scholarship often takes the interpretation and analysis of, and commentary upon, judgments as a central mode of its science. Judgment provides not just the subject but also the texture of legal knowledge, and knowing how to make use of the genres and categories of judgment is part of the practical terrain of juridical authority. It is relatively surprising, then, that legal scholarship in common law jurisdictions – while treating the text of judgment as a privileged source of law – has been content to leave the procedural accounts of legal judgment and its performance to a relatively non-theoretical discourse. Judgment remains a primary representational form of common law for instance, yet an account of its modes, functions, practices, technologies and ‘instrumentality’ has had a relatively limited place in the field of modern jurisprudence. As a result, legal scholarship finds itself increasingly attuned to reading the moral philosophies of judgment while often passing over its technical or procedural jurisdictions.¹

This article begins with the assumption that an important approach to case law and to the aesthetics of judgment involves an attention to their procedures and procedural forms. To read the text of judgment in terms of

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¹ Melbourne Law School, University of Melbourne.

procedure means acknowledging the practices and ‘games’ according to which judgment becomes capable of being performed or expressed. The authority that attaches to legal judgment, then, is composed of more than its reasons, logics and outcomes. More importantly, there is the instrument or technical envelope that mediates its force and authority in the social terrain. From this perspective, judgment and its reasoning might still constitute only types of reaction, while it is procedure that constitutes the activity, the creativity and the innovation in its form. We may be capable of making a more creative use of law, then, if we acknowledge that legal judgment is not just a representation of certain moral or ethical sentiments, but that it also has an ‘instrumentality’ and it is this instrumentality that speaks to the modes of law’s authorisation.

This article offers an account of one particular contemporary procedural form of judgment: the ‘interim control order’. Interim control orders were introduced into the procedural repertoire of legal governance in Australia by the federal government as instruments designed to regiment, organise and track the day-to-day lives of those whose existence could be said to pose a threat to the public with respect to the possibility of a ‘terrorist act’. The validity of the statutory basis for these orders was contested before the High Court of Australia in the case of Thomas v Mowbray. In reading the judgment in Thomas v Mowbray, the aim of this article is not to provide an exhaustive analysis of the normative constitutional issues raised by that case, but to present a relatively alternative narrative concerning judgment and its textual practices. This analysis aims to highlight a jurisprudential issue that the court finds somewhat difficult to address: what authority does the form of the instrument of ‘control’ carry within the repertoires of judgment, or how might one describe the procedural element to the art of completing and authorising an ‘interim control order’? The work of Gilles Deleuze in particular is enlisted in the latter part of this article to implicate the contours of a society for which ‘control’ as a procedure might describe a broader or deeper structure of jurisdictional relations. This analysis presents a theoretical account of how the procedural form described by the ‘interim control order’ alters the jurisdiction of common law.

Problems of Power, Jurisdiction and Procedural Form in Thomas v Mowbray

Procedural Background to Thomas’s Case

In 2003, the Australian federal parliament enacted amendments to the Criminal Code Act 1995 (Cth) (hereafter Criminal Code) intended to deal

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2 The terms ‘activity’ and ‘reactivity’ are used here in the sense employed by Gilles Deleuze in his study of Nietzsche in Deleuze (2002). For a fuller account of Deleuze’s work in relation to the ‘creativity’ of judgment, see especially Lefebvre (2008).

more effectively with what was perceived to be a growing threat of ‘terrorist’ activity. These laws included a number of specific conventional offences such as directing, being a member of, recruiting for, financing, and receiving training or funds from a listed terrorist organisation. In addition to establishing these offences, however, the amendment gave the Federal Magistrates Court – upon the application of a member of the Australian Federal Police – power to directly issue ‘interim control orders’ on individuals for the purpose of ‘protecting the public from a terrorist act’.

This provision for the issuing of ‘control orders’ – which was specified under Division 104 of the Criminal Code – created a particular form of federal judicial procedure, the aim of which was not the determination of either criminal guilt or civil liability, but rather the temporary determination of a juridified relation of surveillance and control.

As part of the procedural technologies of state power, then, the ‘interim control order’ purported to institute a form of life and to address a form of activity that the more traditional juridical procedures were apparently ill-equipped to deal with. The only stipulated criteria for the issuing of such an order required the federal magistrate to assess whether the obligations, prohibitions and restrictions of the order were ‘reasonably necessary, and reasonably appropriate and adapted’, on a balance of probabilities, for achieving the particular purpose of protecting the public from a terrorist act.

The kinds of restrictions and requirements imagined in the amendment were diverse, and included such things as restrictions on being at specified areas or places or obligations to remain at specified premises at certain times; communicating with certain individuals; accessing particular forms of technology such as the internet; and carrying out specified activities (including those in respect of the person’s occupation). Other possibilities included the requirement of wearing a tracking device, of reporting to specified persons at certain times, and of allowing oneself to be photographed and fingerprinted. As a formal instrument in the jurisdiction
of Australian federal criminal law, an interim control order could contain any combination of these ongoing requirements, irrespective of the existence, or stage in the development of, other formal civil or criminal proceedings.

Joseph 'Jack' Thomas was issued with an 'interim control order' on 27 August 2006. Without having been convicted of any offence, he had already been imprisoned three times in the previous four years: once in Pakistan without charge and twice in Australia awaiting trial on charges of receiving funds from, and providing resources to, a terrorist organisation. Earlier that year, a Supreme Court jury had acquitted him of these more serious charges. The minor convictions for receiving funds from a terrorist organisation and falsifying a passport were quashed on appeal in August 2006 on the basis that the evidence used at trial – evidence elicited from Thomas under interrogation in Pakistan – was inadmissible. New evidence supposedly arising from a *Four Corners* television interview screened a few days later however – and a week before he was issued with the control order – subsequently resulted in the ordering of a retrial. In the meantime, nevertheless, the control order took force alongside this process, instituting a particular day-to-day relationship between Thomas and the Australian Federal Police no longer necessarily subtended by the process of investigation, arrest, prosecution, verdict, and so on, but organised around routine reports and encounters.

