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## Visual Jurisprudence

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RICHARD K. SHERWIN

## Visual Jurisprudence

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## VISUAL JURISPRUDENCE

*By images I mean shadows . . .* Plato<sup>1</sup>

*[T]he aura is bound to [the living person's] presence in the here and now.  
There is no facsimile of the aura.* Walter Benjamin<sup>2</sup>

*[E]very epoch is defined by its own practices of knowledge and strategies  
of power, which are composed from regimes of visibility and procedures of  
expression.* David Rodowick<sup>3</sup>

### I. INTRODUCTION

The Confrontation Clause of the Sixth Amendment expresses a preference for actuality. That is why, in a criminal case, the courts say, when it comes to a defendant's right to confront the witnesses against him, only a compelling countervailing interest will suffice to warrant something less than a live, face-to-face encounter in court.<sup>4</sup> When it comes to testing the claims of visual images more generally inside the courtroom, actuality remains the touchstone as well. The law's custodial responsibility for truth-based justice persists on screen and off. But how do we know, when screens turn on, whether or to what extent reality prevails?<sup>5</sup> That uncertainty, particularly in the age of digital editing and digital simulation, generates an urgent need to intelligently confront the power and limitations of visual images inside the courtroom. Lawyers, judges, and jurors today need training in visual literacy. That is what the theory and practice of visual jurisprudence aim to provide.

This, then, is the case for visual prudence in the law. It announces the emergence of visual jurisprudence as a robust, interdisciplinary training ground for specific competencies pertinent to the visual digital age in which we live. Today, lawyers, judges, and jurors face a vast array of visual evidence and visual argument. From videos documenting crimes and accidents to computer displays of their digital simulation, increasingly, the search for fact-based justice inside the courtroom is becoming an offshoot of visual meaning making. But when law migrates to the

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1. PLATO, *The Republic VI*, in *THE COLLECTED DIALOGUES OF PLATO* 745 (Edith Hamilton & Huntington Cairns eds., 2002).
  2. WALTER BENJAMIN, *The Work of Art in the Age of Its Mechanical Reproduction*, in *SELECTED WRITINGS*, 1938-1940, at 260 (Howard Eiland & Michael W. Jennings eds., 2003).
  3. D.N. RODOWICK, *READING THE FIGURAL, OR, PHILOSOPHY AFTER THE NEW MEDIA*, at xi (2001).
  4. The classic reference here is *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (“[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”). See also *United States v. Nippon Paper Indus. Co.*, 17 F. Supp. 2d 38, 42 (D. Mass. 1998) (referring to the use of video conferences in lieu of live testimony in court: “[T]he demands of efficiency, and even necessity, do not create automatic exceptions to Constitutional requirements.”).
  5. See, e.g., Errol Morris's path breaking, and case altering, film—billed as a documentary, but hardly that—*THE THIN BLUE LINE* (American Playhouse 1988). See generally Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *STAN. L. REV.* 39, 47 (1994); RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000) [hereinafter SHERWIN, *WHEN LAW GOES POP*].

screen it lives there as other images do, motivating belief and judgment on the basis of visual delight and unconscious fantasies and desires as well as actualities. Law as image also shares broader cultural anxieties concerning not only the truth of the image, but also the mimetic capacity itself, the human ability to represent reality. What is real, and what is simulation? This is the hallmark of the baroque, when dreams fold into dreams, or should we say the digital baroque, when images on the screen immerse us in a seemingly endless matrix of digital appearances.<sup>6</sup>

As with the baroque in art or music, the digital baroque in law is characterized by saturation of detail and hyper-ornamentation. Perhaps it will come in the form of shimmering colors of a functional magnetic resonance image purporting to show abnormalities in a criminal defendant's brain. Or perhaps it will be a digital simulation of a murder scene, as occurred in the Amanda Knox trial in Italy. In his closing argument at that trial, Perugian prosecutor Giuliano Mignini played a computer-generated simulation that showed an avatar-Amanda Knox killing an avatar-Meredith Kercher. It ended with a gory crime-scene photo of Kercher's body. But was this simply a fantasy—an animated version of the prosecution's theory featuring Amanda Knox as a sex-crazed femme fatale, "Foxy Knoxy," as the British tabloids called her, a "she-devil," as many European journalists wrote, appropriating the prosecutor's phrase?<sup>7</sup>

Effective prosecutors and defense lawyers often mine the popular imagination for well-known characters ("she-devil," "femme fatale") and stock scripts ("sex game gone wrong") to help frame their story in court. Once a narrative frame is set, so, too, is the belief system that it embodies. Within that belief system, dissonant details get pushed away, while consonant ones leap to an observer's attention. This is important to trial lawyers because there are always gaps in the evidence. It is difficult to reconstruct past events. But with a recognizable story frame and a cast of familiar characters in hand, advocates can coax their audience (jurors and judges alike) to fill in missing details. "This is how that kind of story goes." "That is how this kind of person behaves." The audience's experience of the world helps to put flesh on the bare bones of a prosecutor's or defense attorney's legal theory.<sup>8</sup>

The battle inside the courtroom over competing storylines plays out even more powerfully on the screen than it does in print. In an age of smartphones and ubiquitous surveillance cameras, events that once would have gone unrecorded are preserved for posterity and, inevitably, for trial. At the same time, digital graphics and animations take decision makers anywhere and everywhere—into the body in medical malpractice cases, inside complex machinery in patent-infringement cases, or on the scene as a virtual eyewitness to murder in a criminal case. Videos and

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6. See RICHARD K. SHERWIN, *VISUALIZING LAW IN THE AGE OF THE DIGITAL BAROQUE: ARABESQUES & ENTANGLEMENTS* (2011) [hereinafter SHERWIN, *VISUALIZING LAW*].

7. See Richard K. Sherwin, *The Digital Trial*, PROJECT SYNDICATE (Oct. 12, 2011), <http://www.project-syndicate.org/commentary/the-digital-trial>.

8. See SHERWIN, *WHEN LAW GOES POP*, *supra* note 5; see also ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2001).

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animations are powerful tools in the search for fact-based justice.<sup>9</sup> But they also create new stumbling blocks. As viewers, we may think we are getting the whole picture, but every camera frames its own point of view. With equal certainty we may believe in the digital images that we see, but how can we be sure of their basis in reality? Once we enter the domain of digital simulation, how do we keep from slipping into an endless matrix of mere appearances?

The proliferation of electronic visual media has transformed social and cultural practices of meaning making around the world. In all walks of life, the life of law included, visual images increasingly compete with words alone. The visuals shown in court are wide ranging. And so, too, are the aesthetic cues through which they coax viewers into states of belief or skepticism. That is why we need to incorporate new visual benchmarks into the rhetoric of law. New critical standards are needed to help jurists cope with the epistemological, ontological, and metaphysical quandaries that accompany law's migration to the screen.

Shifting to an audio-visual register in the rhetoric of law with our justice system's credibility intact requires broad cultivation of a more refined capacity for critical visual judgment. At the same time, it also requires new forms of visual eloquence. Consider, for a moment, the various ways in which visual communication differs from communicating in words alone. Of particular interest in this regard is the peculiar efficacy of visual representation. What explains its singular power? For one thing, visual representations do not simply resemble reality, they also tend to stimulate the same cognitive and especially emotional responses that are aroused by the reality they depict. Movies, television, and photographs, among other image-based media, tend to overpower mere words (though words also undoubtedly help to shape the way images are construed, as varying the caption to identical photographs will amply show). The power of visual images can be discerned in the way they effectively engulf the spectator (or, in the case of computer games and immersive virtual environments, the "interactive player") in vivid, life-like sensations.

Emotion enhances belief. To the extent that visual images amplify emotion beyond the usual efficacy of text, images tend to be more compelling than text alone. Viewers often treat visual images as if they were "windows" opening onto reality, rather than as the visual constructions that they are. As Richard Lanham put it, we tend to look *at* text, but we look *through* the electronic screen.<sup>10</sup> Unlike words, which are abstract and obviously constructed, photographs, films, and video images seem to be caused by the external world. With no obvious trace of mediation, visual images seem to lack artifice. That is why visual images make for such highly persuasive evidence for what they purport to depict.<sup>11</sup> Moreover, unlike words, even when images seek to make propositional claims some of their meaning always remains

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9. For numerous illustrations of various forms of visual lawyering, see Richard K. Sherwin, *VISUAL PERSUASION PROJECT*, [http://www.nyls.edu/centers/projects/visual\\_persuasion](http://www.nyls.edu/centers/projects/visual_persuasion) (last visited June 17, 2012).

10. See RICHARD LANHAM, *THE ELECTRONIC WORD: DEMOCRACY, TECHNOLOGY, AND THE ARTS* (1995).

11. See Saul M. Kassim & Meghan A. Dunn, *Computer-Animated Displays and the Jury: Facilitative and Prejudicial Effects*, 21 *LAW & HUM. BEHAV.* 269 (1997).

implicit. Images cannot be reduced to explicit propositions.<sup>12</sup> They always leave something behind, something unsaid—the irreducible visual remainder.

In short, images do not merely add to words. They are transformative, both qualitatively and quantitatively, which is to say, both in terms of the content that they display and the efficacy of emotion and belief that they evoke. Much of the power of the image derives from the way it performs its function—how we mind the image for meaning's sake. Consider, for example, the nature of visual uptake. Unlike the sequential assimilation of verbal or textual messages, the meaning of images is often grasped all at once. It takes a lot less time and seeming effort to absorb a picture than to read a thousand words. Such rapid and comparatively easy intelligibility allows viewers to assimilate one visual meaning after another in quick succession. The immediacy of visual uptake also serves to enhance believability. We are so busy, and often so sensorially gratified taking in rapid flows of visual information that the felt need to second-guess what we see hardly arises.

Diminished critical judgment invites enhanced visual credulity. The fact that so much of what we glean from visual images remains unconscious feeds the disinclination to object (or to suspend belief). Visual communication operates largely on the basis of associative logic. In response to what we see on the screen, we unconsciously associate to memories, thoughts, and feelings. Investing images with personal feelings and associations strengthens the viewer's sense of "ownership." It is difficult to argue with something one has already experienced as true. By the same token, familiarity alone, the feeling of having encountered the same sort of visual image before in other works, or other genres in the culture at large, benefits from an already authorized sense of shared meaning. The pleasure of such recognition, like the sensory gratification of experiencing the image itself, augments the viewer's feeling of immersion and, by extension, of the truthfulness of what appears.

The way we mind the world and others around us changes along with significant changes in our tools of perception and mass communication. Over time, we become the tools we use. The camera is already inside our head, so to speak, along with the stream of digital programs and codes that we commonly use to recognize patterns on the screen before us. Like perception and technology, law and culture are intertwined. No longer may students of law remain preoccupied exclusively by the texts of the trade—whether judicial opinions, legislative codes, regulations, contracts, constitutions, or treaties. Law awakens from its dogmatic slumber upon contact with the flesh of the world, and the skin of the image. Facts have a tendency to carry abstract legal codes into the realm of real human drama. Facts spawn stories. And stories are not easily bred in captivity, much less in the lab. They are a part of our everyday lives, and they permeate the popular culture in which we live. In the stories that we hear and tell, popular culture speaks. Our sense of self is distributed by the stories that circulate around and through us.<sup>13</sup> Those very stories cross over into law whenever human

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12. PAUL MESSARIS, *VISUAL PERSUASION: THE ROLE OF IMAGES IN ADVERTISING* (1997).

13. JEROME BRUNER, *ACTS OF MEANING* 69 (1990).

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conflicts crank up the law's machinery of dispute avoidance and dispute resolution. Law without storytelling is like having rules without human conflict.

Culture constitutes the collective repository and repertoire of legal storytelling. In a visual age such as our own, visual storytelling asserts its own measure of content, craft, and efficacy along with its own sense of expectation, interpretation, and critique. The world of law, as everywhere else in contemporary society, marches in lockstep with shared visual scripts and digital programs. In the previous century, Martin Heidegger said we dwell in language, "the house of Being."<sup>14</sup> But today, new rooms have been added on, together with the screens that glow within them. We increasingly inhabit a digital matrix of synthetic visual representations. It's a little like living in the mirror—a special kind of mirror that has been algorithmically encoded to reflect back other rooms and other faces, some of which may or may not be our own. On this imaginary landscape of flattened signs we live out much of our private and public lives. The ensuing transformation in the meaning making process runs the gamut from entertainment, to commerce, to managing the affairs of state.<sup>15</sup>

It is now commonplace in the realm of the human sciences that interpretations of truth and falsity are, to a significant extent, socially constructed and culturally contingent.<sup>16</sup> Many disciplines, including the philosophy of science,<sup>17</sup> the philosophy of language,<sup>18</sup> and linguistics,<sup>19</sup> recognize that meaning depends on context, and that truth depends on the ways in which it is represented. Indeed, new studies of the physiology of perception indicate that even our most basic contacts with reality are socially mediated and constructed.<sup>20</sup> Scholars have sought to explain how knowledge is locally constructed through culturally embedded practices and through diverse techniques of investigation and representation.<sup>21</sup> Likewise, in Anglo-American legal studies, many have recognized that legal meaning is produced by the ways law is practiced,<sup>22</sup> and that rhetoric in its many guises is constitutive of, not opposed to, truth.<sup>23</sup>

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14. See JOSEPH J. KOCKELMANS, HEIDEGGER ON ART AND ART WORKS 198 (1985) ("In thinking, Being comes to language. Language is the house of Being. Man dwells in this house, and the thinkers and the poets are the guardians of this house.") (citing Heidegger's *Letter on Humanism*).

15. See, e.g., BETH SIMONE NOVECK, WIKI GOVERNMENT (2009).

16. See PAUL RICOEUR, THE RULE OF METAPHOR: THE CREATION OF MEANING IN LANGUAGE (1981).

17. See BRUNO LATOUR, SCIENCE IN ACTION (1987); BRUNO LATOUR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS (1986).

18. See RICHARD BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983).

19. See EVE SWEETSER, FROM ETYMOLOGY OF PRAGMATICS: METAPHORICAL AND CULTURAL ASPECTS OF SEMANTIC STRUCTURE (1991).

20. Gregory Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 BIOLOGICAL PSYCHIATRY 245, 245–53 (2005).

21. See CLIFFORD GEERTZ, LOCAL KNOWLEDGE 184 (3d ed. 1983); see also RICHARD SHWEDER, THINKING THROUGH CULTURES (1991).

22. See KARL LLEWELLYN, THE COMMON LAW TRADITION (1962).

23. See RICHARD K. SHERWIN, DIALECTS AND DOMINANCE: A STUDY OF RHETORICAL FIELDS IN THE LAW OF CONFESSIONS, 136 U. PA. L. REV. 729 (1988); see also SHERWIN, WHEN LAW GOES POP, *supra* note 5.

Nevertheless, the cultural shift from an objectivist to a constructivist approach to human knowledge has not been anxiety-free.<sup>24</sup> Many participants in and observers of the legal system in particular continue to experience uneasiness with the semioticians' wisdom that "it's all signs."<sup>25</sup> Their fear seems to be that embracing this constructivist insight would undercut confidence in the capacity of legal proceedings (paradigmatically, trials) to yield provable truths about the world.<sup>26</sup> An unbridgeable gap between what legal decision makers believe they need to know and what, on reflection, they seem able to know is for many a cause for real concern. Within this late modern (or postmodern) mindset, there is a heightened sense of inhabiting a universe of representations that seems to turn the urge for real world knowledge back upon itself, as if in an endless regression, like some spectacular baroque tapestry or infinite arabesque endlessly folding in upon itself.<sup>27</sup>

This vertiginous sense of a lack of grounding has intensified in the digital baroque age in which we now live. Digital technologies allow the pictures and words from which meanings are composed to be seamlessly modified and recombined in any fashion whatsoever, while the Internet allows practically anyone, anywhere, to disseminate meanings just about everywhere. The Enlightenment-era insistence upon essentialist foundations (whether exemplified by Locke's empiricism, Kant's rational categories, or other totalizing epistemologies) is being challenged by digital experience, which has helped to inspire an alternative model of knowledge and reality as a centerless<sup>28</sup> and constantly morphing network of relations.<sup>29</sup>

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24. For example, as Bernstein notes, the shift from viewing reason from the standpoint of scientific "falsifiability" to an acknowledgement of inescapable historicity and situatedness prompts "Cartesian Anxiety" and the fear of relativism. BERNSTEIN, *supra* note 18, at 36.
25. This sentiment was famously expressed in Geertz's observation that law is "a distinctive manner of imagining the real," GEERTZ, *supra* note 21, at 218, and by his memorable description of human being suspended in "webs of meaning they themselves have spun." CLIFFORD GEERTZ, *AVAILABLE LIGHT* 17 (2000); see Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227 (2006) [hereinafter Sherwin et al., *Law in the Digital Age*]; THOMAS SEBEOK, *SIGNS: AN INTRODUCTION TO SEMIOTICS* (1994) (paraphrasing Max Weber).
26. See ROBERT P. BURNS, *A THEORY OF THE TRIAL* (2001); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).
27. See SHERWIN, *VISUALIZING LAW*, *supra* note 6.
28. Consider in this regard the pivotal scene in the Wachowski siblings' film, when Neo learns his life is a fake. As Morpheus puts it: "The world as it was at the end of the twentieth century exists now only as part of a neural-interactive simulation that we call the Matrix. You've been living in a dream world, Neo." *THE MATRIX* (Warner Bros. Pictures 2000). Baroque reality is reality as pure effect, without presence, or being, like a collective hallucination. See VILEM FLUSSER, *THE SHAPE OF THINGS: A PHILOSOPHY OF DESIGN* (1999); GILLES DELEUZE, *PURE IMMANENCE: ESSAYS ON A LIFE* (Anne Boyman trans., 2001); GILLES DELEUZE, *FOLD: LEIBNIZ AND THE BAROQUE* (Tom Conley trans., 1992).
29. Walter Benjamin associates this ontological and epistemological instability with baroque culture, which in his view stands like a tree whose roots have been excised. According to Benjamin, living in a baroque era is suffused with the feeling of being "driven along to a cataract." SHERWIN, *VISUALIZING LAW*, *supra* note 6, at 9 (quoting WALTER BENJAMIN, *THE ORIGIN OF GERMAN TRAGIC DRAMA* 66 (1998)).

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No walk of life, no matter how far flung or esoteric, is immune to the influence of contemporary visual culture. From aboriginal rituals<sup>30</sup> to neuro-scientific studies<sup>31</sup> to courtroom practices around the world,<sup>32</sup> electronic screens increasingly mediate the realities in which we live and from which we seek meaning, understanding, and judgment. Aesthetics, epistemology, ethics, metaphysics, and, yes, jurisprudence, are all being interpellated anew by new communication technologies. Everyone everywhere lives more and more of his or her life on the screen. It behooves us, therefore, to cultivate a proper understanding of the visual codes that are operating in the meaning-making process. To be sure, the stakes involved in undertaking this task are greatest when it comes to law, for that is where power and meaning converge. It is where particular interpretations are backed by the policing force of the state. Finding oneself on law's "field of pain and death"<sup>33</sup> is hardly the occasion to indulge postmodern irony.

New forms of visual empowerment and deceit must be confronted head on. In the age of the digital image, all information is fungible—words, sounds, and images alike. It is a world in which the perfect digital copy makes nostalgia for the original seem more than a little quaint. Benjamin's elegy for the "aura"—by which he meant to describe the peculiar power of the singular artwork to concentrate the mind of the viewer in the here and now of its unique and inimitable presence—barely carries on the late modern air. The strains of the aura are rather foreign to our ears (and eyes) these days against the digital din that demands and endlessly divides our attention. The aura? What could Benjamin have been thinking of? Might it be that some things become so irretrievably lost that we hardly can be bothered to speak of them?