The interim control order issued against Thomas included most of the restrictions and duties mentioned in the legislation, the notable exception being the requirement of wearing a tracking device. It is worth noting that the forms of surveillance and regulation represented in Thomas’s order were not necessarily new forms of state control of the individual. Their validity together as a procedure and formal jurisdiction of the Federal Magistrate’s Court under the *Criminal Code* was subject to constitutional review and was contested by Thomas before the High Court of Australia in *Thomas v Mowbray* in 2007.

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19 See *R v Thomas* (No 3) [2006] VSCA 300 (20 December 2006).

20 The text of ABC TV’s *Four Corners* interview conducted by Sally Neighbour can be accessed from website of *The Australian*, www.theaustralian.news.com.au/story/0,20867,20199530-601,00.html.


‘Judicial Power’, Jurisdiction and Technology of Standardisation in Thomas v Mowbray

The case of Thomas v Mowbray raised a number of points of significance in Australian constitutional jurisprudence. The validity of the issuing of the interim control order against Thomas was challenged on two legal fronts. Apart from the question of whether Division 104 of the Criminal Code was made with a relevant source of legislative power under section 51 of the Constitution, the case rested primarily upon the problem of whether the procedure instituted by interim control orders (and formalised by Division 104) characterised a proper institutional exercise of judicial power. In particular, the court was called upon to determine whether the interim control order proceedings constituted an exercise of judicial power consistent with the jurisdiction of the Federal Magistrates Court as defined by Chapter III of the Constitution. By a five to two majority, the High Court upheld the validity of this procedure under Australian law.

The jurisprudential analysis in the case is interesting on a number of counts. As one instance in the exercise of the power of judgment in relation to Thomas, the High Court decision reveals a way of thinking about judicial power, jurisdiction and the performance of judgment that finds some difficulty in accounting for the particular form of power instituted by the control order procedure. This can be exemplified by the broader approaches taken with respect to the court’s analysis of the procedural and performative bases for its power.

The first of these issues concerns the analysis of power and governmental institutions. The authority to judge in Thomas v Mowbray is constructed broadly for the High Court as a task of constitutional interpretation. The main figure of this form of interpretation is that described by the separation of powers principle in R v Kirby; Ex parte Boilermakers’ Society of Australia (Boilermakers case). This principle reads into the structure of the Constitution an implied limitation on the jurisdiction of Australian federal courts. The courts cannot be invested with a power or authority that would be inconsistent with their exercise of the ‘judicial power’ (as opposed to executive or legislative power) of the Commonwealth. In Thomas v Mowbray, the limitations of this paradigm for considering the authority and validity of instruments such as interim control orders became significant. The general approach taken by the High Court was to acknowledge the necessity first to characterise the kind of power being conferred by Division 104 of the Criminal Code, and then to adjudicate upon whether or not this power was one typically or appropriately exercised by the judiciary. Both Gleeson CJ and Kirby J, for instance, while arriving at different conclusions regarding the validity of Division 104, follow a logic that seems to see governmental power as having a character

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21 For an overview of these issues and the individual judgments, see Lynch (2008).
24 The majority consisted of Gleeson CJ, Callinan, Heydon, Gummow and Crennan JJ (the latter two issuing a joint judgment). Kirby and Hayne JJ dissented.
25 (1956) 94 CLR 254.
determined separately from the institutions that exercise it. The result of this is a difficulty in attending to the particular kind of power instituted by control orders themselves. The court can criticise only whether the power to issue an interim control order is conferred upon the right institution, but not the form of institution that the control order itself establishes, alters or puts into effect. By abstracting power from its various institutions, the constitutional approach taken in the case therefore tends, first, to obscure the fact that the judicature itself constitutes the invention of a certain kind of power (ie the power to judge); and second, to treat the textual and technological history of that invention as unaffected by the procedural form of control orders.

There are two recurring issues in Thomas v Mowbray that further bear this out. The first concerns the relation of jurisdiction to legal ‘standards’ or ‘criteria’ of judgment, while the second concerns the reference and comparison to alternative or analogous juridical procedures.

One way in which the nature of constitutional ‘judicial power’ was to be defined in Thomas v Mowbray was as a power to apply ascertainable juridical standards in the determination of cases or justiciable controversies. Courts must not be left to engage in abstract policy-making or be required, as Hayne J notes, ‘to apply its own idiosyncratic notion as to what is just’. The High Court focuses in Thomas on the meaning of the sole standard of adjudication stipulated in the control order legislation – namely, that each of the measures of the control order must be deemed by the federal magistrate as ‘reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act’. The judges then consider (with varying conclusions) whether this standard is sufficient to confer a judicial power consistent with the role of a court exercising federal jurisdiction under the Constitution.

What is interesting about this approach is that the court is drawn to read the ‘standard’ of the interim control order and its procedure into a somewhat

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26 Gleeson CJ, for instance, does not describe the problem in terms of whether the arrangement in the exercise of powers imagined by the ‘control order’ is consistent with the constitutional arrangement of governmental powers, but rather ‘whether the essential nature of control orders is such that the power to make them cannot be conferred by the legislature upon the judicial branch of government for the reason that such orders are distinctively legislative or executive’. Thomas v Mowbray [2007] HCA 33 (2 August 2007) at [14]. Kirby J notes that: ‘It is the duty of this Court … to characterize Div 104 so as to determine whether it confers power that is neither part of “the judicial power of the Commonwealth” nor ancillary or incidental to that power.’ Thomas v Mowbray [2007] HCA 33 (2 August 2007) at [303].