Little could Benjamin have imagined how far the original would fall, or that one of the last battlegrounds for the aura might end up inside the courtroom itself. But so it has come to pass. A world of digital apparitions, of phantom beings stripped of their reality—does this not describe at least a significant part of the contemporary multimedia world of law on the screen? What term might we imagine for such a world, stripped of its aura? How about "purgatory"?<sup>34</sup> That, in any event, is the very term a federal judge selected in *United States v. Yates*.<sup>35</sup> He chose it to describe the fate of video images that a majority of his colleagues on the bench saw fit to cast out of the courtroom, on constitutional grounds, as not present enough to comport with the law's fundamental responsibility to actual presences, to reality, if you will.

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30. JENNIFER DEGER, *SHIMMERING SCREENS: MAKING MEDIA IN AN ABORIGINAL COMMUNITY* (2006).

31. MICHAEL S. GAZZANIGA, *THE ETHICAL BRAIN: THE SCIENCE OF OUR MORAL DILEMMAS* (2005).

32. See generally Sherwin et al., *Law in the Digital Age*, *supra* note 25.

33. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1606–07 (1986).

34. "The Italian word *ombra* in Dante's lexicon means both 'shadow' (as in the shadow cast by a body) and 'shade' (a term for the form of the soul in the afterlife)." Guido Guinizzelli & Arnaut Daniel, *Terrace 7: Lust*, UNIV. OF TEX., <http://danteworlds.laits.utexas.edu/purgatory/09lust.html#guin> (last visited Aug. 21, 2012). In the action-adventure video game, *DANTE'S INFERNO* (Visceral Games/Electronic Arts 2010), the shades in question really are digital simulacra.

35. 438 F.3d 1307, 1325 (11th Cir. 2006).

The situation is paradoxical, perplexing even, the more one thinks about it. A majority of the court has reversed on appeal a trial judge's decision to permit the live trial testimony, via two-way video transmission, of a witness based in a foreign country. According to the appellate ruling, reliance upon these images in court violates the criminal defendant's constitutional right to confront the witnesses against him. The Sixth Amendment Confrontation Clause requires the actual presence of the witnesses in court, says the majority. Not so, the dissent retorts. According to the dissent, the majority has mistakenly cast the video testimony into "constitutional purgatory." The dissenting judge's perplexity is manifest: "The witnesses are not 'present' enough to be considered in the defendant's 'presence' yet are somehow 'present' in court where the defendant is also 'present.'"

What ontological quandary is this? And what paradox? Are we really being asked to determine how much presence an electronic image has when it is projected onto a screen inside the courtroom? (How present does a technologically reproduced image have to be in order to pass constitutional muster?) Physically, the witness is in Australia; his image is in an American courtroom. Are the trial participants then looking upon a mere shade, the ghostly presence of a digital simulacrum? Purgatory indeed.

But wait. Could it be that one man's shade is another's living presence? Let us see if we can disentangle this metaphysical conundrum. On the dissenting judge's analysis, the forge of purgatory comes from the law that bans the image from appearing in court. On this reckoning, the majority has mistakenly construed the constitutional text as an agent of purgation, for in the dissent's view, the witness's video testimony is indeed real enough to meet the Constitution's demand for presence at trial. For the dissent, then, the evil to be removed (the source of unreality, if you will) is constitutional purgatory itself. Not so for the majority. For them, the testimonial images are simply not real enough to meet the Constitution's demand for presence. For the majority, then, the Constitution is an agent of reality, and the evil to be removed is the unreality of the images themselves.

Who says law in late modernity is no longer an ordeal?

In the remainder of this article, I will occupy this ambiguous space, where "shades" and "presences" uncomfortably commingle. It is a domain well suited to illustrate the ramifications for law of "iconoclasm." Iconoclasm describes our deeply rooted love/hate relationship with visual images.<sup>36</sup> That conflict is now playing out in law as it is in art and science and popular culture more generally. And it is happening everywhere. In what follows, I shall argue that the contest over the meaning of words like "shade" and "presence" and "purgatory" and "reality" captures the complexity and, yes, the profundity of the controversy at issue. It is an epistemological, ontological, and perhaps even metaphysical tangle, for it reflects deep uncertainties about the nature of reality itself—of what we can know about what we see displayed on electronic screens before our eyes. What is it that authorizes the truth claims of digital images as a matter of law? As images play out inside

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36. See *ICONOCLASH: BEYOND THE IMAGE WARS IN SCIENCE, RELIGION AND ART* (Bruno Latour & Peter Weibel eds., 2002).

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courtrooms not only across America, but around the globe, this query increasingly presses upon us. It is pertinent wherever electronic screens technologically reproduce visual evidence or visual arguments that lay claim to truth-based justice.

How much reality do images bear (bare), or occlude, and what difference does this make in the outcome of real cases? What might it mean, in terms of justice or fairness or the right outcome in a given case, when a legal decision is made on the basis of images that delight the senses, without more—as opposed, let us say, to images whose authenticity carries greater ontological authority, the kind of presence that staves off purgatory, and that produces an ethical demand, the kind that we properly associate with the countenance of the real?

Law deals with matters of judgment. So what we are really asking is not simply how much presence does an image present, but also how much presence *ought* an image to present to authorize the force of law? How does one speak of such things? In the newly emerging field of visual jurisprudence, one way to describe such an image is by reference to the aesthetic and ethical sublime.<sup>37</sup> There are images that disappear upon consumption, and images that take us in, that make us shudder with a significance that is hard to explain, but harder still to dismiss. The former (the sensate image as simulacrum) is used up once its effects are done; the latter (the image as sublime) persists in the overdetermined mystery of its irreducible presence.

If we are persuaded that such a thing is possible, that there is a kind of ontological authenticity to the technologically reproduced image, then perhaps its aura has not, as Benjamin thought, been utterly lost after all. If such a possibility exists, then the task at hand is to cultivate the cognitive and cultural competencies that allow us to ascertain the telltale signs of such a visual event along with the communicative efficacy that can do justice to the entangled aesthetic and ethical reality that it reveals.

This is the challenge we face when law migrates to the screen. In the current age of the digital baroque, the nature of screened reality is sorely contested, though what drives that contest might well be soon forgotten. This manner of speaking (and seeing) signals the emergence of visual jurisprudence. Visual jurisprudence inherits, but must also transform, the hermeneutic and phenomenological challenge of textual interpretation, for now it is the radiance of the image with which we are concerned (in addition to, though apart from, the radiance of language).<sup>38</sup>

The remainder of this article will proceed in four parts. Part II begins with the federal court opinion in *Yates*. This case will serve as a basis for contextualizing a central challenge of law's current life on the screen, namely: the status and nature of visual images inside the courtroom. A brief discussion of the Confrontation Clause of the Sixth Amendment will set the scene for the ensuing judicial clash over how real (or how "present") video-based testimony may need to be. Part III develops the analysis further by exploring new ways of thinking and speaking about visual images inside the courtroom. What legitimates the truth of the image as a matter of law,

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37. For a fuller discussion of this matter, see SHERWIN, *VISUALIZING LAW*, *supra* note 6.

38. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 443 (1975) ("It is not the radiance shed on a form from without. Rather it is the nature of the form itself to be radiant . . .").

and what leads to its derogation as mere sensation or empty ornamentation? These are the kinds of questions that impel and shape the quest for visual prudence in the age of the digital baroque. Part IV seeks to advance the cause of visual prudence in the law by providing illustrations of several different ontological and epistemological modalities of the image. Proceeding from actual visual practices inside the courtroom, in this part we shall seek to distinguish the merely ornamental (the visual rhetoric of sensation and delight, evident in what I shall refer to as the “magical realism” of pop science) from the ontological demand of the aesthetic and ethical sublime. The category of the sublime, I shall contend, helps us come to grips with the aura (if it exists) of the visual object in view.

The article concludes with a revision of Walter Benjamin’s sweeping condemnation of the technologically reproduced image, his claim that “there is no facsimile of the aura.”<sup>39</sup> In a world where perfect digital copies proliferate (where it’s “copies all the way down”) the need for an originary presence may hardly seem to arise. I shall argue, however, that such a conclusion is both unwise and unwarranted. Benjamin has no doubt gotten hold of a brilliant insight regarding the risks associated with technologically reproduced images. He commits an injustice, however, by tarring all such images with the same brush. For Benjamin, it is as if every technologically reproduced image embodies no more than empty, “distractive” ornamentation, as if they all serve as vehicles for detached sensation whose “percussive” impact ends immediately upon their consumption. But as the discussion of *Yates* in Part II suggests, and the larger critical analysis in Parts III and IV elucidates, the electronic world of screen images is a mixed world of shades and presences. It encompasses a range of visual realities, from purgatorial traces of sealed, algorithmically generated digital simulacra that assume the appearance of monadic totalities, to uncanny presences that manifest the aesthetic and ethical sublime. In sum, the claim being made here is that, notwithstanding Benjamin’s disavowal, standing before at least some technologically reproduced images, the singular, irreducible call of the sublime persists, and in so doing, so, too, may law’s fealty to the real. In this sense, the commodified image that we consume, and in consuming use up, may be a part of the new visual landscape of law, but it does not account for the whole. Law’s empire—including the multi-modal media that it occupies and deploys and the broad rhetorical spectrum that it spans—may be changing, but the contest for truth-based justice goes on.

## II. VIRTUAL TESTIFYING IN *UNITED STATES V. ANITA YATES*: PURGATORY OR ACTUALITY?

In the *Yates* case, two defendants were charged with mail fraud, conspiracy to defraud the United States, conspiracy to commit money laundering, and various prescription drug-related offenses. The government identified two “essential witnesses” who were beyond the government’s subpoena powers and unwilling to travel to the United States to testify against the defendants at trial. To solve this problem, the government sought to have the witnesses testify via video teleconference

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39. BENJAMIN, *supra* note 2, at 260.

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from Australia. The district court granted that request. The jury convicted the defendants, and an appeal followed.

The central issue raised on appeal addressed the meaning of the Sixth Amendment right of all criminal defendants to confront the witnesses against them at trial. Was a two-way videoconference sufficient to fulfill the demands of confrontation? The defendants, the jury, and the judge were able to see the witnesses on a screen as they testified in real time from Australia. Likewise, the witnesses were able to see the defendants as the witnesses' direct and cross-examination unfolded in court. Nevertheless, a majority of the appellate court decided that this procedure fell short of what the Sixth Amendment required.

In reaching its conclusion, the court relied in part upon the authority of *Coy v. Iowa*,<sup>40</sup> a U.S. Supreme Court case that was decided in 1988. In *Coy* the high court insisted, in an opinion authored by Justice Antonin Scalia, that the word "confront" in the text of the Sixth Amendment means "face-to-face" confrontation.<sup>41</sup> The defendant in *Coy* was charged with sexually assaulting two thirteen-year-old girls. In order to protect the victims from the trauma of having to face their alleged abuser in court, the judge allowed them to testify from behind a screen. This blocked the defendant from the witnesses' sight, though he could dimly see them as they testified. For Justice Scalia and the majority for which he spoke, the violation of defendant's confrontation right was clear. The countervailing policy objective of safeguarding the well-being of the victims was deemed insufficient to mitigate the offense to the defendant's Sixth Amendment right. This view would shift a mere two years later. In *Maryland v. Craig*,<sup>42</sup> in an opinion written by Justice Sandra Day O'Connor, the high court ruled that the use of two-way closed circuit video to protect the well-being of a victim of sexual abuse was justified. On this analysis, the policy objective of protecting the well-being and testimonial capacity of the victim justified a limited intrusion upon the defendant's confrontation right.

According to Justice O'Connor, even without "face-to-face" confrontation, the combined safeguards of ensuring that the witness testify under oath and submit to cross examination, and that jurors see the demeanor of the witness while making her statement, suffice to meet the general truth-testing objectives that the Sixth Amendment lays out. This was so, according to the *Craig* majority, particularly in light of the important public policy at issue, for it was found in this case (unlike in *Coy*) that the witnesses would indeed suffer difficulties testifying if they were forced to confront the accused face-to-face inside the open courtroom.

In a strongly worded dissent, Justice Scalia argued that the *Craig* majority's balancing of competing interests was prohibited by the Constitution. The court, he contended, was not authorized to substitute anything less than the full panoply of truth-testing measures that the drafters of the Confrontation Clause saw fit to inscribe in the

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40. 487 U.S. 1012 (1988).

41. *Id.* at 1016. In pertinent part, the constitutional text reads: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

42. 497 U.S. 836 (1990).

constitutional text. Indeed, for Justice Scalia, it is precisely the difficulty of testifying face-to-face with the accused that constitutes the chief truth-seeking safeguard that the drafters had in mind. As Justice Scalia put it: “That a defendant loses his right to confront a witness when that could cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him.”<sup>43</sup>

With these precedents as background, the *Yates* court faced the choice of either opting for Justice O’Connor’s balancing test or Justice Scalia’s stricter adherence to the “plain meaning” of the constitutional text. The *Yates* majority chose the latter. In so doing, they expressed the concern that distant testifying might reduce, or perhaps eliminate altogether, those “intangible elements of the ordeal of testifying” that, as Justice Scalia noted in *Coy*, lay at the heart of the traditional truth-testing method that the constitutional drafters of the Confrontation Clause had in mind. Given the lack of equivalence between face-to-face and distance testifying, the *Yates* majority insisted that “exceptional circumstances” must exist in order to warrant departing from the confrontation right that all criminal defendants enjoy.<sup>44</sup> Unlike the “important public policy” described by Justice O’Connor in *Craig*—namely, to protect young victims who were specifically found to be unable to testify in open court before the glare of the accused—in *Yates* no comparable interest was deemed to have been presented by the state. The state’s expressed *need* for the testimony “to make a case and to expeditiously resolve it” was not equivalent to the policy goal of safeguarding the emotional wellbeing and testimonial capacity of the young victims in *Craig*.<sup>45</sup> Convenience, expedition, and the desire to succeed in a criminal prosecution are simply not important enough public policy objectives to warrant impairing defendant’s confrontation right.

Needless to say, the dissent in *Yates* saw matters otherwise. Effective law enforcement alone, in the dissenters’ view, constitutes an important policy goal. Moreover, as in *Craig*, here, too, the dissent found sufficient indicia of evidentiary reliability to warrant substituting the witness’s physical presence in court with a virtual presence via two-way video. At the core of the dissent’s disagreement with the *Yates* majority’s dispatch of the witness’s distant testimony into what the dissent dubbed “constitutional purgatory” there lies a fundamental difference of opinion regarding the nature and efficacy of distant (as compared to live, in-court) testimony.<sup>46</sup>

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43. *Id.* at 867.

44. *United States v. Yates*, 438 F.3d 1307, 1318 (11th Cir. 2006).

45. *See id.* at 1316. Notably, there was no actual finding that the witnesses in *Yates* could not travel from Australia. All they claimed was that they preferred not to. *See id.* at 1315.

46. *Id.* at 1325–27. I omit here discussion of whether the testimony of the witness may be deemed an out-of-court statement that qualifies as admissible “hearsay.” In the hearsay context, relevant issues include what it means for the witness to be “unavailable” and what constitutes a testimonial statement. *Compare* *Crawford v. Washington*, 541 U.S. 36 (2004) (ruling that “testimonial,” out-of-court statements are inadmissible if the accused did not have the opportunity to cross-examine that accuser and that accuser is unavailable at trial), *with* *Michigan v. Bryant*, 131 S. Ct. 1150 (2011) (holding that under emergency conditions a dying witness’s identification of defendant as his assailant together with the location of the shooting were “non-testimonial” statements and thus did not warrant sixth amendment confrontation at trial).

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For the dissent, the defendant's ability to see the witness on a screen in court, and the witnesses' ability to see the defendant as each witness testified, is good enough confrontation for Sixth Amendment purposes. For the *Yates* majority, it is not.

Thus the debate is joined. To what extent does “virtual” testifying (what Justice Scalia once described as “a television set beaming electrons that portray a defendant’s image”<sup>47</sup>) differ from the live presence of face-to-face confrontation? The *Yates* majority assumes that virtual testifying falls short of the real thing. But by what measure? Let us consider the possibilities.

At the outset, every virtual witness faces a choice when testifying. She may either look at the monitor before her, or stare directly into the lens of the camera as she speaks. The monitor will permit her to see others inside the courtroom. By forgoing the camera, however, she will appear to be avoiding eye contact with her interlocutor. Of course, even if she chooses to forgo the monitor and stares directly into the camera she is only creating the appearance of eye contact. Since she is actually sitting alone, staring at an inanimate object, it is very difficult for a real emotional connection with her questioner to take place. This loss of connection has been associated with a sense of “derealization” and “dehumanization” of the virtual witness.<sup>48</sup>

Good choices are elusive here. If the virtual witness shifts her gaze from the monitor to the camera and back again she risks creating an impression of evasiveness or lack of credibility. When her interlocutor sees her look away, it may appear as if this is occurring in direct reaction to the question posed, as if the distant witness's discomfort with the query (or with her own response) has made her “dodgy.” This susceptibility to perceptual and cognitive error—whether it is the false inference of causation described above or some other miscue—is suggestive of the distortions to which screen-based legal proceedings are prone.

Let us consider as well the obvious fact that teleconferencing only allows a viewer to see what the camera frames, when it frames it.<sup>49</sup> This is not the same as looking

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47. See Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89 (2002) (statement of Scalia, J.).

48. See Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POLY 211, 215 (2006). In the immigration law context, for example, studies have shown that about half the number of grants of asylum occur in virtual hearings as compared to live ones. See Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Cases*, 22 GEO. IMMIGR. L.J. 259, 279–80 (2008) (citing U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS & TECH. STATISTICAL REQUEST OPA 07-116 (2005)); Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 74 (2006); see also Robert Feldman & Richard B. Chesley, *Who is Lying, Who Is Not: An Attributional Analysis of the Effects of Nonverbal Behavior on Judgments of Defendant Believability*, 2 BEHAV. SCI. & L. 109, 110 (1984).

49. As legendary cinematographer Haskell Wexler once put it, when the camera turns on—beginning at one discrete point in time and ending in another—reality is changed. Conference, *Visual Evidence VII*, U.C.L.A. (Aug. 20, 1999). See, e.g., DON IHDE, TECHNOLOGY AND THE LIFEWORLD 42, 46 (1990) (discussing the extent to which we are situated in the world, and see as a particularly situated person from a particular vantage, toward others otherwise situated).

wherever, whenever, and in the order one wants, inside a courtroom.<sup>50</sup> Lighting, camera angles, and sound serve as filters, or traces, of technological mediation that leave their own singular mark on what appears on the screen.<sup>51</sup> Looking down upon, or up at, the figure in the frame, zooming into his or her intimate space, leaving her face partially obscured in darkness—these choices, and many others besides, all help to characterize the image that is being projected. Each of these framing decisions, in conjunction with widely shared cultural models or scripts or genres that viewers unconsciously bring to the screen when interpreting what they see there, helps to shape the way the viewer perceives the image on the screen. If the information we gather live from someone’s facial expressions or physical demeanor goes beyond the information available from the screen, then screen-based judgments are to some extent distorted. For instance, what if the witness’s nervously jiggling leg, or momentarily darkening eyes, escapes the view of the camera? Or what if the audio fails to convey subtle changes in vocal tone that connote a shift in nuance and expressive meaning?<sup>52</sup> The viewer’s assessment of credibility based on limited access to the witness’s demeanor will be diminished.

Apart from the mechanics and effects of framing, one may also ask whether our encounter with what is on the screen accurately replicates the “crucible” effect of face-to-face confrontation, and of cross-examination in particular. For example, does the screen image activate the same (or perhaps a different set of) fantasies and associations? In open court one can imagine a witness on the stand thinking, “What if the defendant were to jump up from behind the table at which he is now seated and strike me?” By precluding the possibility of a fantasy like this, the screen may alter the way the witness testifies in court. Are there other affects or impulses (what the psychoanalytic community refers to as the phenomenon of interpersonal “transference”) that the screen fails to replicate? In a similar vein, we may also wonder whether a witness’s response to an advocate’s projected feelings—what the other makes me feel in response to his or her affect (what is known in the psychoanalytic community as “counter-transference”)—also occurs in response to images on the screen.