28 Criminal Code, s 104.4(1)(d).

29 See Thomas v Mowbray [2007] HCA 33 (2 August 2007) (Gleeson CJ) at [20]-[27], (Kirby J) at [312]-[322], (Gummow and Crennan JJ) at [94]-[103] and (Hayne J) at [475]-[499].
narrow location. By focusing attention on the particular terms used in the legislation, such as ‘reasonably necessary’, and their familiarity within the juridical lexicon, the High Court appears to bypass any close analysis of either the form of the control order itself, or the kind of standardisation that, as a procedural instrument, it institutes upon the traditional function of ‘judging’. Kirby and Hayne JJ, for instance, both reject the validity of the legislation on the basis that it does not afford an ascertainable juridical standard, particularly in requiring the federal magistrate to decide arbitrarily what is reasonably necessary to protect the public from a terrorist act. It is as though this would reduce the function of the judge to a kind of passive receiver of essentially executive governmental information or advice. But what their approaches share with the judges in the majority is the same assumption about where to look for the articulation of legal standards within texts. While the discussion in Thomas v Mowbray offers a relatively studious analysis of the words of the legislation, and wonders whether they might accurately represent an appropriate standard or criteria of legal judgment, an analysis of the problem of whether the control order itself, as an issued document, maintains the form of a ‘standard’ – or in what sense it arranges a certain legal technology of standardisation – is left relatively hidden. Beyond the content of the order and the decision to issue or authorise it lies the innovation that the instrument brings to the typical function of standardisation in judgment.

My argument here is that the particular outcome of the High Court’s approach is a jurisprudence that sees the procedural ‘know-how’ of law as

\[\text{Kirby J, for instance, notes the arbitrary and potentially tyrannous nature of power conferred on the court: 'The court would be required to make its decision without the benefit of a stated, pre-existing criterion of law afforded by the legislature ... [T]he stated criteria attempt to confer on federal judges powers and discretions that, in their nebulous generality, are unchecked and unguided. In matters affecting individual liberty, this is to condone a form of judicial tyranny alien to federal judicial office in this country.' Thomas v Mowbray [2007] HCA 33 (2 August 2007) at [322]. Hayne J adds at [499] that a series of cases pursued under Division 104 of the Criminal Code may give rise to certain fact-finding predictions but not any juridical standard. If an ascertainable principle of law did happen to emerge over time, on the other hand, this principle would no longer be that of the Criminal Code itself.}\]

\[\text{While two of the majority judges, Gleeson and Callinan, find the standard expressed in section 104.4 to confer a consistently judicial form of power, it is worth noting that Gummow and Crennan JJ express a scepticism that the mere absence of judicial criteria or standards in legislation should necessarily be fatal to its validity in conferring power upon a federal court. They were the only members of the High Court, therefore, to offer an alternative formulation of this problem, notably framed within the language of jurisdiction; the question is 'whether s 104.4 ... is a law which is adequate to 'define' what is 'the jurisdiction' of the issuing courts, within the sense of s77(i) of the Constitution, or whether it fails to do so because it is an attempt to delegate to the issuing courts the essentially legislative task of determining 'the content of a law as a rule of conduct or a declaration as to power, right or duty'.' Thomas v Mowbray [2007] HCA 33 (2 August 2007) at [71], the final quotation being from The Commonwealth v Grunseit (1943) 67 CLR 58 at 82.}\]
secondary in relation to the moral and representational philosophies of legal judgment. Thus the validity or justification of the control order is sought outside of any attention to what it can do. The second theme in the judgment that further explicates this is the reference by a number of the judges to historical legal forms of procedure. As mentioned already, the validity of the procedure instituted against Jack Thomas rested heavily upon whether the High Court could characterise this procedure as part of the practices of governmental power traditionally exercised by the judiciary. Formulated in these terms, the drawing of comparisons between the procedure instituted by Division 104 of the Criminal Code and other procedures or functions which legitimately have been conferred upon the judicial branch made up a significant part of the judgment. The task was to situate the power represented by control orders within the typical practices of legal judgment and according to certain historical analogues of juridical procedure. Gleeson CJ, for instance, compares the form of the control order to that of bail and apprehended violence orders while situating its jurisprudential basis in the established history of 'preventive justice'. Gummow and Crennan JJ also locate the control order within the traditional history of a 'preventative jurisdiction', which is commonly based on an assessment or adjudication of 'risk' rather than on a determination of criminal 'guilt'. But while Kirby and Hayne JJ remain less willing to pass over the differences between the control order and other forms of procedure, their method nevertheless follows a similar analogical pattern to the majority. Kirby J, for example, works diligently to distinguish the form of the interim control order from each of the practices mentioned by the majority. In doing so, however, rather than identifying an alternative procedural template in which the interim court order might participate, he simply concludes that it involves 'an attempt to break new legislative ground'.

This use of analogy by both the majority and minority judgments in Thomas v Mowbray follows a schema that tends to obscure the relation between the procedural form of the control order and the forum of judgment it makes possible. Can one still give an account of the relation between the action and the authority of the control order - what the power of this instrument is - if the problem of jurisdiction is reduced to a comparison of pre-existing forms of procedure? If the procedural form of the control order is said to do nothing more than what has been achieved through previous analogous forms of judicial practice, then what one does not have is

32 Thomas v Mowbray [2007] HCA 33 (2 August 2007) at [16].
33 Thomas v Mowbray [2007] HCA 33 (2 August 2007) at [120].
34 Thomas v Mowbray [2007] HCA 33 (2 August 2007) at [330]-[338]. Kirby J distinguishes the control order from the other orders said to be analogous on four points: (1) such orders are generally ancillary to other proceedings; (2) they are directly related to the past conduct of the person; (3) they are often aimed at protecting specified persons rather than society in general; and (4) they are based on evidence of what the particular person is likely to do rather than on what third parties might do.
35 Thomas v Mowbray [2007] HCA 33 (2 August 2007) at [331].
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precisely an account of what gives this particular procedural device its ‘activity’, its cultural and technological currency, or what makes it ‘come into its own’ at a particular time and place. A way of describing what is new, innovative and active within the procedure inaugurated by Division 104 of the Criminal Code, then, requires an attention to more than just the analogous models on which it might be based. It calls for an attention to the history of textual and procedural manipulations that have attempted to bring the changing dimensions of existence under the sign of legal judgment.