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50. Though the “all-at-once-ness” (or *gestalt*) of unmediated perception may elude the selectivity of the camera’s mechanical eye, the *gestalt* of watching images on the screen emulates that of unmediated perception. This phenomenon lies at the heart of so-called “naïve realism,” the firm belief by the viewer that he or she has seen all that she needs in order to be certain of the reality the screen shows. See Sherwin et al., *Law in the Digital Age*, *supra* note 25.

51. See, e.g., BYRON REEVES & CLIFFORD NASS, *THE MEDIA EQUATION: HOW PEOPLE TREAT COMPUTERS, TELEVISION, AND NEW MEDIA LIKE REAL PEOPLE AND PLACES* (1996) (noting that people commonly equate media images and reality). If viewers treat screen images as equivalent to reality, the witness will be held responsible for how she appears notwithstanding extrinsic (technology-based) factors that help to shape and inform that appearance.

52. According to one study, words account for only seven percent of meaning in oral communication. Voice accounts for thirty-seven percent, and body language accounts for a whopping fifty-five percent. See ALBERT MEHRABIAN, *NONVERBAL COMMUNICATION* 178 (1972). The effects of technology-based distortions in sound and image at virtual hearings, therefore, may be substantial. Yet, because these effects are not consciously discerned they remain invisible.

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This lack, if that is the case, may have consequences not only in the way jurors, for example, respond to (and judge) the demeanor of the witness, but also in the way an opposing party's counsel goes about the business of cross-examining a witness. Impeachment strategies during cross-examination often depend upon intuited assessments of the witness's state of mind. What question, framed in what way, in what voice, from what distance, and with what affect, will have the desired impeachment effect on the testifying witness?<sup>53</sup> Without this analytic and affect-based gauge will cross-examination be impaired? Or consider shifting from the advocate's perspective to that of the virtual witness. Deprived of an immediate sense of how his or her words and demeanor may be affecting others inside the courtroom, does the distant witness lack the opportunity to gauge the actual efficacy (or inefficacy) of his communication and adapt his words or communication style or demeanor accordingly?

These concerns suggest that a distant witness might well say different things, and speak or behave differently, were he speaking live inside the courtroom. This is not simply a matter of impeding the witness's empathy or disrupting the usual feedback system that constitutes the ecology of effective communication. It may also be the case that speaking to a camera, or to images on a screen, prompts different fantasies as well as different affects as compared to performing speech live in court. Of course, this shift away from live communication might encourage a timid witness to say something to the camera that he or she might not be able to say directly in person. By the same token, it might also invite the witness to act on impulses more akin to showmanship—performing for the camera, so to speak.<sup>54</sup> Such a performance is in a certain respect sealed off from external reality, and thus remains more prone to solipsistic (or hyper-subjective) thoughts, fantasies, and associations. At the same time, the screen might also invite other screen-based associations. Here we confront a different kind of subjectivity—one that is constituted by our immersion in the world of film and television and video games. If we tend to become the object we think with,<sup>55</sup> what is there to prevent the distant witness, or any screen viewer in court for that matter, to associate the image on the screen with other screen-based images that the viewer has seen before? This is one of the ways in which popular culture insinuates itself back into the courtroom. Viewers of screens inside the courtroom tend to see with eyes that have been conditioned by other popular images.<sup>56</sup> Other stock characters or stock narratives to which the viewer associates as she watches may now help shape and inform the meaning of the images she sees. (“Oh, this is just like a scene from . . . .”) This is the way life imitates art.<sup>57</sup>

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53. See generally MICHAEL E. TIGAR, *EXAMINING WITNESSES* (2d ed. 1972).

54. See *Estes v. Texas*, 381 U.S. 532, 591 (1965) (noting that publicity “introduces into the conduct of a criminal trial the element of professional ‘showmanship’”).

55. See generally CHRISTOPHER BOLLAS, *THE EVOCATIVE OBJECT WORLD* (2009).

56. See generally SHERWIN, *WHEN LAW GOES POP*, *supra* note 5.

57. Consider, in this regard, Justice Scalia's reference to the feature film *THE FRENCH CONNECTION* (20th Century Fox 1971) during oral argument in *Scott v. Harris*, 127 U.S. 1209 (2007). For Justice Scalia, the

If testimony on the screen looks more like TV, or is reminiscent of something from the movies, does that mean that viewers might read the image in a different way than they would in real life? Might viewers unconsciously bring film or TV associations to their experience of what they see on the screen? Might it be that the more like TV something appears, the less real it feels, and therefore the less threatening, and less likely to serve as an accurate measure of truth? Or, for that matter, might the benchmark for belief substitute a pop cultural template for an unmediated, experiential one? In that case, the more like TV or film, the more real the image may seem.

There is a socio-cultural repertoire and archive of stock moves and associations that accompany discrete forms of experience, the social scenes and scripts that we know and unconsciously replicate in everyday life. In a similar vein, we also recognize and respond to the discrete repertoire and archive of stock moves and associations in specific forms of media. We tend not to experience a live performance in the theater the same way we experience screen images in the cinema. Might the intervention of the camera and the monitor's screen-reality inside the courtroom disrupt or in some way fragment and complicate the continuity of a live performance aesthetic with its attendant expectations and interpretive strategies and outcomes?<sup>58</sup> With what kind of dramaturgy, governed by what aesthetic rules and cognitive/cultural expectations are we dealing when we enter an electronically mediated courtroom?

These are only some of the considerations that help to suggest why the *Yates* majority was correct in assuming (as have most other courts considering the matter<sup>59</sup>) that distant or virtual testimony on the screen is *not* equivalent to face-to-face testimony inside the courtroom. Based precisely on this assumption, Justice Scalia has said that "virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."<sup>60</sup> But can we be so sure that we have gotten our categories down? What is "virtual," and what is "real"?

In the next part we will step back from the particulars of the *Yates* debate in order to assess some of the larger issues that it raises. Here we will address head on the epistemological, ontological, and metaphysical quandaries that arise when law lives, as other images do, on electronic screens in court, and out.

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film served as a benchmark for evaluating a crucial police surveillance video in the *Harris* case. For a transcript of the oral argument, go to [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_1631/argument](http://www.oyez.org/cases/2000-2009/2006/2006_05_1631/argument) (last visited Aug. 30, 2012).

58. See Branislav Jakovljevic, *Wooster Baroque*, TDR: THE DRAMA REVIEW 54:3, 87-122 (Fall 2010).
59. See, e.g., *United States v. Nippon Paper Indus. Co.*, 17 F. Supp. 2d 38, 42 (D. Mass. 1998) ("Studies have suggested that television and video screens necessarily present antiseptic, watered down versions of reality. Much of the interaction of the courtroom is missed.").
60. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93-94 (2002) (statement of Scalia, J.).

### III. THE NEW RHETORIC OF VISUALIZING LAW

Rhetoric is all about efficacy. What can we say or show to win belief? According to the cognitive psychologists, understanding suffices for belief to occur. Once we grasp what we see (or hear or read) we accept what we grasp.<sup>61</sup> The speed, vividness, and emotional force of our mental response to images only enhance our sense of their truth. In this respect, visual delight may well serve as a measure of visual truth. The subject who delights in the image she takes in has reason (or at least motive) to believe in the source of that delight. Belief allows and invites ownership of the affective payoff that a particular visual experience allows. In this sense, the truth of the image lies on its surface, as on the viewer's skin.<sup>62</sup> It functions by way of its use value, which is to say, the feelings its consumption permits.

But use value is not the only way to measure the truth of an image. Throughout history images have been treated as being imbued with something like an aura, a kind of halo or surplus of meaning that is irreducible to what they actually depict. As William Mitchell has written, the image seems to return our gaze: as if somehow it had absorbed and reflects back our individual and collective emotional and even erotic investments.<sup>63</sup> In this sense, we may say that images can be ontologically overloaded. They sometimes shimmer with an invisible presence; a strange surplus or aura renders their impact even more vivid to the senses, even more cognitively potent.<sup>64</sup> And this is so despite the fact that we remain ill-prepared to articulate why or how this phenomenon takes place. Yet, the mystery is not without consequence. We think with visual objects. We partake in the state of being that they radiate. This is what it is like to enter into the field of the image (rather than use it up in the act of consumption).

We have seen this ontological debate before. For Plato it was a matter of gazing at shadows cast upon the cave wall as opposed to glimpsing the radiance of the original ("archetypal") Idea. It is the same quandary that persists in the long and oftentimes violent history of iconoclasm. Is the visual object a sacramental aid in the process of ritual devotion, or is it an abomination that falsely proclaims a divine visual presence? In more modern vernacular, we ask: Is it real or just a simulacrum? Have we been cast into the virtual realm of some alien digital matrix, left to wander in a baroque maze of dreams within dreams?<sup>65</sup> Or, perhaps making the best of what

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61. See, e.g., Deborah Prentice & Richard Gerrig, *Exploring the Boundary Between Fiction and Reality*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 529–46 (Shelly Chaiken & Yaacov Trope eds., 1999).

62. For more on the nature of "haptic visuality" (the idea of touching a film with one's eyes and perhaps being touched in turn), see LAURA MARKS, *THE SKIN OF THE FILM* (2000), and MAURICE MERLEAU-PONTY, *THE VISIBLE AND THE INVISIBLE* 248–49 (Alphonso Lingis trans., Claude Lefort ed., Northwestern Univ. Press 1968) (1964); see also ALISON YOUNG, *THE SCENE OF VIOLENCE: CINEMA, CRIME, AFFECT* (2010).

63. See W.J.T. MITCHELL, *WHAT DO PICTURES WANT? THE LIVES AND LOVES OF IMAGES* (2004); JAMES ELKINS, *THE OBJECT STARES BACK* (1996).

64. See SHERWIN, *VISUALIZING LAW*, *supra* note 6; JENNIFER DEGER, *SHIMMERING SCREENS* (2006).

65. There has been a spate of popular films over recent years that revolve around this quintessentially baroque theme. See, e.g., *THE MATRIX*, *supra* note 28; *eXISTENZ* (Alliance Atlantis Commc'ns 1999); *INCEPTION* (Warner Bros. Pictures 2010).

we cannot defy, rather than harping on the spectacular emptiness of the image,<sup>66</sup> maybe we should simply yield to its allure. As Mitchell writes, faced with “a nauseating void of signifiers,” it is possible to choose “nihilistic abandonment to free play and arbitrary will.”<sup>67</sup> This strategy marks the embrace of reality as endless carnival, a perpetual baroque spectacle, or masque.

The seventeenth century baroque like the current digital baroque love/hate relationship with images (Bruno Latour’s “iconoclasm”) reflects an historically recurrent “either/or” response to the image.<sup>68</sup> Either it is what it shows or it is not. Either it is a transparent frame, like a window onto reality, or it is a deceit that ought to be utterly rejected. In this way, we see that the iconoclastic impulse is parasitic upon naïve realism.

In the end, it comes down to shades and presences, the perennial epistemological, ontological, and perhaps even metaphysical quandary: How real (if at all) is the image before us? What does it portend, reality or purgatory? Being, or mere simulacra? A sublime presence, or empty delight? The answer depends on the subject who gazes as well as the nature of the image she sees, consumes, or is taken in by. When it is a matter of consuming visual objects, the subject is the measure of the image’s aesthetic worth and truth value. By contrast, when the subject is estranged from herself by her encounter with the otherness of the image, then it is necessary to go beyond the subject to discern the meaning or truth-value of what has occurred.

This is not meant to be taken as the strict opposition that this phrasing may seem to suggest. After all, the utterly strange remains impenetrable. We get nothing from it. Meaning is always an admixture of the strange and the familiar. But the uncanny experience of an image that embodies an ontological surplus tells us that more is there than meets the eye. What makes an image uncanny is precisely what lies outside the viewing subject. Here we encounter the image’s ineluctable otherness, the irreducible visual remainder. There is something that the image itself cannot wholly represent or contain. It is the strange absence that we encounter as an uncanny presence. That is the way we experience the aura of the image.<sup>69</sup>

In law as well? Yes. When law lives the life of images it lives as images do: in shades and presences, in shallow delight and uncanny fullness. Let us see how this might be so inside the courtroom.

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66. See, e.g., JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* (1994).

67. W.J.T. Mitchell, *What Is an Image?* in 15 *NEW LITERARY HISTORY: IMAGE/IMAGO/IMAGINATION* 503, 519 (1984); GILLES DELEUZE, *PLATO AND THE SIMULACRUM* 27 (Rosalind Krauss trans., 1983).

68. See SHERWIN, *VISUALIZING LAW*, *supra* note 6.

69. Compare Wallace Stevens’s invocation in his sublime poem, *The Idea of Order at Key West* (“She sang beyond the genius of the sea. The water never formed to mind or voice, Like a body wholly body, fluttering Its empty sleeves; and yet its mimic motion Made constant cry, caused constantly a cry, That was not ours although we understood, Inhuman, of the veritable ocean.”). WALLACE STEVENS, *The Idea of Order at Key West*, in *THE COLLECTED POEMS OF WALLACE STEVENS* 128 (1990).

## IV. SHADES AND PRESENCES INSIDE THE COURTROOM

We will begin with spectacle, the realm of visual delight in the popular domain of magical realism. In short, we will first go under, to the underworld of purgatory, so to speak, before re-emerging, to the extent we can, into the fuller light of actuality. It is fitting, therefore, to offer a few words concerning the baroque, for the baroque is the domain of metaphysical anxiety *par excellence*. Gripped by ontological anxiety, baroque and neo-baroque culture leads us to wonder: Have we been trapped in a hall of mirrors or of dreams within dreams? Is this but a shadow world that we live in, what we have come to call in our time the virtual world of digital simulation, the airtight realm of algorithmically calculated simulacra?

Consider in this regard art historian S.J. Freedberg's characterization of the sixteenth-century genre of high mannerist painting, what he calls the "manic ferment" and packed extravagance of these eccentric forms, with their strange elongation and self-conscious aesthetic placement.<sup>70</sup> This is the familiar strategy of baroque distraction. Baroque representations must perpetually make up in emotional intensity, mobility of expression, and an extravagant multiplicity of form, for the felt emptiness that lies at their core.

Now consider the aesthetics of popular visual entertainment, and in particular the contemporary aesthetic that I refer to here as the magical realism of pop science. Studies have shown that the mere presence of a photograph at trial (even a neutral one) significantly increases the conviction rate compared to when no photos are shown (up to 38% from only 8.8%).<sup>71</sup> The mere mention of "neuroscience" has the power to enhance the credibility of claims made in its name.<sup>72</sup> It stands to reason that the union of the two (visualizing neuroscience) would constitute a potent tool of persuasion inside the courtroom. It already has in the precincts of science. Between 2003 and 2008, on average, a thousand peer-reviewed scholarly articles on neuroscience were being published every month.<sup>73</sup> The claims being made were wide-ranging, and sometimes elaborate. As early as 1994, for example, Francis Crick had written: "Your joys and your sorrows, your memories and your ambitions, your sense of personal identity and free will, are in fact no more than the behavior of a vast assembly of nerve cells and their associated molecules."<sup>74</sup> The neuroscientific refrain ("mind is matter") has resounded far and wide. In this view, free will dissolves in a bath of bio-chemical processes. No wonder Michael Gazzaniga asserted that advances in neuroscience

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70. S.J. FREEDBERG, *PAINTING IN ITALY: 1500–1600*, at 446–49 (Yale Univ. Press 3d ed. 1993) (1971).

71. See generally D.A. Bright & J. Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, in *LAW AND HUMAN BEHAVIOR* 183 (2006).

72. See Deena Weisberg et al., *The Seductive Allure of Neuroscience Explanations*, 20 *J. COGNITIVE NEUROSCIENCE* 470–77 (2008); see also J.D. Trout, *Seduction Without Cause: Uncovering Neurophilia*, 12 *TRENDS IN COGNITIVE SCI.* 281 (2008).

73. O.C. Snead, *Neuroimaging and the "Complexity" of Capital Punishment*, 82 *N.Y.U. L. REV.* 1265, 1273 (2007).

74. FRANCIS CRICK, *ASTONISHING HYPOTHESIS: THE SCIENTIFIC SEARCH FOR THE SOUL* 3 (1994).

would someday “dominate the entire legal system.”<sup>75</sup> How could it not, if the hard-core determinist claims being made in its name turned out to be correct?

To that end, the efficacy of digital visualization tools such as fMRIs (functional magnetic resonance images) in particular, which purport to show the human organism at work from the inside, has not been lost on neuroscientists and trial lawyers alike. As one experimental psychologist observed, however, “[t]here is a real danger that pictures of blobs on brains seduce one into thinking that we can now directly observe psychological constructs.”<sup>76</sup> Yet, despite these concerns, with increasing frequency fMRIs have been showing up in court in personal injury cases (to make brain injuries visible to jurors), in criminal cases (to establish incompetence or insanity), and in the sentencing stage of death penalty cases (to show mitigation, which is to say, to support the defense claim that execution is inappropriate when brain abnormalities diminish the defendant’s culpability).<sup>77</sup> At the same time, crime scene investigators are increasingly submitting every shred of forensic proof for lab testing—leading to ever growing backlogs. As Antony Zuiker, the creator of the popular TV series *CSI: Crime Scene Investigation*, put it, “blood, hair, saliva, skin et cetera are forensically designed to tell an investigator what has happened without having any witness to a crime.”<sup>78</sup>

The message is clear: while witnesses may lie or make mistakes, science does not. In this way, new digital forensic technologies signal a return to the early days of evidence, when the credibility of physical evidence was thought to far outweigh eyewitness testimony.<sup>79</sup> If there is one thing upon which commentators seem to agree it is this: CSI technology is not just science, it is super-science.<sup>80</sup> And judging by the images that popular, forensics-minded TV shows present, the visual aesthetics of the new visual technologies are beautiful to behold. Of course, that is part of their power. Aesthetic delight in the image encourages a sense of understanding and acceptance, and that response, cognitive psychologists tell us, is tantamount to belief. Add aesthetic delight to the widespread belief in the authority of science and you have a potent formula for producing belief (in what is true).

This is certainly the case with regard to many of the new scientific technologies that are being used to generate visual evidence in court. To the untrained eye, which

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75. GAZZANIGA, *supra* note 31.

76. See Neal Feigenson, *Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI*, INT’L L.J. IN CONTEXT 233, 247 (2006) (quoting R. Henson, *What Can Functional Neuroimaging Tell the Experimental Psychologist?*, 58 Q.J. EXPERIMENTAL PSYCHOL. A 193–233 (2005)).

77. See, e.g., Alexis Madrigal, *Courtroom First: Brain Scan Used in Murder Sentencing*, WIRED SCI. (Nov. 23, 2009) (Brain scan evidence claimed by the defense to show that the defendant’s brain was psychopathic was allowed into the sentencing portion of a murder trial in Chicago.).

78. Kimberlianne Podlas, *“The CSI Effect”: Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 432 (2006).

79. See ALEXANDER WELSH, STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND (1992).

80. See N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects Public Expectations About Real Forensic Science*, 47 JURIMETRICS J. 357–58 (2007).

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is to say, to the ordinary common sense of most judges and jurors, digital scans or fMRIs of the brain and other parts of the body look a lot like a photograph or an x-ray. But they are hardly that. The brain does not really ‘light up’ when active. fMRIs are actually statistical maps, visualizations of comparative data sets, calculating variations from the norm of the magnetic resonance of water molecules within localized blood flow to the brain. It is this highly complex information that has been digitally programmed to look like a brain lighting up in some parts, but not in others. In many cases, the resulting image may seem to provide direct evidence of the truth claim a particular advocate is seeking to prove.