Documents of Law’s Transmission: Scholastic and Bureaucratic Technologies of Legal Interpretation

Forms of Authenticity: The Transmission of Legal Authority

Understanding the transmission of law and the modes of law’s transmissibility has been important in accounting for how systems of authority are renewed and passed on in time and space. The sites for an analysis of law’s transmission can be related first to the study of various practices that have surrounded the use and interpretation of juridical texts, and second to the means of instituting law through the variety of legal devices and instruments employed in any given society. In both of these cases, the question of the transmission of law is not a question of communication, but one of institution: how does the authority of a text and its tradition come to pass into the vicinity of a new or remote generation and animate it? The modes by which this has been pursued vary historically and culturally. It will be useful here to situate some of these historical and cultural moments in order to try to orient the discussion of Thomas v Mowbray – in particular, to contextualise the kind of difference introduced to the mode of law’s transmission by the form of law implicated by the so-called ‘interim control order’.

One way to analyse law’s modes of transmission involves an attention to the interplay between ‘original’ and ‘copy’ within the production of particular forms of documentation. The sign of authority in a legal document may be linked, on the one hand, to its authenticity as a cultural artefact and, on the other, to the modes by which it becomes transmitted and reproduced as an object of faith. It is not that there is a necessary originality to the text of law as such, but that the relation between original and copy in the transmission of texts in general describes a form of authority that is not alien to the practices of legal interpretation. The authority of law must be maintained or passed on in a form that also allows for its reception and inscription in new places and in new generations of interpreters. How a new generation of juridical interpreter inherits the law and constructs a space within it for new orderings of expression is therefore paramount to any understanding of the continuing currency of dominant forms of legal authority.

On the metaphysics of transmission in relation to a logic of inheritance and instrumentality, see Hachamovitch (1991).
In his essay ‘The Work of Art in the Age of Mechanical Reproduction’, Walter Benjamin articulates a striking insight into the modern conditions of appreciating and valuing works of art and artistic texts. With the mechanical reproducibility of images in modern society, Benjamin notices that an interpreter no longer engages in the same ritual way with the feeling attached to being in the presence of an ‘original’ text.

Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be. The unique existence of the work of art determined the history to which it was subject throughout the time of its existence ... The presence of the original is the pre-requisite to the concept of authenticity [and] [t]he whole sphere of authenticity is outside technical — and, of course, not only technical — reproducibility.37

Techniques for the reproduction and reinscription of texts therefore have a profound influence on the historical modes of constructing and transmitting legal authority. If the authority of artistic texts is linked to the authenticity of its form of documentation, then it always involves the double matter of, on the one hand, holding the reader or interpreter before the ‘aura’ of an original while, on the other hand, inventing (within the form of this original) a certain ‘blank space’ appropriate to a mode of expression, repetition, iteration, and so on. An act of writing, for example, must always involve a great technical leap in reinventing and subordinating an otherwise fully expressive fragment of the world, such as a piece of clay or stone, as a blank ‘substrate’ for the inscription of a more novel and ‘pressing’ form of enunciation. Not only this, but the inscription must also borrow its authority from the qualities of the substrate itself — for instance, the permanency and immutability of writing on stone compared with sand.

As a textual tradition, the law is not immune or separate from the technologies involved in its production and dissemination. Read from the perspective of these technologies, the text takes part in broader technical and procedural arrangements that define its action and authority as an instrument. Two particular arrangements in law’s technical practices can be noted here as instances in the history of procedural jurisprudence: one organised around the technology of annotation and the other around mass production and the standardised legal form.

Textual Apparatuses of Glosses and Standard Forms
The impulse to have the law rewritten for a contemporary generation of users has no doubt been an important one. In modern jurisprudence, this impulse might be best noticed in the relatively continuous drive to the processes of ‘law reform’. Today, the legislative apparatus of the state is invoked to respond to any kind of social or juridical problem. But for a much

37 Benjamin (1968), p 220.
longer period, it seems, 'the law' was not contemplated as something that could simply be changed or reformed at will. At most, it could be revealed, declared, interpreted, even codified in various ways. Legal change might have been guaranteed given the inherent erroneousness involved in the process of transcription or iteration, but purposeful change to the law itself would have been unthinkable – or at least entirely imprudent. Jurisprudence as a tradition did not so much demand the creation of new laws to respond to new situations, but demanded rather a more prudent way of relating to the text of law.

One of these ways of relating to the text of law is associated with a scholastic tradition. The glossators in European Medieval jurisprudence invented a particular method of reading the authenticity and originality of Roman juridicism. The mode of transmission of the authority of this tradition involved a manual skill in the fidelity of reproducing and transcribing texts. The converse to this practice, however, was that a new space had to be opened up for the reception of the authenticity of the classical texts within a practical culture of legal interpretation specific to the time. The glossators, having the documents of Roman civil law before them, also invented a method of jurisprudence that attempted to explain, systematise and interpret these texts by way of a technique of annotation. Producing 'glosses' of the texts meant writing notes in the margins and between the lines of the original, and these glosses were not just interpretive markers or educational notes: they constituted an annotative apparatus of 'captions' produced for a textual image which in itself no longer fully held its ritual effect as the 'presence' of a cultural artefact. The original text becomes an insignia attached to a new cultural form of jurisprudential expression.

Having a technique that held the reader before these two texts at once, then – on the one hand, an authentic and authoritative text such as the *Corpus Iuris Civilis*, the value of which was becoming increasingly emblematic; and, on the other, a crafted annotative text which served as its key – was clearly a large part of the activity of scholastic modes of legal documentation. The appeal of this method was that it was capable of maintaining a documented form of authority as an 'authentic transcription', while conferring this textual authority on to an art and style of scholastic jurisprudence constructed in the margins and within the proximal space of the received text. The decline of the glossatorial tradition as a practice of legal interpretation, on the other hand – a decline that marks a shift from an age of annotation to that of commentary – is the result of a tendency toward the redundancy of this original text. First, there was the establishment of a 'standard' or 'ordinary' gloss: in particular, the *Glossa Ordinaria* of Accursius in the thirteenth century, which became a standard apparatus of interpretation as an assemblage of many glosses from the previous century

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On this tradition of jurisprudence, see Kelley (1990), pp 109–18; Kantorowicz (1938); Ullmann (1975); Post (1964); Vinogradoff (1929).
and a half." Second, in a more organic sense, the progressive importance of the apparatus of the gloss and the greater space it demanded in relation to the original text over time, served to push the latter into an ever smaller, more vestigial position, eventually to become a pure 'marker' or 'stamp' of authority.

The tradition that perfected the form of authority and authenticity characterised by the 'stamp' or the 'mould' can conventionally be called bureaucratic society. If it is possible to give an account of the kind of authority and jurisdiction attached to the 'interim control order', then an attention to the kind of textual innovations and technologies belonging to bureaucratic governmental society is paramount. The bureaucratic activity of documentation is, for instance, largely an activity of standardisation and the use of the standard form. The standard form is the instrument most obviously adapted to governing a society dominated by the form of mass production (of objects, images, texts, and so on). Mass production pursued a particular ideal characterised by infinite replicability – it sought to make 'universal' and 'generic' products that could belong identically in each and every situation. Within legal culture, this generic product was the standard form. As a text and instrument, the standard form had at least three important characteristics: (1) it could be infinitely replicated but no longer 'imitated' as such; (2) it was to be available to everyone in an identical form; and (3) it was capable of ordering and processing 'mass' actions or expressions. With the standard form as a legal text (and with modern, positive law more generally), one no longer requires the authority attached to the presence of an original; it is the empty mould or template and its mode of replicability that takes its place.41

Standard forms therefore constitute a unique tool in the bureaucratic techniques of modern judgment and normativity. The standard form governs by making the template of a document or instrument available to any person whatever who can fill it in according to the particularity of their individual interests, so long as these interests coincide with the 'standard' of the document itself. To be authenticated as an actor in accordance with this instrument, then, is no longer to be in the presence of the original artefact – or only in an extremely vestigial way – but to be authenticated in the very form of being a reproducible, replicable and regulated element. This is what bureaucratic society gives to the meaning of judgment. One is authenticated as an actor not according to the relative privilege in one’s proximity to a canonical text, but by the constructed fact of being in precisely the same textual position as everyone else – that is, as a replicable individual defined

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39 See Kelley (1990), p 113.
40 On the concept of mass production in the context of legal technologies of adjudication, see Murphy (2004).
41 Walter Benjamin considered this process to lead to a 'tremendous shattering of tradition'. '[T]he technique of reproduction detaches the reproduced object from the domain of tradition. By making many reproductions it substitutes a plurality of copies for a unique existence.' See Benjamin (1968), p 221.
within the action of a mass. What is not lost from the glossatorial tradition here is that one still has the task of ‘filling in the blanks’, so to speak, although the blanks in the bureaucratic form have to be produced and reproduced according to the logic of the document itself, and have the compelling effect of standardisation in the very action of authentication. The form works as a social instrument because it relegated to a standard template all of the anxieties of privilege and status that continued to prevent and inhibit ‘the masses’ from engaging in the textual and cultural activity of jurisprudence. But it also supervises and manages the ‘space’ of interpretation of such cultural activity to a much more stringent degree.

Procedures of Control

If the procedures of form-filling seem relatively insignificant within the context of the legal and constitutional problematic discussed in Thomas v Mowbray, this may be to ignore the unique development of the technology of legal judgment represented by the use of standard forms or instruments. Amongst the various procedures of adjudication developed within the modern history of legal practice, the action of standard forms figures prominently. Procedural jurisprudence in common law may have been dominated until the nineteenth century by a strict knowledge of ‘Forms of Action’ which defined the discrete procedural avenues around which judgment in the royal courts was occasioned. But the abolition of this formulary system, while leaving an increasingly broad array of procedural devices at the disposal of judicial institutions, also resulted in a decline in the jurisprudential significance attributed to these differences of procedure. It is more difficult to imagine, with the abolition of the Forms of Action, exactly what the procedural form of common law changes with respect to the judgment it makes performable.

It may be worth noting, then, that ‘interim control orders’ do not have the same action and do not facilitate the same kind of judgment that standard forms do. Despite the obvious fact that the greater practical aspect to the issuing of a control order involves the action of completing and ‘rubber-stamping’ a bureaucratic instrument, the action and innovation of this kind of instrument are nevertheless no longer directed purely at instituting a ‘standardisation’. As a procedure of the federal courts of Australia, interim control orders alter the jurisdiction of those courts. How they alter that jurisdiction can be described in part by considering the kind of society for which it becomes a tool – one no longer content to govern by instituting the action of masses and individuals, but by something else again.

42 Until the nineteenth century, the procedures of common law judgment were governed by the use of certain types of standard form. The ‘Forms of Action’ at common law came to be passed on as particular areas of legal doctrine, but they originated as purely procedural documents that authenticated the form in which rights were to be contested. See Maitland (1936).
The Procedures of Discipline and Control for Gilles Deleuze

In an essay titled "Postscript on the Societies of Control", the French philosopher Gilles Deleuze introduces a series of theoretical terms for acknowledging the transition between what Michel Foucault called 'disciplinary society' and that which Deleuze himself terms a 'society of control'. For Deleuze, a certain kind of society can be defined by its instruments, weapons and machines: tools for the production of particular kinds of 'affect'. Foucault invoked a concept of the 'disciplinary' society to distinguish it from the 'sovereign' or 'juridical' societies in which power and governance typically were exercised in a negative and decisive form of ruling over life and death. Rather, disciplinary society constituted the invention of a certain positive administrative power over life. It devised – or at least made dominant – certain techniques of power in which judgment could subsist within life as a standard or norm rather than essentially in the form of a sovereign privilege. The procedural apparatus of disciplinary society therefore was uniquely 'normalising': its function, as François Ewald puts it, was not necessarily to confine or compartmentalise, but to create a homogeneous social space. Disciplinary society governed through the action and production of standards immanent to the normative relations of statistical populations.