The natural inclination to view fMRIs as if they were photographs thus poses a serious risk of changing conviction and acquittal rates in cases involving fMRIs. Nor does this even begin to take into account the possible influence of the forensic pop science that is seen on TV shows like *CSI: Crime Scene Investigation* and its numerous offshoots. The fascination with cognitive neuroscience together with the wide-ranging evidentiary claims of digital forensic technology have spread from scientific circles to the domain of popular entertainment. Consider: from 2000, the year it debuted on TV, to 2006, *CSI: Crime Scene Investigation* grew into a franchise, with two spinoffs, *CSI: Miami* and *CSI: New York*. In 2004, each enjoyed over fourteen million weekly viewers, while the original series had over twenty-five million. Comparable shows, featuring crime-stopping, cutting-edge technologies have ensued, including: *Without a Trace*, *Numbers*, *Criminal Minds*, and *Navy NCIS: Naval Criminal Investigative Service*—on one network alone. Other networks have sought to ride the wave with spinoffs of their own, including: *The Closer*, *Crossing Jordan*, and *Bones*.<sup>81</sup>

This cumulative visual feast seeks to assure us that science brings certainty. Forensic investigators probe crime scenes for physical clues that inevitably lead to likely suspects. Perhaps they will retrace the trajectory of a gunshot back to its source, as in one episode of *NCIS*.<sup>82</sup> Look: that glare in the car window, it’s the flash of a gun caught fortuitously in the frame of an ATM camera, and now, by simply shifting the view on the screen to an overhead police surveillance camera we readily see the image of a driver in a van. His face is quickly scanned and just as quickly dumped into a database that immediately produces the identity investigators were seeking. Wondrous.

Or like that episode on *CSI*, when traces of an attacker’s skin were caught under the fingernails of a child, the result of a struggle.<sup>83</sup> After being placed in a machine the size of a toaster, the skin cells glow green, like numinous crystals of kryptonite, beautiful to behold. It’s a quick trip to a skin cell database, and presto! The criminal target’s face instantly looms large on an adjoining screen. Like magic, except that we are meant to conclude that what seems like magic is really the stuff of science, the product of the most sophisticated forensic technologies. Even the *CSI* labs seem

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81. See generally Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 *STAN. L. REV.* 1335 (2009); Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 *NEW ENG. L. REV.* 435 (2007).

82. *Naval Criminal Investigative Service: Legend Part 1* (NBC television broadcast Apr. 28, 2009).

83. *Crime Scene Investigation: Say Uncle* (CBS television broadcast Nov. 13, 2008).

magical, suffused as they are in a mystical violet light that adds to the uncanny beauty of the scientific truths produced there. But is it truth, or sheer visual delight parading as truth? If the latter, then the same possibility apparently haunts the computer screens of professional scientists and trial lawyers alike.

The sheer visual delight of digital forensic technologies enchants the eye. As one researcher concluded, “exposure to brain images in the popular press, which provides a physical explanation for cognitive phenomena, likely influences the allure of cognitive neuroscience data.”<sup>84</sup> This describes the power of the ersatz aura, the magical realism of pop science. Needless to say, the incentive to intensify this aesthetic effect—what some neuroscience researchers call the “Christmas tree effect”<sup>85</sup>—in order to enhance the credibility of what the image purports to show raises serious ethical concerns. And these concerns are now part and parcel of the challenge of the aesthetic of delight when sensational images seek the authority of law inside the courtroom.<sup>86</sup>

But is the ornamental, sensate image all there is? Certainly not. What, then, might it be like to encounter in court an image that shines with the strange presence of the aesthetic and ethical sublime, the uncanny force of the visual remainder? Consider the following illustration from a recent murder trial. Here we encounter the eerie presence of a mother’s rage caught on a videotape that she thought (with near delusional fervor) would make the reason behind her defense plain to see. There is something uncanny here, a compelling presence that remains absent, yet haunts the viewer nevertheless. This is what occurred inside a New York City courtroom when a video documentary transfixed the attention of judge, jurors, and spectators alike. The occasion was the murder trial of Dr. Mazoltuv Borukhova. Borukhova was tried and ultimately convicted of having paid a distant relative, Mikhail Mallayev, \$20,000 to kill her husband, Dr. Daniel Malakov. Malakov, from whom Borukhova had been estranged for the last three years, was the father of their four-year-old daughter, Michelle.

The shooting took place in a Queens playground in plain view of the victim’s daughter, who stood nearby with her mother. The motive? Six days before, a family court judge had granted a transfer of custody from Borukhova to Malakov and this, so the state’s theory ran, was something Borukhova could not tolerate. The state argued that she could not accept losing custody of her only child. And to be sure, there was something exceedingly odd about Borukhova’s maternal protectiveness. For example, when Michelle’s father paid custody visits, Borukhova would do everything in her power to draw her daughter’s attention away from her father.

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84. David P. McCabe & Alan D. Castel, *Seeing Is Believing: The Effect of Brain Images on Judgments of Scientific Reasoning*, 107 *COGNITION* 343, 351 (2008); see also Jay D. Aronson, *The Law’s Use of Brain Evidence*, 6 *ANN. REV. L. & SOC. SCI.* 93, 101 (2010); Owen D. Jones, Joshua W. Buckholtz, Jeffrey D. Schall & Rene Marois, *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 5 *STAN. TECH. L. REV.* 1, 5 (2009) [hereinafter Jones et al., *Brain Imaging for Legal Thinkers*].

85. See Trout, *supra* note 72. See generally Jones et al., *Brain Imaging for Legal Thinkers*, *supra* note 84.

86. See generally Michael Perlin, *His Brain Has Been Mismanaged with Great Skill: How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 44 *AKRON L. REV.* 885 (2009).

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Michelle would remain firmly planted in her mother's lap throughout each visit, occupied with toys and sweets that her mother provided. Malakov's diminished status in his daughter's eyes (she cried whenever he sought her attention) caused him to seek help—first, from a court-appointed guardian, then from the court itself. Over time, Judge Sidney Strauss came to realize that things were not quite right with Borukhova's overweening possessiveness. She was "smothering" the child, he explained in the judicial opinion that accompanied his order that custody be shifted from mother to father. That order, prosecutors contended, enraged Borukhova, and sowed the seed for murder.

But how do we know the state had it right? Well, among other indicators, there is a videotape, made by a professional videographer that Borukhova herself hired. The assignment was to document one of her daughter's custody visits at the home of her father. And what do we see? But perhaps we should ask not what we see, but rather what lies beneath the surface of the scene that the video unfolds. What perturbations unsettle the apparent banality of a day in the life of a child of separated parents arriving at her father's home? The scene opens with Michelle emerging from a car, clasped tightly in the arms of her mother. "Here we go," we hear Borukhova announce. Michelle immediately breaks into loud sobs. Malakov arrives from the right, smiling broadly. He takes his daughter's right arm, which had been hooked around Borukhova's neck and shoulder. Then he tries to do the same with her left. "Very good," he says in an assuring tone, as Michelle screams. "Ouch," we hear Borukhova cry out. Then the estranged couple begin an odd dance, circling around and around, with Michelle locked between them. "Let the hand . . ." says Malakov, without completing his sentence. "Ouch," Borukhova cries out again, louder this time. "Why are you pushing?" Malakov asks. "I'm not pushing," Borukhova replies. And around they go, circling in their dance of unyielding custody. Slowly, parents and child make their way closer to the front gate of Malakov's home. "Can you separate her legs?" he asks. Then he says it again, as the couple and child circle back onto the street outside the gate. Michelle's screams grow louder. An elderly woman in a black hat, Borukhova's mother perhaps, pushes Malakov's brother, Joseph, off to the right. We hear his plaintive voice, "Why is she touching me?" After asking the same question five times, he cries out, "Please don't touch me." At the same time, a woman in a white shirt can be seen trying to get Borukhova to let go of Michelle's legs. "You don't touch me," we hear Borukhova say, and say again, as if echoing Joseph's words from a moment ago. Meanwhile, Borukhova still has her arms wrapped around her daughter's red corduroy pants, locked tight at the knees, though apparently Malakov hasn't noticed this. They continue to circle. Finally, Malakov realizes why mother and father have been locked into this peculiar dance. "Why are you holding her . . . ? Let go of her feet." He pauses, now, as if at a loss. His insistent smile at last wavers. "Let the left side go," he says. "Lift your arms, I'm holding her. Lift her other arm." Eventually, Michelle is released from her mother's grip. As father and daughter finally walk past the front gate toward an open doorway, the woman in the white shirt gazes toward the videographer. In a tired voice she says,

“Can you please shut off the camera?” “No,” we hear Borukhova sharply countermand. “Don’t shut it off.”

What have the jurors and judge just witnessed? The images rush by quickly, and are quickly done. Yet, their brevity is belied by the depth of disturbance that they leave in their wake. There is an undercurrent here, a silent score to which couple and child have danced. In that silence viewers may discern the hidden presence of motive, its trace manifest in the irrational rage that keeps Borukhova locked in a custodial embrace, circling, unable to let her daughter go. There is something uncanny in this mother’s capacity for revenge. The task of judgment this jury faces consists not simply in the battle to come to grips with the human capacity for murder. Here they must also struggle to comprehend how a mother could deprive her only child of its father. There is something utterly incomprehensible, almost Medean, in such an inhuman act. One watches, and shudders, sensing what this dance of custody foretells. The violence is already there: the dozens of phone calls (ninety-one in all) between Borukhova and the cousin hired to kill have already been made, and the process of finalizing the details of the murder will continue, including the almost comical homemade silencer, made of a bleach bottle and duct tape, that blew off with the first shot, and remained behind after the event, lying uselessly inside the playground where the shooting occurred, though perhaps not entirely useless, for it bore the fingerprints that the shooter also carelessly left behind.

When the local news media covered the Borukhova trial reporters took special interest in the custody video that played inside the courtroom, and how viewers responded. As one juror would later put it, “She was cold and unconcerned. She didn’t try to comfort her daughter . . . She just wanted to show on tape how upset the child was.”<sup>87</sup> Needless to say, the figure who appeared in these images was not the demure, self-possessed physician that her attorney sought to portray at trial. There was something uncanny, almost monstrous, about what the video showed. It was apparent to those in the room who watched, and who saw the jurors as they too watched, with fixated gazes, many eyes brimming with tears, hands lifting to mouths, heads shaking ever so slightly from left to right and back again, as if in disbelief. A shudder coursed through the courtroom. Something uncanny was unfolding, and it made them shudder.