For Deleuze, the procedures of discipline described by Foucault follow a certain model of power that can be expressed in multiple settings. The school, the factory, the prison, the military battalion, and so on each has its productive forces mobilised and organised according to a largely analogous relation of instituting 'masses', and addressing individuals in terms of their statistical place within the mass. The tools of disciplinary society accordingly constitute prototypes of uniformity and individualisation:

Disciplinary societies have two poles: signatures standing for individuals, and numbers or places in a register standing for their position in a mass. Disciplines see no incompatibility between these two aspects, and their power both amasses and individuates, that is, it fashions those over whom it's exerted into a body of people and molds the individuality of each member of that body ...

This model of power was already becoming something antiquated within the kind of technological milieu of the second half of the twentieth century, according to Deleuze. 'Disciplinary' forces in this sense were being replaced

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43 'Discipline increases the forces of the body (in the economic terms of utility) and diminishes these same forces (in political terms of obedience).’ Foucault (1991), p 138.
44 Ewald (1991), p 141. Ewald highlights the normative, probabilistic and actuarial forms of legal knowledge that attach to disciplinary as opposed to sovereign society: the importance of the calculation and deployment of the concept of risk within uniform or homogeneous spaces and the determination of the concept of the ‘least arbitrary’ (p 158) in relation to the rules of adjudication.
by forces of another type. Deleuze calls this relation of forces ‘control’. A society of control constitutes a paradigm of power for itself separate to that of disciplinary society. Deleuze draws distinctions between them on a number of levels.

1. What disciplinary society produces essentially through the ‘mould’ or ‘cast’ (as factory-production or mass-production), control society produces through ‘modulation’ (as the production peculiar to the corporation: its need for ‘a product’).

2. Where disciplinary society organises uniform and discontinuous institutions in which one is always starting afresh (school, then factory, then hospital), control society organises continuous and specialised programs with which one is never finished (continuing education, health regimes).

3. Where disciplinary society authorises through the signature (as a technical sign of individuality), control society authorises through codes or sequences (as password and barcode).

4. Where disciplinary society judges according to the norm (life assessed through the lens of prison-surveillance), control society judges according to a more immanent principle — one that can possibly do without prisons by making use of the ‘tracking device’ or ‘electronic tagging’. We are animals, for example, moved on from the ‘disciplinary’ zoo to a ‘controlled’ open game reserve.

These are not just two differently shaped societies with different sets of technologies, but two differently shaped spaces. If the space of disciplinary society, for example, is ideally and analytically homogeneous and uniform, then that of control society is ideally ‘folded’. Its ideal is no longer an action or product expressed in as many places at the same time, but one expressed at any place at any time.

From a jurisprudential perspective, the procedures of control describe a particular system and forum of judgment even as they attempt to open up and trace certain tactical spaces outside of the action of norms and common

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Take, for instance, the kind of folding of personal space effected by contemporary mass-produced technology with the aim of making all one’s personal objects accessible wherever one goes, as well as making oneself locatable at any point at any particular time. This effect is a purely topological (rather than a statistical) manipulation: a nullification of the distances navigated in everyday life through the construction of a system of ‘portals’. Limitation to the speed of transmission is overcome by the power of folding space and making any point or any event occurring in the world theoretically accessible at any other point in the network. It is unnecessary, moreover, to insist that these developments are essentially either liberating or oppressive. In the same way that we never have to leave the home in a control society, we also in a sense never escape from work, or from education, conscription, incarceration, and so on.

Deleuze describes this arrangement of a control mechanism as being capable of determining ‘the position of any element at any given moment — an animal in a game reserve, a man in a business’ — tracking, in other words, the movement of an element in an open space by means of an electronic collar. Deleuze (1995), p 181.
rules of standardisation. What was characteristic of the rise of disciplinary arrangements of power is also true of control procedures: at first glance, they have the appearance of giving to a certain form of life an independence from the systems that previously claimed the right to ‘judge’ them. They give the characteristic impression, as Ewald notes of normative systems, that ‘anything were possible’. Control society, for instance, seems to afford individuals a certain free leash compared with the previous model-institutions of uniformity and standardisation within which they had been addressed and measured, just as prisons had previously appeared to liberate us from the gallows. And yet the mechanism of control constitutes at another level an even more insidious system of judgment. Furthermore, if the legal instrument of the ‘interim control order’ is already one of the textual artefacts designed from the perspective of power invented by a control society, then a jurisprudential analysis of its legal authority must take the dimensions of this perspective into account.

Dimensions of a Jurisdiction of Control

How does the procedural form of control constitute the dimensions of a jurisdiction? For the majority in the case of Thomas v Mowbray, the ‘control order’ specified under Division 104 of the Criminal Code is to be considered part of the procedural jurisdiction of federal courts in Australia. But, as has been mentioned above, the judgment in Thomas’s case tends to address what is involved in the exercise of this kind of authority with only a very limited specificity. It is as though the court sees itself as capable of authorising a procedural form of law, the precise activity of which it no longer has much interest in giving a descriptive account. What is clear is that the action of control within the procedures of judgment – notwithstanding the specificity of Division 104 of the Criminal Code – is one not limited to the project of anti-terrorism. The power in a judgment belongs to the innovation in its procedural form, and the procedural form of control – like that of the ‘standard form’ – cannot be defined in relation to what state agencies seek to invoke as their social purpose from time to time. The instrument of a control order is first a type of technical contrivance designed to address a particular segment of existence and to bring it under a jurisdiction: to render it able to be judged.

Jack Thomas becomes the subject of legal judgment according to at least two parallel procedures. One is defined by the criminal jurisdictions of the Supreme Court of Victoria, and holds him as an individual between discrete state institutions. According to this particular procedural set-up, Thomas can be judged only in relation to definite charges which are the subject of investigation, trial, verdict, and so on. From the point of view of

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42 See, in particular, R v Thomas (No 3) [2006] VSCA 300 (20 December 2006); R v Thomas (No 1) [2006] VSCA 165 (18 August 2006); Thomas v The Queen [2008] HCA Trans 258 (17 July 2008); DPP v Thomas (Ruling No 3: Reasons for Ruling) [2006] VSC 243 (7 April 2006). On the outcome of the retrial, see Hagan (2008).
the court itself, this may have constituted the whole process – being charged, tried, acquitted and re-charged. And whether or not there is new evidence for which he can be re-charged, or whether perhaps there will be new allegations, Thomas knows that at a certain level he will never be done with the authorities. It isn’t a question of not being caught or charged by the authorities anymore; it is more a question of managing their involvement in the life of one’s criminal tribulations. This is the basis behind the alternative parallel procedural set-up that the control order seeks to formalise. The control order procedure does not have a verdict as the culmination of the procedure; on the contrary, it seeks to ward off any definite verdict in order to keep the matter (in one form or another) constantly at its preliminary stages of investigation. Such a situation resembles, as Deleuze notes in ‘Postscript on Control Societies’, that of Franz Kafka’s protagonist K in his novel The Trial. Legal judgment moves between the two key procedural tactics of ‘apparent acquittal’ (a temporary reprieve) and ‘indefinite postponement’ (a protraction of the process itself).

The ‘interim control order’ is precisely the kind of document or form of judgment designed to register and formalise this latter tactic as a matter of law. The tactic is like a ‘minor’ treatment (in the musical sense) of a major or orthodox procedural arrangement: a different set of emphases. For example: what you may have been investigated for, charged with, tried for, convicted of, and so on, takes on a lesser importance in relation to the procedure which had in the meantime simply regulated your continuing or recurring contact with the authorities. Control therefore seeks to calibrate itself toward judging a certain aspect of existence that the discrete and major criminal procedural institutions had left unjudged.

What is the further significance of such a procedural set-up? In a series of lectures entitled ‘Truth and Juridical Forms’, Michel Foucault invoked the opposition between two juridical forms of procedure in order to problematise the historical bases of Western epistemology. What he was concerned to show was that judgment, truth and subjectivity are not universalisable concepts in history, but are dependent upon the invention of certain ‘games’ of truth or performances of knowledge. As specific ways of performing judgment, then, the particular juridical forms of procedure identified by Foucault (those of the ‘test’ and the ‘inquiry’) are taken to define very different structurations between society and its will to know. For Foucault, the procedure of the ‘test’ largely defined the juridical procedures of feudal Europe and Germanic law. It was concerned with staging the dimensions of strength, authority and right between private parties to a discrete conflict. The test constituted variously a ritual, a formula, an ordeal, a combat, and so on, which as a formal procedure was ‘a way of proving not the truth, but the strength, the weight, the importance of the one who spoke’.

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52 See Foucault (1994).
doing justice to a situation of conflict through staging the local and hierarchical dimensions of authority. With the procedure of the inquiry, on the other hand, what one gauges is something quite different. The inquiry as a juridical method is aimed at reconstructing the truth by commissioning and piecing together evidence. This model, Foucault argues, borrowed from the ecclesiastical procedure of inquisition. It was no longer a matter of ritualising the plural dimensions of authority in conflict, but of contemplating pure violations of the law and presenting them to a unified perspective of authority. The result was a melding of religious transgression and legal infraction: the state itself was an injured party and demanded compensation for crimes that it had a new interest in uncovering within the population.

This genealogy of juridical procedure tends to explain for Foucault the persistence in modern society of a more diffuse crimino-inquisitorial impulse, and the instrument of the ‘control order’ – as one authorised performance of judgment – can be looked upon from the perspective of this particular history. At one level, it clearly authorises a juridical form of surveillance typical of normative modes of governance. But what it also adds to the procedural techniques of legal judgment, possibly beyond their merely normative register, is worth iterating.

First, the temporal organisation of the procedure is unorthodox. Interim control orders appear to define a procedure that is structurally antecedent to the particular event they aim to investigate. In this way, the proceedings themselves maintain the general form of an inquiry, but it is as though this juridical inquiry does not have to wait for the event in order to be mobilised into action. This is not the same as the so-called ‘preventive jurisdiction’ associated with binding over orders, bail measures and apprehended violence orders (AVOs), which are organised basically either in the form of security or as an injunction regarding future behaviour. Control orders do not just aim at preventing a particular kind of wrongdoing, they organise an inquiry antecedently into the elements and conditions of an event that has never happened and cannot yet be imagined. Unlike AVOs, control orders do pose a deeply crimino-inquisitorial problem: the authorities want to know how to bring something to light. Just as the invention of the inquiry – which, as Foucault notes, sought to find out how to bring a person before a judicial authority when one didn’t know yet who was responsible for the crime – the question for the procedure of the control order is: how does one run an investigation when the event you want to investigate has not yet occurred? The answer – which is the innovation in this form – is to proceduralise the

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57 AVOs, in particular, respond to the proposition that violence and violent crime overwhelmingly involve a domestic or personal element of a continuing relationship. This type of order therefore typically seeks to address the terms of the relationship itself by lending the force of a court order to a set of terms typically sought by one of the parties.
58 Foucault (1994), p 47.
‘everyday’, to bring juridical procedure down to the level of ‘ordinary’ events or to that level of life previously thought unworthy of being judged within a legal forum.