A terrible presence lurks in that absence. The spectators in court watched, and as they watched they covered their mouths with their hands and shuddered, knowing that one of those dancers had already set in motion a plan to murder the other, had formed the intent, made the calls, as she circled around and around clutching the child whose loss brought her unbearable pain and incomprehensible rage. They dance and he smiles; he smiles and they dance: mother seeking to hold onto child, father seeking to release her from mother’s ironclad embrace. And accompanying that dance a silent score plays, the phantasmal presence of a mother’s revenge. We watch after the event, knowing what we know, and we shudder. It is a reality we cannot

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87. See Janet Malcolm, *Iphigenia in Forest Hills: Anatomy of a Murder Trial*, THE NEW YORKER, May 3, 2010, at 34.

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grasp and so remains dancing beyond our reach. Yet, its uncanny presence leaves a trace, a strange presence that haunts the otherwise banal images that unfold within the sanctity of the courtroom. A sublime terror causes a shudder, but that is not all. It also demands a response.

The experience of sublime horror is uncanny. It exceeds our comprehension. Yet, at the same time, it demands something of us. We cannot not respond, for once having become mindful of that which calls for a response, our response becomes an unshakable responsibility. Responding is the ethical itself. Emil Fackenheim calls this going beyond thought in the enactment of resistance before a sublime horror.<sup>88</sup> Emmanuel Levinas calls it going beyond being. That is what happens when we respond to the infinite need of the other who stands before us: “I exist through the other and for the other . . . I am inspired . . . [My responsibility] means an openness in which being’s essence is surpassed in inspiration.”<sup>89</sup> In the grip of the ethical sublime, we enter a state of being-for-the-other. This is the ethically inspired state of ontological transport. We experience an uncanny, incomprehensible absence—whether it is the inexpressible horror of inhuman rage or inhuman indifference. We experience it, and we shudder. It demands a response.

The ethical originates in this inexpressible absence, this “ought” for which I am responsible. In this sense, justice, as human fraternity, is prior to freedom. We shudder, and know we must act. The ethical is an indictment as well as a sublime transport. It calls us into question even as it calls us beyond ourselves, in response to that which demands a response.

### V. CONCLUSION: BETWEEN PURGATORY AND THE VISUAL SUBLIME

With greater visual prudence comes more sophisticated visual discernment and, by extension, better judgment. Are we moved by sheer visual delight or by the sublime presence of an ontological excess that we experience as an ethical demand, an “ought” for which we are responsible? The virtue of the visual must be discerned with care. That is the province of visual jurisprudence. We find ourselves as if on a tightrope, balanced between the subjective virtuality of sensation and delight, on the one hand, and the external demand of the real, on the other. And we ask: By virtue of what kind of image is judgment warranted? We consume the mirror image and are, in turn, consumed by the echo of sensations that it produces. Likewise, the digital simulacrum that is generated by the mechanical image (the aniconic offspring of hidden algorithmic calculations) encloses the viewer within a parallel world that reflects the subject everywhere.<sup>90</sup> Lacking any life of its own, it can only ramify the familiar world of the senses and the inherited, habitual cultural and cognitive forms that subjectively narrate their meaning. By contrast, the sublime image calls the

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88. EMILE FACKENHEIM, *TO MEND THE WORLD: FOUNDATIONS OF POST-HOLOCAUST JEWISH THOUGHT* 239–40 (1994).

89. EMMANUEL LEVINAS, *OTHERWISE THAN BEING, OR BEYOND ESSENCE* 114–15 (Alphonso Lingis trans., 1998) (1974).

90. See generally SHERWIN, *VISUALIZING LAW*, *supra* note 6.

subject into question; it invites us into the world beyond ourselves. We meet reality midway between. And there is where the image's worth ought to be tested. Subjective ownership of meaning, particularly when it seems warranted by the power of delight or amplified sensation, risks confusing that which is too close by, with that which is other. If the image does not indict the viewer, calling her into question, nothing other than the subject can be known. The aesthetic and ethical sublime converge on this point—on an otherness that takes us beyond ourselves. We may call this the auratic authority of the visual image.

In this sense, we may say that Benjamin's point concerning the loss of the aura in the mechanical reproduction of the image remains as valid today as when he last refined it in 1939. At the same time, however, he takes the insight too far. Benjamin was right to alert us to the sense of falsification, the ersatz experience that accompanies our consumption of the visual image as commodified simulacrum. This is the crux of baroque experience—seeing as if in a hall of mirrors, where the subject is endlessly ramified. In baroque experience we can never get outside ourselves. There is no place to stand to assess what is felt to be real. This is the sealed, yet endlessly fungible truth of baroque (including digital baroque) experience: the sense that truth is no more than an incessantly renewed tapestry of immanent totalities, each as immediate as it is transient.<sup>91</sup> The real, by contrast, lies beyond the subject's grasp ("like a body wholly body, fluttering its empty sleeves"<sup>92</sup>). It can never be totalized. Going towards the otherness of the real, meeting it at least half way, and self-reflexively assessing it there, constitutes the phenomenology and hermeneutic of visual jurisprudence, and of the visual meaning making process more generally.

With no "Other" beyond the subject there is no space in which to assess the authenticity of visual experience. That is why, in the baroque maze of the virtual, "original" and "copy," "fake" and "authentic," lose their meaning. On the flattened plane of baroque hyper-subjectivity, it is all the same. Measured by the exclusive benchmark of sensory efficacy, one algorithm is as good (real, true, right) as another. We need otherness to think otherwise. That is what it means to say that aesthetic and ethical responsibility begins with reality. While we may never fully attain it, reality unfolds in conjunction with the sublime. Simulated signs (algorithms included) are not typically suited to let reality be. (As Benjamin puts it, "*There is no facsimile of the aura.*"<sup>93</sup>) Simulations are images with no trace left of an original. Only the image that is at least to some extent capable of the sublime brings us toward the real, which is to say, lets something else appear.<sup>94</sup> To allow oneself to experience an image in this way one must look and think with the image, beyond oneself. First one must allow a presence to emerge. Only after that encounter, if it occurs, may the work of critical interpretation meaningfully proceed. This is not the mimetic function

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91. See, e.g., GILLES DELEUZE, *PURE IMMANENCE* (Anne Boyman trans., 2001).

92. STEVENS, *supra* note 69.

93. See BENJAMIN, *supra* note 2, at 260.

94. See Martin Heidegger, *PARMENIDES 37* (Andrew Schuwer & Richard Rojcewicz trans., 1992) (1982).

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of seeing as re-presentation (or mastery) but of “being-with”—what Heidegger describes as “being open to” what is other.<sup>95</sup>

Only the simulacrum or simulated mirror-image may be encountered as a totality. The sublime image offers neither certainty nor totality. That is one of the hallmarks of its aesthetic and ethical authority. It is what Benjamin may have had in mind when he alluded at the outset of his famous essay to the “distance” of the aura. The aura, like being itself, remains inescapably elusive. Our experience of the sublime (otherness of being) consists precisely in the realization of absence in presence. It is this that makes us shudder. When the image collapses upon itself in totalized digital flatness, nothing is present enough to warrant the authority of being. The flutter that we take as real is but the totality of a subjective or algorithmic phantasm, and the sensation it fleetingly warrants. Not all technologically reproduced images collapse into commodification, but it is incumbent upon the viewer to know when the image in view has done precisely that.

The Confrontation Clause of the Sixth Amendment has been deemed to express a preference for actuality. The excess of being, what I have referred to here as the presence of otherness, may elude full articulation, yet it remains worthy of law’s preferential treatment. That is why, when it comes to a defendant’s right to be present in court, and to confront the witnesses against him, only a compelling countervailing interest will suffice to warrant something less.<sup>96</sup> A comparable preference for actuality should inform our treatment of visual images inside the courtroom. The law’s custodial responsibility for truth-based justice begins with reality, on screen and off. That is why it is incumbent upon everyone concerned with the continued legitimacy of law’s authority in the age of the digital baroque to seek the reality of the image, and to learn to repudiate its falsification.

This, then, is the case for visual prudence in the law. We need to incorporate new visual benchmarks into the rhetoric of law in order to cope with the epistemological, ontological, and metaphysical quandaries that accompany law’s migration to the screen. When law lives as an image on the screen, it lives there as other images do, from the purgatory of the simulacrum to the presence of the aesthetic and ethical sublime. That is why it is incumbent upon us to understand the life of images in our time, and to adapt our rhetorical toolkit accordingly. Visual jurisprudence is the newly emerging field that sets out to assess the aesthetic and ethical implications of visualizing law in practice and in theory. Visual rhetoric must now become part and parcel of law’s aspirational claim to truth-based justice.

We may condemn or perhaps even forget the aura when we diet only on flattened, percussive images whose screen life consists in the momentary flash of delight and sensation. But there are other images in the world that impart an entirely different kind of experience. These images resist immediate consumption to the extent that they embody some aspect of the real. We encounter that aspect when we go beyond

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95. *Id.* at 103.

96. *See* United States v. Nippon Paper Indus. Co., 17 F. Supp. 2d 38, 42 (D. Mass. 1998) (“The demands of efficiency, and even necessity, do not create automatic exceptions to Constitutional requirements.”).

ourselves and enter the otherness of the aesthetic and ethical sublime. Recognizing the range of experiential possibilities in the realm of the visual, and choosing a mode of discourse for the image that best suits it, has now become essential to law's ongoing legitimation.

It is against the backdrop of this newly developing rhetoric of visual experience that the epistemological, ontological, and metaphysical quandary of law now plays out. To make our way from the shadow land of visual purgatory to a place where we may see in a clearer light requires that we take very seriously indeed the demand for visual competence. That is the province of visual jurisprudence. The visual poetics presented here is but a beginning. There is much more work to be done to visually acquit the viewing subject of reality's indictment by images.<sup>97</sup> Are there technologically reproduced images that breathe in the air of the sublime? It may well be that in our time the fate of the aura and the fate of law have grown irrevocably entangled.

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97. See, e.g., *LAW, CULTURE AND VISUAL STUDIES* (Anne Wagner & Richard K. Sherwin eds., 2013).