The second dimension which follows from this arrangement of jurisdiction concerns the mode of its address. Address involves the destination of the letter of the law and the envelope by which it comes to apply to its object. Modern legal instruments typically address actions performed by individuals within groups. We become authorised in a legal sense typically through forms which, in their uniformity, address us as individuals and which allow a statistical identification of individual actions. The exercise of jurisdiction under Division 104 of the *Criminal Code* however is no longer a jurisdiction solely addressed to the individual and the determination of the ‘statistical’ threats or risks that they pose. The fact that an individual is addressed as the subject of a control order is merely an incident to the form of power which really seeks to address what could be called ‘non-statistical’ and ‘pre-individual’ threats. For this reason, an interim control order can theoretically be imposed on an individual who may in fact pose no threat at all in a statistical and normative sense and yet may nevertheless constitute a singularly governable and pivotal element in relation to the manoeuvres that attempt to oversee the dimensions of a serious crime. The problem is: how best to address as an individual (e.g. Jack Thomas) a set of threats that remain otherwise non-individual; structurally unpredictable etc. This is one reason why judgment under the jurisdiction instituted by Division 104 of the *Criminal Code* involves more than a probabilistic assessment of ‘risk’.

Thomas does not have to be the one likely to commit or be involved in a terrorist act but only the one through which such a threat can be most effectively controlled. Control is thus an

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54 See McVeigh, Rush and Young (2001).

55 Deleuze has addressed the theme of ‘pre-individual singularities’ in his major theses. See Deleuze (2004, 1990). In *The Logic of Sense* he writes at 118: ‘What is neither individual nor personal are ... emissions of singularities insofar as they occur on an unconscious surface and possess a mobile, immanent principle of auto-unification through a nomadic distribution... Singularities are the true transcendental events, and Ferlinghetti calls them “the fourth person singular.”’ And in *Difference and Repetition* he notes at 223 that ‘[I]deas subsume the distribution of distinctive or singular points; their distinctive character ... consists precisely in the distribution of the ordinary and the distinctive, the singular and the regular, and in the extension of the singular across regular points into the vicinity of another singularity. There is no abstract universal beyond the individual or beyond the particular and the general: it is singularity itself which is “pre-individual”.’

61 Compare with Gummow and Crennan JJ in *Thomas v Mowbray* [2007] HCA 33 (2 August 2007) at [79]: ‘In assessing whether the courts have adequate legal standards or criteria “for the purpose of protecting the public from a terrorist act” it is relevant to note, not only that a judicial procedure has been laid down, but also that the orders which may be made are a familiar part of judicial power to make orders restraining the liberty of the subject, for the purposes of keeping the peace or preserving property. Orders, which are not orders for punishment following conviction, but which involve restraints upon the person to whom they are directed, can be made after a judicial assessment of a future risk.’
attempt at making these subterranean co-ordinates of an event come under the determination of a jurisdiction.

A final way to describe the action belonging to a jurisdiction of control is the change it introduces to the procedures of standardisation. The power of standard forms, as mentioned earlier, is that they create a space of uniformity in which normative legal relations and legal expressions can occur. It is not that judgment needs to conform to a standard arrangement in order to have authority, but that the standard form performs the judgment and authority of standardisation. Its authority is precisely that of producing a normative register. The interim control order, on the other hand, retains the basic shape of a standard form in that it is technically reproducible for a large number of individuals, but its action and power is no longer linked to this replicability and standardisation. Rather than being reproducible, it is the very fact of its suitability for being modified, personalised, tailored, customised and so forth that seems to give the control order a procedural utility.\(^{2}\) We can call the action of control a ‘simulation’ rather than a standardisation. Whereas standardisation offers a criterion of judgment drawn not from a superior or original form, but from the sheer regularity of distinct cases, simulation in turn offers it purely as an ‘effect’. Judgment is therefore no longer normalising, but seductive. It does not use a sedentary table or ‘frame’ of reference, but a simulated reference of movements, resonances and codifications. Its measure is not discrete and scalar, but indefinite and planar.

Conclusion

Reading a legal judgment through its procedures and its procedural forms offers one way of posing the problem of its authority within the terms of jurisdiction. If a law of actions or procedure remains one of the central genres of Western jurisprudential thought—a genre that attempts to address the performative, active and expressive element of judgment—then finding a way to account for the ‘instrumentality’ of law’s textual apparatuses of judgment and the forms of judgment inaugurated by particular regimes of legal procedure and documentation may be an important aspect to develop within contemporary legal scholarship. This is particularly so given the fact that procedural matters in jurisprudence occupy a much smaller intellectual space than they once did. Modern methodologies in legal analysis are often more accustomed to the patterns of moral philosophy than they are to the procedural aesthetics of jurisdiction. Legal discourse, as a result, tends to lack the means of addressing its own authority in anything but vague or technical language.

The procedural form of ‘control’ inaugurated specifically by the interim control order regime in Division 104 of the Criminal Code offers in this article one example of the importance that a jurisprudential account of procedure has within contemporary political and juridical dialogues. The

\(^{2}\) Note that the terminology of ‘tailoring’ is used by Gummow and Crennan JJ in *Thomas v Mowbray* [2007] HCA 33 (2 August 2007) to describe the ordinary powers associated with preventative judicial orders, at [79].
consideration and appraisal of this form of procedure in *Thomas v Mowbray* also reveals the institutional limitations to these dialogues. The High Court in that case attempts to give an account of the form of judgment, ‘judicial power’ or jurisdiction described by the control order legislation and its compatibility with that form of federal jurisdiction conferred under the Constitution. However, by framing this assessment of procedural authority through the invocation of certain historical analogues to the interim control order, the judges tend to forego a more descriptive analysis of the kind of perspective of power and mode of existence that the instrument of the control order may be designed to institute and render justiciable.

For this reason, this article has attempted to situate the practice of procedural innovation involved with control orders within an historical context. An analysis of the action of forms of legal documentation and transmission in scholastic and bureaucratic traditions is intended to provide an outline and perspective on the instrumentality of forms of authority and authenticity. It also allows for a consideration of what the apparatus of control orders might add to that mode of power instituted by standard forms in particular, and the project of standardisation and uniformity in general, pursued by societies of mass-production. In this sense, it becomes possible to describe the contours of a ‘jurisdiction of control’ with the assistance of Deleuze’s theoretical note on ‘societies of control’. The control order can be seen as one of the tools of a society preoccupied with the attempt to judge the dimensions of an event beyond its statistical, individual and ‘actuarial’ determinations.

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